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SEEING THE FOREST AND THE TREES: THE MINNESOTA TIMBER HARVESTING GEIS APPLIED IN *POTLATCH* AND *BOISE CASCADE*

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I. INTRODUCTION

Fifty years ago, Justice William O. Douglas declared that judges "do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."[1] Eight years before, the Minnesota Supreme Court presaged Justice Douglas's admonition in observing that "the public policy of a state is for the legislature to determine and not the courts."[2] More recently, the Minnesota Supreme Court echoed the warning, stating that "[t]his court will not substitute its judgment for that of the legislature."[3] Similarly, a court may not substitute its judgment for that of an administrative agency, even if the court may have reached a different substantive conclusion than the agency.[4]

In *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*[5] *("Boise Cascade")*,[6] the Minnesota Court of Appeals required the Minnesota Pollution Control Agency ("MPCA") to prepare an environmental impact statement ("EIS") under the Minnesota Environmental Policy Act ("MEPA") on the expansion of a Boise Cascade Corporation paper mill.[7] By requiring that MPCA conduct an EIS, the court of appeals substituted its judgment for that of MPCA and the Minnesota legislature. The decision also offered an unpersuasive distinction of *National Audubon Society v. Minnesota Pollution Control Agency ("Potlatch")*,[8] a case that the court of appeals decided four years earlier involving strikingly similar facts. Fortunately, the Minnesota

1. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

2. Mattson v. Flynn, 13 N.W.2d 11, 16 (Minn. 1944). *See also In re* Karger's Estate, 93 N.W.2d 137, 142 (Minn. 1958) (opining that "[w]hat the law ought to be is for the legislature; what the law is rests with the courts").

3. Skeen v. State, 505 N.W.2d 299, 312 (Minn. 1993).

4. Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 825 (Minn. 1988). *See also* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (providing that a court may not "substitute its judgment for that of the agency").

5. 632 N.W.2d 230 (Minn. Ct. App. 2001), *rev'd*, 644 N.W.2d 457 (Minn. 2002).

6. Because Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency, 632 N.W.2d 230 (Minn. Ct. App. 2001) (hereinafter *Boise Cascade*) and Nat'l Audubon Soc'y v. Minn. Pollution Control Agency, 569 N.W.2d 211 (Minn. Ct. App. 1997) (hereinafter *Potlatch*) involve the same named defendant (MPCA) and a common plaintiff (the Minnesota Center for Environmental Advocacy), this article's short form citations for the cases reference the names of the defendant-intervenors.

7. *Boise Cascade*, 632 N.W.2d at 238.

8. 569 N.W.2d 211 (Minn. Ct. App. 1997).

Supreme Court recognized the intermediate appellate court's error, and on May 23, 2002, reversed the decision of the court of appeals in *Boise Cascade*.[9]

MEPA requires state or local governments to collect information regarding the environmental effects of a project that any governmental unit undertakes, permits, assists, finances, regulates, or approves. For projects whose environmental effects cannot be studied adequately on a case-by-case basis, the Minnesota Environmental Quality Board ("EQB") may conduct a so-called "generic" environmental impact statement. In 1989, the EQB determined that the cumulative effects of timber harvesting in Minnesota could not be studied adequately in project-specific environmental review, and ordered the preparation of the Generic Environmental Impact Statement on Timber Harvesting and Forest Management in Minnesota ("GEIS").[10] Completed in 1994, the 5000-page GEIS evaluated the cumulative environmental effects of logging in Minnesota's forests and recommended mitigation measures to address those effects. In 1995, the Minnesota legislature enacted the Sustainable Forest Resources Act ("SFRA") to implement the GEIS recommendations.[11]

This article analyzes the challenges to MPCA's application of the GEIS in *Potlatch* and *Boise Cascade*. The article suggests that, despite a few flaws in the opinion, the court of appeals in *Potlatch* correctly upheld MPCA's use of the GEIS and the decision not to require a project-specific EIS.[12] However, just four years later in *Boise Cascade*, the court of appeals ignored *Potlatch*, legislative policy, and the administrative record in holding that MPCA acted arbitrarily and capriciously in relying upon the GEIS and deciding not to require a project-specific EIS.[13] The Minnesota Supreme Court properly reversed, but reached an erroneous conclusion regarding the incorporation of timber harvesting mitigation measures into MPCA permits. Justice Paul H. Anderson clarified the issue but, in an otherwise cogent and persuasive concurring opinion, incorrectly assumed that MPCA failed to rely upon the implementation of such measures in reaching its decision on the

9. *Boise Cascade*, 644 N.W.2d at 459.

10. *See* JAAKKO POYRY CONSULTING, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT STUDY ON TIMBER HARVESTING AND FOREST MANAGEMENT IN MINNESOTA 1 (1994) [hereinafter GEIS].

11. MINN. STAT. ch. 89A (2000).

12. *Potlatch*, 569 N.W.2d at 219.

13. *Boise Cascade*, 632 N.W.2d at 237.

need for an EIS.[14] By reversing the court of appeals, the Minnesota Supreme Court in *Boise Cascade* demonstrated appropriate deference to MPCA, adhered to the Minnesota legislature's intent in enacting SFRA, and reaffirmed the analysis in *Potlatch*.[15]

II. THE MINNESOTA ENVIRONMENTAL POLICY ACT, THE GENERIC EIS ON TIMBER HARVESTING, AND THE SUSTAINABLE FOREST RESOURCES ACT

A. MEPA Statutory and Regulatory Background

On May 19, 1973, four years after Congress passed the National Environmental Policy Act ("NEPA"),[16] the Minnesota legislature enacted MEPA.[17] Modeled after NEPA,[18] MEPA's purpose is "to force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions"[19] by requiring state and local governmental entities to "use all practical means, consistent with other essential considerations of state policy" to implement the statute's policies.[20]

14. *Boise Cascade*, 644 N.W.2d at 469 (Anderson, J., concurring).

15. *Id.* at 467-68.

16. 42 U.S.C. §§ 4321-4370f (2000). NEPA applies to the actions of federal agencies. *Id.*

17. MINN. STAT. §§ 116D.01-.11 (2000).

18. *See* No Power Line, Inc. v. Minn. Envtl. Quality Council, 262 N.W.2d 312, 323 (Minn. 1977) (observing that MEPA is "[p]atterned on NEPA"). Minnesota courts often rely upon federal case law decided under NEPA in construing MEPA. *See, e.g., id.* at 323 n.28 (noting that the Minnesota Supreme Court has relied upon NEPA case law in interpreting MEPA); Minn. Pub. Interest Research Group v. Minn. Envtl. Quality Council, 237 N.W.2d 375, 380-81 (Minn. 1975) (relying in part upon NEPA case law in holding that decisions regarding environmental impact statements are subject to judicial review under MEPA); Iron Rangers Ridge Action v. Iron Range Res., 531 N.W.2d 874, 881-82 (Minn. Ct. App. 1995) (terming NEPA the "federal equivalent" of MEPA, and citing NEPA case law in analyzing impacts and mitigation under MEPA).

19. *No Power Line*, 262 N.W.2d at 327.

20. MINN. STAT. § 116D.02, subd. 2 (2000). MEPA articulates nineteen broad policy goals, including fulfilling "the responsibilities of each generation as trustee of the environment for succeeding generations," preserving "important historic, cultural, and natural aspects of our national heritage, and maintain[ing], wherever practicable, an environment that supports diversity, and variety of individual choice," and minimizing "wasteful and unnecessary depletion of nonrenewable resources." MINN. STAT. § 116D.02, subd. 2(a), (d), (l) (2000). Section 116D.02 is very similar to NEPA Section 101, 42 U.S.C. § 4331. Although NEPA Section 101 emphasizes important policy considerations, federal courts have held that the provision does not establish enforceable standards of conduct

MEPA applies to any "major governmental action"[21] that may have the potential for significant environmental effects.[22] The EQB promulgated regulations that implement MEPA's environmental review requirements.[23] Under the statute and the EQB rules, a

and does not create a cause of action for failure to meet the goals described. *See, e.g.,* Envtl. Def. Fund v. Army Corps of Eng'rs, 325 F. Supp. 749, 755 (E.D. Ark. 1971) ("It is true that the Act require[s] the government 'to improve and coordinate Federal plans, functions, programs, and resources,' but it does not purport to vest in the plaintiffs, or anyone else, a 'right' to the type of environment envisioned therein."), *inj. dissolved and case dismissed* 342 F. Supp. 1211 (E.D. Ark. 1972), *aff'd* 470 F.2d 289 (8th Cir. 1972); Bradford Township v. Ill. State Toll Highway Auth., 463 F.2d 537, 540 (7th Cir.), *cert. denied*, 409 U.S. 1048 (1972) ("The declarations of a national environmental policy and a statement of purpose appearing in [NEPA] are not sufficient to establish substantive rights. For these reasons, the plaintiffs have asserted no cognizable federal rights under these statutes."); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 534 (S.D. Tex. 1972) (citing *Envtl. Def. Fund*, 325 F. Supp. at 755). Similarly, Minnesota courts have rejected attempts to transform MEPA's broad policy goals into substantive standards or causes of action. *See, e.g., In re* NSP Red Wing Ash Disposal Facility, 421 N.W.2d 398, 405 (Minn. Ct. App. 1988) (refusing to imply from the broad statements of purpose in MEPA a guarantee of a "meaningful hearing" when other Minnesota regulations expressly provide the right to a contested case hearing); Gleason v. Metro. Airports Comm'n, File No. MC 98-019439 (Hennepin County Dist. Ct.) (dismissing challenge to environmental review under the goals set forth in MEPA, MINN. STAT. § 116D.02, subd. 2, for failure to state a claim upon which relief may be granted); Nat'l Audubon Soc'y v. Minn. Pollution Control Agency, File No. C1-95-602306 (Cook County Dist. Ct. Sept. 5, 1996) (dismissing challenge to environmental review under the goals set forth in MEPA, MINN. STAT. § 116D.03, subd. 2, for failure to state a claim upon which relief may be granted).

