



Growth, Interrupted:  
Getting  
Environmental Review Right  
The First Time

**Christopher M. Hood  
Flaherty & Hood, P.A.  
October 5, 2006**



# Overview

- **Basics of Environmental Review**
- **Recent Case Law Developments**
- **Recent Regulatory Developments**

# Terminology

**“EAW” or Environmental Assessment Worksheet:** A screening tool used to determine whether a full EIS is needed

**“EIS” or Environmental Impact Statement:** An in-depth analysis used for major development projects that will significantly change the environment

# Terminology

- **Alternative Review:** RGUs can do environmental review in lieu of an EIS/EAW if substitute review addresses substantially same issues

The background of the slide features a photograph of a two-story house with a gabled roof and a large tree in the foreground. The entire image is overlaid with a semi-transparent teal color. The text is centered and overlaid on this background.

# Terminology

**“AUAR” or Alternative Urban Areawide Review:** A type of environmental assessment used to determine potential cumulative environmental impacts from future urban development over a broad, but defined, geographic area

# Terminology

## **“EQB” or MN Environmental Quality Board:**

Board authorized to coordinate environmental review between multiple levels of government and project proposers

## **“RGU” or Responsible Governmental Unit:**

Municipal, county, or state governmental unit tasked with ensuring that environmental review is completed successfully

# Terminology

- **Positive Declaration:** Written statement by the RGU requiring the preparation of an EIS
- **Negative Declaration:** Written statement by the RGU that a proposed project does not require an EIS

# When Is Review Needed?

- 1. Project has *potential for significant environmental effects***
- 2. Project not exempt under Minn. R. 4410.4600**
- 3. Determination by RGU or EQB, in response to petition or on its own**
- 4. Mandatory EAW or EIS category**

## Project Exempt Under Minn. R. 4410.4600

- **26 Categories – Minn. R. 4410.4600**
- **“Standard” exemptions**
- **Certain energy, mining, airport projects, etc.**
- **Warehousing, light industrial, commercial, institutional development under certain square footage, depending on location**
- **Residential development fewer than a certain number of units, depending on location**

**Consult the Rules!**

## Projects NOT Eligible for Environmental Review

- **Projects that are already built—no retroactive environmental review**
- **Projects that already have necessary governmental approvals and permits**
- **Projects that don't require building—i.e. comprehensive plans**
- **Projects that don't need state or local permits or approvals even if they will cause significant environmental effects**

Determination by RGU or EQB, in response to petition or on its own

## **EAW Petition:**

- **May be filed by any 25 individuals**
- **Project must receive written notice of petition**
- **RGU must decide within 15 days whether EAW is necessary**
- **Petition remains in effect 1 year**

Determination by RGU or EQB, in response to petition or on its own

## **Discretionary Review**

- **Any governmental agency with jurisdiction may order an EAW if it feels that a project has the potential for significant environmental effects**

# Mandatory EAW?

- **36 Categories**
- **Threshold test applies**
  - **Energy and waste management**
  - **Mining and industry**
  - **Projects affecting water and wetlands**
  - **Mixed residential, airport, golf course**
  - **Any mandatory EIS category**

**Consult the Rules!**

# Mandatory EIS?

- **24 Categories**
- **Threshold test applies**
  - **Energy and hazardous waste**
  - **Mining and certain industries**
  - **Projects affecting water and wetlands**
  - **Residential development**

**Consult the Rules!**

# RGU Selection

- **Mandatory – prescribed by rule**
- **Discretionary – RGU**
- **Petition – EQB determines**

# EAW Process

- **Proposer completes data portions and submits to RGU**
- **RGU – Are data portions complete?**
  - If incomplete, RGU must return submittal to proposer for completion.
- **RGU has 30 days to add material and approve EAW for distribution**
- **Public review and comment for 30 days following notice published in *EQB Monitor***

# EAW Process

- **RGU must address all timely submitted and substantive comments**
- **The RGU may, but need not, hold a public meeting(s) to gather comments on the EAW**
- **RGU EIS need decision**

Project has “potential for significant environmental effects.”

