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## Defining "Significance": Balancing Procedural and Substantive Judicial Review of Negative Declarations under the Minnesota Environmental Policy Act. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*

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## CASENOTE

**DEFINING "SIGNIFICANCE": BALANCING PROCEDURAL AND SUBSTANTIVE  
JUDICIAL REVIEW OF NEGATIVE DECLARATIONS UNDER THE MINNESOTA  
ENVIRONMENTAL POLICY ACT**

*Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*<sup>1</sup>

I. INTRODUCTION

The State of Minnesota, by enacting the Minnesota Environmental Policy Act (MEPA),<sup>2</sup> has declared a statewide policy that requires substantive protections and results from the environmental review process.<sup>3</sup> The scope of Minnesota's environmental policy surpasses the limited scope of the National Environmental Policy Act (NEPA), MEPA's federal counterpart.<sup>4</sup> Whereas NEPA is strictly a procedural statute, demanding deference to agency decision-making, Minnesota courts may conduct both procedural and substantive review of agency decisions under MEPA.<sup>5</sup>

In *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency* (MCEA), the Minnesota Supreme Court upheld a state agency's finding that timber harvesting, mitigated by voluntary mitigation strategies, posed no potential for "significant" environmental impact, and thus, did not require the preparation of an environmental impact statement.<sup>6</sup> Failing to provide an adequate legal definition of "significant" environmental effects under Minnesota law,<sup>7</sup> the court reviewed MCEA on purely procedural grounds, ignoring the substantive environmental requirements imposed by the state legislature.<sup>8</sup>

II. FACTS AND HOLDING

In the instant decision, the Minnesota Center for Environmental Advocacy (MCEA) filed a declaratory judgment action against the Minnesota Pollution Control Agency (MPCA) in Minnesota's Ninth Judicial District of Koochiching County.<sup>9</sup> The lawsuit followed a 5-1 decision by MPCA's board (Board), concluding that the Boise Cascade Corporation's (Boise) proposal to increase its pulp wood production did not require an Environmental Impact Statement (impact statement).<sup>10</sup> The impact statement would entail a "more detailed and time-consuming" analysis of the potential environmental effects of the proposal.<sup>11</sup>

<sup>1</sup> 644 N.W.2d 457 (Minn. 2002) (hereinafter "MCEA").

<sup>2</sup> *Infra* pt. III.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Infra* pts. II, IV.

<sup>7</sup> *Infra* pt. V.

<sup>8</sup> *Id.*

<sup>9</sup> World Reporter, *Judge Advances Expansion of International Falls, Minn., Paper Mill, Knight-Ridder Tribune*, 2000 WL 29454122 at \*1 (Nov. 15, 2000).

<sup>10</sup> MCEA, 644 N.W.2d at 459.

<sup>11</sup> Dennis Lien, *Minnesota Paper Company Allowed to Raise Production; Decision Questioned, Knight-Ridder Tribune*, 2000 WL 14921105 at \*1 (Feb. 23, 2000).

Boise operates a pulp and paper mill in International Falls, Minnesota, and produces a variety of fine paper products.<sup>12</sup> In order to reduce the mill's dependency upon pulp purchased on the outside market,<sup>13</sup> Boise proposed an efficiency improvement project that would expand the mill's maximum wood consumption by 100,000 cords of wood.<sup>14</sup> MCEA and other Minnesota environmental groups attacked the Boise proposal with concerns that the timber data used by MPCA to evaluate the environmental effects of the project was inaccurate and would result in the unsustainable deforestation of Minnesota's timber.<sup>15</sup> Specifically, MCEA criticized the use of a Forestry Generic Environmental Impact Statement (generic impact statement) in the preparation of an Environmental Assessment Worksheet (environmental assessment) required under Minnesota environmental law.<sup>16</sup> Nevertheless, the Board, upon the recommendations of MPCA staff and the Minnesota Department of Natural Resources (MDNR), concluded that "there would be no significant impact to the state's timber resources,"<sup>17</sup> and an impact statement was not required.<sup>18</sup>

MCEA challenged the Board's decision in Minnesota district court arguing that MPCA's refusal to require an impact statement violated Minnesota law.<sup>19</sup> MCEA argued that, under the Sustainable Forest Resource Act (SFRA),<sup>20</sup> MPCA's reliance upon mitigation measures to control the environmental impact of the Boise proposal was inappropriate.<sup>21</sup> The district court granted summary judgment for defendants MPCA and Boise,<sup>22</sup> and held, first, that MPCA appropriately used the generic impact statement within its preparation of the environmental assessment.<sup>23</sup> Second, the court held that the mitigation measures were appropriate under the SFRA.<sup>24</sup> Finally, because "substantial deference" is given to administrative agencies, the court held that the MCEA could not show that the MPCA's conclusions were "arbitrary or capricious."<sup>25</sup>

MCEA appealed the decision of the district court to the Minnesota Court of Appeals. That court questioned the sufficiency of the mitigation measures, stating that "many of the measures have not been performed and there is no regulatory method to assure performance."<sup>26</sup> Furthermore, "[w]ithout some assurances that mitigation measures can be compelled, even [with] good-faith

<sup>12</sup> *MCEA*, 644 N.W.2d at 459.

<sup>13</sup> *Id.* Boise consumed approximately 600,000 cords at the time the action was filed. The proposal would expand Boise's consumption to approximately 700,000 cords, of which the additional timber was to be harvested within a 150-mile radius of the mill.

<sup>14</sup> *Id.* at n. 2. "A cord of wood is a stack of wood 4 feet wide, 4 feet high, and 8 feet long."

<sup>15</sup> Lien, 2000 WL 14921105 at \*1. The article notes that "the project would increase statewide wood consumption by only about 2 percent." *MCEA*, 644 N.W.2d at 460 (MDNR estimated a maximum increase of 2.5 percent in statewide timber harvest levels).

<sup>16</sup> Lien, 2000 WL 14921105 at \*2; *see Infra* pt. III (providing an explanation of Minnesota's statutory and regulatory environmental review process); *see MCEA*, 644 N.W.2d at 461; *see generally* Minn. Stat. § 116D.04 (2000).

<sup>17</sup> Lien, 2000 WL 14921105 at \*2 (The Board also denied MCEA's request to submit the issue to an administrative law judge for a recommendation.).

<sup>18</sup> *MCEA*, 644 N.W.2d at 461.

<sup>19</sup> *Id.*

<sup>20</sup> "Sustainable Forest Resources Act," Minn. Stat. § 89A.01, .07, .09 (2000).

<sup>21</sup> *MCEA*, 644 N.W.2d at 461.

<sup>22</sup> *Id.* ("[Boise] intervened and was joined as a party defendant.").

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 461-62.

<sup>25</sup> *Id.* at 462.

