No. A20-0960

State of Minnesota

In Court of Appeals

In the Matter of the Determination of the Need for an Environmental Impact Statement for the Nolte Family Irrigation Project in the Township of North Germany, Wadena County, Minnesota.

BRIEF OF AMICUS CURIAE THE POLLINATOR STEWARDSHIP COUNCIL AND ADDENDUM

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INTRODUCTION

Amici curiae Pollinator Stewardship Council (PSC) submits this brief[1] in support of Relators who seek reversal of the Department of Natural Resources' (DNR) July 9, 2020 Negative Declaration on the need for an Environmental Impact Statement (EIS) for the proposed 303-acre Nolte Family Irrigation project (the Nolte Project).

The proposed Nolte Project, which is part of R.D. Offutt Company's (RDO) 7,000-acre phased expansion in the Pineland Sands area of Central Minnesota, poses serious environmental concerns. As noted by the Relators, heavy fertilizer application in sandy soils will result in nitrate contamination of private wells, groundwater, and river systems. The planting of seed coated with neonicotinoid insecticides combined with frequent crop dusting or chemigation application methods of neonicotinoid insecticides to potato and rotational crops, which are prone to chemical drift, will adversely impact pollinators and critical pollinator habitat in the vicinity of the Nolte Project.

In issuing its Negative Declaration, the DNR arbitrarily ignored or summarily dismissed potentially significant environmental impacts, including the adverse effects of the Nolte Project on pollinators. The PSC supports Relators contention that in making its Negative Declaration, the DNR erred as a matter of law and also rendered a decision that is arbitrary, capricious, and unsupported by substantial evidence.

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[1] No party or counsel for any party authored this brief in whole or in part. No person or entity other than the Pollinator Stewardship Council, its members, or its counsel have made a monetary contribution to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

Contrary to Minnesota Statutes section 116D.04, subdivision 2a, and Minnesota Rule 4410.1700, subparts 1 and 4, the DNR failed to respond specifically to substantive Environmental Assessment Worksheet (EAW) comments on environmental concerns, including pesticide drift and the adverse impact of the Nolte Project on pollinators. Because the potential for significant environmental effects was not considered, the DNR erred by failing to order an EIS.

The Court of Appeals should reverse the Negative Declaration and order the DNR to complete an EIS for the entire 7,000-acre phased action. In the alternative, the Court should order the DNR to complete an EAW for the 7,000-acre phased action or an EIS for the 303-acre Project.

DESCRIPTION AND INTEREST OFAMICUS CURIAE POLLINATOR STEWARDSHIP COUNCIL

The PSC is a nonprofit organization incorporated in Kansas in 2012 and is comprised of beekeepers working to help beekeepers. The mission of the PSC is to defend managed and native pollinators vital to a sustainable and affordable food supply from the adverse impacts of pesticides. Fully one-third of the United States' food supply requires pollination, and the PSC works to protect the pollinators and commercial beekeepers who provide pollination to farmers. The PSC accomplishes its mission by: (1) ensuring that federal and state agencies enforce and comply with laws to protect pollinators from pesticides; (2) providing advocacy, guidance, and tools for beekeepers to defend their bees from the detrimental effects of pesticides; and (3) raising awareness about the adverse impacts of pesticides on pollinators.

The PSC's board and membership include many of the nation's leading commercial honey beekeepers. Some of these beekeepers are Minnesota-based commercial migratory beekeepers who provide pollination services to farmers throughout the United States.

The proposed 303-acre Nolte Project is part of a 7,000-acre RDO phased expansion action. The widespread use of neonicotinoid insecticides in planting potatoes and other crops, combined with frequent crop dusting or chemigation application methods of neonicotinoid insecticides, will adversely impact pollinators and critical pollinator habitat in the vicinity of the Nolte Project and other nearby land used by RDO. An EIS is therefore needed to evaluate these significant and cumulative impacts.