1. ***Type, extent, and reversibility of environmental effects***
2. ***Cumulative potential effects of related or anticipated future projects***
3. ***Extent to which effects subject to mitigation by regulatory authority***
4. ***Extent to which effects and be anticipated and controlled***

**EIS Need Decision!**

# EAW Process

- **RGU issues positive or negative declaration on whether EIS is needed**
- **EAW Process averages 90 days, can take 120 days or longer**

# Key Points for EAW's

- **Careful review (i.e., “hard look”) and build a record supported by substantial evidence**
- **Respond to all substantive public comments**
- **Do not rely upon future regulations to mitigate predicted environmental effects**
- **A positive or negative declaration must be based on detailed findings of fact supported by substantial evidence**

# EIS Scoping Process

- **EIS Scoping Process—Used before the preparation of an EIS to reduce the scope and bulk of the EIS and to identify the potentially significant factors affecting the environment as a result of the proposed project**

# EIS Preparation

- **Draft EIS—RGU coordinates with proposer, state agencies and other stakeholders and creates first draft of EIS**

# Key EIS Elements

- **Project description**
- **Governmental approvals and permits**
- **Comparison of potentially significant environmental impacts with alternatives**
- **Environmental, economic, employment, and sociological impacts**
- **Mitigation measures to minimize adverse environmental, economic, employment, or sociological effects of the project**

**Consult the Rules!**

# Draft EIS

- **Notice of Draft EIS must be published**
- **Mandatory informational meeting required**
- **Public Review and Comment on Draft**
  - **Public review and comment for NOT LESS than 10 days after the last informational meeting**

# Final EIS

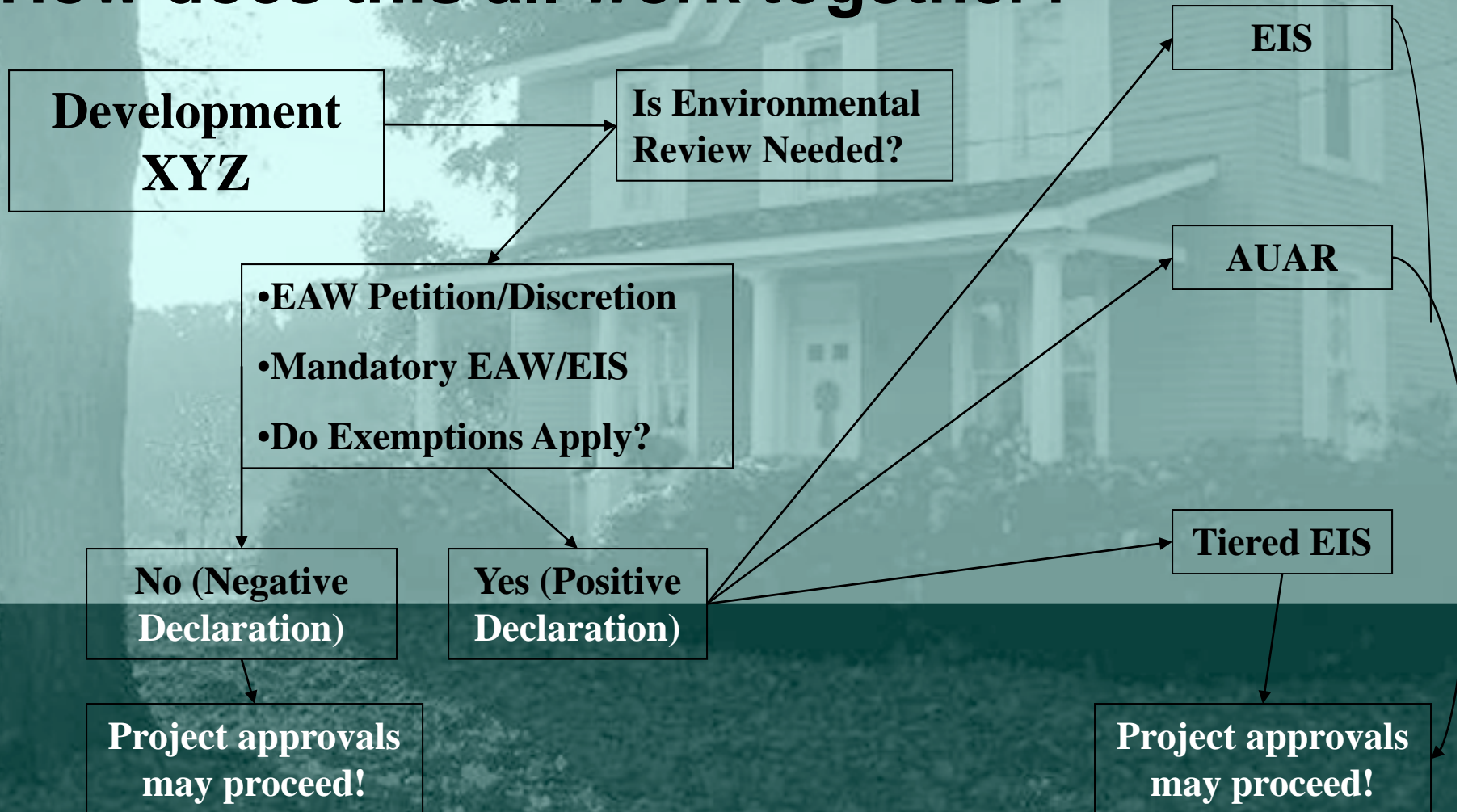
- **Final EIS—RGU incorporates and discusses any needed changes**
- **Once prepared, the Final EIS is available for public review and comment**
- **Public review and comment must be for a period of not less than 10 days following publication of notice in *EQB Monitor***