<sup>26</sup> *Minn. Ctr. for Envtl. Advoc. v. Minn. Pollution Control Agency*, 632 N.W.2d 230, 234 (Minn. App. 2001).

intentions...the potential for unmitigated and irreparable environmental harm remains.”<sup>27</sup> Ultimately, because there was not substantial evidence to support the MPCA’s conclusion that “potentially adverse environmental effects of the Boise project [were] subject to mitigation by ongoing public regulatory authority,”<sup>28</sup> the court of appeals reversed the district court’s decision and ordered the MPCA to prepare an impact statement.<sup>29</sup>

MPCA and Boise appealed to the Minnesota Supreme Court. The Minnesota Supreme Court reversed, allowing the Boise project to proceed without requiring an impact statement, in a two-part holding.<sup>30</sup> First, the court held that MPCA appropriately applied the generic impact statement because determining whether this project would produce significant environmental effects is “primarily factual,”<sup>31</sup> and “general principles of administrative law” require the court to defer to the “technical expertise” of the agency.<sup>32</sup> Second, the Supreme Court ruled that the environmental assessment constituted substantial evidence that the Boise project was subject to mitigation by ongoing public regulatory authority because the Boise project was required to comply with all MPCA standards and was dependent upon MPCA’s issuance of permits.<sup>33</sup>

### III. LEGAL BACKGROUND

On January 1, 1970, modern environmental policy and regulation came into being with the signing into law of NEPA.<sup>34</sup> Several states emulated the federal government, enacting their own environmental policy acts. Minnesota’s act, unlike NEPA, contains provisions for the substantive protection of the state’s natural resources.<sup>35</sup> However, the Minnesota Court of Appeals, in a line of negative declaration cases, has had difficulty applying the proper balance of procedural and substantive review under MEPA.<sup>36</sup>

#### A. NEPA and its progeny

The purpose of NEPA is to ensure that all federal agencies consider environmental factors equally with other decision-making factors in the administrative process.<sup>37</sup> NEPA is a procedural statute and has no substantive component.<sup>38</sup> Consequently, when a judicial court reviews a federal agency’s consideration of environmental factors, the standard of review follows the federal Administrative Procedure Act’s “arbitrary or capricious” standard rather than a reasonableness or *de*

<sup>27</sup> *Id.* at 237.

<sup>28</sup> *Id.* at 238.

<sup>29</sup> *MCEA*, 644 N.W.2d at 462.

<sup>30</sup> *Id.* at 465, 469.

<sup>31</sup> *Id.* at 464.

<sup>32</sup> *Id.* at 465.

<sup>33</sup> *Id.* at 466-67.

<sup>34</sup> James W. Spensley, Esq., *National Environmental Policy Act*, in *Environmental Law Handbook*, ch. 10, 413 (Thomas F. P. Sullivan ed., 15th ed., Government Institutes 1999); *see infra* pt. III.A.; *see generally* 42 U.S.C. § 4332 *et seq.* (2000).

<sup>35</sup> *Infra* pt. III.B.

<sup>36</sup> *Infra* pt. III.C.

<sup>37</sup> Spensley, *supra* n. 34, at ch.10, 413.

<sup>38</sup> *See Vermont Yankee Nuclear Power Corp. v. Nat. Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978) (Justice Rehnquist observed, “NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.”).

*novo* standard.<sup>39</sup> This means that challenging an agency's decision in federal court is a daunting task.<sup>40</sup>

Fifteen states have modeled their own "Little NEPA's" or "state environmental policy acts" (SEPAs) after NEPA,<sup>41</sup> requiring state and local agencies to consider the environmental effects of agency decisions.<sup>42</sup> SEPAs are particularly important to state environmental law because they provide citizens with the ability to challenge and enjoin projects when government agencies have failed to adequately consider the environmental effects of their actions under the statute.<sup>43</sup>

### B. MEPA and the Sustainable Forest Resources Act

The State of Minnesota, in 1973, enacted its own SEPA legislation in the form of MEPA.<sup>44</sup> The purposes of the statute were to declare a state environmental policy, to promote efforts that prevent damage to the environment and contribute to the welfare of human beings, and to develop the state's understanding of its environment and natural resources.<sup>45</sup>

Minnesota is unique in that it is one of few states to incorporate both procedural and substantive requirements into the environmental review process.<sup>46</sup> One substantive requirement states that,

[n]o state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.<sup>47</sup>

This Subdivision applies to projects approved after the preparation of an impact statement.<sup>48</sup> Thus, it would not apply to a project that was determined not to have a potential for significant environmental impact.

<sup>39</sup> See William H Rodgers, Jr., *Environmental Law*, § 9.5, 873 (2d ed., West 1994).

<sup>40</sup> See *id.* at § 9.3, 838 ("Twelve times the Court has taken NEPA cases and twelve times has decided in favor of the government.").

<sup>41</sup> David Sive & Mark A. Chertok, "Little NEPA's" and their Environmental Impact Assessment Processes, SG101 ALI-ABA 1259, 1261 (2002).

<sup>42</sup> Daniel P. Selmi & Kenneth A. Manaster, *State Environmental Law*, § 10.01, 10-1,2, (7th ed., Clark Boardman Callaghan 1996).

<sup>43</sup> *Id.*

<sup>44</sup> Minn. Stat. § 116D.01 *et seq.* (2001).

<sup>45</sup> Minn. Stat. § 116D.01 (2001).

<sup>46</sup> Sive & Chertok, *supra* n. 41, at 1262.

<sup>47</sup> Minn. Stat. § 116D.04, Subdiv. 6.

<sup>48</sup> Stacy Lynn Bettison, *The Silencing of the Minnesota Environmental Policy Act: The Minnesota Court of Appeals and the Need for Meaningful Judicial Review*, 26 Wm. Mitchell L. Rev. 967, 987 n. 108 (2000) ("This subsection is triggered only when an [impact statement] has already determined that there will be significant impairment to the environment due to the proposed project").

However, MEPA's declaration of state environmental policy has another substantive requirement.<sup>49</sup> Section 116D.02 of MEPA states that,

The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.<sup>50</sup>

Under MEPA, the primary procedural tools used to assess the environmental effects of projects that require agency approval are the environmental assessment and the impact statement.<sup>51</sup> An environmental assessment is "a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action,"<sup>52</sup> and must be prepared when there may be a potential for significant environmental effects because of a proposed action.<sup>53</sup> An environmental impact statement is an "analytical...document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated."<sup>54</sup> An environmental impact statement is prepared upon the determination that "there is potential for significant environmental effects resulting from any major governmental action."<sup>55</sup>

MEPA authorizes Minnesota's Environmental Quality Board (EQB) to promulgate rules in conformity with MEPA's directives.<sup>56</sup> The EQB rules require mandatory preparation of environmental assessments if proposed projects satisfy a "threshold test" by meeting the criteria in one of 35 categories of regulated environmental effects.<sup>57</sup> The same rules assign a particular state agency, or responsible government unit (RGU), to prepare the environmental assessment.<sup>58</sup> Under the Minnesota Rules, when an RGU,

<sup>49</sup> *Id.* at 999-1000 ("This language mirrors the language in NEPA that originally was deemed to contain the substantive requirements." *Id.* at 1000 n. 181); *see infra* n. 141.