ARGUMENT

A. The DNR Failed to Give Adequate Consideration to the Nolte Project's Proposed Use of Insecticides on Pollinators

In the EAW, the DNR noted that pesticides—including insecticides—would be used on potato and other rotational crops. AR 374 at 27, 29. However, in response to specific concerns relating to potentially significant pesticide drift effects on pollinators, the DNR's Record of Decision (ROD) references only the EAW's three-sentence, non-species-specific generic conclusions regarding potential pesticide impacts. AR 486 at DNR08389; AR 611, AR 711 at 11, 28-29.

The EAW references Attachment D, which lists all pesticides that are available for use on the Nolte Project on potatoes and other crops, including corn, rye grass and clover, oats, alfalfa and fescue. AR 375 at DNR06937-DNR06943. Attachment D contains dozens of pesticides, including over 20 neonicotinoid insecticides, that may be applied in unknown

quantities to potato and rotational crops. *Id.* In addition to the potential pesticides listed in Attachment D, the Nolte Project proposes to use corn seed treated with Poncho 250, which includes the neonicotinoid insecticide clothianidin to limit crop damage by nematodes. AR 374 at 29. However, the machines that plant neonicotinoid-coated seeds (drilling machines towed behind tractors) have been shown capable of producing neonicotinoid dust in concentrations lethal to bees. Andrea Tapparo et al., *Assessment of the Environmental Exposure of Honeybees to Particulate Matter Containing Neonicotinoid Insecticides Coming from Corn Coated Seeds*, 46 (5) ENVTL. SCI. TECH. 2592-2599 (2012).

In assessing the potential hazards to sensitive ecological resources, the DNR made a generalized characterization of the potential environmental impacts as follows:

> Run-off, drift and volatilization of pesticides may present a potential threat to plant and pollinator species diversity throughout the remaining jack pine woodland native plant communities, and increases the potential for impaired water status in the nearby Redeye River. Expansion of row crops and fencing would cut off migration corridors and movement, isolating remaining small pockets of jack pine woodlands for some wildlife habitat use, including pollinator hatching and foraging.

AR 374 at 32. The DNR also failed to address Minnesota Pollution Control Agency (MPCA) comments on the EAW where the MPCA noted elevated levels of chlorothalonil and chlorpyrifos have been documented in pollinator combs up to several miles away from farms in Central Minnesota. AR 611. Additionally, the DNR did not respond to Dr. George Kraft's comments on potential neonicotinoid water contamination and associated threats to aquatic and terrestrial invertebrates. AR 486 at DNR08389. Despite these comments and concerns, the DNR declined to undertake review of the cumulative impacts of insecticides proposed to be used at the Nolte Project.

B. Honey Bees Are Critical Pollinators of Economically and Ecologically Important Crops in Minnesota

The importance of pollinators to agriculture is not a new concept. Pollinators and flowering plants (angiosperms) have a 50-million-year-old history of working together. As one author aptly warned growers in 1917:

> He may fertilize, and cultivate the soil, prune, thin, and spray the tree, in a word, he may do all the things which modern practices advocates, yet without his pollinating agents, chief among which are the honeybees, to transfer the pollen from the stamens to the pistols of the blooms, his crop may fail.

B.N. Gates, *Honey Bees In Relation To Horticulture*, MASS. HORT. SOC. TRANS. 1:71-88 (1917).

Minnesota is home to a substantial portion of the managed honey bee (*Apis mellifera*) colonies in the United States and consistently ranks as one of the top honey-producing states in the country. Kim Flottum, *U.S. Honey Industry Report – 2017*, BEE CULTURE (Apr. 18, 2018), https://www.beeculture.com/u-s-honey-industry-report-2017. Minnesota has abundant floral sources, producing honey varietals that are sought after by consumers around the country and indeed around the world. Honey sales income sustains Minnesota beekeepers. And Minnesota's farmers rely on Minnesota beekeepers to provide them with pollination services for many vitally important crops, such as sunflowers, canola, apples, cranberries, edible beans including soybeans, clovers raised for seed, and many more specialty crops and home gardens. Managed and wild pollinators are needed in Minnesota to contribute to ecosystem services, one of which is pollinating these crops. *See generally* K.S. DELAPLANE & D.F. MAYER. CROP POLLINATION BY BEES (CABI Publishing, 2000).