# EIS Adequacy

- **Adequacy Determination—RGU issues declaration on whether Final EIS is complete and sufficient**
- **EIS adequacy determination must be made within 280 days of notice of Final EIS preparation**

# Environmental Review Basics

## How does this all work together?



# AUAR Process

- **Alternative to EAW/EIS**
- **RGU Selects Boundaries of AUAR**
- **RGU specifies one or more anticipated development scenarios**
- **One scenario must be consistent with comprehensive plan and one scenario must be consistent with any known development plan**

# AUAR Drafted

- **Following preparation, the RGU publishes notice in *EQB Monitor* of availability of draft AUAR for public comment and provides 30 days for submittal of public comments**
- **RGU revises document based on comments received and includes mitigation plan**

# AUAR Process

- **Mitigation plan most important element of AUAR**
- **RGU distributes revised AUAR. State agencies have 10 days to file objections**
- **If objection - EQB hearing and adequacy decision**
- **RGU has 120 days to complete AUAR process**

# Benefits of AUAR

- **Projects within the AUAR boundaries, consistent with development assumptions, are exempt from further environmental review**
- **Prohibitions on approvals and permits do not apply to projects within the AUAR upon adoption of the mitigation plan**
- **AUAR may be updated in the future and remain valid**

# Prohibition on Action

- **If an EAW or an EIS is required, project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project**

# Recent Case Law Developments

- **MCEA v. MPCA and *City of Princeton* (Minn.App. 2005)**
- **MCEA v. *St. Paul Park* (Minn.App. 2006)**
- **CARD v. Kandiyohi County and *Duininck Bros.* (Minn. 2006)**