<sup>50</sup> Minn. Stat. § 116D.02, Subdiv. 1.

<sup>51</sup> *See generally* Minn. Stat. § 116D.04.

<sup>52</sup> *Id.* at Subdiv. 1a(c).

<sup>53</sup> *Id.* at Subdiv. 2a(c).

<sup>54</sup> *Id.* at Subdiv. 2a (Additionally, the EIS considers "economic, employment and sociological effects" of the action's implementation, and the EIS shall "be prepared as early as practical.").

<sup>55</sup> *Id.*; Minn. R. 4410.1700 (2001).

<sup>56</sup> Minn. Stat. § 116D.04, Subdiv. 5a.

<sup>57</sup> *See* Minn. R. 4410.4300.

<sup>58</sup> *See id.* (Subparagraph 15.A. designates MPCA as the RGU for projects that seeking to modify a "stationary source facility that increases generation by 100 tons or more per year of any single air pollutant after installation of air pollution control equipment," as applicable in the instant case).

decid[es] whether a project has the potential for significant environmental effects, the following factors shall be considered:

- A. type, extent, and reversibility of environmental effects;
- B. cumulative potential effects of related or anticipated future projects;
- C. the extent to which the environmental effect are subject to mitigation by ongoing public regulatory authority; and
- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.<sup>59</sup>

If, after consideration of these factors, the RGU determines that the proposed project has no potential for significant environmental effects, the RGU issues a negative declaration and an impact statement is not required.<sup>60</sup>

In addition to the environmental assessment and the environmental impact statement mentioned above, the Minnesota Rules also sanction the use of a generic environmental impact statement “to study types of projects that are not adequately reviewed on a case-by-case basis.”<sup>61</sup> A generic impact statement may be ordered by EQB or may be requested by the public.<sup>62</sup> While a generic impact statement may not act as a substitute for project-specific environmental review,<sup>63</sup> a generic impact statement may be incorporated into project-specific review by “tiering.”<sup>64</sup>

From 1989 to 1994, the EQB prepared a generic impact statement, considering the impact of timber harvesting on Minnesota’s forests, in response to a petition by concerned Minnesota citizens.<sup>65</sup> In 1995, based upon the results of the generic impact statement,<sup>66</sup> the state legislature enacted the Sustainable Forest Resources Act (SFRA).<sup>67</sup>

SFRA established the Minnesota Forest Resources Council (Resources Council),<sup>68</sup> and requires the Resources Council to “develop *recommendations* to the governor...with respect to forest resource policies and practices that result in the sustainable management, use, and protection of the state’s forest resources.”<sup>69</sup>

Under the SFRA, the Resources Council is ordered to develop timber harvesting and forest management guidelines.<sup>70</sup> “The guidelines must address the water, air, soil, biotic, recreational, and aesthetic resources found in forest ecosystems by focusing on those impacts commonly associated with applying site-level forestry practices [and]...must reflect a range of practical and sound

<sup>59</sup> Minn. R. 4410.1700, Subp. 7 (2001).

<sup>60</sup> See *id.* at Subp. 3.

<sup>61</sup> Minn. R. 4410.3800, Subp. 1.

<sup>62</sup> *Id.* at Subps. 2, 3.

<sup>63</sup> *Id.* at Subp. 8.

<sup>64</sup> *Id.*; see generally Spensley, *National Environmental Policy Act*, in *Environmental Law Handbook*, ch. 10, 426 (“Tiering is an approach whereby the very site-specific project EIS can incorporate by reference and without repetition the broader considerations of a region-wide EIS...if they are relevant.”).

<sup>65</sup> *MCEA*, 644 N.W.2d at 463.

<sup>66</sup> *Id.*

<sup>67</sup> Minn. Stat. § 89A.01 *et seq.* (2001).

<sup>68</sup> Minn. Stat. § 89A.03.

<sup>69</sup> *Id.* at Subdiv. 2 (emphasis added).

<sup>70</sup> Minn. Stat. § 89A.05.

practices based on the best available scientific information.”<sup>71</sup> These guidelines, however, are voluntary.<sup>72</sup>

### C. Minnesota Case Law and Scope of Judicial Review

Minnesota case law has produced inconsistent results and approaches to judicial review of an agency’s issuance of a negative declaration.<sup>73</sup> In *Trout Unlimited, Inc. v. Minn. Dept. of Agric.*,<sup>74</sup> concerned Minnesota citizens petitioned for environmental review of a proposed irrigation project.<sup>75</sup> After the preparation of an environmental assessment that identified potential significant erosion that might not be mitigable,<sup>76</sup> the Commissioner of the Department of Agriculture concluded that “[m]onitoring and permit conditions” were sufficient ongoing public regulatory authority.<sup>77</sup> The court reversed the Commissioner’s negative declaration, reasoning that

[u]nder the Commissioner’s analysis, the irrigation project would go forward without an [impact statement] and in the event significant environmental effects did occur, the Commissioner would then rely on monitoring or restrictive permitting procedures to reduce or eliminate those deleterious effects. The very purpose of an [impact statement], however is to determine the potential for significant environmental effects *before* they occur. By deferring this issue to later permitting and monitoring decisions, the Commissioner abandoned his duty to require an [impact statement] where there exists a “potential for significant environmental effects.”<sup>78</sup>

Subsequently, the court held that the environmental assessment revealed a potential for significant environmental effects of the project and ordered the preparation of an environmental impact statement.<sup>79</sup>

Two months later, in *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*,<sup>80</sup> another panel of the court of appeals upheld an RGU’s negative declaration,<sup>81</sup> yet still required the project proposers to complete four environmental studies before the RGU would issue a conditional use permit.<sup>82</sup> The plaintiffs’ argument that an impact statement would differ from the four studies in comprehensiveness of review and the proposal of alternatives was not well taken by the court.<sup>83</sup> which held that the RGU’s decision was not arbitrary or capricious and was supported by substantial

<sup>71</sup> *Id.* at Subdiv. 1.

<sup>72</sup> *Id.* at Subdiv. 3; (It is the voluntary nature of the Resources Council’s timber management guidelines that is at the heart of the dispute in the instant case. *See MCEA*, 644 N.W.2d at 463.).

<sup>73</sup> *See Selmi & Manaster, State Environmental Law*, § 10.03, 10-18, 19.

<sup>74</sup> 528 N.W.2d 903 (Minn. App. 1995).

