

State of Minnesota  
In Court of Appeals

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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.

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**RELATORS' REPLY BRIEF**

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## TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES .....  | i    |
| STATEMENT OF THE CASE .....   | 1    |
| ARGUMENT .....  | 2    |
| I. DNR’S SEPARATION OF THE PROJECT FROM RDO’S 7,000-ACRE PHASED<br>EXPANSION ACTION VIOLATES MEPA. ....   | 2    |
| A. Substantial Evidence Demonstrates that RDO Continues Implementation of its<br>7,000-acre Phased Expansion<br>Action.....   | 2    |
| B. DNR’s Planned Future Project Stages Are Well-defined, Not Speculative.....   | 6    |
| C. Substantial Evidence Demonstrates that RDO is the Project Proposer Behind the<br>Nolte Project.....  | 8    |
| D. Relators Are Not Requesting a Generic EIS.....   | 10   |
| II. DNR’S NEGATIVE DECLARATION BASED ON ITS DETERMINATION THAT THE<br>PROPOSED PROJECT DOES NOT HAVE THE POTENTIAL FOR SIGNIFICANT<br>ENVIRONMENTAL EFFECTS VIOLATES MEPA. .... | 12   |
| A. DNR Erred as a Matter of Law in Failing to Specifically Respond to<br>Dr. Kraft’s Site-Specific Assessment of Potentially Significant Nitrate Water<br>Contamination.....    | 12   |
| 1. The Water Quality Section of the ROD Does Not Address Dr. Kraft’s<br>Report.....   | 12   |
| 2. DNR Did Not Respond to Dr. Kraft’s Assessment by “Grouping” It with<br>Mr. Broberg’s Comment.....  | 15   |
| B. DNR’s Determination that the Project Does Not Have the Potential for<br>Significant Water Quality Impacts is Arbitrary and Capricious.....                                   | 18   |
| C. DNR's Determination that Mitigation Will Offset Water Pollution Effects is<br>Arbitrary and Capricious and Unsupported by Substantial Evidence.....                          | 21   |

|   |    |
|---|----|
| D. DNR Erred as a Matter of Law in Finding that the Project Does Not Have the Potential for Significant Water Quantity Effects to Private Wells, the Redeye River and Wetlands..... | 24 |
| 1. DNR Failed to Take Basic Steps to Assess and Mitigate Risks to Private Well Owners.....  | 25 |
| 2. DNR Failed to Carry Out an Aquifer Pump Test for Two out of Three Wells.....   | 26 |
| E. DNR’s Determination that the Project Does Not Have the Potential for Significant Pesticide Drift Effects Is an Error of Law and Arbitrary and Capricious.....                    | 29 |
| 1. The Project Poses Unaddressed, Potentially Significant Pesticide Drift Risk to Neighbors.....  | 29 |
| 2. The Project Poses Unaddressed, Potentially Significant Pesticide Drift Risk to Pollinators.....  | 31 |
| III. CONCLUSION.....  | 32 |

## TABLE OF AUTHORITIES

|   |             |
|---|-------------|
|   | <b>Page</b> |
| <b>MINNESOTA CASES</b>  |             |
| <i>Citizens Advocating Responsible Development v. Kandiyohi County Bd. Of Commrs.</i> , 713 N.W.2d 817 (Minn. 2006).....                              | 21-22       |
| <i>Friends of Twin Lakes v. City of Roseville</i> , 764 N.W.2d 378, (Minn. Ct. App. 2009)....   | 24          |
| <i>In re Env'tl. Assessment Worksheet for the 33<sup>rd</sup> Sale of State Metallic Leases in Aitkin</i> , 833 N.W.2d 212 (Minn. Ct. App. 2013)..... | 7           |
| <i>In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. &amp; Gas Utils.</i> , 768 N.W. 2d 112, 119 (Minn. 2009).....        | 21          |
| <i>Minnesotans for Responsible Rec. v. Dep’t of Natural Res.</i> , 651 NW 2d 533 (Minn. Ct. App. 2002).....   | 7           |
| <i>Pope County Mothers v. Minnesota Pollution Control Agency</i> , 594 N.W. 2d 233 (Minn. Ct. App. 1999).....   | 24          |



|  |        |
|--|--------|
| <i>Rangers v. Iron Range Resources</i> , 531 N.W.2d 874 (Minn. Ct. App. 1995).....   | 7      |
| <i>Trout Unlimited v. Minnesota Dept. of Agric.</i> , 528 N.W.2d 903 (Minn. Ct. App. 1995),<br>review denied (Minn. Apr. 27, 1995) ..... | 18, 24 |

## OTHER AUTHORITY

|  |    |
|--|----|
| Minn. R. 4410.1700, Subp. 9 (2018).....  | 2  |
| Minn. R. 4410.1000, Subp. 4 (2018).....  | 2  |
| Minn. R. 4410.0200, Subp. 68 (2020)..... | 8  |
| Minn. R. 4410.1700, Subp. 4 (2018).....  | 12 |
| Minn. R. 4410.1700, Subp. 2a (2018)..... | 24 |

## UNPUBLISHED DECISIONS

|   |    |
|---|----|
| <i>In re Declaring a Negative Need for an Env'tl. Impact Statement for Proposed Living<br/>Word Bible Camp Project</i> , 2014 Minn. App. Unpub. LEXIS 742 at 30, 2014 WL<br>3557954 at *11 (Minn. Ct. App. 2014).....                                     | 14 |
| <i>In re Denial of a Contested Case Hearing Request &amp; Modification of a Notice of<br/>Coverage Under Individual Nat'l Pollution Discharge Elimination Sys. Feedlot Permit<br/>No. MN0067652</i> , 2019 WL 5106666 (Minn. Ct. App. Oct. 14, 2019)..... | 23 |
| <i>In re Minn. Pipeline Co.</i> , 2008 WL 2344739 (Minn. Ct. App. June 10, 2008).....   | 24 |
| <i>In re Minntac Mine Expansion Project</i> , 2014 WL 274077 (Minn. Ct. App.<br>June 10, 2008) .....  | 24 |

## STATEMENT OF THE CASE

In issuing its Negative Declaration on the need for an Environmental Impact Statement (EIS) for the proposed Nolte Family Irrigation Project (Project), the Department of Natural Resources' (DNR) failed to take a hard look. It illegally segmented the Project from R.D. Offutt Farms' (RDO) 7,000-acre deforestation and industrial irrigated farming expansion in the vulnerable Pineland Sands aquifer area, failed to evaluate the potential for significant effects and failed to specifically respond to comments. The DNR's Negative Declaration was unsupported by substantial evidence, arbitrary and capricious and an error of law.

DNR's reply brief fails to cite substantial evidence in the record supporting its claims that RDO has discontinued implementation of its phased expansion, including the Project site. DNR further fails to reference any evidence in the record that it specifically responded to the expert water quality assessment of Dr. Kraft or substantial evidence that the agency considered potentially significant local water quality effects or pesticide drift effects to people and pollinators. DNR also failed to demonstrate that its deferred aquifer pump testing for 2 out of 3 Project irrigation wells was not legal error.

Relators submit this reply brief to demonstrate the serious flaws with Respondent's arguments and respectfully request this Court of Appeals reverse DNR's Negative Declaration and provide the relief requested below.

## ARGUMENT

### I. DNR'S SEPARATION OF THE PROJECT FROM RDO'S 7,000-ACRE PHASED EXPANSION ACTION VIOLATES MEPA.

#### A. Substantial Evidence Demonstrates that RDO Continues Implementation of its 7,000-acre Phased Expansion Action

Substantial evidence in the record directly contradicts DNR's repeated argument that RDO has "abandoned" its phased expansion project to convert 7,000 acres of globally threatened jack pine habitat to highly destructive industrial irrigated potato production in Minnesota's Pineland Sands. DNR Br. At 2, 6, 17, 18, 19. RDO, faced with DNR-ordered environmental review, temporarily withdrew its *en masse* application package, including the irrigation permit applications for the Project site. AR 62 at DNR00995; AR 375, at DNR06947-52. Thereafter, however, RDO continued to strategically request and receive DNR approval of segments of its 7,000-acre expansion project. AR 62 at DNR00995, 64, 90, 250, 375 at DNR06951. RDO's expansion effort represents a paradigmatic case of segmentation and, so far, with DNR's cooperation, a successful end-run around environmental review requirements prohibiting the same. AR 375 DNR06947-48. Minn. R. 4410.1700, Subp. 9, Minn. R. 4410.1000, Subp. 4 (requiring evaluation of phased actions as a single project).