In summer, Minnesota's managed bees pollinate Minnesota crops. In the winter, Minnesota bees are transported to more favorable climates such as Texas and California, where they pollinate other commercially important crops. Managed honey bees alone pollinate more than $17 billion worth of crops in the United States each year and are regarded as the most important pollinator. Nicholas W. Calderone, *Insect Pollinated Crops, Insect Pollinators and US Agriculture: Trend Analysis of Aggregate Data for the Period 1992–2009*, PLOS ONE (May 22, 2012), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0037235. Native insects, primarily native bees, contribute more than $8.7 billion of pollination services in the United States each year. *Id.*

Pollinator-dependent commodities makes up nearly 6% of the total agricultural acres planted in Minnesota. U.S.D.A. National Agricultural Statistics Service, *Quick Stats* (2015), https://quickstats.nass.usda.gov/. Additionally, more than 85% of Minnesota crops are visited by or may benefit from pollinators. Soybeans, for instance, are mainly self-fertile, but yield has been shown to be positively affected in some soybean varieties if visited by bees. DELAPLANE ET AL., *supra*, at 254-55; S.E. McGregor, *Insect Pollination of Cultivated Crop Plants*, U.S.D.A. Agricultural Research Service (1979), available at http://www.ars.usda.gov/SP2UserFiles/Place/20220500/OnlinePollinationHandbook.pdf.

The tendency for pollinators to visit a large portion of Minnesota's agricultural landscape highlights the importance of a Minnesota-specific review to cover the range of neonicotinoid uses in agriculture, including uses for seed treatments, soil drenches and foliar applications. The DNR failed to provide this necessary review when considering the use of neonicotinoid insecticides proposed to be used at the Nolte Project.

C. Neonicotinoid Insecticides Applied to Potato Crops Have A Documented Adverse Impact on Pollinators

Beekeepers have long been concerned by the heavy reliance of potato growers, such as the proposed Nolte Project, on neonicotinoid insecticides. Neonicotinoids are a broad-spectrum insecticide predominantly used as seed treatment on major field crops and are additionally used as aerial applied sprays in crop production for managing pests. Rosemary Mason et al., *Immune Suppression by Neonicotinoid Insecticides at the Root of Global Wildlife Declines*, JOURNAL OF ENVTL. IMMUNOLOGY AND TOXICOLOGY 1, 3–12 (2013), https://www.boerenlandvogels.nl/sites/default/files/JEIT%20Immune%20Suppression%20pdf_6.pdf. The popularity of neonicotinoid insecticides is largely due to their promoted high toxicity to insects and low toxicity to vertebrates. *See id.* at 7. Beekeepers regularly report difficulties keeping their bees healthy and alive if they are foraging near fields where these pesticides have been applied.[2]

In multiple independent studies conducted in the United States and Europe, neonicotinoid pesticides have been shown to have negative impacts on both wild bees and managed honey bees. *See, e.g.*, Mickaël Henry et al., *A common Pesticide Decreases Foraging Success and Survival in Honey Bees*, 336 SCIENCE 348-350 (2012); Penelope R.

[2] Steve Ellis, President and board member of the PSC, manages a commercial beekeeping busines of 2,300 hives in Barrett, Minnesota, and has first-hand experience of a bee kill incident associated with the planting of insecticide-treated maize seed near Elbow Lake, Minnesota in 2013. Bayer CropScience LP conducted an investigation of the incident and concluded that: "neonicotinoid exposure likely contributed to the observed mortality." David L. Fischer, *Investigation of a May 7, 2013 Bee Kill Incident Hypothesized to be Associated with Planting of Insecticide-treated Maize Seed Near Elbow Lake, Minnesota*, Final Report, Bayer CropScience LP (July 8, 2013).

Whitehorn et al., *Neonicotinoid Pesticide Reduces Bumble Bee Colony Growth and Queen Production*, 336 SCIENCE 351-352 (2012); Christian H. Krupke et al., *Multiple Routes of Pesticide Exposure for Honey Bees Living Near Agricultural Fields*, PLOS ONE (Jan. 3, 2012), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0029268.