<sup>75</sup> *Id.* at 905 (“Because of the steep slopes and coarse soil along the stream, a concern arose that the proposed irrigation could erode the stream banks, resulting in significant degradation.”).

<sup>76</sup> *Id.* at 905-6.

<sup>77</sup> *See id.* at 909.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 531 N.W.2d 874 (Minn. App. 1995).

<sup>81</sup> *Id.* at 877-8 (determining that no environmental impact statement was required for a project that proposed to construct a golf course and possibly 200-250 housing units).

<sup>82</sup> *Id.*

<sup>83</sup> *See id.* at 884.



evidence in the record.<sup>84</sup> Furthermore, the *Iron Rangers* Court found that the case before them was distinguishable from *Trout*. There, “it was impossible to determine the likely impact of herbicides, insecticides, and fungicides on a nearby stream without knowing the amount of the expected chemical input” and thus, the Commissioner deferred his duty to make a determination until future permitting decisions.<sup>85</sup> This was not so in *Iron Rangers*. The court held the record to show that the RGU properly relied on a conditional use permit process to determine the need for an impact statement because the project proposer agreed to seek the permit before the review process began.<sup>86</sup> Additionally, “the county determined that it lacked sufficient information to issue a conditional use permit for the golf course, and delayed its decision until it received the additional information on...forest fragmentation.”<sup>87</sup>

In *National Audubon Society v. MPCA*,<sup>88</sup> the Potlatch Corporation proposed a plant expansion, similar to the Boise project, that would increase the plant’s wood consumption from 178,000 to 355,000 cords of wood per year.<sup>89</sup> MPCA prepared a mandatory environmental assessment “based on the findings contained in the [generic impact statement],”<sup>90</sup> finding that the expansion had no potential significant environmental effect.<sup>91</sup> The Minnesota Court of Appeals applied the arbitrary or capricious standard when focusing “on the legal sufficiency of and factual basis for the reasons given” by the agency, and employed the substantial evidence test when reviewing the administrative record.<sup>92</sup> Holding that “MPCA’s reliance on the specific mitigation measures set forth in the [generic impact statement] to reduce the environmental impacts of the Potlatch expansion was not unreasonable or impermissible,”<sup>93</sup> the court of appeals reasoned that “it is questionable whether a project-specific [impact statement] would provide information substantially different from or better than that contained in the [generic impact statement].”<sup>94</sup>

*Trout*, *Iron Rangers* and *National Audubon* have been criticized for failing to employ procedural review of negative declarations,<sup>95</sup> conducting judicial review under the substantive “unreasonable, arbitrary, or capricious” standard.<sup>96</sup> Specifically, *Iron Rangers* and *National Audubon* have “unduly deferred when considering whether agency action is based upon unlawful procedure.”<sup>97</sup> In other words, these courts imposed their own substantive judgments on agency decisions, abdicating their function of providing meaningful judicial review.<sup>98</sup> Upon this backdrop, the *MCEA* Court addressed the standard of judicial review of an agency’s issuance of a negative declaration.

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<sup>84</sup> *Id.* at 885.

<sup>85</sup> *Id.* at 885.

<sup>86</sup> *Id.* at 884.

<sup>87</sup> *Id.*

<sup>88</sup> 569 N.W.2d 211 (Minn. App. 1997).

<sup>89</sup> *Id.* at 214.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 215.

<sup>93</sup> *Id.* at 218.

<sup>94</sup> *Id.* at 217.

<sup>95</sup> See Bettison, *supra* n. 48, at 985-96.

<sup>96</sup> *Id.* at 1007, n. 79.

<sup>97</sup> *Id.* at 985.

<sup>98</sup> See *id.* (Bettison argues, first and foremost, that the Minnesota Supreme Court should adopt MAPA as the appropriate standard of review for negative declarations. See *id.* at 971.).

## IV. INSTANT DECISION

In the instant case, the Minnesota Supreme Court held that the MPCA's decision not to require an impact statement to analyze the environmental effects of Boise's efficiency improvement project was supported by "substantial evidence" and was not "arbitrary or capricious."<sup>99</sup> In reaching this conclusion, the court first considered whether the standard of review under the Minnesota Administrative Procedure Act (MAPA) should apply to the court's consideration of the MPCA's decision, or whether the court should review the MPCA's decision *de novo*.<sup>100</sup> After determining that the MAPA standard of review was appropriate, the court considered the propriety of the MPCA's use of the generic impact statement and whether, under Minnesota law and regulation, the MPCA adequately determined that potential environmental effects of the Boise project were subject to mitigation by continued regulation.<sup>101</sup>

## A. Standard of Review under the MAPA

The MAPA codifies the standard of judicial review when a court considers an agency decision.<sup>102</sup> The reviewing court may reverse the agency's decision if the decision may have prejudiced the rights of the petitioners because the decision was an error of law, was unsupported by substantial evidence, or was arbitrary or capricious.<sup>103</sup>

In the instant case, the court explained that MPCA's decision regarding the Boise project was not a "contested case" within the meaning of the MAPA.<sup>104</sup> Nevertheless, in determining that the MAPA's standards of review should apply, the court relied on principles of administrative law set forth in *Reserve Mining Co. v. Herbst*.<sup>105</sup> Under the principle of separation of powers, the legislature may not delegate to the court "duties which are essentially administrative in character."<sup>106</sup> This principle underlies the rule that "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education and experience."<sup>107</sup>

MCEA, on the other hand, argued that the court should show no deference to MPCA.<sup>108</sup> Although an agency is entitled to deference in interpreting its own rules, MPCA engaged in

<sup>99</sup> *MCEA*, 644 N.W.2d at 469.

<sup>100</sup> *Id.* at 463-64 (MCEA argued in favor of *de novo* review); *see generally* Minn. Stat. § 14 (2001).

<sup>101</sup> *See id.* at 465-69.

<sup>102</sup> *See* Minn. Stat. § 14.69 (2001).

<sup>103</sup> *Id.* ("[the court] may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because of the administrative finding, inferences, conclusion, or decisions are: (a) In violation of constitutional provisions; or (b) In excess of the statutory authority or jurisdiction of the agency; or (c) Made upon unlawful procedure; or (d) Affected by other error of law; or (e) Unsupported by substantial evidence in view of the entire record submitted; or (f) Arbitrary or capricious").

<sup>104</sup> *MCEA*, 644 N.W.2d at 464, n. 8 ("Here, MPCA's decision not to require an [Impact Statement] was not a contested case within the meaning of the MAPA because no hearing was required and the only 'party' involved in the original decision was Boise Cascade;" *see* Minn. Stat. § 14.02, subdiv. 3 (2000) ("Contested case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.")).

<sup>105</sup> 256 N.W.2d 808 (Minn. 1977).

<sup>106</sup> *MCEA*, 644 N.W.2d at 464 (citing *Reserve Mining*, 256 N.W.2d at 824).