Contrary to DNR's assertion of a long-dead project, since its original submission of 54 applications in 2015, RDO has instructed Mr. Nolte to reapply for three irrigation permits while also itself reapplying for and receiving at least 5 of the 21 permits it

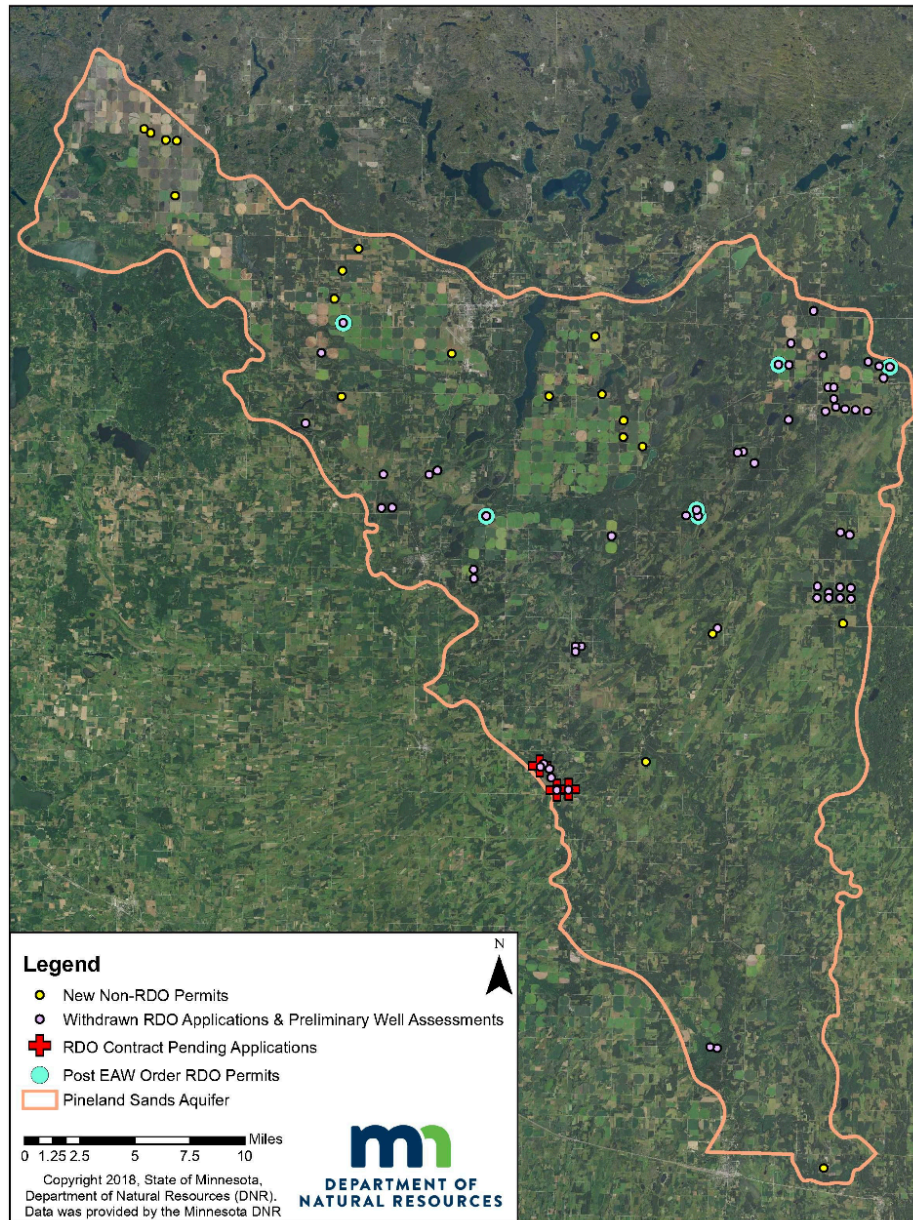
originally requested from DNR. AR 64, 250, 203 at ¶ 21 (e). (See Figure 1 below).<sup>1</sup> DNR stated that issuance of the first 2 of 21 originally requested permits constituted a “phased action.” AR 484 at DNR08342, referencing DNR’s 2016 Record of Decision on the Citizen’s Petition for an EAW available at:

[https://d3n8a8pro7vhmx.cloudfront.net/toxictaterscoalition/pages/96/attachments/original/1455395157/Response\\_and\\_Record\\_of\\_Decision\\_for\\_RD\\_Offutt\\_Petition\\_12Feb2016\(2\).pdf?1455395157](https://d3n8a8pro7vhmx.cloudfront.net/toxictaterscoalition/pages/96/attachments/original/1455395157/Response_and_Record_of_Decision_for_RD_Offutt_Petition_12Feb2016(2).pdf?1455395157) ¶ 46. However, the agency has now approved nearly half of RDO’s

originally requested expansion project permits with zero environmental review. Such continued forward motion, to meet readily identifiable demand at RDO’s Park Rapids processing facility, renders completely irrational DNR’s conclusion that RDO’s expansion project “ceased to exist” and “hasn’t [existed] for years.” DNR Br. At 18, 19.

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<sup>1</sup> RDO’s 2015 application package also included 33 well assessment applications, requesting DNR approval of new irrigation well construction. (See Figure 1).