21. MINN. STAT. § 116D.04, subd. 2a (2000). A "governmental action" is an activity, "including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government." *Id.* at subd. 1a(d); MINN. R. 4410.0200, subp. 33 (1999). A "governmental unit" is "any state agency and any general or special purpose unit of government in the state including, but not limited to, watershed districts . . . , counties, towns, cities, port authorities, housing authorities, and economic development authorities . . . but not including courts, school districts, and regional development commissions other than the metropolitan council." MINN. STAT. § 116D.04, subd. 1a(e) (2000); MINN. R. 4410.0200, subp. 34 (1999).

22. *See* MINN. STAT. § 116D.04, subd. 2a (2000) ("[w]here there is potential for significant environmental effects resulting from any major governmental action, the action shall be proceeded by a detailed environmental impact statement"). *See also* MINNESOTA ENVIRONMENTAL QUALITY BOARD, GUIDE TO MINNESOTA ENVIRONMENTAL REVIEW RULES 1 (1998), *available at* http://www.mnplan.state.mn.us/pdf/rulguid3.pdf (last visited Aug. 4, 2002) (discussing MEPA requirements) [hereinafter EQB RULES GUIDE]. In short, MEPA may apply if a project: (1) involves physical manipulation of the environment; (2) will take place in the future; and (3) is conducted by, requires the approval of, or receives financial assistance from a local, state, or federal governmental unit. *Id.*

23. *See* MINN. R. ch. 4410 (1999).

"responsible governmental unit" ("RGU")[24] discharges MEPA's prerequisites by preparing and evaluating environmental review documents,[25] and "complying with environmental review processes in a timely manner."[26] An RGU is typically the government or governmental agency with the largest role in approving or supervising a project.[27]

MEPA mandates that governmental entities prepare an EIS where there is the potential for significant environmental effects resulting from any major government action.[28] The EQB rules require an EIS for certain projects that, based upon location or character, make the potential for significant environmental effects highly likely. If a project meets or exceeds the so-called "mandatory" EIS thresholds established in the EBQ rules, the governmental entity serving as the RGU must prepare an EIS before undertaking or approving the project.[29] Even if a project does not fall within a mandatory EIS category, an RGU must prepare a so-called "discretionary" EIS if the proposed project has the potential for significant environmental effects.[30] The RGU must consider four criteria in determining whether a project has the potential for significant environmental effects: (1) the type, extent, and reversibility of the effects; (2) the cumulative potential effects of the project and related or anticipated future projects; (3) the extent to which the effects are "subject to mitigation by ongoing public regulatory authority"; and (4) the extent to which other available environmental studies may anticipate and control

24. *See* MINN. STAT. § 116D.04, subd. 1a(e) (2000) (defining "governmental unit" as "any state agency and any general or special purpose unit of government in the state including, but not limited to, watershed districts organized under chapter 103D, counties, towns, cities, port authorities, housing authorities, and economic development authorities established under section 469.090 to 469.108, but not including courts, school districts, and regional development commissions other than the metropolitan council"); MINN. R. 4410.0200, subp. 75 (defining "responsible governmental unit").

25. MINN. STAT. § 116D.04, subd. 2a (2000); MINN. R. 4410.0200, subp. 75 (1999).

26. MINN. R. 4410.0400, subp. 2 (1999).

27. MINNESOTA ENVIRONMENTAL QUALITY BOARD, EAW GUIDELINES: PREPARING ENVIRONMENTAL ASSESSMENT WORKSHEETS 1 (2000).

28. MINN. STAT. § 116D.04, subd. 2a (2000); MINN. R. 4410.0200, subps. 1, 3 (1999).

29. *See* MINN. R. 4410.2000, subp. 2 (1999) (stating that an RGU must prepare an EIS for projects meeting or exceeding the thresholds established in MINN. R. 4410.4400) and MINN. R. 4410.4400 (1999) (establishing mandatory EIS categories and the RGU for each mandatory category).

30. MINN. R. 4410.2000, subp. 3(A)-(B) (1999).

the environmental effects of the proposed project.[31]

Governmental entities consider whether a project has the potential for significant environmental effects by preparing an environmental assessment worksheet ("EAW").[32] If a proposed project meets or exceeds certain thresholds established in the EQB rules, an RGU must prepare an EAW;[33] if not, an RGU may prepare an EAW if the proposed project "may have the potential for significant environmental effects."[34] Ostensibly a "brief document prepared in worksheet format which is designed to rapidly assess the environmental effects" associated with a proposal,[35] an EAW for a complex project may include hundreds of pages of analysis.[36]

If a project's environmental effects are not subject to adequate review on a case-by-case basis, the EQB may order preparation of a generic EIS.[37] Among the criteria for determining whether a generic EIS is necessary are the regional and statewide significance of a project's environmental effects, and the degree to which project-specific review is able to address such effects.[38] Because traditional project-specific environmental review has limitations in

31. MINN. R. 4410.1700, subp. 7(A)-(D) (1999).

32. *See* MINN. R. 4410.1000, subp. 1 (1999) (noting that the purpose of an EAW is to "aid in the determination of whether an EIS is needed for a proposed project" and to "serve as a basis to begin the scoping process for an EIS" if one is necessary). *See also* MINN. R. 4410.2100, subp. 2(A)-(B) (1999) (for projects that do not fall within the mandatory EIS categories, an EAW serves "to identify the need for preparing an EIS pursuant to part 4410.1700" and "to initiate discussion concerning the scope of the EIS if an EIS is ordered pursuant to part 4410.1700").

33. *See* MINN. R. 4410.4300 (1999) (establishing mandatory EAW categories and the RGU for each mandatory category). The legislature may also expressly require an EAW for a project, even though the project does not meet or exceed a mandatory EAW threshold under Minnesota Rule 4410.4300 (1999). *See In re* Am. Iron & Supply Co., 604 N.W.2d 140, 143 (Minn. Ct. App. 2000) (stating that the Minnesota legislature passed a statute requiring that MPCA conduct an EAW on a metal shredding facility to determine whether an EIS was necessary).

34. MINN. R. 4410.1000, subp. 3 (1999). A group of at least twenty-five citizens may also petition the EQB for an EAW. MINN. R. 4410.1100, supb. 1 (1999). The petition must include "material evidence indicating that, because of the nature or location of the proposed project, there may be a potential for significant environmental effects." MINN. R. 4410.1100, supb. 2(E) (1999). If the EQB determines that the petition complies with process requirements, it forwards the petition to the RGU. MINN. R. 4410.1100, supb. 5 (1999). The RGU then decides whether to conduct an EAW. MINN. R. 4410.1100, supb. 6 (1999).

35. MINN. R. 4410.1000, subp. 1 (1999).

36. *See, e.g.*, *Boise Cascade*, 644 N.W.2d at 459-60 (noting that the EAW involved was well over 100 pages).

37. MINN. R. 4410.3800, subp. 1 (1999).

38. MINN. R. 4410.3800, subp. 5(H) (1999).

evaluating widespread cumulative environmental effects, a generic EIS is often a better instrument to address effects of regional or statewide concern.[39] Although preparation of a generic EIS does not exempt particular proposals from MEPA's procedural requirements, an RGU must use information from a generic EIS in conducting project-specific environmental review.[40] So long as the EQB "determines that the generic EIS remains adequate at the time the specific project is subject to review," an environmental review document for a project related to the subject matter of the generic EIS "shall use the information in the generic EIS by tiering and shall reflect the recommendations contained in the generic EIS."[41]

The EQB rules also exempt specific projects from environmental review.[42] For all projects other than "government activities"—which are defined as "[p]roposals and enactments of the legislature"—the exemption is qualified.[43] Accordingly, if an otherwise exempt project meets or exceeds any of the thresholds for a mandatory EAW or EIS, the exemption does not apply.[44] If the legislature exempts a proposed project, however, the project is not subject to environmental review even if it meets or exceeds the thresholds for a mandatory EAW or EIS.[45]

Judicial review of an RGU's decision on the need for an EAW, the need for an EIS, and the adequacy of an EIS is available by a declaratory judgment action commenced within thirty days of the decision.[46] Venue is in the district court of the county where the

39. EQB RULES GUIDE, *supra* note 22, at 5.

40. MINN. R. 4410.3800, subp. 8 (1999).

41. *Id.* "Tiering" means "incorporating by reference the discussion of an issue from a broader or more generic EIS." MINN. R. 4410.0200, subp. 88 (1999).