<sup>107</sup> *Id.* at 463.

<sup>108</sup> *Id.* at 464.

environmental review under MEPA interpreting the rules of another agency, the EQB.<sup>109</sup> Thus, since MPCA was not interpreting its own rules, the court's review necessarily presented legal issues that must be considered *de novo*.<sup>110</sup>

Nevertheless, employing *Reserve Mining*, the MCEA Court determined that environmental review was sufficiently technical to require the MPCA's expertise and deferred to the agency's interpretation of the statute and its determination that the statutory requirements were met.<sup>111</sup> In so deciding the court reasoned that "[a] determination whether significant environmental effects result from this project is primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented."<sup>112</sup> Thus, the instant case would be decided in accordance with the MAPA by considering whether there was substantial evidentiary support underlying MPCA's decision not to require an impact statement, or whether the decision was arbitrary or capricious.<sup>113</sup>

### B. Application of the Substantial Evidence Standard

After establishing the standard of review, the court considered the MCEA's argument that the MPCA failed to conduct the necessary analysis to justify reliance on the generic impact statement.<sup>114</sup> Stating that its role in reviewing the MPCA's decision was limited,<sup>115</sup> the court emphasized the significance of the EQB's approval of the use of the generic impact statement.<sup>116</sup>

Also significant was MPCA's lengthy consultation with MDNR, an agency with technical expertise in timber and forestry.<sup>117</sup> Because of MDNR's technical expertise, MPCA properly relied on MDNR's conclusion that the generic impact statement was the most "comprehensive, scientific assessment of forest health procedures to date," and that the Boise Project was of the type anticipated by the generic impact statement.<sup>118</sup>

Therefore, the court deferred to the MPCA's use of the generic impact statement in the preparation of the environmental assessment, holding that such use was not arbitrary or capricious because of the agencies' (MPCA and MDNR) technical expertise in assessing environmental issues.<sup>119</sup>

Next, the court considered whether the environmental effects of the Boise Project were subject to mitigation by ongoing public regulatory authority.<sup>120</sup> MPCA, in its findings of fact and conclusions, found that the Boise Project was subject to mitigation under the SFRA and the corresponding guidelines established by MFRC.<sup>121</sup> MCEA had argued, and the court of appeals

<sup>109</sup> Br. of Respt. at 19, *MCEA*, *supra* n. 1.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 464.

<sup>112</sup> *Id.* at 463.

<sup>113</sup> *MCEA*, 644 N.W.2d at 464.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 465, (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Resources Defense Council*, 435 U.S. 519, 555 (1978)).

<sup>116</sup> *Id.*; *see generally* Proposed Findings of Fact, Conclusions and Order, (Minn. Environmental Quality Bd., Dec. 20, 1999).

<sup>117</sup> *Id.* at 465.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *See generally id.* at 465-69.

<sup>121</sup> *Id.* at 465.

agreed,<sup>122</sup> that the voluntary timber management guidelines promulgated by the MFRC were not “subject to mitigation by ongoing public regulatory authority,”<sup>123</sup> as required under Minnesota’s Administrative Rules, because the MFRC had no power to enforce its guidelines.<sup>124</sup>

As noted above,<sup>125</sup> the proper test to resolve the issue was embodied in the “substantial evidence standard” under MAPA. After considering the record, Boise’s project design, and the permitting function of MPCA, the court found “such relevant evidence as a reasonable mind might accept as adequate to support [MPCA’s] conclusion.”<sup>126</sup>

First, “the 36-page Appendix E of the [environmental assessment] detailed an array of specific mitigation measures being undertaken.”<sup>127</sup> Second, the record, as established by the environmental assessment, showed commitments by Boise and MDNR to apply the Forest Council’s guidelines to land that they own, while the MDNR and United States Forest Service (Forest Service) are actively implementing mitigation measures in one-third of the forested land in Minnesota.<sup>128</sup> Finally, MPCA’s findings showed that Boise made “detailed” commitments to mitigation.<sup>129</sup>

Next, the court agreed with MPCA’s conclusion that any potential significant environmental effects of the Boise Project had been identified and that the proper mitigation measures were incorporated into the project design.<sup>130</sup> Citing Appendix F of the environmental assessment, the court agreed with MPCA that Boise’s 24 mitigation efforts, MDNR’s commitment to the timber management guidelines, and county and federal efforts on their land all constituted real commitments to mitigation beyond the voluntary nature of the guidelines.<sup>131</sup> “Thus, it is irrelevant whether the MFRC is a public regulatory authority because the MPCA can, if necessary, enforce mitigative measures through its permitting function.”<sup>132</sup>

The court also agreed with MPCA’s finding that mitigation was incorporated into proposed permits.<sup>133</sup> The Boise Project required two permit modifications by MPCA that included mitigation

<sup>122</sup> See *MCEA*, 632 N.W.2d at 237-38.

<sup>123</sup> Minn. R. 4410.1700, Subpara. 7(C) (2001).

<sup>124</sup> *MCEA*, 644 N.W.2d at 466-67, (The MCEA also argued that the MFRC was not a “public regulatory authority” under 44410.1700, but the court dismissed the Court dismissed this argument because the MPCA could compel mitigation through its permitting function.).

<sup>125</sup> *Supra* pt. IV.A.

<sup>126</sup> *MCEA*, 644 N.W.2d at 466-67 (citing *Cable Communications Bd. V. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 668 (Minn. 1984) (The court defined substantial evidence as “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety”).

<sup>127</sup> *Id.* at 466; see generally *MCEA v. MPCA*, Appendix for Respondent Minnesota Center for Environmental Advocacy, C6-01-96 R-142-81.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (The court also emphasized commitments to mitigation efforts by MDNR’s, several Minnesota counties’, and federal efforts on their respective lands); see generally *MCEA*, *supra* n. 1, Appendix for Respondent Minnesota Center for Environmental Advocacy, C6-01-96 R-182-84.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 467.