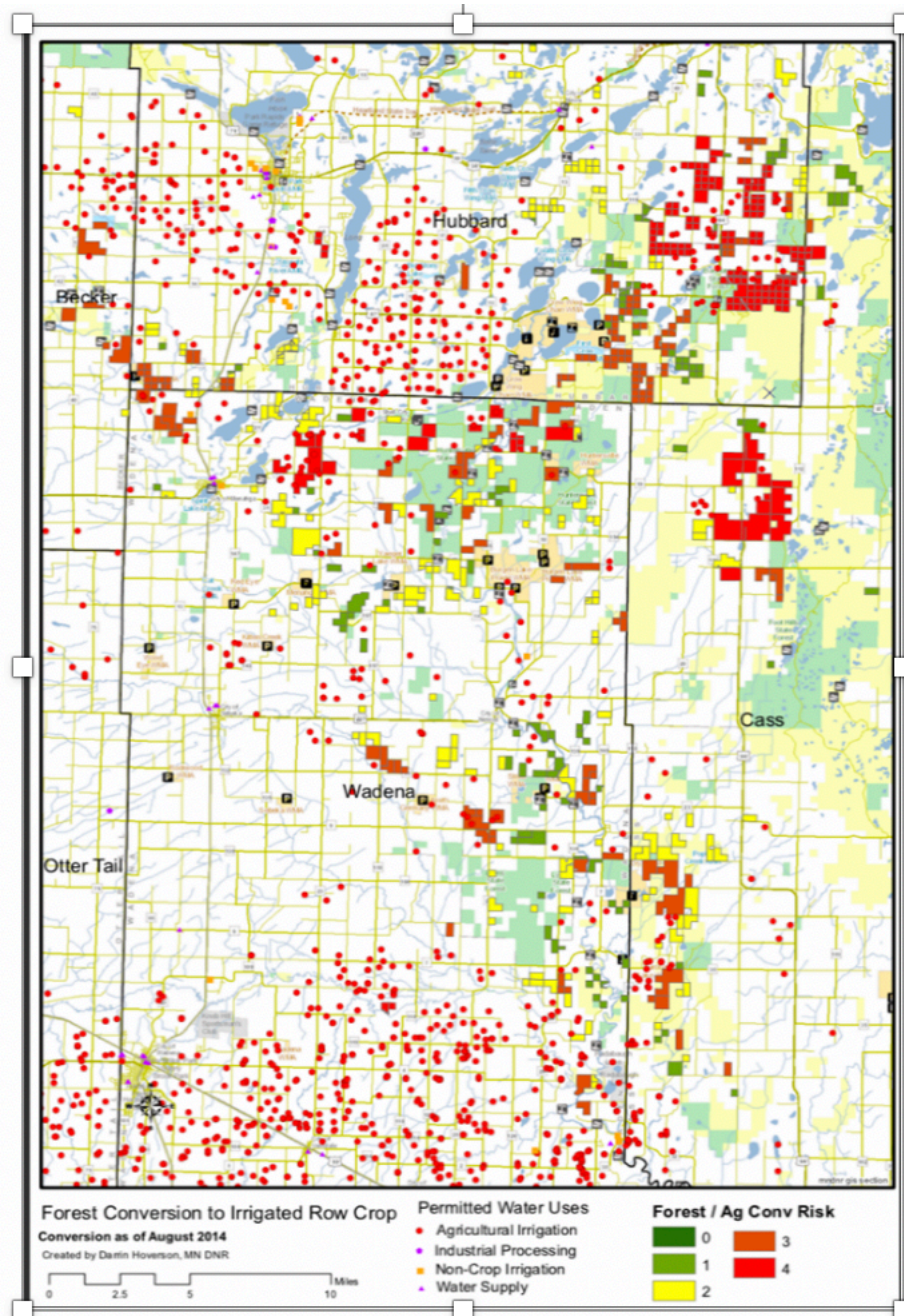


**Figure 1:** Irrigation Sites Proposed as Part of RDO’s 2015 Application Package and Approved Since 2015. AR 250.

In addition to mapping RDO’s proposed irrigation sites, DNR has already forecasted and mapped the deforestation associated with the same. AR 484 at DNR08338-39. (See Figure 2 below). Moreover, in 2018, DNR clearly flagged its concern, identical to Relators, that RDO’s continued phased implementation of its 2015



proposal surreptitiously threatens the same significant regionwide environmental harms that led the agency to twice order comprehensive environmental review in 2015. AR 62 at DNR00995



**Figure 2:** DNR's 2015 Deforestation Assessment. AR 484 at DNR08339.

DNR misinterprets Relators' discussion of its EAW order. DNR Br. At 24. Relators do not belatedly challenge the order. Instead, Relators argue that it further evidences the agency's legal error in failing to assess the Nolte Project as part of RDO's phased action. In its order, DNR manufactured an artificial distinction between the Nolte Project and RDO by narrowly referencing only RDO's most recent 2018 permit amendment requests, instead of the 2015 RDO proposal from which the Project spawned. AR 789 at DNRAMEND20203 ¶ 1-3. DNR similarly relegated the discussion of RDO's 2015 project proposal in the EAW to an encyclopedic overview in a "Regional Environmental Topics" attachment. AR 375 at DNR06947-52.

DNR's contention that RDO's hollow threats of withdrawal from Minnesota are credible evidence of discontinued implementation defies credulity. DNR Br. At 22. While large corporations, like petulant children, often launch threats and bully when they do not get their way, reality reflects that RDO has invested substantial money in a processing facility, real estate and irrigation well development in the Pineland Sands and has continued to apply for and receive DNR approval of new and modified irrigation permits. AR 62 at DNR00995, 64, 484 at DNR08335-36, DNR08338-40.

#### **B. DNR's Planned Future Project Stages Are Well-defined, Not Speculative**

Substantial evidence in the record also refutes DNR's argument that RDO's planned future implementation phases are "speculative." DNR Br. At 19. RDO submitted 21 permit applications for already constructed irrigation wells. AR 375 at DNR06947. It has since submitted applications and received approval to operate at least 8 of its existing wells, including the proposed Nolte Project wells. AR 62 at DNR00995, 64. And, RDO's

concurrently requested 33 well assessment applications proposed construction of additional, precisely located irrigation wells. AR 250, 375 at DNR06947. This Court has recognized that proposed construction constitutes a definite, site-specific action, i.e. a project reviewable under MEPA. *See, Minnesotans for Responsible Rec. v. Dep't of Natural Res.*, 651 NW 2d 533, 536 (Minn. Ct. App. 2002) (noting that “eight individual trails ... discussed in system plans are definite, site-specific actions that contemplate on-the-ground environmental changes and therefore constitute projects subject to environmental review.”).

*Metallic Leases* is clearly distinguishable and does not support DNR's contention that RDO's phased action cannot meaningfully be reviewed. *In re Env'tl. Assessment Worksheet for the 33<sup>rd</sup> Sale of State Metallic Leases in Aitkin*, 838 N.W.2d 212 (Minn. Ct. App. 2013). *Metallic Leases* involved the sale of mineral leases for exploration of nearly 64,000 acres with no definite locations identified for projects. *Id.* at 217. Moreover, the Court in *Metallic Leases* stated that pending permit applications are not a precondition for ordering environmental review. *Id.* At 219.

Likewise, *Rangers v. Iron Range Resources*, 531 N.W.2d 874 (Minn. Ct. App. 1995) also has no bearing on this case. In *Iron Rangers*, MCEA stated abstract concerns regarding potential effects associated with expansion of a recreational area. *Id.* At 881-83. In stark contrast, in this case, Relators have provided the only and substantial scientific evidence regarding potentially significant local water quality, pesticide drift and pollinator effects.



### **C. Substantial Evidence Demonstrates that RDO is the Project Proposer Behind the Nolte Project**

Zero evidence supports DNR's contention that Mr. Nolte purchased the Project site "outright" from RDO in an arms-length transaction and developed the Project independently. DNR Br. At 6, 21. Substantial evidence in the record does demonstrate, however, that RDO has acted as project proposer in directing implementation at the Nolte Project site. Minn. R. 4410.0200, Subp. 68 (2020) (stating that a proposer can be a single person or a person who directs others to undertake a project).

First, RDO drilled the project irrigation wells and deforested a substantial portion of the Project site. AR 489 at DNR08488, 752 at DNR10019. (See Figure 3). Second, RDO twice applied for Project irrigation permits. AR 375 at DNR06947-48, 489 at DNR08488. Third, RDO directed Nolte to reapply for a third time for Project irrigation permits. AR 203 at ¶ 21 (e). Fourth, after RDO entered into a sham land transfer agreement with Nolte, the company continued to pay thousands of dollars of property taxes on the Project site. AR 206 at DNR04329. Fifth, RDO's in-house and outside counsel worked on Nolte's behalf to accelerate DNR issuance of irrigation permits. AR 210 at DNR04334. Sixth, during the early period of environmental review, "Nolte's" project consultants twice offered old, erroneous RDO aquifer tests to DNR in an attempt to avoid site-specific testing. AR 26, 35, 49. And finally, the warranty deed on which DNR solely relies to support its contention of Nolte's "outright" ownership is stamped, "Returned to R.D. Offutt Farms," strongly indicating that RDO has financed Nolte's "purchase" of the Project property and maintains legal ownership of the same. AR 211.



**Figure 3:** Photo of Clear Cutting on Project Site. AR 375 at DNR06929.

Moreover, Mr. Nolte’s fickle word regarding his terminated relationship with RDO proves to be even less persuasive evidence than the xeroxed copy of the warranty deed stamped “Returned to R.D. Offutt Farms.” The record reflects that Nolte repeatedly told DNR that he intended to work with RDO to grow irrigated potatoes on the Project site. AR 210 at DNR04334. Only after being prodded by DNR and Minnesota Department of Agriculture (MDA) in response to several EAW comments, did Mr. Nolte craft a new “official” statement regarding his relationship with RDO. AR 629 at DNRAMEND20224, cmt. 87a; AR 666. Mr. Nolte’s wobbly word regarding

discontinued work with RDO stands on even shakier ground when one considers economic realities— Mr. Nolte incurred \$1.13 million in debt to “purchase” the property from RDO and stands to make 8-14 times more profit growing potatoes than growing corn, wheat or soybeans. AR 203 at DNR04303; AR 432 at DNR08074.