Neonicotinoid insecticides were first used in North America in 1995 on potato fields on Prince Edward Island and Nova Scotia. Pierre Mineau & Cynthia Palmer, *The Impact of the Nation's Most Widely Used Insecticides on Birds*, AMERICAN BIRD CONSERVANCY, at 13 (Mar. 2013), https://extension.entm.purdue.edu/neonicotinoids/PDF/TheImpactofthe NationsMostWidelyUsedInsecticidesonBirds.pdf. Neonicotinoid insecticides were used in France at the same time on sunflower crops. Alison Benjamin, *Toxic Pollen and Mad Bee Disease Disaster*, THE GUARDIAN (Mar. 29 2012), http://www.guardian.co.uk /environment/2012/mar/29/toxic-pollen-mad-bee-disease. French beekeepers coined the term "Mad Bee Disease," a condition synonymous with strange unexplained conditions first observed by U.S. beekeeper David Hackenberg, later described as Colony Collapse Disorder (CCD), in which bees become disoriented and unable to return to the hive. *Id.* The French beekeepers reported that their honey bee population had essentially "melted away." *Id.* France has since banned certain neonicotinoid pesticides because of their toxicity to pollinators. *Id.*

Almost immediately after use of neonicotinoid insecticides in the United States, beekeepers began reporting bee kill incidents. Studies indicate that the practice contaminated rotational clover crops with the insecticide from previous years neonicotinoid use on potatoes. Christian L. Mogren & Jonathan G. Lundgren,

Neonicotinoid-Contaminated Pollinator Strips Adjacent to Cropland Reduce Honey Bee Nutritional Status, 6 SCIENTIFIC REPORTS 29608 (2016). Neonicotinoid insecticides have also been found to adversely affect other pollinators. Recent studies on monarch butterfly larvae have shown a nearly 100% mortality rate when larvae were reared on milkweed which absorbed neonicotinoid insecticides. Niranjana Krishnan et al., *Assessing Field-Scale Risks of Foliar Insecticide Applications to Monarch Butterfly (*Danaus plexippus*) Larvae*, 39 ENVTL. TOXICOLOGY & CHEM. 923-941 (Jan. 21, 2020).

Neonicotinoids spread throughout the environment for numerous reasons. First, only a small quantity (2–20%) of the seed-coated insecticide, such as will be used at the proposed Nolte Project, is absorbed by the developing plant; the remainder is released into the environment through leaching, drainage, run-off, or snowmelt. Erin M. Maloney et al., *Cumulative Toxicity of Neonicotinoid Insecticide Mixtures to Chironomus Dilutus Under Acute Exposure Scenarios*, 9999 ENVTL. TOXICOLOGY & CHEM. 1–11 (June 5, 2017). Neonicotinoids are highly soluble in water. Christy A. Morrissey et al., *Neonicotinoid Contamination of Global Surface Waters and Associated Risk to Aquatic Invertebrates: A Review*, 74 ENV'T INT'L 291–303 (Oct. 28, 2014). Second, neonicotinoids accumulate in soils with each additional usage. Under the right conditions, neonicotinoids can persist in the soil sometimes for many years. Mason et al., *supra*. Furthermore, untreated plants associated with adjacent cropland are often contaminated by neonicotinoids due to the systemic nature of these chemicals. Mogren, et al., *supra*. The widespread use of neonicotinoids provides numerous opportunities for exposure to non-target, beneficial species, such as pollinators, via the water, soil, and contaminated plant tissues.