42. *See generally* MINN. R. 4410.4600, subps. 1-26 (1999) (listing exempt projects).

43. MINN. R. 4410.4600, subp. 26 (1999).

44. MINN. R. 4410.4600, subp. 1 (1999). *See* Minn. Ctr. for Envtl. Advocacy v. Big Stone County Bd. of Comm'rs, 638 N.W.2d 198, 204 (Minn. Ct. App. 2002) (holding that an EIS was mandatory under MINN. R. 4410.4400, subp. 20 because a project eliminated a protected wetland, and as such could not qualify for the routine ditch maintenance and repair exception in MINN. R. 4410.4600, subp. 17).

45. *See* MINN. R. 4410.4600, subp. 1 (1999) (noting that the limitation to the exemption does not apply to subpart 26, the "governmental activities" exemption). *See also* State v. Minn. Dept. of Natural Res., No. CX-93-2435, 1994 WL 193758 at *1 (Minn. Ct. App. May 11, 1994) (holding that the phrase "notwithstanding . . . any other law to the contrary" in directing a sale of state land exempted the sale from MEPA environmental review under MINN. R. 4410.4600, supb. 26).

46. MINN. STAT. § 116D.04, subd. 10 (2000). MEPA, MINN. STAT. § 116D.04, subd. 10 (2000), specifically grants EQB the right to initiate judicial review of

proposed project would be undertaken.[47] In reviewing decisions of administrative agencies under MEPA on the need for an EAW, the need for an EIS, and the adequacy of an EIS, Minnesota courts examine whether substantial evidence in the administrative record supports the decisions, and whether the decisions are arbitrary or capricious.[48] MEPA also provides that "any person" may bring an action against the EQB or other unit of government failing to undertake aspects of the environmental review process within the time specified under the statute, such as the statutory requirement[49] for completing an EIS within 280 days.[50]

B. The Generic EIS on Timber Harvesting and Forest Management in Minnesota[51]

Between 1980 and 1994, the level of timber harvesting in Minnesota increased from 2.3 million cords annually to 4.1 million cords annually.[52] Spurred by the growth in harvest levels, a group

decisions referred to in the section, and to intervene as of right in any proceeding brought under subdivision 10. Aside from the EQB, Section 116D.04, subd. 10 does not state who may bring an action under the section. However, the language of subdivision 10 authorizing the EQB to "intervene as of right in any proceeding brought under this subdivision" suggests that parties other than the EQB may file actions under Section 116D.04, subd. 10. *Id.*

47. *Id.*

48. *See, e.g., Boise Cascade*, 644 N.W.2d at 464 (applying the standards of review codified in the Minnesota Administrative Procedures Act, MINN. STAT. § 14.69, in reviewing a decision on the need for an EIS under MEPA).

49. *See* MINN. STAT. § 116D.04, subd. 11 (2000). In addition to the two private rights of action discussed above, MINN. STAT. § 116D.04, subd. 13 (2000), establishes the manner in which the EQB may bring actions to enforce MEPA. Unlike MINN. STAT. § 116D.04, subd. 10 (2000), subdivision 13 does not contain a statement authorizing the EQB to intervene as of right. The absence of an express right of intervention for EQB demonstrates that subdivision 13 is limited to EQB enforcement actions and does not allow private parties to bring an action under the subdivision.

50. *See* MINN. STAT. § 116D.04, subd. 2a (2000) (requiring that an EIS be prepared within 280 days after notice of its preparation, unless the governor or the parties extend the time for good cause).

51. It is beyond the scope of this article to discuss in detail the entire Final Generic Environmental Impact Statement on Timber Harvesting and Forest Management in Minnesota. This section, which generally describes the framework and conclusions of the study, is intended to provide the background and context necessary for an understanding of the *Potlatch* and *Boise Cascade* decisions.

52. MINNESOTA DEPARTMENT OF PLANNING, MINNESOTA MILESTONES 2002: MEASURES THAT MATTER, Indicator 60 (Timber Harvest) *at* http://www.mnplan.state.mn.us/mm/indicator.html?Id=60&G=39 (last visited Aug. 6, 2002). Total timber harvest has been stable since 1995, fluctuating slightly between 3.7 and 3.8 million cords per year. According to the Minnesota

of citizens in July 1989 petitioned the EQB to conduct a generic environmental impact statement that would examine the statewide effects of timber harvesting and forest management.[53] Minnesota's project-based environmental review process under MEPA, the petitioners argued, could not adequately evaluate the cumulative environmental effects of increased timber harvesting.[54] The EQB agreed.[55] In December 1989, the EQB unanimously passed a resolution directing the preparation of a timber harvesting and forest management generic environmental impact statement,[56] and selected Jaakko Poyry Consulting, Inc. of Tarrytown, New York to conduct the study.[57]

When published in April 1994, the timber harvesting GEIS was unprecedented in the history of environmental impact statements in Minnesota. The 5000-page study, which includes nine technical papers and five background papers,[58] took over four years to

Department of Natural Resources ("DNR"), "[t]he drop in the timber harvest in 1995 reflects an adjustment based on decreased use of firewood since 1989 and 1990." *Id.*

53. GEIS, *supra* note 10, at 1-4.

54. *Id.*

55. *Id.* *See also Potlatch*, 569 N.W.2d at 217-18 ("The GEIS was requested by the Environmental Quality Board because the effects of timber harvesting within the state could not be adequately analyzed on a case-by-case, project-specific basis. This is, in part, because it is not possible to identify the specific areas or stands of timber that will be harvested and because the ownership of Minnesota's available timberland is divided among a wide variety of groups and individuals."); EQB RULES GUIDE, *supra* note 22, at 5 (the potential for cumulative impact from a variety of specific projects "was one of the chief reasons why the EQB prepared a Generic EIS on timber harvesting activities").

56. GEIS, *supra* note 10, at 1-4.

57. According to the GEIS, Jaakko Poyry Consulting, Inc., is a member of the Jaakko Poyry Group, "the world's leading independent consulting and engineering organization specializing in forestry and forest industry development." GEIS, *supra* note 10, at liii. Established in 1958 and headquartered in Helsinki, Finland, the Jaakko Poyry Group at the time it completed the GEIS employed nearly 6,000 people in over twenty countries. *Id.* The Group "has a worldwide reputation as advisor to forest industries, national governments, and international agencies," with particular expertise "in conducting environmental impact assessments and environmentally-based development plans for a region, based upon an objective, analytical, and comprehensive approach that includes estimating the economic impact of the recommendations." *Id.*

58. As the GEIS acknowledges, the first step in undertaking such a study is to "identify and define the issues to be addressed," a process known as "scoping" under MEPA. *Id.* at 1-6. In early 1990, the GEIS Advisory Committee, *see infra* note 61 and accompanying text, developed a draft report specifying the issues that the GEIS would address. GEIS, *supra* note 10, at 1-6. The EQB issued the report as a draft scoping document in July 1990, and solicited public comments. *Id.* After receiving public comments and further recommendations from the Advisory

complete and cost the state of Minnesota $875,000.[59] In addition to the consulting resources of Jaakko Poyry, more than sixty scientists in twenty disciplines prepared the GEIS.[60] A ten-person advisory committee, representing economic development, environmental, conservation, tourism, and public land management interests, provided direction and oversight throughout the GEIS study process.[61]

As the EQB directed, the GEIS analyzed and evaluated the potential significant environmental effects of three annual statewide timber harvest levels. The first was the "base" scenario of four million cords, which the EQB selected because it was the level of the statewide timber harvest in 1990—the most recent year of available data when the state prepared the GEIS.[62] The second or "medium" scenario assumed an annual harvest of 4.9 million cords, which was the level of the statewide timber harvest that the GEIS estimated would occur by 1995 if certain announced forest products industry expansions occurred.[63] The third or "high"

Committee, the EQB approved a final scoping decision for the GEIS in December 1990. *Id.* The nine technical papers addressed major issues that the final scoping document required the GEIS to analyze: (1) *Maintaining Productivity and the Forest Resource Base*; (2) *Forest Soils*; (3) *Forest Health*; (4) *Water Quality and Fisheries*; (5) *Biodiversity*; (6) *Wildlife*; (7) *Unique Historical and Cultural Resources*; (8) *Economics and Management Issues*; and (9) *Recreation and Aesthetics*. *Id.* at 1-9 to 1-12, 2-27 to 2-44. For each issue, the technical papers provide a comprehensive record of the topics evaluated, assessment methodologies employed, and conclusions drawn regarding the subject matter. *Id.* at 2-28. Two of the five background papers, *Global Atmospheric Change* and *Recycled Fiber Opportunities*, address factors identified in the EQB's final scoping decision. *Id.* at 2-44 to 2-45. Three others, *Public Forestry Organizations and Policies*, *Harvesting Systems*, and *Silvicultural Systems*, provide background information on forest management and timber harvesting in Minnesota. *Id.* at 2-45. The GEIS integrates the conclusions drawn from the nine technical papers and the five background papers. *Id.* at 2-28.