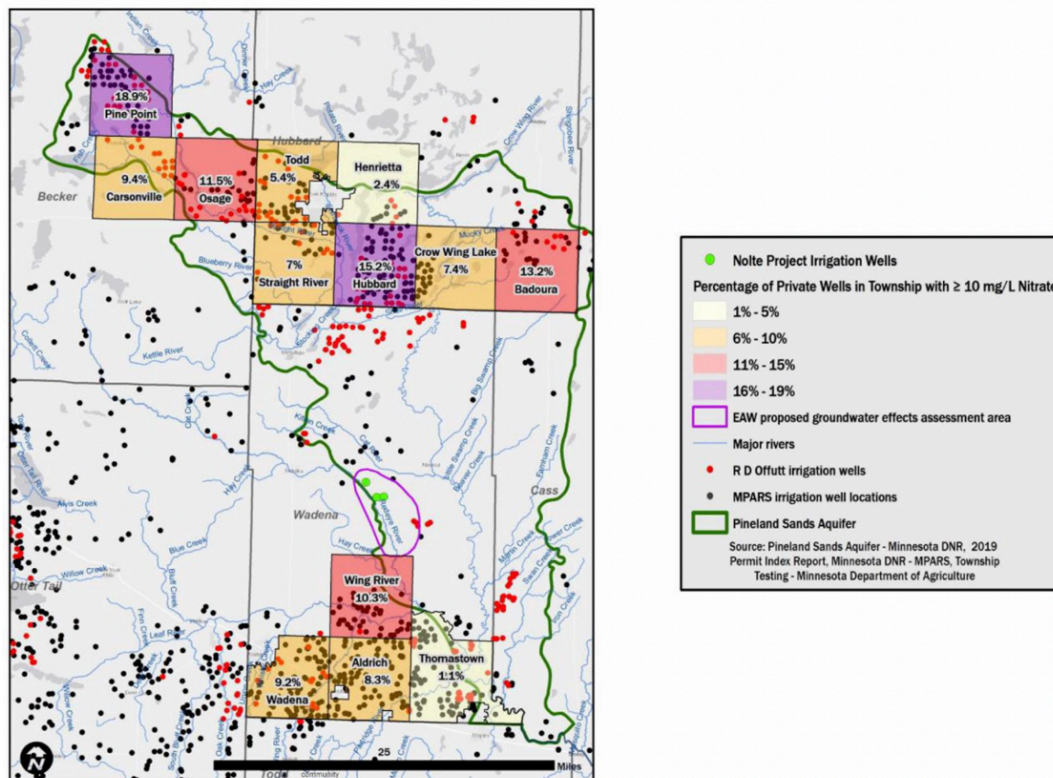
The evidence in the record permits only one reasonable conclusion. Since 2015, RDO has continued to strategically and illegally implement a phased expansion action to convert 7,000 acres of threatened forest to industrial irrigated agriculture without environmental review. As part of its phased expansion, RDO, as project proposer, has directed the physical, legal, technical and financial development of the Nolte Project site.

#### **D. Relators Are Not Requesting a Generic EIS**

DNR’s policy argument that Relators are inappropriately attempting to use the Nolte Project site as a “vehicle for an expansive—and expensive—regionwide environmental impact statement” is preposterous. DNR Br. At 3. First, MEPA law, not Relators, requires that phased actions be evaluated as a single project to avoid death by a thousand cuts. Second, MEPA requires that RDO, NOT Mr. Nolte, pay for the EIS covering its operations. AR 484 at DNR08328.

If the Court orders an EIS in this case, RDO will be getting off cheaply. RDO has already foisted millions of dollars in facility subsidy and drinking water treatment and health costs on to communities in the Pineland Sands. AR 484 at DNR08329-30. Moreover, the company is unlikely to be required to pay for the as-of-yet unassessed costs of attempting to remediate contamination, which now measures 100 times background levels, in the Straight River or unsafe private well nitrate contamination to

the north and south of the Project site in the Pineland Sands. AR 349 at DNR06259. (See Figure 4 below).



**Figure 4:** RDO Irrigation Wells in Townships with Significant Numbers of Nitrate-Contaminated Private Wells. AR 484 at DNR08354.

RDO’s irrigation appropriation now amounts to half of all groundwater appropriation in the Pineland Sands and constitutes a dense patchwork of deforestation and devastation across the region. AR 62 at DNR00996. DNR has not once, in 50 years, required RDO to conduct an environmental review of its operations. Accordingly, Relators very reasonably request a project-specific EIS covering the full extent of RDO’s existing and proposed operations—not a generic EIS.

## **II. DNR'S NEGATIVE DECLARATION BASED ON ITS DETERMINATION THAT THE PROPOSED PROJECT DOES NOT HAVE THE POTENTIAL FOR SIGNIFICANT ENVIRONMENTAL EFFECTS VIOLATES MEPA.**

### **A. DNR Erred as a Matter of Law in Failing to Specifically Respond to Dr. Kraft's Site-Specific Assessment of Potentially Significant Nitrate Water Contamination**

In making an EIS determination, a reviewing body must specifically respond to all substantive and timely comments on the EAW. Minn. R. 4410.1700, Subp. 4 (2018). In its reply brief, DNR dangerously asserts that it specifically responded to Dr. Kraft's expert report. DNR Br. At 26. Dr. Kraft's assessment determined that the proposed Project will likely result in groundwater contamination **double to quadruple the Safe Drinking Water Act limit**. AR 486 at DNR08385-98. The record belies DNR's claim. Neither DNR's comment summary document nor the agency's ROD identify and address the substantive elements of Dr. Kraft's expert report. AR 710, 711. In fact, not once in 12,000 pages of redundant and disorganized record material does DNR address Dr. Kraft's assessment.

#### **1. The Water Quality Section of the ROD Does Not Address Dr. Kraft's Report**

DNR's first argument broadly asserts that the water quality section of the ROD addresses the issues presented in Dr. Kraft's assessment. DNR Br. at 26. However, neither the water quality section, nor any other section of the ROD, discusses the assessment. AR 711. Moreover, the second paragraph in the water quality section of the ROD, which notes that DNR considered only two "location-specific" comments regarding groundwater quality—one focused on the Ten Mile Lake Watershed and the



other focused on Park Rapids—leaves no question that DNR failed to consider Dr. Kraft’s site-specific analysis. AR 711 at DNR09456.

The majority of the ROD water quality section actually discusses the agency’s lack of available groundwater quality data. AR 711 at DNR09457. After discussing lacking data, DNR claims that “[g]iven the number of variables involved in predicting groundwater quality in the environmentally relevant area, it is unlikely that a modeling exercise would produce definitive results that could be relied upon in decision making.” AR 711 at DNR09457. DNR’s obviously incorrect statement, called into question previously by agency experts, could not more clearly support Relators’ assertion. AR 756 at DNR10165. Surely, had DNR considered Dr. Kraft’s site-specific modeling of nitrate groundwater contamination, the agency would have more narrowly tailored its unsupported generalization or, alternatively, acknowledged and then disregarded Dr. Kraft’s alarming conclusion.

After identifying a dearth of available water quality data and inexplicably disavowing predictive modeling, DNR baldly asserts in the ROD that “[t]he relatively small (303 acres) area of the potential nitrate application combined with the compliance to the MAWQCP certification indicate that the Project is not anticipated to significantly contribute to any increase in nitrate concentration in nearby wells or cause those wells to exceed the drinking water standard of 10 mg/L.” AR 711 at DNR09457-58. DNR fails to explain how its demonstrably false generalization constitutes a specific response to Dr. Kraft’s step-by-step analysis, which assumes the use of BMPs.

DNR also argues, puzzlingly, that its general concession stating, “nitrate and pesticide groundwater contamination could originate beneath the cropped project site and could migrate offsite into deeper aquifers and discharge to wetlands, streams, and the Redeye River,” should be considered a response to Dr. Kraft. AR 711 at DNR09458. Relators are at a loss for how DNR’s general statement, confirming Dr. Kraft’s assessment, supports DNR’s argument. Moreover, in confirming the potential for offsite nitrate and pesticide water contamination migration, the agency fails to explain by what serendipitous natural law contamination that migrates offsite into groundwater will avoid polluting the private wells located therein.

In addition to being internally contradictory, and nonresponsive to Dr. Kraft, the ROD’s claim that there is no risk of private well nitrate contamination contradicts DNR’s own in-house hydrogeologist expert, Michelle Walker, who made clear that the agency “do[es] not know whether nearby wells are at risk of nitrate or pesticide contamination specifically from the proposer’s use.” AR 647 at DNRAMEND21096; AR 629 at DNRAMEND20223, cmt. 84d. Another DNR official’s statement that he was unsure how “[wells] could be modified to address nitrates” renders even more egregious the agency’s unsupported lie regarding potential well contamination risk. AR 757 at DNR10199, DNR10211.