# MCEA v. MPCA and *City of Princeton*

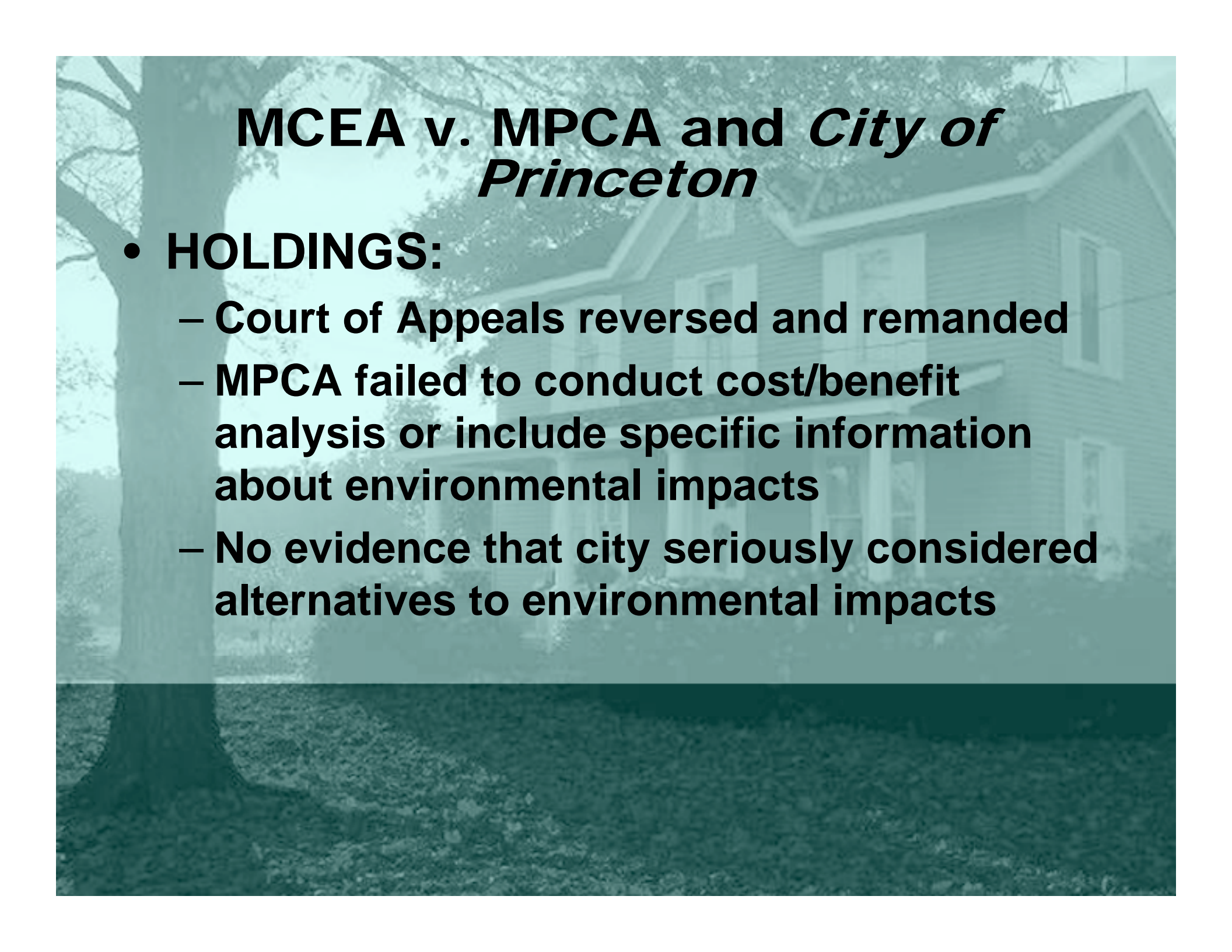
- **FACTS:**

- Princeton's WWTF close to capacity and at end of lifespan
- City applied for a new NPDES permit for a new facility
- New WWTF would triple the original discharge
- City conducted nondegradation review
- MPCA issued negative declaration on the need for EIS and granted the NPDES permit over MCEA's objections

**Rum River – ORVW and  
no prior discharge!**

# Issue

- **Did the MPCA's/City's non-degradation determination adequately examine alternatives to discharging?**



MCEA v. MPCA and *City of Princeton*

- **HOLDINGS:**

- Court of Appeals reversed and remanded
- MPCA failed to conduct cost/benefit analysis or include specific information about environmental impacts
- No evidence that city seriously considered alternatives to environmental impacts

# MCEA v. St. Paul Park

- **FACTS:**

- Proposed development on 667-acre parcel along east bank of Mississippi River
- Development to over 10 years to begin in 2004
- St. Paul Park RGU and completed AUAR in 2003
- 20 different entities submitted comments
- MCEA challenged AUAR asserting it failed to analyze a geographical area larger than that selected by the RGU, and that the AUAR failed to consider cumulative impacts