<sup>133</sup> *Id.*

measures within the scope of each permit.<sup>134</sup> Finding that the permit requirements created at least some mandatory aspect of mitigation, the court also found that these permit requirements, in addition to other voluntary and ongoing mitigation measures, established ongoing public regulation of the Boise Project.<sup>135</sup>

Finally, after addressing the issue of ongoing public regulatory authority, the MCEA Court clarified its review of the MPCA's decision in light of MCEA's and the appellate court's criticism of the voluntary nature of the mitigation measures. It was "somewhat misleading," said the court, to focus on the mandatory or voluntary nature of the mitigation measures.<sup>136</sup> The court's review focused on the adequacy and factual foundation of the MPCA's decision that the Boise Project had *no potential for significant environmental effects*, and thus, required no impact statement.<sup>137</sup> Still, the court reinforced its decision stating that the Minnesota Rules fail to address whether mitigation measures are mandatory or voluntary.<sup>138</sup> Under MEPA, however, mitigation factors must be voluntary.<sup>139</sup>

Therefore, the court held that "the MPCA's conclusion that 'the potential environmental effects of the project [were] subject to mitigation by ongoing public regulatory authority' was supported by substantial evidence and not arbitrary or capricious,"<sup>140</sup> because the mitigation measures were incorporated into Boise's project design, and were subject to regulation through MPCA's mandatory re-issuance of regulatory permits.<sup>141</sup>

## V. COMMENT

Stacy Lynn Bettison's article examined the instances in which the Minnesota Court of Appeals has abdicated its judicial function in determining when agencies have properly complied with MEPA's procedures.<sup>142</sup> She attacked the *National Audubon* decision for its failure to conduct a "distinct procedural review."<sup>143</sup> Additionally, she castigated the court's imposition of its judgment over MEPA's procedural requirements, which bar the use of generic impact analysis in lieu of EQB's requirements for project-specific review.<sup>144</sup>

<sup>134</sup> *Id.* (Under the Clean Air Act, MPCA administers and enforces Title V air operating permits and Prevention of Significant Deterioration permits. MPCA required Boise to obtain both of these permits before implementing the Boise project).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 467-68.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; see Minn. Stat. § 89A.05, Subd. 3 ("The timber harvesting and forest management guidelines are voluntary.").

<sup>140</sup> *Id.* at 469.

<sup>141</sup> *Id.* at 466-67.

<sup>142</sup> Bettison, *supra* n. 48, at 972.

<sup>143</sup> *Id.* (Although Bettison concentrates on the importance of procedural review, she notes that "[MEPA] might require certain substantive results, such as requiring agencies to avoid the detrimental environmental impacts addressed in the [impact statement] or [environmental assessment]. *Id.* at 977, n. 46.)

<sup>144</sup> See *Id.* at 1003-06 ("In sanctioning the use of a GEIS to determine a project's potential for significant environmental effect, the Audubon court undermined the force of MEPA, gutted the regulations prohibiting the use of the GEIS as a substitute for project-specific review, and weakened the GEIS as a viable method for developing long-term environmental policies, strategies and goals." *Id.* at 1006).

Bettison saw *MCEA*, then undecided, as “*Audubon II*,”<sup>145</sup> and must have hoped that the Minnesota Supreme Court would adopt her proposed method of review. Although *MCEA* conducted a “distinctly procedural review,” the case was similar to *National Audubon* not in reasoning, but in result – abdication of meaningful procedural or substantive judicial review. After deciding that MAPA review would apply,<sup>146</sup> the *MCEA* Court deferred to EQB in determining that the use of the generic impact statement was appropriate in the preparation of the environmental assessment.<sup>147</sup> As discussed earlier, *National Audubon* affirmed a negative declaration based on a generic impact statement because it was “questionable” whether an impact statement would result in information beyond that already found in the generic impact statement.<sup>148</sup>

Surprisingly, in the instant case, we have seen a distinct procedural review produce the same unfortunate outcome under strikingly similar factual circumstances. In order to effectuate the procedural and substantive requirements of MEPA, Minnesota’s courts must approach every negative declaration case with an eye toward procedural and substantive agency review, and must establish a rational framework for such review.

#### A. Procedural and Substantive Review under MAPA

Because MEPA is not merely a procedural statute, Minnesota’s courts may review both the agency’s adherence to procedure and its substantive decisions.<sup>149</sup> Therefore, procedural judicial review considers whether an agency decision was “made upon unlawful procedure,” while substantive judicial review considers whether an agency decision was arbitrary and capricious.<sup>150</sup> Bettison suggests that “when determining whether the agency has followed proper procedure, a substantive evaluation will, at times, become necessary.”<sup>151</sup>

For instance, the EQB’s MEPA regulations provide that the RGU shall consider the “cumulative potential effects of related or anticipated future projects” when determining whether the proposed project has the potential for significant environmental effects. The EQB has interpreted this criterion to mean “that cumulative impacts must be weighed along with the project’s direct impacts.” In considering whether the agency followed this procedural requirement, the court must first ask whether the RGU considered cumulative impacts. If the [environmental assessment] entirely omitted a discussion of cumulative impacts or if the RGU’s consideration was “pro forma,” then the RGU failed to follow the regulation requiring analysis of cumulative impacts. If, on the other hand, the [environmental assessment] discussed cumulative impacts to a certain extent, then the court must look to the actual content of the cumulative impact analysis to determine its validity. At this point the inquiry becomes substantive. While the overarching issue is whether the agency followed procedure, the question has transformed into a substantive review,

<sup>145</sup> *Id.* at 1005, n. 219.

<sup>146</sup> *MCEA*, 644 N.W.2d at 464.

<sup>147</sup> *Supra* pt. IV.B.

<sup>148</sup> Bettison, *supra* n. 48, at 1003.

<sup>149</sup> *Id.* at 999.

<sup>150</sup> *Id.* at 1000.

<sup>151</sup> *Id.*

and, as noted above, the court should defer to the technical expertise of the agency, reviewing only for arbitrariness or caprice.<sup>152</sup>

This subject matter of the example above was addressed by the court of appeals in *MCEA*. The environmental assessment addressed cumulative impacts, requiring the court to look at the actual content of the analysis. The court of appeals quoted the environmental assessment, stating,

[t]he precise effects of cumulative timber harvest, at current and projected levels. . . within the area where Boise Cascade procures wood is not scientifically known. Research beyond the scope of this [environmental assessment] is required to address this potential type of impact and apply the results in developing appropriate mitigation strategies.<sup>153</sup>

Following Bettison's "procedure first, substance second" review, it is clear that the agency's negative declaration was arbitrary and capricious on the basis of its cumulative impact analysis. However, the district court ruled that it did not need to address this issue because MCEA did not timely appeal the EQB's determination of adequacy.<sup>154</sup> Similarly, the Minnesota Supreme Court avoided the cumulative impact analysis, stating that mitigation was the only relevant issue on appeal.<sup>155</sup>

If the State of Minnesota is as serious about protecting its natural resources as MEPA's substantive requirements would suggest,<sup>156</sup> reviewing courts must have the authority to raise issues of agency caprice anew. However, such review should not open the door to unlimited substantive review of agency findings. Thus, Minnesota must find a way to balance substantive and procedural review with MEPA's substantive and procedural requirements. Otherwise, as in the instant case, MEPA will have been relegated to a procedural statute and the legislature can dispense of substantive MEPA.

Minnesota's courts can resolve this problem by adding one step before engaging in Bettison's procedure first review. This step involves distinguishing questions of law from questions of fact.

### *B. The Law-Fact Distinction*

One of the more challenging tasks of a court deciding whether there is a need for an impact statement is distinguishing questions of law from questions of fact.<sup>157</sup> A court must decide all

<sup>152</sup> *Id.* at 1000-01.