Citing *In re Declaring a Negative Need for an Env’tl. Impact Statement for Proposed Living Word Bible Camp Project*, 2014 Minn. App. Unpub. LEXIS 742 at 30, 2014 WL 3557954 at \*11 (Minn. Ct. App. 2014) (*LWBC*), DNR argues this Court should not “reweigh the evidence”. DNR Br. at 30. However, this case does not entail a “conflict of

expert opinion”. In *LWBC*, DNR and county experts provided scientific assessments refuting the potentially significant environmental effects identified by Realtors. 2014 Minn. App. Unpub. LEXIS 742 at 31-33. Contrastingly, in this case, Relators have put forth the only scientific studies and site-specific assessments demonstrating potentially significant local water quality and pesticide drift effects, and DNR has failed to provide any assessment, supported by evidence, responding to the same. AR 482, 486 at DNR08385-98, 497, 500, 502, 512, 513, 517, 518, 519, 520. Accordingly, Relators do not request that this Court “reweigh the evidence”, they ask the Court to order DNR to consider it, as legally required, for the first time.

## **2. DNR Did Not Respond to Dr. Kraft’s Assessment by “Grouping” It with Mr. Broberg’s Comment**

DNR falls back on the argument, contrary to black letter law, that it specifically responded to Dr. Kraft’s assessment by “grouping” it with Mr. Broberg’s “overlapping” comment. DNR Br. at 27. DNR unpersuasively attempts to equate Mr. Broberg’s comment and Dr. Kraft’s expert assessment by stating that both men simply asserted that the Project would lead to nitrate contamination exceeding the Safe Drinking Water Act limit.

The record belies DNR’s assertion. Dr. Kraft holds a Ph.D. in soil science and hydrogeology and a hydrologist license. AR 486 at DNR08385-98. Using his unique expertise, he calculated the Project’s nitrate groundwater contamination risk through a site-specific modeling assessment. AR 486 at DNR08385-98. Dr. Kraft’s 5-page assessment of localized nitrate contamination utilized site conditions, including the



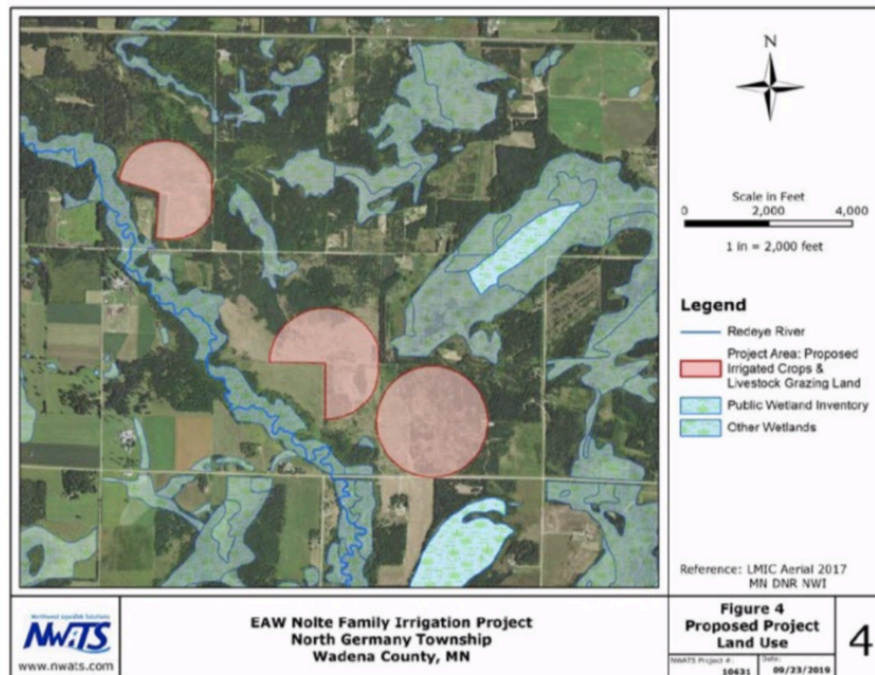
proposed crop rotation identified in DNR's EAW, scientific literature and University of Minnesota fertilization recommendations and average crop yields. AR 486 at DNR08385-98. Dr. Kraft also analyzed the potential for significant nitrate contamination from the application of 720 tons of manure, which will add an additional 14,400 pounds of nitrogen to the landscape. AR 486 at DNR08388-89.

In contrast, Mr. Broberg, a Minnesota licensed geologist, provided a much more wide-ranging comment covering several sections of the EAW. AR 497. He based his distinct nitrate groundwater contamination comment, which independently corroborates Kraft's assessment, on the Minnesota Department of Agriculture's (MDA) nearby study of groundwater contamination beneath irrigated cropland and a scientific literature review. AR 497 at DNR08653-57, DNR08659-08660, DNR08665.

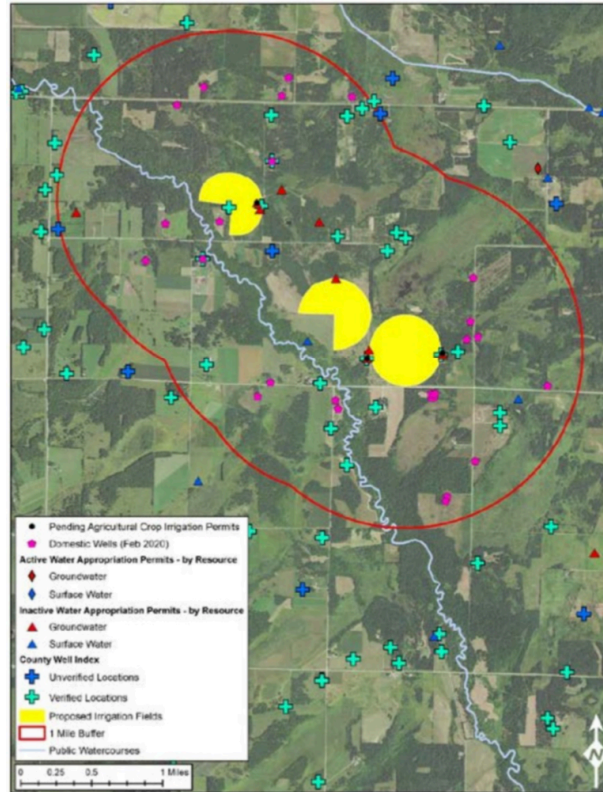
Although the water quality section of the ROD *repeats Mr. Broberg's* comment regarding the potential for exceedance of nitrate public health limits, DNR failed to specifically *respond* to the same. AR 711 at DNR09456-59. DNR's failure to respond to Mr. Broberg's comment constitutes independent reversible error and further underscores the arbitrariness of the agency's contention that it responded to Dr. Kraft by responding to Mr. Broberg.

Contrary to DNR's glib statements, Relators take no issue with the failure to credit Dr. Kraft by name for doing the agency's job. Relators do, however, vehemently object to DNR's attempt to completely sidestep a site-specific, scientifically sound assessment in order to put forth a wholly unsupported conclusion that there is an insignificant risk of nitrate groundwater, surface water and private drinking well contamination. DNR's

failure to specifically respond to Dr. Kraft's expert report not only violates MEPA and constitute clearly reversible legal error, their wholly unfounded conclusions jeopardize public watercourses and the health and safety of citizens relying on at least 37 private drinking water wells surrounding the Project site. AR 374 at DNR06886; AR 497 at DNR08658. (See Figure 5, 6 below).



**Figure 5:** Redeye River Public Water Course and 225 Acres of Wetlands Surrounding Project Site, Including Public Water Wetlands. AR 374 at DNR06872.