# MCEA v. St. Paul Park

- **ISSUES:**
  - **Should cumulative impacts beyond the designated boundaries of an AUAR be considered?**
  - **Is an AUAR appropriate or should multiple EIS' be used rather than one AUAR?**

# MCEA v. St. Paul Park

- **HOLDINGS:**

- **Consideration of cumulative impacts beyond the AUAR boundaries not required by law**
- **RGU has discretion to determine proper boundaries of AUAR**
- **Boundaries may be challenged if arbitrary and capricious**

# CARD v. Kandiyohi County and Duininck Bros.

- **FACTS:**

- **RGU, County, issued negative declaration on need for an EIS for two proposed gravel pit projects**
- **County contains numerous gravel pits and mines**
- **County zoning requires “conditional use permit”**
- **CARD appealed arguing the term “cumulative potential effects” had to be evaluated in terms of the more generic “cumulative impact”**
- **By failing to do so, the group argued, the County’s EIS need analysis was inadequate**



# CARD v. Kandiyohi County and Duininck Bros.

- **ISSUE:**

- **Is the definition of “cumulative potential effects” the same as “cumulative impact?”**



# CARD v. Kandiyohi County and Duininck Bros.

- **HOLDINGS:**

- **Definition of two terms not the same.**
- **RGU cannot compel an EIS on the basis of speculative factors.**

# CARD v. Kandiyohi County and Duininck Bros.

- **HOLDINGS:**

- “cumulative potential effects” criterion aims to determine whether a project, which may not individually have the potential to cause effects, could have a significant effect when other local projects are considered
- the RGU must consider “anticipated future projects” – an inquiry that is less speculative because it involves specific projects actually planned or for which a basis of expectation has been laid

# CARD v. Kandiyohi County and Duininck Bros.

- **HOLDINGS:**

- **RGU cannot rely on “vague statements of good intentions” to mitigate potential impacts**
- **It is not sufficient for RGU to release an EIS that did not bother to investigate environmental effects because it was confident it could later pass regulations if any harm occurred**
- **Mitigation measures must be specific, targeted, and reasonably certain to mitigate environmental effects**

## Case Law—Lessons Learned

- **Take the requisite “hard look” at potential environmental impacts from the proposed project**
- **Prepare detailed factual findings and a record of decision that is well supported by evidence**
- **Address in the EIS need decision all timely substantive public comments including possible alternatives to the project**

## Case Law—Lessons Learned

- **Make sure applicable regulations are in force and in effect at the time of the EIS need decision**
- **Analyze cumulative potential effects for site-specific review limited by time and geographic area**
- **Conduct a cost/benefit analysis, if necessary and fully discuss mitigation alternatives/measures**

## Case Law—Lessons Learned

- **AUAR - Cumulative impacts analysis can be limited to the boundaries of an AUAR. (Unless EQB changes the rules to prevent)**
- **If using an AUAR, prepare findings for designation of area and for choice to use AUAR as opposed to EAW/EIS**

# Recent Regulatory Developments

- **EQB is currently changing some of the Chapter 4410 rules on environmental review. Two step process:**
  - **Phase 1—Technical/housekeeping changes to several mandatory EAW categories. *COMPLETED***
  - **Phase 2—New mandatory EAW and EIS categories for lakeshore/shoreland developments & development near “highly-important natural resources.” *IN RULEMAKING***

## Phase 2

- Define “cumulative potential effects” in light of *CARD v. Kandyohi*.
- Reverse *MCEA v. St. Paul Park*.
  - EQB wants to require that RGU’s consider impacts outside the designated AUAR.
    - Where do you draw the line?

# Resources

**MN Environmental Quality Board**

**<http://www.eqb.state.mn.us>**

**Minnesota Rules Chapter 4410**

**<http://www.leg.state.mn.us/leg/statutes.asp>**

**Flaherty & Hood, P. A.**

**[www.flaherty-hood.com](http://www.flaherty-hood.com)**



Questions?



**Growth, Interrupted:  
Getting  
Environmental Review Right  
The First Time**

**Christopher M. Hood  
Flaherty & Hood, P.A.**

**651-225-8840      [cmhood@flaherty-hood.com](mailto:cmhood@flaherty-hood.com)**