59. *Id.* at 1-5 to 1-6.

60. *Id.* at liii-liv; 2-1 to 2-6.

61. *See id.* at 1-5 (noting that the total cost was divided among several public and private sources). The EQB requested that the Advisory Committee advise the EQB on the scope of the GEIS and the selection of the consultant to prepare the GEIS. *Id.* In addition, the EQB asked the Advisory Committee to review and comment on the consultant's reports, the proposed draft GEIS, and the final GEIS. *Id.* Finally, the EQB directed the Advisory Committee to provide recommendations on alternatives for mitigating significant environmental impacts identified in the GEIS. *Id.*

62. *Id.* at ii.

63. *Id.* In fact, the annual timber harvest in Minnesota has yet to approach the level of 4.9 million cords. *See supra* note 52. Annual timber harvest in the state peaked at 4.1 million cords in 1993 and 1994. *See supra* text accompanying note 52. Since 1995, total timber harvest has been stable, fluctuating slightly between

scenario assumed an annual timber harvest of seven million cords, which the GEIS estimated was the maximum sustainable annual timber volume available for statewide harvest for all tree species in the year 2000.[64] As the GEIS emphasized, the scenarios *"are not recommended levels of harvest nor should their development and analysis be considered a plan[;]"* they were simply *"levels the study was asked to analyze to determine what the impacts would be if these harvests were to occur."*[65]

Modeling for each scenario predicted the "spatial and temporal distribution" of timber harvesting by species that might occur throughout the state during the fifty-year planning horizon of the GEIS.[66] The "primary data input" for modeling the three scenarios was the United States Forest Service's Forestry Inventory and Analysis ("FIA") database, which consists of nearly 14,000 one-acre plots in forests throughout the state.[67] After using the FIA information to map timber resources, the GEIS employed computer models to assess projected timber harvests for the base, medium, and high levels, and to evaluate environmental effects.[68] The GEIS then divided the state into seven areas called "ecoregions," and evaluated the cumulative statewide effects for each level of timber harvest by ecoregion.[69] According to the GEIS, logging would occur in virtually all forested regions of the state, because Minnesota has a well-developed road network and a decentralized timber industry.[70]

For the base scenario, the GEIS identified seventeen types of environmental effects by ecoregion across the state. The effects included the projected significant loss of forest in four ecoregions, changes to the tree species mix that could affect biodiversity and wildlife habitat, accelerated erosion from forest roads, changes in

3.7 and 3.8 million cords per year. *See supra* note 52.

64. GEIS, *supra* note 10 at ii. The high scenario was the maximum level of harvesting that the GEIS estimated the state could sustain from a timber production perspective only. *Id.* at xxix. The GEIS did not evaluate the high scenario as a feasible level of statewide timber harvest. *Id.* Rather, the GEIS employed the level as an analytical tool and concluded that, even "with the assumptions and constraints [of the study] applied, this level is not achievable on a sustainable basis." *Id.*

65. *Id.* at ii.

66. *Id.* The fifty-year period spanned the years 1990 through 2040. *Id.* at iii.

67. *Id.* at ii.

68. *Id.* at iii.

69. *Id.* at vi.

70. *Id.* at xxi.

the population of certain forest-dependent wildlife, and the development of permanent forest roads in otherwise undeveloped areas.[71] For the medium and high scenarios, the GEIS concluded that the cumulative effects would be of the same type as the base scenario, but the degree of the effects would be more pronounced.[72] "In particular," the GEIS stated, "the high scenario suggests many impacts are large and would be left unmitigated."[73]

To address the identified environmental effects, the GEIS recommended implementation of three categories of mitigation strategies. The first category was "site-level" responses, intended to modify the procedures used in timber harvesting and forest management on individual parcels. These mitigation measures included adjusting harvest practices and equipment, altering silvicultural practices, protecting sensitive sites, and increasing forest productivity.[74] The second category was "landscape-level" measures requiring long-term solutions on a regional or statewide level. These measures involved reducing the area of forest converted to other land uses, safeguarding sensitive sites for plant species, and developing logging approaches in areas near bodies of water.[75] The final category of mitigation was instituting forest resources research designed to obtain information necessary to undertake planning efforts, to monitor site-level and landscape-level changes resulting from logging, and to provide forest management and planning tools.[76]

After discussing mitigation measures, the GEIS concluded that the four million cord base annual harvest scenario was "sustainable in a broad sense" and could continue "indefinitely" while maintaining other forest resource characteristics.[77] The only caveat was that the state needed to implement the recommended mitigation strategies "within the next few years" for the base level harvest scenario to be sustainable.[78] Similarly, the 4.9 million cord medium annual harvest scenario was "sustainable in the long-term" if the recommended mitigation was implemented "relatively soon"

71. *Id.* at xxi-xxiii.
72. *Id.* at xxvii.
73. *Id.*
74. *Id.* at xxiii-xxiv.
75. *Id.* at xxiv-xxv.
76. *Id.* at xxv-xxvi.
77. *Id.* at xxvi-xxvii.
78. *Id.* at xxvi-xxvii.

within the fifty-year planning horizon of the GEIS.[79] Finally, the GEIS concluded that a harvest level of up to 5.5 million cords annually was sustainable without adversely affecting the state's forests if "the loss of forest land projected in the north was halted, and substantial investments in forest management are made to improve productivity."[80] The GEIS warned, however, that this conclusion assumed that "the site-specific or other mitigations below the modeled level of resolution are implemented within the next few years and do mitigate otherwise significant impacts."[81] Reaching such harvest levels might also require the United States Forest Service to increase the "allowable sale quantities on the two national forests in Minnesota."[82]

In addition to mitigation strategies, the GEIS endorsed four "strategic programmatic responses" offering policy recommendations to implement the proposed mitigation measures and to evaluate their efficacy.[83] According to the GEIS, the state should first establish a "comprehensive Forest Resources Practices Program" that would serve as "an umbrella structure" for implementation of specific guidelines to mitigate the environmental effects of timber harvesting that the GEIS identified.[84] Second, the GEIS recommended a statewide "Sustainable Forest Resources Program" that "transcend[s] ownership boundaries" to successfully mitigate "unacceptable *landscape-level* impacts from timber harvesting and forest management activities."[85] Third, the GEIS encouraged a forest resources research program to fill information gaps identified in the GEIS process, and to develop the information "needed to fully mitigate the projected timber harvesting and forest management significant impacts."[86] Finally, the GEIS advocated formation "in advance of the other policy initiatives" of a Minnesota Board of Forest Resources.[87] The board would be "the most appropriate administrative structure for implementing these [programmatic]

79. *Id.* at xxviii.
80. *Id.*
81. *Id.*
82. *Id.* at xxix.
83. *Id.* at xxix-xxxiii.
84. *Id.* at xxix-xxx.
85. *Id.* at xxx-xxxi.
86. *Id.* at xxxi-xxxii.
87. *Id.* at xxxiii.

initiatives."[88]

C. SFRA Statutory Background

In 1995, the Minnesota legislature enacted the Sustainable Forest Resources Act ("SFRA")[89] to implement the GEIS recommendations.[90] SFRA established a seventeen member Forest Resources Council, with the governor appointing the chair and fifteen members.[91] The statute charges the council with developing recommendations to the governor and to federal, state, and local governments regarding forest management practices that will result in sustainable use and protection of the state's forest resources.[92] More importantly, SFRA mandates that the Council develop guidelines that address the environmental effects of timber harvesting by applying "site-level"[93] forestry practices based upon "the best available scientific information."[94] Although the Council's timber harvesting and forest management guidelines are voluntary,[95] SFRA requires DNR to monitor silvicultural practices and compliance with the timber harvesting guidelines "at the statewide, landscape, and site levels."[96] DNR must also oversee

88. *Id.* at xxxii-xxxiii.

89. MINN. STAT. ch. 89A (2000).

90. *See Boise Cascade*, 644 N.W.2d at 463 ("In response to the Forestry GEIS, the Minnesota legislature enacted the Sustainable Forest Resources Act.").