<sup>153</sup> *MCEA*, 632 N.W.2d at 236.

<sup>154</sup> *MCEA*, 644 N.W.2d at 461 (Though the district court went on to find that MPCA properly used the generic impact statement, it did not incorporate a substantive review of the environmental assessment as suggested by Bettison).

<sup>155</sup> *Id.* at 465.

<sup>156</sup> *See supra* n. 50 (Minn. Stat. § 116D.02).

<sup>157</sup> Daniel R. Mandelker, *NEPA Law and Litigation*, § 8.02[3], 8-11 (2nd ed., West 1998) ("Distinguishing between legal and factual questions in NEPA threshold decisions is difficult because the findings necessary to determine questions of law, such as the meaning of 'significance,' are often findings of fact usually left largely to agency discretion.").

questions of law, while an agency should be granted deference to its factual determinations.<sup>158</sup> The law-fact distinction is of prime importance in the administrative review process because it serves as a guideline for the division of labor between judge and administrator based on their respective expertise.<sup>159</sup>

Daniel Mandelker, analyzing the law-fact distinction to judicial review of negative declarations, states that a court “must first give a legal interpretation to the word ‘significant’ and must then apply that definition to the agency’s action.”<sup>160</sup> The *MCEA* Court should have followed this approach by defining “significant” as a matter of law within the context of MEPA and the EQB Rules. Instead, the court simply decided that “significant” environmental effects were mere questions of fact.<sup>161</sup>

MEPA requires the preparation of an impact statement “[w]here there is potential for significant environmental effects. . . .”<sup>162</sup> Neither “significant” nor “significant environmental effects” are expressly defined under MEPA or the EQB Rules. Nevertheless, MEPA provides a framework for a legal definition of “significant” in addition to the four factors to be considered under the EQB Rules. This framework is located within MEPA’s substantive requirements.

Mandelker suggests that a statute creates substantive requirements if it contains “law to apply” as found in its declaration of environmental policy.<sup>163</sup> MEPA expressly contains a declaration of environmental policy in § 116D.02, Subdivision One,<sup>164</sup> which states,

it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use *all practicable means and measures*, including financial and technical assistance, *in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state’s people.*<sup>165</sup>

The next question is whether this subdivision contains “law to apply.”<sup>166</sup> By requiring the use of “all practicable means. . . in a manner calculated. . . to promote the general welfare,” the policy clearly proscribes what the state government must do, and how it must do it. Thus, on its face MEPA’s policy statement does contain “law to apply.”<sup>167</sup>

<sup>158</sup> See *Id.*

<sup>159</sup> Bernard Schwartz, *Administrative Law*, § 10.5, 634 (3d ed., Little, Brown & Company 1991).

<sup>160</sup> Mandelker, *supra* n. 157, at § 8.02[3], p. 8-9, 10.

<sup>161</sup> See *MCEA*, 644 N.W.2d at 464 (“A determination whether significant environmental effects result from this project is primarily factual and necessarily requires application of the agency’s technical knowledge and expertise to the facts presented.”).

<sup>162</sup> Minn. Stat. § 116D.04, Subd. 2a.

<sup>163</sup> Mandelker, *supra* n. 157, at § 10.04[1], p. 10-19; see generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>164</sup> See Minn. Stat. § 116D.04, Subd. 1 (Full text of Subdivision 1).

<sup>165</sup> Minn. Stat. § 116D.02, Subd. 1 (emphasis added).

<sup>166</sup> See *Id.* at § 10.04[1], p. 10-19 (“One example of a statutory policy that may contain substantive ‘law to apply’ is the policy that ‘it is the continuing responsibility of the Federal Government to . . . attain the widest range of beneficial uses of the environment without degradation.’”).

<sup>167</sup> If nothing more, this policy statement at least deserves the attention and interpretation of Minnesota’s highest court.



How then should Minnesota's courts apply the substantive law found within MEPA? The use of "all practicable means and measures" calculated to achieve MEPA's substantive requirements appears to create a sort of substantive-procedural requirement. On the procedural side, it tells the agency what it must do, but substantively requires more than *pro forma* compliance. This is evidenced by the use of the word practicable, which denotes possibility, not functionality.<sup>168</sup> As used in the statute, "practicable means and measures" would require environmental assessments and impact statements to use up-to-date statistical data, particularly in situations where it is unclear that an agency's decision will, in fact, meet MEPA's substantive requirements. Furthermore, an agency must proceed "in a manner calculated to foster and promote" everything from the general welfare to the "future generations of the state's people." This language is substantive, because it tells the agency how it must make its determinations.

MEPA's policy statement contains a definition of what forms of potential environmental effects the state legislature considered significant and desired to protect. Thus, contrary to the court's reliance on *Robertson v. Methow Valley Citizens' Council*,<sup>169</sup> MEPA's substantive provisions cannot be ignored,<sup>170</sup> and create requirements in addition to the four considerations under the EQB rules. The court failed to address MEPA's substantive provisions and, with rubber-stamp in hand, failed to provide meaningful judicial review of MPCA's findings.<sup>171</sup>

### C. Applying "Significance" to MPCA's Consideration of Mitigation

Following Mandelker's direction, the next step is to apply the legal definition of significance to the agency's findings.<sup>172</sup> In considering whether MPCA's finding that the Boise Project was subject to mitigation measures included all practicable means and measures calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and to fulfill the social, economic, and other requirements of present and future generations of the state's people, the court must first ask whether MPCA considered mitigation.<sup>173</sup> Because MPCA did address mitigation in the environmental assessment, MPCA did follow the regulation requiring analysis of mitigation.<sup>174</sup> Since the environmental assessment discussed mitigation to a certain extent, then the court must look to the actual content of the mitigation analysis to determine its validity. At this point the inquiry becomes substantive and

<sup>168</sup> *The Oxford Essential Dictionary*, 468 (American Edition, Berkley Books 1998) (Practical and practicable are sometimes confused. Practical means 'concerning practice,' that is, 'useful; functional.' Practicable comes from *practice able*, meaning 'able to be practiced' or 'able to be done; possible.').

<sup>169</sup> 490 U.S. 332, 352 (1989) (NEPA does not require specific results or substantive requirements that mitigation plans be actually formulated or adopted).

<sup>170</sup> *MCEA*, 644 N.W.2d at 468 n. 10 ("We note that the question whether the MEPA contains substantive protections above and beyond the procedural protections it shares with federal law is not before this court, and we will not address that issue here.").

<sup>171</sup> While this standard of review is required under NEPA, Minnesota courts are not strictly limited to procedural review. See *supra* pt. III.A, B.

<sup>172</sup> *Supra* n. 156.