**Figure 6:** 37 Private Wells Within 1 Mile of Project Site. AR 374 at DNR06887.

### **B. DNR’s Determination that the Project Does Not Have the Potential for Significant Water Quality Impacts is Arbitrary and Capricious**

In *Trout*, this Court held that an irrigation project one-third the size of the Nolte Project in the vulnerable Pineland Sands aquifer area had the potential for significant water quality effects and required an EIS. *Trout Unlimited v. Minnesota Dept. of Agric.*, 528 N.W.2d 903 (Minn. Ct. App. 1995), *review denied* (Minn. Apr. 27, 1995). *Trout* demonstrates that DNR’s failure to order an EIS was arbitrary and capricious.<sup>2</sup>

<sup>2</sup> DNR’s references to several ROD sections fail to address Relators’ contention that DNR overlooked the Project’s potential for significant local water quality effects identical to those raised in *Trout*. Paragraph 22 superficially addresses groundwater quantity, not quality. Paragraph 24 addresses cumulative not local water quality effects. Paragraph 28 generically addresses mitigation. Paragraph 31 fails to specifically respond to Dr. Kraft or Mr. Broberg and discusses lack of available water quality data. Paragraph

During EAW development, DNR failed to address agency experts' comments identifying potentially significant local water quality and quantity effects and pesticide impacts identical to those raised in *Trout*. AR 19, 22, 128, 131 at DNR01767, DNR01768, DNR01771-73, 222 at DNR04377, 224 at DNR04401, 226 at DNR04405 cmts. 1, 14-16, 611, 793. After initially circulating only a "very rough draft", DNR gave the Minnesota Pollution Control Agency (PCA), Minnesota Department of Health (MDH) and MDA only 1.5 days to evaluate final text on pesticides, nitrate, geology, and water issues presented in the 60-page final draft EAW. AR 153, 187. DNR further advised the agencies that "the time for consideration has passed" and they "aim to resolve all [] concerns" before publication of the EAW. AR 187. Despite DNR's inappropriate intimation that agencies should resolve all concerns immediately and not submit formal EAW comments, PCA submitted a comment that parallels Relators' and amici curiae's concerns regarding pollinators and water quality. AR 611. Moreover, the engaged MDH official clarified that due to DNR's short turnaround time and the raging pandemic, senior staff at MDH were not available to review the EAW and her comments could not be attributed to the agency. AR 680 at DNRAMEND21275. Accordingly, MDH's failure to explicitly comment on the need for an EIS, also fails to support DNR's argument.

DNR also failed to evaluate and provide specific responses to Relators' comments respecting potentially significant local water quality effects identical to those raised in *Trout*. For example, Mr. Broberg discussed MDA's Byron Township Study. AR 497 at

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35(c) restates unsupported conclusions and references an example of water quantity permit conditions. And Paragraph 35(h) also references cumulative effects. AR 711.

DNR08659-60. He noted that MDA's study clearly demonstrated the potential for "nitrate migration in groundwater beneath a single center pivot field [to discharge] hundreds to thousands of acre feet of nitrate contaminated groundwater." AR 497 at DNR08660. Mr. Broberg also pointed out that MDA's study demonstrated the potential for significant nitrate contamination despite the use of cost prohibitive BMPs. AR 497 at DNR08660. Mr. Broberg further discussed the high density of wells surrounding the Project site and the lack of risk information regarding the same. AR 497 at DNR08658.

Wholly sidestepping Mr. Broberg's discussion of the substantive findings in the MDA study and several other scientific studies, DNR claimed in the ROD, without any evidence, that lower nitrate leaching has been observed elsewhere following the implementation of BMPs. AR 629 at DNRAMEND20223 at cmt. 85a,b; AR 711 at DNR09455.<sup>3</sup>

Amicus Curiae, Willis Mattison and Peder Otterson, reinforce Relators' argument that the same potentially significant nitrate and pesticide contamination, water depletion and pesticide drift effects that plagued the much smaller irrigated agriculture project at issue

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<sup>3</sup> DNR's string citation to various pages in the EAW underscores Relators' arguments that DNR failed to consider potentially significant effects. Br. at 10-11. DNR identifies the vulnerable wetlands and Redeye River but completely fails to assess potential negative effects to the same. DNR dubiously states that effects to water resources are unlikely, because the resources are not located directly in the irrigation fields. AR 374 at DNR06891-92. DNR states seven times that it cannot assess effects to private wells or water resources without an aquifer test. AR 374 at DNR06890-92, DNR06895. Other sections cited by DNR address cumulative effects, not local effects (DNR06904-15, DNR06918-21, DNR06924); provide a generic list of over 250 pesticides (AR 375 at DNR 06938-43); provide an encyclopedic discussion of pesticide fate and generic BMPs (DNR06892); and misstate the known water quality impairments from irrigated agriculture discussed in applicable watershed reports (AR 374 at DNR06892; AR 611).

in *Trout* are at the core of this case, which proposes a project 3 times larger. Mattison Otterson Am. Br. at 5. These scientists with a combined 60 years of service at PCA and DNR, further support Relators' argument that concerns first raised in *Trout* have now become well-documented pollution realities and must be more thoroughly considered through an EIS. Mattison Otterson Am. Br. at 5-6. Amici further argue, citing *In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W. 2d 112, 119 (Minn. 2009) (citing *Sierra Club v. Clark*, 755 F.2d 608, 619 (8th Cir. 1985)), that DNR's unexplained deviation from directly relevant prior agency environmental review comments renders the agency's decision arbitrary and capricious. Mattison Otterson Am. Br. at 6-9.

**C. DNR's Determination that Mitigation Will Offset Water Pollution Effects is Arbitrary and Capricious and Unsupported by Substantial Evidence**

DNR's reply brief entirely misses the point of Relators' mitigation argument. The Minnesota Supreme Court requires that mitigation measures be "specific" and "targeted" and "certain to be able to mitigate the environmental effects." *Citizens Advocating Responsible Development v. Kandiyohi County Bd. of Commrs.*, 713 N.W.2d 817, 834-35 (Minn. 2006) (emphasis added). Mitigation is not an either-or proposition.

Although, mandatory BMPs that do not address the potential environmental harms posed by a specific operation do not pass muster, that is exactly what DNR's first mitigation argument proposes. DNR argues that Nolte's MAWQC agreement provides sufficient mitigation, because it requires BMPs via an enforceable contract. DNR Br. at 29. However, the document clearly states that the BMPs therein were developed for a

completely different farming operation. AR 4 at DNR00060. The MAWQC specifies BMPs for a *dryland* cattle farming operation, which the Nolte's described as including "2,000 acres in long-term hay production, 500 acres in permanent pasture, [and] 200 acres in corn production." AR 4 at DNR00060. By contrast, the proposed operation at issue in the EAW is an *irrigated* operation consisting of 303 acres in a potato production rotation. AR 374 at DNR06882-83.

DNR failed to evaluate Dr. Kraft's assessment of potentially significant nitrate contamination and now attempts to establish by fiat that wholly irrelevant BMPs, designed for a completely different operation, will mitigate groundwater contamination and prevent contamination migration into surrounding private wells, the Redeye River and hundreds of acres of wetlands.

Not only does DNR's argument put the cart before the horse and run afoul of this Court's well-established mitigation precedent, it contradicts DNR's and MDH's own comments during environmental review. Namely, that Nolte's historical practices are irrelevant to determining potential environmental impacts from his newly proposed operation. AR 19 at DNR00207, cmt. 40, AR 131 at DNR01767. Moreover, DNR, not just Relators, also asserted during EAW development that additional, site-specific nitrate and manure management plans are necessary to evaluate the potential for significant environmental effects from Nolte's newly proposed 303-acre irrigated potato operation. AR 19 at DNR00205, cmt. 15, 31, 39, 69, AR 210 at DNR04333.

DNR next argues that Nolte's Wadena County Soil and Water Irrigation Conservation Plan provides sufficient mitigation. However, that plan cannot reasonably be considered

specific, targeted or certain. The “plan” includes seven generic “recommendations” contained in nine sentences on half a page. AR 15 at DNR00184-85. The sole mandatory element of the recommendations in the “plan” generically requires application of commercial fertilizer and pesticides in accordance of University of Minnesota recommendations and application of manure in accordance with a manure management plan. AR 15 at DNR00185. However, Nolte never developed or provided either a nitrate management plan or a manure management plan for the newly proposed operation, despite DNR’s repeated requests. AR 19 at DNR00205 cmt. 15, 210 at DNR04333. Accordingly, the two seemingly mandatory, albeit entirely generic, recommendations in DNR’s second proffered mitigation document also fail to provide substantial evidence of specific, targeted and certain mitigation. AR 15.

Lastly, *In re Denial of a Contested Case Hearing Request & Modification of a Notice of Coverage Under Individual Nat’l Pollution Discharge Elimination Sys. Feedlot Permit No. MN0067652*, 2019 LEXIS 976, 2019 WL 5106666 (Minn. Ct. App. Oct. 14, 2019) (*Daley Farms*) does not stand for the broad proposition that DNR can rely on *any* BMPs as proof of mitigation. In *Daley Farms*, PCA relied on clearly stated pollution limits in the applicable Animal Feeding Operation permit as well as additional site-specific mitigation requirements that went beyond generic BMPs and were developed as a specific response to Relators’ concerns regarding potential nitrate contamination. 2019 LEXIS 976 at 27-28. DNR has not developed similar site-specific BMPs for addressing identified potentially significant contamination and depletion effects from the Project in this case.