91. MINN. STAT. § 89A.03, subd. 1 (2000). The Indian affairs council appoints the seventeenth member. *Id.* The members appointed by the governor must include a variety of representatives, including two persons representing environmental groups, two non-industrial private forest land owners, and a representative from DNR, a conservation organization, the forest products industry, a logging contractor, the tourism industry, a county land commissioner, a higher educational institution, the United States Forest Service, a game species management organization, a labor organization, and a secondary wood products manufacturer. *Id.* As originally enacted, SFRA established a thirteen member council appointed by the governor only. 1995 Minn. Laws ch. 220, § 80. In 1998, the legislature amended the statute to add an appointment by the Indian affairs council. 1998 Minn. Laws ch. 401, § 30. The next year, the legislature amended the statute to read as currently codified. 1999 Minn. Laws ch. 231, § 116.

92. MINN. STAT. § 89A.03, subd. 2 (2000).

93. SFRA defines "site-level" as "efforts affecting operational procedures used in the planning and implementation of timber harvesting and forest management activities on an individual site or local scale." MINN. STAT. § 89A.01, subd. 12 (2000).

94. MINN. STAT. § 89A.05, subd. 1 (2000).

95. *Id.* at subd. 3.

96. MINN. STAT. § 89A.07, subd. 2 (2000). "Landscape" refers to a "heterogeneous land area composed of interacting sustainable forest resources that are defined by natural features and socially defined attributes." MINN. STAT.

broad trends and conditions in the state's forests and provide such information to the Council.[97] The statute mandates that DNR evaluate the effectiveness of practices to mitigate the environmental effects of logging on the state's forest resources.[98] These provisions ensure that DNR, a state agency with ongoing regulatory authority, monitors compliance with and the effectiveness of the Council's forest management guidelines.

In addition to DNR monitoring, SFRA requires the Council to monitor implementation of the guidelines.[99] Should the DNR monitoring or other information indicate that the guidelines are not being met or that "significant adverse impacts are occurring," the Council must recommend to the governor additional measures to address the adverse effects.[100] The statute also creates a forest resources partnership of forest landowners, forest managers, and loggers charged with implementing the Council's recommendations "in a timely and coordinated manner across ownerships."[101]

SFRA addresses landscape-level[102] effects by requiring the Council to develop long-range strategic planning and coordination of forests owned by all levels of government, as well as industry and private individuals.[103] To assist such planning, the statute authorizes the Council to establish regional committees.[104] The Council created eight regional landscape committees, each representing a different area of the state.[105] The regional committees must report their accomplishments to the Council.[106]

§ 89A.01, subd. 9 (2000).

97. MINN. STAT. § 89A.07, subd. 1 (2000).

98. MINN. STAT. § 89A.07, subd. 3 (2000).

99. MINN. STAT. § 89A.05, subd. 3 (2000).

100. *Id.*

101. MINN. STAT. § 89A.04 (2000).

102. "Landscape-level" as used in the GEIS and SFRA means "typically long-term or broad-based efforts that may require extensive analysis or planning over large areas that may involve or require coordination across land ownerships." MINN. STAT. § 89A.01, subd. 10 (2000). "Landscape-level" contrasts with "site-level," which refers to effects from timber harvesting and forest management activities on an individual site or local scale. MINN. STAT. § 89A.01, subd. 12 (2000).

103. MINN. STAT. § 89A.06 (2000).

104. *Id.* at § 89A.06, subd. 2 (2000).

105. *See* Minnesota Forest Resources Council website *at* http://www.frc.state.mn.us/Landscp/Landscape.html (last visited Aug. 1, 2002).

106. MINN. STAT. § 89A.06, subd. 4. As originally enacted, SFRA did not specify reporting or action deadlines for the regional committees. 1995 Minn. Laws ch. 220, § 83. In the 1999 reauthorization, the Minnesota legislature added such

When originally enacted in 1995, SFRA was to expire on June 30, 1999.[107] In 1999 the legislature reauthorized the statute through June 30, 2001,[108] and in 2001 the legislature extended the sunset date through June 30, 2007.[109] The 1999 reauthorization also contained several provisions that responded to the Council's site-level forest management guidelines, adopted in December 1998 and published in February 1999.[110] The technical teams that developed the guidelines reached consensus on measures addressing forest soils, wildlife habitat, and preservation of historic and cultural resources.[111] The team preparing the riparian zone management guidelines,[112] however, reached a "near consensus"

deadlines. 1999 Minn. Laws ch. 231, § 119, codified at MINN. STAT. § 89A.06, subd. 2a. The Council met these deadlines. *See* MINNESOTA FOREST RESOURCES COUNCIL, SUSTAINABLE FOREST RESOURCES ACT IMPLEMENTATION IN 1999: ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 13-14 (2000) (Council completed work for the northeast landscape region by December 1, 1999, as required by MINN. STAT. § 89A.06, subd. 2a(1)); MINNESOTA FOREST RESOURCES COUNCIL, SUSTAINABLE FOREST RESOURCES ACT IMPLEMENTATION IN 2000: ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 13 (2001) (Council completed assessments for the north central and southeast landscape regions by July 2001, as required by MINN. STAT. § 89A.06, subd. 2a(2)); MINNESOTA FOREST RESOURCES COUNCIL, SUSTAINABLE FOREST RESOURCES ACT IMPLEMENTATION IN 2001: ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 7 (2002) (Council completed draft desired forest conditions, goals, and strategies for the northeast and north central regions by July 1, 2001, as required MINN. STAT. § 89A.06, subd. 2a(3)). In 2001, the legislature amended SFRA to require that all regional committees complete their landscape assessments by June 30, 2002, and that the Council develop "desired future outcomes and strategies" for all regions except the metropolitan and prairie regions by June 30, 2003. 2001 Minn. Laws 1st Spec. Sess. ch. 2, § 102 (codified at MINN. STAT. § 89A.06, subd. 2a (Supp. 2001)). The Council completed six regional landscape assessments by June 2001, and is compiling assessments for the metropolitan and prairie regions. MINNESOTA FOREST RESOURCES COUNCIL, SUSTAINABLE FOREST RESOURCES ACT IMPLEMENTATION IN 2001: ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 7 (2002) *at* http://www.frc.state.mn.us/info/mfrcdocs.html (last visited Aug. 6, 2002).

107. 1995 Minn. Laws ch. 220, § 142.

108. 1999 Minn. Laws ch. 231, § 191.

109. 2001 Minn. Laws 1st Special Sess. ch. 2, § 151.

110. MINNESOTA FOREST RESOURCES COUNCIL, SUSTAINING MINNESOTA FOREST RESOURCES: VOLUNTARY SITE-LEVEL FOREST MANAGEMENT GUIDELINES FOR LANDOWNERS, LOGGERS AND RESOURCE MANAGERS (1999) [hereinafter COUNCIL GUIDELINES].

111. *See* http://www.frc.state.mn.us/Fmgdline/Guidelines.html (last visited Aug. 1, 2002). Technical team members included representatives from federal and state agencies, county land departments, universities, the forest industry, Native American tribes, loggers, conservation groups, environmental organizations, the tourism and recreation industry, private landowners, and utility companies. *Id.*

112. "Riparian" areas or zones are areas of land and water that form a

because two of the team's twenty members did not concur with the proposed guidelines.[113] In the 1999 SFRA reauthorization, the legislature mandated that the riparian area guidelines undergo peer review by December 1999.[114] The Council met the deadline, and is using information from the peer review process in determining whether the riparian management zone guidelines need revision.[115]

In addition, the 1999 reauthorization requires DNR to accelerate monitoring of the extent and condition of riparian forests and the effectiveness of the guidelines in riparian management zones.[116] The Council must also review and update the site-level forest management guidelines by June 30, 2003.[117] When reviewing the guidelines, the Council must consider information from the monitoring that DNR conducts under SFRA, and must subject any recommended revisions to peer review before adopting revised guidelines.[118] Finally, the legislature directed the Council to establish processes in addition to Minnesota's open meeting law[119] in order to "broaden public involvement in all aspects of [the Council's] deliberations."[120]

To comply with the 1999 SFRA reauthorization, the Council approved a guideline review process in September 2001 and requested public comment on the need for revisions.[121] Council staff then identified potential guideline modifications based upon

transition "from aquatic to terrestrial ecosystems along streams, lakes and open water wetlands." COUNCIL GUIDELINES, Riparian Areas, *supra* note 110, at 3.

113. *Id.*

114. 1999 Minn. Laws ch. 231, § 118 (codified as amended at MINN. STAT. § 89A.05, subd. 1 (2000)). The amended statute defined "peer review" as "a scientifically based review conducted by individuals with substantial knowledge and experience in the subject matter." 1999 Minn. Laws ch. 231, § 114 (codified as amended at MINN. STAT. § 89A.01, subd. 10a (2000)).