<sup>173</sup> See Bettison, *supra* n. 48 (The language from Bettison's example concerning cumulative impact analysis has been modified to incorporate MPCA's consideration of mitigation and "significant" as defined under MEPA.).

<sup>174</sup> See *supra* n. 59 (Minn. R. 4410.1700.).

the court should defer to the technical expertise of the agency, reviewing only for arbitrariness or caprice.<sup>175</sup>

Now, with a legal definition of “significant,” MPCA is held to the arbitrary and capricious standard with regard to its technical consideration of mitigation *and* its consideration of significance as a matter of law. Admittedly the definition of significant was not articulated at the time of MPCA’s decision. Nevertheless the substantive requirement existed and must have been considered in accordance with MEPA.

Thus, under the revised standard of review, Justice Paul H. Anderson’s observations in his concurring opinion support the view that MPCA’s consideration of mitigation was arbitrary and capricious. He specifically observed that “the record reflects that neither the MPCA nor the DNR analyzed the potential environmental effects of Boise Cascade’s project under the assumption that mitigation measures for *timber harvesting*, such as the MFRC timber harvesting guidelines, would be included in any MPCA permits.”<sup>176</sup> Additionally,

[t]o support its holding, the majority also relie[d] upon the mitigation measures implemented and enforced by the United States Forest Service (USFS), the DNR, and certain Minnesota counties. *However, the MPCA did not address these measures as part of its specific findings on mitigation and presumably did not base its final decision on them.*<sup>177</sup>

Though Justice Anderson relented that there was, nevertheless, a scintilla of evidence in the record to support MPCA’s conclusion,<sup>178</sup> under the revised standard the record indicates that MPCA failed to incorporate the mitigation of timber harvesting into its permits, and thus, could not have included all practicable means and measures in a manner calculated to protect Minnesota’s natural resources. Employing this analysis, the court should have found MPCA’s evaluation of mitigation arbitrary and capricious, and should have required the preparation of an impact statement in order to fulfill MEPA’s commitment to maintain harmony between human beings and nature, and to fulfill the social or long-term economic requirements of the state’s people.

#### *D. Impact Statement Preparation*

As a final note, one observation on the decision to prepare or to forego impact statements is that businesses and agencies both have interests in avoiding impact statements because of the time and financial costs of preparation.<sup>179</sup> As one commentator put it, “[s]tatistically, [impact statement]

<sup>175</sup> See *supra* n. 175.

<sup>176</sup> See *MCEA*, 644 N.W.2d at 469 (emphasis in original).

<sup>177</sup> *Id.* at 470 (emphasis added).

<sup>178</sup> *Id.* at 470 (Although these mitigation measures are certainly not as comprehensive as those recommended in the Forestry GEIS, the mitigation measures noted by the majority do constitute more than a scintilla of evidence in the record that the MPCA did, in fact, consider the extent to which the effects of the project were subject to mitigation by ongoing public regulatory authority.” (emphasis added)).

<sup>179</sup> *Selmi*, *supra* n. 42, at 10-16 (“Because of the cost and delay associated with preparation of a full EIS, private applicants often would prefer to avoid preparing an impact statement if they can change their project to reduce possibly significant environmental effects to a level of insignificance. Thus, the practice of issuing “conditional” or “mitigated” negative declarations has become increasingly common.”).

preparation is the exception rather than the rule.”<sup>180</sup> In 1996, Minnesota RGUs prepared 137 environmental assessments and two impact statements.<sup>181</sup>

In pursuing the Boise project and defending the adequacy of MPCA’s record, Boise cites a three-and-a-half year preparation process, the preparation of the approximately 150-page environmental assessment, and another year-long process of public and agency review and comment.<sup>182</sup> Additionally, Boise asserted that the MPCA record consisted of over 600 documents, comprising of over 6,000 pages of materials.<sup>183</sup>

Upon these facts, it appears that MPCA’s environmental assessment amounts to substantially more than “a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required.”<sup>184</sup> Selmi, in his treatise on state environmental law, recognized that “where the agency finds itself preparing voluminous documents to support such a declaration – documents that approach the length of an [impact statement] – the agency might be better advised to complete the full [impact statement] process rather than risk having a conditional negative declaration overturned.”<sup>185</sup>

Intuitively, the environmental assessment exists to accelerate the environmental review process for projects with minimal environmental impact, thus saving an agency’s limited resources of time and money. However, given the legislature’s purpose for enacting MEPA,<sup>186</sup> the Resources Council’s directive to “foster no net loss of forest land in Minnesota”,<sup>187</sup> and the “brief document” characterization of the environmental assessment,<sup>188</sup> an impact statement would have been the most appropriate, indeed the necessary analysis, to ensure the continued sustainable development of Minnesota’s forests. Despite the fact that the court held in MPCA’s favor, the instant litigation and collateral costs may have been entirely avoided by the thoroughness and greater perception of legitimacy of an impact statement.

## VI. CONCLUSION

In *MCEA*, the Minnesota Supreme Court reviewed MPCA’s negative declaration using only procedural standards of judicial review. The court should have expanded its review to include MEPA’s substantive requirements by engaging in substantive review of the word “significant”.<sup>189</sup> By failing to address the legal definition of “significant,” the court ignored MEPA’s substantive

<sup>180</sup> Bettison, *supra* n. 48, at 975.

<sup>181</sup> *Id.* (“The Minnesota Historical Society informally records the number of EAWs and EISs prepared each year. While that office is missing some data, its information also reveals few EISs prepared yearly: in 1997, 60 EAWs and zero EISs; in 1998, 99 EAWs and one EIS; and in 1999, 68 EAWs and one EIS. . . . On the other hand, an individual from the Department of Natural Resources, Environmental Review Section, suggested different numbers, although his data could not be confirmed: 150 – 200 EAWs each year compared to 5 – 10 EISs each year.” *Id.* at 975, n. 34).

<sup>182</sup> *MCEA*. Br. of Intervenor-Petitioner Boise Cascade, at 9.

<sup>183</sup> *Id.* at 10.

<sup>184</sup> *Supra* at n. 52.

<sup>185</sup> Selmi, *supra* n. 42, at. 10-19.

<sup>186</sup> *Supra* at n. 50.

<sup>187</sup> Minn. Stat. § 89.02, Subd. 2(5).

<sup>188</sup> *Supra* at n. 52.

<sup>189</sup> *See infra* pt. V.C.

provisions and has threatened the very component of MEPA that makes it more than a mere carbon copy of NEPA.<sup>190</sup>

In the aftermath of *MCEA*, Minnesota's courts and legislature, as well as all states that have or are desirous of substantive environmental protections, must find a way to rationally balance procedural and substantive review in environmental cases. Only then can substantive SEPAs effectuate their legislative mandate to substantively protect states' environments from arbitrary agency decisions.

THOMAS SCHMID

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<sup>190</sup> *Id.*