**D. DNR Erred as a Matter of Law in Finding that the Project Does Not Have the Potential for Significant Water Quantity Effects to Private Wells, the Redeye River and Wetlands**

When information necessary to understand the potential for or significance of environmental effects is lacking but could reasonably be obtained, Minn. R. 4410.1700, Subp. 2a, requires a reviewing agency extend the EAW process and gather additional information or include appropriate studies within the scope of an EIS. Moreover, both *Trout* and *Pope*, which held that reviewing agencies had violated MEPA by impermissibly deferring the gathering of necessary and easily obtainable information, require reversal in this case. *Trout*, 528 N.W.2d 903; *Pope County Mothers v. Minnesota Pollution Control Agency*, 594 N.W. 2d 233 (Minn. Ct. App. 1999). DNR has not only deferred, but actually abandoned altogether, the gathering of necessary and easily obtainable information on a timeline, which would allow it to be used to mitigate effects to private wells, the Redeye River and hundreds of acres of adjacent wetlands. AR 213 at DNR04342-44 ¶ 11, 25, 26, 27.

DNR's citations to *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378 (Minn. Ct. App. 2009), *In re Minntac Mine Expansion Project*, 2014 Minn. App. Unpub. LEXIS 69, 2014 WL 274077 (Minn. Ct. App. June 10, 2008), and *In re Minn. Pipeline Co.*, 2008 Minn. App. Unpub. LEXIS 675, 2008 WL 2344736 (Minn. Ct. App. June 10, 2008) are clearly distinguishable on the facts. *Friend of Twin Lakes* included minimal changes, over an extended period of time, to an already developed urban land use site and included several site-specific mitigation measures. 764 N.W.2d at 381-82. In *In re Minntac*, Relators failed to demonstrate likely increases in groundwater pollution, and the

permit included site-specific monitoring as well as development of a plan, based on monitoring and modeling, to achieve groundwater standards. 2014 Minn. App. Unpub. LEXIS 69 at 17-18. Similarly, in *In re Pipeline*, site-specific mitigation plans clearly required compliance with other permits. 2008 Minn. App. Unpub. LEXIS 675 at 29-32. In this case, DNR has wholly failed to assess the potential for local water quality contamination, failed to assess impacts from pumping two out of three project wells, put forth generic or wholly inapplicable mitigation measures and purported to use future, unidentified permitting controls *in lieu* of site-specific assessment to address potentially significant effects, if and when they occur. AR 4, 15, 172 at DNR03722-23, 374, 647 at DNRAMEND21096, 711, 753 at DNR10069-71.

### **1. DNR Failed to Take Basic Steps to Assess and Mitigate Risks to Private Well Owners**

As part of its pump test and related report on Project risks, DNR failed to gather and assess basic information, including the age and depth of several private wells. AR 497 at DNR08658, 711 at DNR09443-45. Accordingly, DNR could not evaluate the contamination and depletion risks to these wells. Kathy Connell's three wells on her immediately adjacent organic farming homestead are among the domestic wells for which DNR gathered zero risk assessment information. (See Figure 7 below). AR 753 at DNR10069.

The limited monitoring and modeling conducted highlights the risk to private wells and underscores the need to gather additional information. AR 753 at DNR10045-46, DNR10069-71. Specifically, DNR reported well drawdowns approximately 1 to 90

feet in monitored wells after pumping only one out of three Project wells for seven days, and DNR modeled drawdowns of 17 to 19.5 feet in neighboring wells located farther away from the Project than Connell's. AR 753 at DNR10054, AR 215 at DNR04355 ¶ 23.

DNR has also waived the requirement that Nolte gather the missing domestic well information as part of the permitting process, claiming that the information is available from MDH but inexplicably failing to evaluate the same. AR 213 at DNR04342 ¶¶11, 214 at DNR04348 ¶¶11; AR 215 at DNR04354 ¶¶11. Despite identifying several wells at unknown, high or moderate risk, DNR has further failed to require Nolte to enter into well interference agreements with potentially impacted well owners, with the exception of one other neighbor. AR 213 at DNR0434-44, 214 at DNR04350, 215 at DNR04356.

## **2. DNR Failed to Carry Out an Aquifer Pump Test for Two out of Three Wells**

DNR has erroneously ignored its own prior precedent and in-house expert's advice in abandoning pump testing as part of environmental review. In 2012, DNR stated that although pump testing may be required as part of the permitting process, it should also be incorporated during environmental review to fully assess potentially significant effects. AR 77 at DNR01112.

In this case, the Project site includes three irrigation wells, which will pump from leaky, adjoining aquifers. AR 753 at DNR10045. DNR plans to allow Nolte to commence continuous and concurrent pumping without first completing aquifer pump tests for two out of three wells. AR 213 at DNR04343-44 ¶ 25-27, 214 at DNR04350 ¶ 27, 215 at DNR04356 ¶ 27. DNR has noted, and state law provides, that the agency cannot adjust

pumping volumes during the irrigation season, should impacts to surface water resources occur. AR 691. Moreover, because DNR failed to conduct a pump test for the northern well, the agency was unable to establish aquifer safe yield. AR 213 at DNR04344 ¶26.<sup>4</sup> Accordingly, DNR's issuance of permits without necessary pump testing and environmental review threatens significant and irreversible harm to aquifers, private wells, the Redeye River and wetlands during Nolte's first irrigation season.

The Wadena County Geologic Atlas, on which DNR relied in the EAW, does not enable a local assessment of the potential for significant water depletion effects. AR 374 at DNR06890, 753 at DNR10049-50. Instead, the local aquifer variability and interconnectivity identified in this county-level Atlas, underscores the need for pump testing to evaluate local risk. AR 374 at DNR06890. In fact, DNR states seven times in the EAW that aquifer testing evaluating the rates and volumes for each well is necessary. AR 374 at DNR06890-92, DNR06895. DNR's hydrogeologist asserted the same during EAW development. AR 19 at DNR00208 cmt. 56, 59, 60, 64, 65, 66, 68.

Rather than "mooting" Realtors' concerns, conclusions in the single completed aquifer pump test underscore Relators' argument that DNR must complete the two remaining pump tests as part of an EIS. Initial conclusions include: 1) all three wells are completed in leaky, connected aquifers, 2) several nearby domestic wells are at high risk when the Project wells are pumped singularly or concurrently, 3) zero information is

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<sup>4</sup> Safe yield is the amount of water that can be withdrawn from an aquifer without significant ecological impacts. DNR Geological Atlas, "The Rich Language of Hydrogeology".

available for 11 private wells; and 4) the effect of pumping the northern well on surface waterbodies cannot be evaluated at this time. AR 753 at DNR10045-46.