115. MINNESOTA FOREST RESOURCES COUNCIL, SUSTAINABLE FOREST RESOURCES ACT IMPLEMENTATION IN 2001: ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 15 (2002) [hereinafter COUNCIL'S 2001 ANNUAL REPORT].

116. 1999 Minn. Laws ch. 231, § 118, codified at MINN. STAT. § 89A.05, subd. 4 (2000) (requiring DNR to report to the legislature by February 2001 on the extent and condition of riparian forests).

117. 1999 Minn. Laws ch. 231, § 118 (codified at MINN. STAT. § 89A.05, subd. 1 (2000)).

118. *Id.* (codified at MINN. STAT. § 89A.05, subd. 2a (2000)).

119. MINN. STAT. § 471.705 (1996) (codified as amended at MINN. STAT. §§ 13D.01-.07 (2000)).

120. 1999 Minn. Laws ch. 231, § 116 (codified as amended at MINN. STAT. § 89A.03, subd. 3 (2000)).

121. COUNCIL'S 2001 ANNUAL REPORT, *supra* note 115, at 15.

the results of compliance and efficacy monitoring under SFRA, as well as the riparian management zone guideline peer review.[122] The Council weighed the public comments and staff recommendations in early 2002 and expects to approve any revised guidelines by May 2003.[123] In addition, as the 1999 reauthorization required,[124] DNR submitted to the legislature in March 2001 an initial evaluation of riparian areas in Minnesota.[125]

III. THE TIMBER HARVESTING GEIS PROPERLY APPLIED—*POTLATCH*, THE EQB, AND THE DISTRICT COURT OPINION IN *BOISE CASCADE*

A. *The* Potlatch *Case*

1. Background

The first case to construe the GEIS as applied to a specific project was the *Potlatch* case.[126] In *Potlatch*, the St. Louis County District Court and the Minnesota Court of Appeals applied an "arbitrary and capricious" standard in reviewing an EAW that MPCA prepared for expansion of a Potlatch Corporation wood products facility.[127] Both courts held that MPCA reasonably relied upon the GEIS in determining that a project-specific EIS was unnecessary under MEPA.[128]

Potlatch involved the expansion of a plant near Cook, Minnesota, that manufactured oriented strand board.[129] In June

122. *Id.*

123. *Id.*

124. *See supra* note 116 and accompanying text.

125. MINNESOTA DEPT. OF NATURAL RESOURCES, RIPARIAN FORESTS IN MINNESOTA: A REPORT TO THE LEGISLATURE (2001). In June 2002, DNR submitted another report to the legislature that estimated timber harvest in riparian areas by using sophisticated satellite imagery in combination with aerial photography. *See* COUNCIL'S 2001 ANNUAL REPORT, *supra* note 115, at 10-15.

126. 569 N.W.2d 211, 217-18 (Minn. Ct. App. 1997). The author represented defendant-intervenor Potlatch Corporation in the litigation.

127. *Id.* at 215-16, 217.

128. *Id.* at 217-18.

129. "Oriented strand board" is a sheeting product used in the building industry manufactured from wood flakes. At the Potlatch facility, tree-length timber is cut into 100-inch logs and the bark is removed. The wood is then shaved into thin stands approximately ¾-inch wide by three inches long. Potlatch mixes the strands with resins and wax in a blending drum, places or "orients" the strands onto sheets in layers to form a mat, presses the mats to a predetermined thickness in a high-temperature press, cuts the pressed board into finished sizes, and

1995, Potlatch Corporation sought approval from MPCA to expand the facility and roughly double production, enabling the facility to process an additional 177,000 cords of wood annually.[130] Potlatch Corporation estimated that ninety percent of the wood for the proposed expansion was available within a 150-mile radius from the Cook facility, which included the counties of Itasca, Koochiching, Lake, and St. Louis.[131] Potlatch Corporation applied for an amendment to the Cook facility's Clean Air Act emissions permit to reflect the expansion and MPCA, as the RGU under MEPA, prepared an EAW for the project.[132] During the EAW process, MPCA requested the assistance of the Minnesota Department of Natural Resources ("DNR") in reviewing timber harvesting issues, and in preparing responses to comments on the EAW related to forestry and wildlife management.[133]

packages the product for shipment. MPCA, Environmental Assessment Worksheet for Potlatch Oriented Strand Board Plant Expansion, Cook, Minnesota, at 2-3 (July 26, 1995) [hereinafter Potlatch EAW] (Appellants' Appendix at A-150 to A-151, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

130. *Potlatch*, 569 N.W.2d at 214. *See also* Potlatch EAW at 3 (Appellants' Appendix at A-151, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

131. *Potlatch*, 569 N.W.2d at 214. *See also* Potlatch EAW, Appendix 1 at 3 (Appellants' Appendix at A-182, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)). Although Potlatch's Resource Availability Study determined that wood for the expansion was available within a 150-mile radius, Potlatch Corporation often procured wood from Canada, Wisconsin, and locations in Minnesota well outside the 150-mile radius from the Cook facility. Potlatch Minnesota Wood Products Division, Cook OSB Plant Expansion, Resource Availability Study, at 14-15 (Respondent's Appendix at A-158-59, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)). Given the dynamic nature of the wood market, only general assumptions are possible regarding where timber harvesting might occur. As Gerald Rose, DNR's Directory of Forestry, testified before the MPCA Citizen's Board when it considered the Potlatch EAW, "wood procurement is very dynamic in the State of Minnesota and an increase in consumption in a given local[e] will spread throughout the state; in other words, if somebody can pay more, the market will determine where the wood will come from." Transcript of MPCA Citizen's Board Meeting, Nov. 28, 1995, at 17 (Respondent's Appendix at A-25, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

132. *Potlatch*, 569 N.W.2d at 214. The EQB's environmental review rules required MPCA to prepare an EAW because the project was predicted to increase the generation of a regulated air pollutant emitted by the expanded Potlatch facility by 100 tons or more per year. *See* MINN. R. 4410.1000, subp. 2 (1999) and MINN. R. 4410.4300, subp. 15.A (1999). For such projects, the EQB rules specify that MPCA is the RGU. MINN. R. 4410.4300, subp. 15.A (1999).

133. *Potlatch*, 569 N.W.2d at 214. The *Potlatch* court made a factual error in stating that MPCA "delegated" its responsibility for evaluating the effects of increased timber harvesting to DNR. *See infra* notes 202-206 and accompanying

MPCA, with DNR's assistance, prepared a thirty-one page EAW and a nineteen-page appendix. The EAW focused on analyzing the effects of the increased wood harvest associated with the Potlatch expansion.[134] In July 1995, as required by the environmental review rules,[135] MPCA solicited public comments on the EAW.[136] MPCA received twenty-seven comments, most addressed to timber harvesting issues, from private citizens, environmental groups, and government agencies.[137] At the request of MPCA, the DNR prepared a thirty-six page response to comments directed at the Potlatch project's effects on the state's forests.[138] MPCA then reviewed all of the information gathered in the EAW process, including the GEIS, to assess whether the Potlatch project had "the potential for significant environmental effects" and required an EIS.[139] On November 28, 1995, the MPCA Citizen's Board voted eight-to-one not to require a project-specific EIS for the Potlatch expansion.[140] Two weeks later, MPCA issued a modified air emissions permit authorizing Potlatch Corporation to construct and operate the expanded Cook facility.[141]

2. Potlatch *in the District Court*

On December 22, 1995, four environmental groups, led by the National Audubon Society, filed a four-count complaint against MPCA in St. Louis County District Court.[142] Count one alleged that MPCA violated MEPA by failing to require an EIS for the Potlatch Cook expansion project.[143] Count two alleged that the Potlatch

text.

134. Potlatch EAW at 2, 5, 20-22 and Appendix at 1-19 (Appellants' Appendix at A-150, A-153, A-168 to A-170, and A-180 to A-198, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

135. MINN. R. 4410.1500 , 4410.1600 (1993).

136. *Potlatch*, 569 N.W.2d at 214; Respondent MPCA's Brief at 3, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391).

137. *Id.*

138. Potlatch EAW Attachment 4, Comments and Responses on Timber Harvest Issues (Appellants' Appendix at A-199 to A-234, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

139. *See* MINN. R. 4410.1700, subp. 1 (1993) ("An EIS shall be ordered for projects that have the potential for significant environmental effects.").

140. *Potlatch*, 569 N.W.2d at 214-15; Respondent MPCA's Brief at 4, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391).

141. *Potlatch*, 569 N.W.2d at 215.