Neonicotinoid insecticides are also systemic, meaning that, in addition to use as a seed coating, they are absorbed by the plant and expressed into the nectar and pollen of the plants they are applied to. Ilana Jimenez, *What Is A Systemic Pesticide: Using Systemic Insecticides In Gardens*, GARDENING KNOW HOW (Aug. 4, 2020), https://www.gardeningknowhow.com/plant-problems/pests/pesticides/systemic-pesticide-in-gardens.htm. After a systemic pesticide is applied to seeds, soil, or leaves of a plant, it is "absorbed into the plant and distributed throughout the plant's tissues, reaching the plant's leaves, roots, fruit, and flowers." *Id.* Systemic pesticides cannot be washed off the fruit or leaves of a plant once they are absorbed. *Id.*

The European Food Safety Authority has found that application of neonicotinoids on potato crops poses high risks to honey bees on the treated crop, field margin, and adjacent crops. EFSA, *Conclusion on the Peer Review of the Pesticide Risk Assessment for Bees for the Active Substance Clothianidin Considering All Access Other than Seed Treatments and Granules*, 13(8) EFSA JOURNAL 4210, at 7 (2015). Rotational crops, such as corn and soy, which will be used in the proposed Nolte Project, are also bee attractive crops that will be treated with neonicotinoids. Attachment D, AR 375 at DNR06937-DNR06943. The DNR's decision failed to take these important considerations into account.

D. Nolte's Proposed Application of Neonicotinoid Insecticides On Potato and Rotational Crops Will Harm Pollinators

Throughout spring and summer, mixtures of neonicotinoids are also found in the pollen and nectar of wildflowers growing in arable field margins, at concentrations that are sometimes even higher than those found in the crop. Indeed, national studies have shown

that the large majority (97%) of neonicotinoids brought back in pollen to honey bee hives in arable landscapes was from wildflowers, not crops. Cristina Botias et al., *Neonicotinoid Residues in Wildflowers, a Potential Route of Chronic Exposure for Bees*, 49 ENVTL. SCI. & TECH. 12731-12740 (2015).

Minnesota focused studies have shown demonstrated pesticide impacts on wildflowers in the vicinity of potato and rotational crops. Dr. Vera Krischik from the University of Minnesota recently conducted research into the off-target movement or drift of pesticides into wildflower patches near fields where potatoes, corn, or soybeans were grown. Vera Krischik, *Environment and Natural Resources Trust Fund (ENRTF) M.L. 2017 Work Plan*, M.L. 2017, Ch. 96, Sec. 2, subd. 08b, at 3-4 (Aug. 15, 2020).

To assess impacts on nearby wildflowers Dr. Krischik tested flowers for pesticide residue, including neonicotinoid insecticides. As mentioned above, systemic insecticides, once absorbed, move through all tissues of a plant and flowers, and their nectar and pollen which are a main exposure route for bees. Dr. Krischik's methodology included the collection and grinding of flower heads that were submitted to the laboratory for analysis. *Id.* at 5. This testing is a key component to understanding a pesticide's drift, the way the pesticide behaves, when applied according to label, in the environment, and the exposure avenues for pollinators. In her study, Dr. Krischik found:

> Pesticide residue on wildflowers near potato fields showed that 100% of 36 samples tested contained at least 2 and up to 15 different pesticides. Research on pesticide residue on flowers near corn fields showed that 40% of 32 samples tested contained only 1 pesticide and it was atrazine. Pesticide residue was highest on wildflowers near potatoes and demonstrates the need for buffer strips.

Id. Dr. Krischik's methodology included sampling wildflowers, not from edges of agricultural fields but significant patches of flowers at a distance of 50 to 400 feet from agricultural fields where pesticides including neonicotinoid insecticides had been applied. Dr. Krischik's research supports the contention that pesticides known to be toxic to bees will drift off of the Nolte Project site, contaminating the nectar and pollen food source for neighboring honey bees and native pollinators as far as 400 feet from the field where they were applied. *See id.* These environmental effects were inexplicably passed over in the DNR's review of the impacts from the proposed Nolte Project.

E. The State of Minnesota and the DNR Have Recognized the Adverse Impacts of Neonicotinoid Insecticides

The State of Minnesota is well aware of the issues related to neonicotinoid poisoning of pollen and nectar, as well as the resulting mortality it can cause to pollinators. In 2016, the Minnesota Department of Agriculture (MDA) issued a two-year comprehensive review of neonicotinoids use and their impacts on pollinators in Minnesota. MDA, *Review of Neonicotinoid Use, Registration, and Insect Pollinator Impacts in Minnesota* (Aug. 2016), https://www.mda.state.mn.us/sites/default/files/inline-files/neonicreviewrpt2016.pdf. In response to the MDA's findings, former Governor Mark Dayton issued Executive Order 16-07, in which he directed steps to reverse pollinator decline and restore pollinator health in Minnesota. *See* Exec. Order 16-07 (Aug. 25, 2016). In issuing this order, former Governor Dayton recognized that:

> [T]he Special Registration Review conducted by the Minnesota Department of Agriculture found sufficient scientific evidence that neonicotinoid pesticides present toxicity concerns for honeybees, native bees, as well as other pollinating insects… and pollinator decline is serious and requires

> immediate attention to ensure the sustainability of our food production systems, avoid economic impacts on our farmers and rural communities, and to protect the health of the environment in Minnesota.

Id. The order required immediate action to be taken to reduce pollinator exposure on state-owned lands. The Governor's Pollinator Protection Committee (GPPC) was also established in late 2016 to study and recommend action steps needed to protect pollinators.[3] In their final report released in late 2018, the committee recommended a number of ways to reduce pollinator exposure to neonicotinoids including a full ban on their use in Minnesota. GPPC, *Recommendations for Pollinator Protection in Minnesota*, Report to the Governor, at 32 (Nov. 2018), https://www.eqb.state.mn.us/sites/default/files/documents/GCPP-recommendations-2018-4.pdf.

The MDA's Review of Neonicotinoid Use was the result of 2014 legislation calling on the agency to review this class of chemistry. Over the last 10 years, the Minnesota legislature has continually funded pollinator protection efforts through habitat programs and research support through the Legislative Citizen-Commission on Minnesota Resources (LCCMR) and university funding, including, most notably, a new University of Minnesota Bee Lab. Lyra Fontaine, *U Gets Funding Boost for Bee Research*, THE MINNESOTA DAILY (July 9, 2014), https://mndaily.com/229264/uncategorized/u-gets-funding-boost-bee-research. In 2019, the legislature created funding for the immensely popular "Lawns to Legumes" habitat cost-share grant program to provide monetary support for pollinator habitat installations in yards and gardens. BSWR, *Lawns to Legumes: Your Yard Can BEE*

[3] Steve Ellis, President and board member of the PSC, has served on the Governor's Pollinator Protection Committee.

the Change (2019), http://bwsr.state.mn.us/l2l. In the program's pilot year, it "aimed to provide cost-share funding to an estimated 700 to 1,200 residents." Interest in the program was so great, however, that "[m]ore than 7,500 applications were received." *Id.* As of January 2019, Minnesota leads the nation in the amount of policy, both at the state and local level, passed and introduced to protect pollinators. Damon M. Hall & Rebecca Steiner, *Insect Pollinator Conservation Policy Innovations at Subnational Levels: Lessons for Lawmakers*, 93 ENVTL. SCI. & POLICY 118–128 (2019).

In 2016, after the issuance of Governor Dayton's Executive Order 16-07, the Minnesota Environmental Quality Board (EQB) convened an Interagency Pollinator Protection Team (IPPT). The IPPT includes representatives from the Minnesota Departments of Administration, Agriculture, Corrections, Education, Health, Natural Resources, and Transportation; the Minnesota Board of Soil and Water Resources (BSWR); the MPCA; and the Minnesota Zoological Garden. The IPPT provides operational support, ensures interagency cooperation, develops cross agency policies and programs, and reports annually on progress through publication of an annual Minnesota State Agency Pollinator Report. EQB, *Pollinators*, https://www.eqb.state.mn.us/content/pollinators.

In April 2019, Governor Tim Walz reaffirmed Minnesota's commitment to protecting pollinators when he issued Executive Order 19-28, which declared a "priority for state government to support and promote healthy and diverse pollinator populations that sustain and enhance Minnesota's environment, economy and way of life," and charged

the DNR and BSWR with leading the implementation of this goal. Exec. Order 19-28 (Apr. 5, 2019).