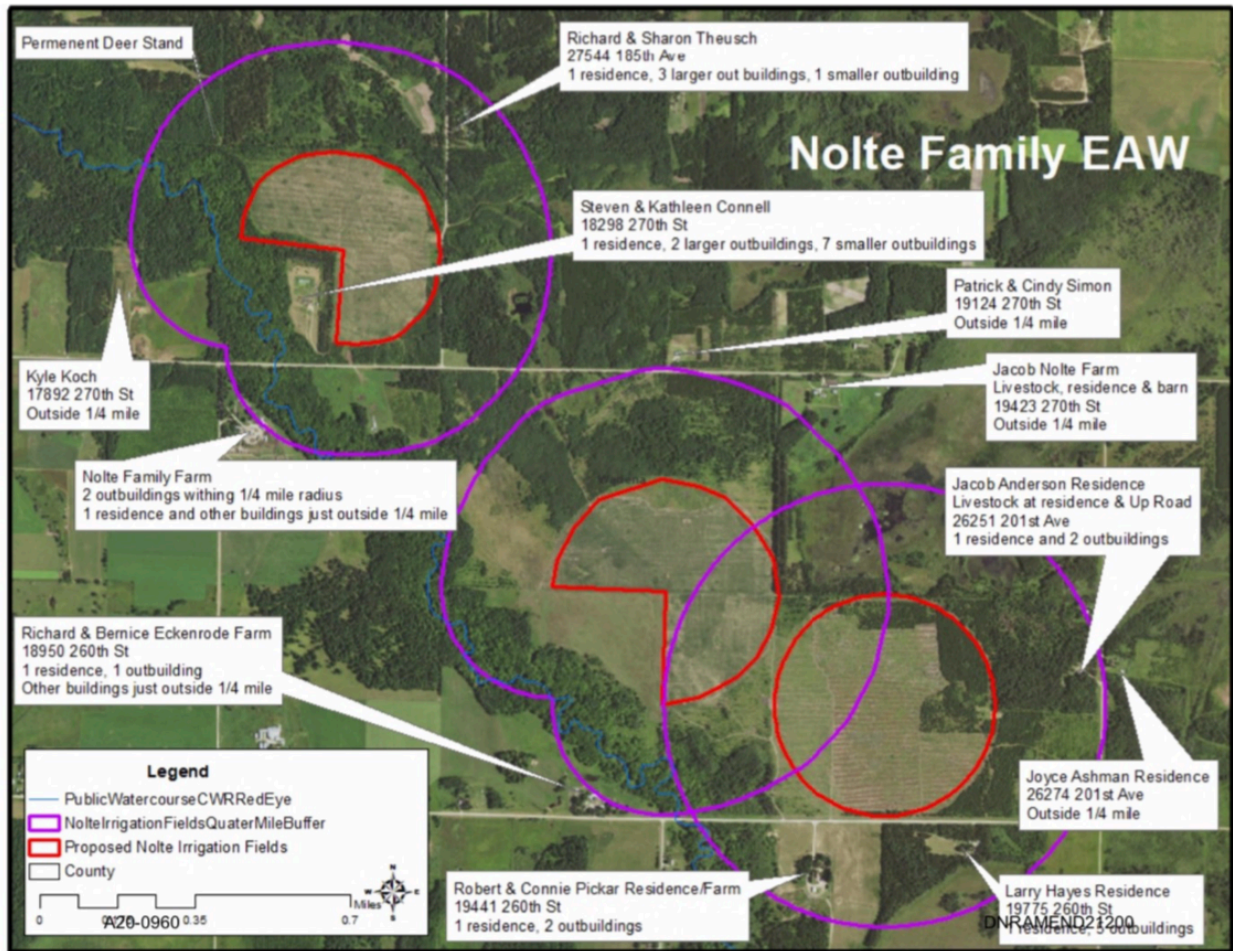
Significantly, the northern well that DNR chose not to evaluate through a pump test poses unique risks. It is drilled in a shallower aquifer. AR 213 at DNR04343 ¶25. Not only is it directly connected to the deeper buried aquifer to be pumped by the two southern wells, the northern irrigation well may also be more directly connected to the unconfined drinking water aquifer as well as the river and wetland water resources. AR 753 at DNR10051, DNR10053.

The record belies DNR's argument that "draft permit conditions" will mitigate against potentially significant water depletion effects. First, the permit finding of fact sheets indicate that DNR has waived the requirements that Nolte evaluate risks to private wells and enter into well interference agreements with at-risk neighbors. AR 213 at DNR04342 ¶11, 214 at DNR04348 ¶11, DNR04350 ¶ 24-25, 215 at DNR04354 ¶11, DNR04356 ¶ 24-25. Second, the fact sheets do not include conditions prohibiting concurrent pumping of northern and southern Project wells. AR 213, 214 at DNR04350 ¶ 27, 215 at DNR04356 ¶ 27. Third, the fact sheets require a use-season test NOT an antecedent aquifer pump test for the northern irrigation well, leaving open the possibility for potentially significant interim effects to domestic wells and surface water resources during Nolte's first irrigation season. AR 213 at DNR04344. As with purported mitigation of potentially significant water quality effects, DNR attempts to put the cart before the horse, asserting effective mitigation without first assessing site-specific risk.

**E. DNR's Determination that the Project Does Not Have the Potential for Significant Pesticide Drift Effects Is an Error of Law and Arbitrary and Capricious**

**1. The Project Poses Unaddressed, Potentially Significant Pesticide Drift Risk to Neighbors**

In reaching its conclusion that pesticide drift from the Project represents a “low/negligible” risk to human health, DNR: 1) failed to specifically respond to Relator Toxic Tater’s and Pesticide Action Network’s study confirming significant pesticide drift incidents in the Pineland Sands; 2) ignored agency expert and previous agency environmental review comments; 3) “scrapped” its site-specific quarter-mile buffer human health assessment and 4) lied about known links between Non-Hodgkin’s lymphoma and pesticide use. AR 19 at DNR00207 cmt. 49, 131 at DNR01767, DNR01771-73, 222 at DNR04377, 224 at DNR04401, 226 at DNR04406 cmt. 16, 482 at DNR08322, 484 at DNR08371-74, 680 at DNR21274, 698 at DNR21318.



**Figure 7:** Residences Within and Just Outside a Quarter Mile of the Project Site. AR 657.

DNR made zero attempt to assess the “type, extent, and reversibility” of pesticide drift effects to surrounding homesteads. (See Figure 7). When Relator, Toxic Taters submitted an EAW comment noting that DNR had completely failed to assess the risk to all surrounding residences within the quarter-mile buffer discussed in the EAW, DNR and MDH “scrapped” their buffer analysis altogether. AR 374 at DNR06900, 482 at DNR08324. DNR fell back on abstract EPA assessments having no bearing on the uniquely vulnerable human population surrounding the Project site. After eliminating its

local assessment, DNR arbitrarily restated the same “low/negligible” human health risk conclusion in its ROD. AR 680 at DNR21274, 711 at DNR09454, DNR09466.

DNR also lied about the known health risk from pesticide drift in the ROD. AR 698 at DNR21318, 711 at DNR09453. Relaying a story of careless RDO helicopters spraying pesticides for four hours over his tree farm and noting his wife’s fear of going outside, one commenter requested DNR address the link between pesticide use and the 12% higher rate of Non-Hodgkin’s lymphoma in Wadena County. AR 643 at DNRAMEND21074-77. Although MDH informed DNR that studies show a clear link between pesticide use and Non-Hodgkin’s lymphoma, DNR chose to ignore the studies and state in the ROD that there is no connection between pesticide use and the types of cancer, which occur at statistically elevated rates in Wadena county. AR 698 at DNR21318, 711 at DNR09453.

## **2. The Project Poses Unaddressed, Potentially Significant Pesticide Drift Risk to Pollinators**

DNR failed to respond to Dr. Kraft’s assessment, and cited study, indicating potentially significant pesticide effects to aquatic and terrestrial invertebrates as well as to PCA’s comments regarding Chlorothalonil and Chlorpyrifos contamination in combs several miles away from farm sites. AR 486 at DNR08389, 611. Instead of specifically responding, DNR simply restated or cross-referenced the same few, generic sentences included in the EAW regarding potential effects to pollinators. AR 711 at DNR09448, DNR09465-66.



Amicus curiae, the Pollinator Stewardship Council (PSC), buttress Relators argument regarding potentially significant effects from the use of neonicotinoid pesticides on the Project site. PSC provides overwhelming scientific evidence documenting neonicotinoid toxicity to bees and butterflies in Minnesota. PSC notes several state initiatives and Governors' Executive Orders aimed at better protecting pollinators including one executive order which notes that "... pollinator decline ... 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." PSC Am. Br. at 12-13. PSC further argues that DNR's complete and utter failure to assess potentially significant pollinator effects is particularly egregious in light of Governor Walz's executive order, which charges DNR with taking the lead on achieving Minnesota's pollinator protection goals. PSC Am. Br. at 14-15.

In failing to assess potentially significant pesticide drift effects to people and pollinators in its EAW and failing to specifically respond to comments, DNR erred as a matter of law and rendered a decision that is arbitrary and capricious and unsupported by substantial evidence.

### **III. CONCLUSION**

DNR's Negative Declaration on the need for an EIS was unsupported by substantial evidence, arbitrary and capricious and an error of law. Relators respectfully request the Court of Appeals reverse DNR's Negative Declaration and order an EIS for the entire 7,000-acre phased action. In the alternative, Relators request the Court order

DNR to complete an EAW for the 7,000-acre phased action or an EIS for the 303-acre Project. Relators further request the Court order DNR to rescind the three Project irrigation permits issued before completing required environmental review.

Respectfully submitted,

Dated: December 28, 2020

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## CERTIFICATION OF BRIEF LENGTH AND CONTENT

I hereby certify that this reply brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subds. 1 and 3 for a brief produced with a proportional font. The length of this reply brief is 6,986 words. This brief was prepared using Microsoft Word for Mac, version 16.42.

I hereby certify that the content of the accompanying paper reply brief 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.

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