142. *Id.*

143. In particular, count one alleged that MPCA violated MINN. STAT. § 116D.04, subd. 2a, which requires that "[w]here there is a potential for significant

expansion would cause pollution, impairment, or destruction of protected natural resources in Minnesota under MEPA. Count two also maintained that such action and the existence of feasible alternatives violated MEPA.[144] Count three asserted that MPCA violated MEPA by failing to consider adequate protective measures to mitigate the Potlatch expansion's project-specific effects.[145] Count four alleged that the Potlatch expansion would cause pollution, impairment, or destruction of protected natural resources under the Minnesota Environmental Rights Act ("MERA"),[146] thereby violating MERA.[147] Potlatch Corporation intervened, and MPCA and Potlatch then moved to dismiss counts two, three, and four for failure to state a claim upon which relief may be granted.[148] The district court granted the motion to dismiss.[149] The parties then brought cross-motions for summary

environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit," as well as MINN. R. 4410.1700, subp. 2a(A), 7(A), which provide that an RGU must require an EIS if it determines information regarding a project's environmental effect is missing, and sets forth four criteria for determining whether a project has the "potential for significant environmental effects." Complaint at ¶¶ 64-68, Nat'l Audubon Soc'y v. Minn. Pollution Control Agency (Cook County Dist. Ct. 1996) (No. C1-95-602306).

144. *Id.* at ¶¶ 69-72 (citing MINN. STAT. § 116D.04, subd. 4 for the "pollution, impairment, or destruction of protected natural resources" and MINN. STAT. § 116D.04, subd. 6 for the "existence of feasible alternatives").

145. *Id.* at ¶¶ 73-76 (citing MINN. STAT. § 116D.04, subd. 2).

146. *Id.* at ¶ 78 (citing MINN. STAT. § 116B.02, subd. 4, which defines "[p]ollution, impairment or destruction" as "any conduct by any person which violates, or is likely to violate, any environmental quality standard, limitation, rule, order, license, stipulation agreement, or permit . . . or any conduct which materially adversely affects or is likely to materially adversely affect the environment . . . .").

147. *Id.* at ¶ 79 (citing MINN. STAT. § 116B.03, subd. 1, which authorizes "any person residing within the state" to bring a civil action in district court for declaratory or equitable relief against any other person for "the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction . . . .").

148. *Potlatch*, 569 N.W.2d at 215.

149. *Potlatch*, File No. C1-95-602306 (St. Louis County Dist. Ct. Sept. 5, 1996). With respect to count two, the district court held that environmental review did not constitute a "state action" approving a project, and that plaintiffs did not have a cause of action under MEPA, MINN. STAT. § 116D.04, subd. 6 (1994). The district court also dismissed count three, holding that the goals set forth in MEPA, MINN. STAT. § 116D.03, subd. 2 (1994), did not create a cause of action. The district court dismissed count four because MPCA's conduct of environmental review under MEPA did not cause "pollution, impairment, or destruction" of the state's natural resources, and could not give rise to a MERA action under MINN. STAT. § 116B.03 (1994).

judgment on count one, which challenged MPCA's decision not to require an EIS for the Potlatch expansion project.[150]

In support of its motion for summary judgment, MPCA argued that it analyzed whether the Potlatch expansion required a project-specific EIS based upon MEPA's four criteria for determining the "potential for significant environmental effects."[151] In particular, MPCA maintained that the EAW and the GEIS fully addressed the type of environmental effects associated with the Potlatch expansion.[152] MPCA also argued that the environmental effects of the Potlatch expansion were subject to "mitigation by ongoing public regulatory authority" because SFRA required the Forest Resources Council, under the oversight of the DNR, to implement the mitigation measures outlined in the GEIS.[153] The GEIS, MPCA contended, demonstrated that the effects of the Potlatch expansion could be anticipated and controlled "as a result of other available environmental studies."[154] MPCA concluded that, under the "arbitrary and capricious" standard of review, the administrative record provided substantial evidence to support its decision that EAW and the GEIS adequately assessed the effects of increased timber harvesting associated with the Potlatch expansion, and that an EIS for the expansion project alone was unnecessary.[155]

The environmental groups countered that MPCA "systematically excluded adverse agency opinion" from the administrative record, and that MPCA's failure to consider the objections of DNR's Fish and Wildlife Division was arbitrary and capricious.[156] Documents that the environmental groups obtained through the Minnesota Government Data Practices Act[157] revealed that although the DNR's Forestry Division did not believe that the Potlatch expansion warranted a project-specific EIS, the DNR's Fish and Wildlife Division did recommend an EIS for the project.[158]

150. *Potlatch*, 569 N.W.2d at 215.

151. MPCA's Memorandum of Law in Support of Motion for Summary Judgment at 13-21, *Potlatch* (No. C1-95-602306). For the four criteria, *see supra* note 31 and accompanying text.

152. *Id.* at 13-15, referencing MINN. R. 4410.1700, subp. 7(A), (B) (1993).

153. *Id.* at 16-18, referencing MINN. R. 4410.1700, subp. 7(C) (1993).

154. *Id.* at 18-19, referencing MINN. R. 4410.1700, subp. 7(D) (1993).

155. *Id.* at 2-4, 19-21.

156. Plaintiffs' Brief in Support of Motion for Summary Judgment at 17-26, *Potlatch* (No. C1-95-602306) (hereinafter Plaintiffs' Brief).

157. MINN. STAT. ch. 13 (1994).

158. Plaintiffs' Brief at 17-23. Plaintiffs initially sought discovery that included internal DNR Division of Fish and Wildlife documents relating to the Potlatch

Ultimately, the DNR Commissioner resolved the conflict, declared DNR's official position that the Potlatch project did not require an EIS, and did not submit to MPCA the internal Forestry Division documents drafted during the EAW process.[159] The environmental groups argued that (1) the MPCA "arbitrarily cut the DNR Division of Fish and Wildlife out of the [Potlatch EAW] process;"[160] (2) the district court should consider the Fish and Wildlife Division's documents "excluded" from the administrative record;[161] (3) the GEIS mitigation measures relied upon in the Potlatch EAW were voluntary and unimplemented;[162] and (4) the GEIS did not "anticipate" the effects of the Potlatch expansion, and thus could not substitute for a project-specific EIS.[163]

MPCA responded that when it decided a project-specific EIS was unnecessary, the DNR Fish and Wildlife Division documents were not in MPCA's possession, and therefore were not part of the administrative record.[164] Moreover, MPCA contended that it was not arbitrary and capricious for the agency to rely upon DNR's official position on the need for an EIS.[165] Furthermore, the administrative record addressed all of the substantive objections raised in the Fish and Wildlife Division documents.[166] With respect to mitigation, MPCA argued that many of the GEIS mitigation strategies, which the state would implement under SFRA, would be in place before construction of the Potlatch project. It further argued that the GEIS envisioned mitigation could take years or

expansion. MPCA moved for a protective order, which the district court granted. The district court held that discovery was available in challenges to administrative decisions only where "there is a sufficient showing that there have been procedural irregularities in the administrative proceeding or when the administrative record is clearly inadequate," and that plaintiffs failed to demonstrate such irregularities or inadequacy. *Potlatch*, File No. C1-95-602306, at 4 (St. Louis County Dist. Ct. June 14, 1996). MPCA, however, invited the plaintiffs to request the DNR Division of Fish and Wildlife documents under the Government Data Practices Act, and the plaintiffs obtained the documents directly from DNR under the Act. Plaintiffs' Brief at 7-8.

159. MPCA's Memorandum of Law in Support of Motion for Summary Judgment at 5-8, *Potlatch* (No. C1-95-602306).

160. Plaintiffs' Brief at 20.

161. *Id.* at 23-26.

162. *Id.* at 26-35.

163. *Id.* at 35-41.

164. MPCA's Response in Opposition to Plaintiffs' Motion for Summary Judgment at 4-8, *Potlatch* (No. C1-95-602306).

165. *Id.*

166. *Id.* at 8-11.

decades as the forests regenerated.[167] MPCA also asserted that it used the cumulative effects analysis in the GEIS precisely as the GEIS drafters intended.[168] According to MPCA, a project-specific EIS would provide no additional information because it was impossible to predict the exact location of logging associated with the Potlatch project. Moreover, a project-specific EIS would rely upon the same database as the GEIS to predict timber-harvesting effects.[169]

The district court granted MPCA's summary judgment motion, observing that "[p]laintiffs' entire case rests upon the [DNR Fish and Wildlife Division] documents submitted over objection which are outside the administrative record."[170] After spending "considerable time" reviewing the documents, the court concluded that they did not "show some sort of 'record sanitizing' by state agencies in order to achieve a slanted and predictable result."[171] MPCA did not act arbitrarily and capriciously by relying upon DNR's official position, the court held, and "[t]he fact that there was dissent within the DNR from that agency's final decision does not render the decision unlawful."[172] Although the district court did not expressly address the mitigation issue, it opined that given the "million-dollar GEIS was put together" to address the effects of timber harvesting, "[s]till another study . . . with no real way of making it site-specific, seems of little worth[.]"[173] Plaintiffs appealed,[174] correctly noting that the district court did not discuss

167. *Id.* at 21-32.