In matters outside of the context of environmental review of the proposed permitting of the Nolte Project, the DNR has also contributed to the understanding of Minnesota's bee populations and their health. In 2014, through a $370,000 grant from the Environmental and Natural Resources Trust Fund, the DNR began an ongoing survey of our state's wild bee population, finding that Minnesota is home to over 450 species of bees. DNR, *Wild Bees in Minnesota*, https://www.dnr.state.mn.us/mbs/ grasslandbees.html. One of these species—the Rusty Patched Bumble Bee—was designated as the Minnesota State Bee through legislation in 2019. Minn. Stat. § 1.1465. As of 2017, the Rusty Patched Bumble Bee has also been designated as endangered under the federal Endangered Species Act. USFWS, *Rusty Patched Bumble Bee*, https://www.fws.gov/midwest/endangered/ insects/rpbb/archives.html. In the petition for endangered designation, the U.S. Fish and Wildlife Service named neonicotinoid and other pesticide exposure as a driver of Rusty Patched Bumble Bee population decline. *Id.*

Significantly, the DNR's own practices indicate the department's understanding of the toxicity of neonicotinoid insecticides. In its 2014 Pollinator Best Management Practices and Habitat Restoration Guidelines, the DNR specifies best management practices (BMPs) for restoring and enhancing habitat for native insect pollinators (bees, butterflies, moths, flies, etc.). The DNR directs it staff and others working on DNR-managed lands and on state-funded restoration projects to "[a]void neonicotinoid insecticides and other insecticides that are highly toxic to pollinators" and to "[a]void plant materials that have

been treated with neonicotinoid insecticides." DNR, *DNR Pollinator Best Management Practices and Habitat Restoration Guidelines*, at 6 (Dec. 2014), https://files.dnr.state.mn.us/natural_resources/npc/2014_draft_pollinator_bmp_guidelines.pdf.

Despite the DNR's own guidance, the department has sometimes failed to adequately account for the interests of pollinators. In 2005, the Minnesota Supreme Court concluded that the DNR could be liable for the deaths of foraging commercial honey bees that resulted from the overspray of pesticides on land the DNR owned and managed. *Anderson v. Dep't Nat. Resources*, 693 N.W.2d 181, 188-89 (Minn. 2005). The DNR must exercise greater caution when considering the use of deadly insecticides such as neonicotinoids, which it failed to do with respect to the Nolte Project.

CONCLUSION

The proposed Nolte Project is one segment of RDO's 7,000-acre phased irrigated potato expansion action in the Pineland Sands area. This project, standing alone, has the potential for significant environmental effects, including planting of seed coated with neonicotinoid insecticides combined with frequent crop dusting or chemigation application methods of neonicotinoid insecticides to potato and rotational crops, which are prone to chemical drift, and which will adversely impact pollinators and critical habitat in the vicinity of the Nolte Project.

In issuing its Negative Declaration, the DNR arbitrarily ignored or summarily dismissed potentially significant environmental impacts including the adverse effects of the Nolte Project on pollinators. Amici PSC supports Relators contention that in making its Negative Declaration, the DNR erred as a matter of law and also made a decision that

is arbitrary, capricious, and unsupported by substantial evidence. Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.1700, subps. 1 & 4.

Contrary to applicable statutes and rules, the DNR failed to respond specifically to substantive EAW comments on environmental concerns including pesticide drift and the adverse impact of the Nolte Project on pollinators. Because the potential for significant environmental effects was not considered, the DNR erred by failing to order an EIS.

The Court of Appeals should reverse the Negative Declaration and order the DNR to complete an EIS for the entire 7,000-acre phased action. In the alternative, the Court should order the DNR to complete an EAW for the 7,000-acre phased action or an EIS for the 303-acre Nolte Project.

Dated: November 20, 2020

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable, is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.
2. I hereby certify that Amici Pollinator Sustainability Council foregoing brief conforms to the requirements of Minn. R. Civ. App. P. 128.02 and 132.01, subds. 1 and 3(c) for a brief produced with a proportional font.
3. The length of Amici Pollinator Sustainability Council's brief is 4,279 words.
4. Amici Pollinator Sustainability Council's brief was prepared using Microsoft Word 2016 in 13-point Times New Roman.

November 20, 2020. /s/ Joseph Maternowski (#016463X)