168. *Id.* at 11-20.

169. *Id.* The primary database for the GEIS was the United States Forest Service's Forest Inventory and Assessment (FIA) plots, a series of 13,536 one-acre forest parcels randomly located throughout the state's forests. *See supra* note 67 and accompanying text. MPCA argued that any EIS for the Potlatch expansion "would require use of the same primary data inputs (i.e., FIA data) and modeling technologies applied in the GEIS," ensuring that "an EIS for the Potlatch expansion project would essentially replicate the work of the GEIS and produce similar, if not identical information on cumulative timber harvesting impacts." MPCA's Response Brief at 18.

170. Findings and Order for Summary Judgment at 1, *Potlatch*, (St. Louis County Dist. Ct. Dec. 30, 1996) (No. C1-95-602306).

171. *Id.*

172. *Id.* at 3.

173. *Id.* at 2.

174. In addition to appealing the district court's order granting MPCA summary judgment on the claim regarding the need for an EIS, the environmental groups appealed the district court's decision to dismiss the claim alleging that MPCA violated MERA. *Potlatch*, 569 N.W.2d at 215. The court of appeals affirmed the district court, holding that "MERA may not be used to seek

the mitigation issue, but incorrectly asserting that the district court "confined its review to the question of whether the MPCA compiled a one-sided and self-serving account of the potential impacts of the proposed expansion."[175]

3. Potlatch *in the Court of Appeals*

On appeal, the parties in *Potlatch* essentially reiterated the arguments made before the district court in the cross-motions for summary judgment. The environmental groups, relying upon their primary argument in the district court, maintained that MPCA excluded the DNR Fish and Wildlife Division's objections to the Potlatch EAW, thereby providing an administrative record that "gave the public and the MPCA Citizens' Board the illusion of consensus."[176] Although appellants' public comments raised the same issues found in the DNR Fish and Wildlife Division documents, the environmental groups claimed that MPCA acted arbitrarily and capriciously by failing to "inform agency decision makers that the DNR, not just the general public, was deeply divided on whether to recommend preparation of an EIS."[177] The environmental groups also claimed that the SFRA mitigation measures were illusory, voluntary, and could not constitute "mitigation by ongoing public regulatory authority" under MEPA.[178] Finally, the environmental groups suggested that MPCA used the GEIS to "evade" project-specific review of the Potlatch expansion; a project-specific EIS would provide "important new information" and afford the state an opportunity to evaluate alternatives to the expansion.[179]

review of an agency's decision not to prepare an EIS, because MEPA is the appropriate avenue for review of such decisions." *Id.* at 219.

175. Statement of the Case of Appellants at 10, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391). Appellants maintained that "[o]n the issue of whether the GEIS supplants the need for project-specific review, the [district court] said nothing." *Id.* In actuality, the district court explicitly stated that given the GEIS, a project-specific EIS on timber harvesting "seems of little worth[.]" Findings and Order for Summary Judgment at 2, *Potlatch*, (St. Louis County Dist. Ct. Dec. 30, 1996) (No. C1-95-602306).

176. Appellants' Brief at 20, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391).

177. *Id.* at 25.

178. *Id.* at 32-39.

179. *Id.* at 39-46. As appellants noted, an EIS requires an examination of alternatives to a proposed action, whereas an EAW does not. *Id.* at 46 (citing MEPA, MINN. STAT. § 116D.04, subd. 2(a) (1994)).

In response, MPCA contended it reasonably relied upon DNR's official comments, and that those comments discussed the issues regarding GEIS modeling and mitigation that the internal Fish and Wildlife Division documents outlined.[180] MPCA also maintained that the EAW identified ten potential environmental effects related to timber harvesting associated with the Potlatch expansion, and outlined specific mitigation measures to address those effects.[181] In addition, MPCA argued that the Minnesota legislature enacted SFRA in response to the GEIS, that SFRA created the Minnesota Forest Resources Council to implement the GEIS mitigation strategies, and that SFRA required DNR to monitor mitigation compliance.[182] According to MPCA, the environmental groups failed to offer databases or modeling technologies superior to those in the GEIS.[183] MEPA expressly requires the use of generic EIS information in project-specific environmental review, MPCA argued, and does not require an RGU "to conduct studies endlessly."[184]

In a thoughtful opinion, the court of appeals affirmed the district court. Recognizing that DNR was "deeply divided on the issue of whether to recommend the preparation of an EIS," the court nevertheless found that MPCA acted appropriately in relying "on the official opinion of the DNR submitted during the public comment period."[185] The court stated that requiring an administrative agency to "look beyond the official comment issued by another commenting agency" would "require a reviewing agency to interject itself, we think improperly, into the internal debate of the commenting agency."[186] The court also found that because the EAW "target[ed] specific mitigation measures that have been or

180. Respondent MPCA's Brief at 34-39, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391).

181. *Id.* at 22-31.

182. *Id.* at 32-34.

183. *Id.* at 21. As it argued in the district court, MPCA maintained that a project-specific EIS for the Potlatch expansion would analyze the same United States Forest Service FIA plots that the GEIS relied upon, and that "[t]here is simply no evidence that a better database or modeling technology is available to study the effects of increased timber harvesting from Potlatch's expansion." *Id.*

184. *Id.* at 12-13 (citing MINN. R. 4410.3800, subp. 8 (1995)) (requiring project-specific environmental review to use the information and recommendation in a generic EIS if EQB determines that the generic EIS "remains adequate at the time the specific project is subject to review").

185. *Potlatch*, 569 N.W.2d at 216.

186. *Id.*

will soon be implemented that address the environmental impacts associated with the Potlatch expansion,"[187] the mitigation measures were more than "mere vague statements of good intentions."[188] In addition, the court found that it was "questionable whether a project-specific EIS would provide information substantially different from or better than that contained in the GEIS."[189] Ownership of the state's forests "is divided among a wide variety of groups," and the "harvest of any timber stand depends on the discretion of the specific landowner."[190] As a result, the court opined, "there does not appear to be any meaningful way to identify the specific 7,600 acres of timberland likely to be harvested from the 6,297,000 acres available for commercial timber harvesting in the four-county Potlatch wood procurement zone."[191] According to the court, the EQB prepared the GEIS precisely because the effects of timber harvesting "could not be adequately analyzed on a case-by-case, project-specific basis."[192] The court concluded that MPCA used the GEIS properly, and the Minnesota Supreme Court denied the environmental groups' petition for review of the court of appeals' decision.

4. Evaluating the Potlatch *Decision*

In *Potlatch*, the court of appeals offered a rational and well-considered discussion of the challenge to MPCA's use of the GEIS. The court found that substantial evidence in the administrative record, which included the Potlatch EAW and the GEIS by reference, supported MPCA's decision not to require a project-specific EIS. As a result, the court properly held that MPCA's actions were reasonable and not arbitrary or capricious.

There are, however, three significant flaws in the *Potlatch* opinion. The first is the court's declaration that "it is *questionable* whether a project-specific EIS would provide information substantially different from or better than that contained in the GEIS."[193] Although the court's conclusion was correct, use of the

187. *Id.* at 217.
188. *Id.* (citing Iron Rangers for Responsible Ridge Action v. Iron Range Res., 531 N.W.2d 874, 881 (Minn. Ct. App. 1995) and Audubon Soc'y v. Dailey, 977 F.2d 428, 436 (8th Cir. 1992) (internal quotation marks omitted)).
189. *Potlatch*, 569 N.W.2d at 217.
190. *Id.* at 218.
191. *Id.*
192. *Id.* at 217.
193. *Id.* (emphasis added).

term "questionable" does not accurately reflect the administrative record. As the DNR's official comments on the Potlatch expansion explained, "[i]t is doubtful to expect that a site-specific EIS for this project would produce substantially more insightful information on cumulative timber and non-timber impacts and mitigations than is contained in the GEIS."[194] This was true in part because, as the court recognized, it was impossible to identify the specific stands of timber to be harvested as a result of the Potlatch expansion.[195] More significant, however, was the DNR's conclusion that the GEIS "provides an analysis of potential environmental effects and anticipates applicable mitigations associated with harvest levels encompassing the proposed Potlatch expansion."[196] In analyzing the potential effects of timber harvesting and measures to mitigate those effects, the GEIS evaluated the same information that the MPCA and DNR would consider in conducting a project-specific timber harvesting EIS for the Potlatch expansion.[197] The administrative record, therefore, established that it was much more than "questionable" whether an EIS would have provided different or better information than the GEIS. Rather, the administrative record reflected that an EIS on timber harvesting associated with the Potlatch expansion would have duplicated the work and the conclusions of the four-year, $875,000 GEIS.

The second flaw in the *Potlatch* opinion is the court's failure to analyze the "ongoing regulatory authority" component of mitigation. According to the court, MPCA considered the extent to which the environmental effects of the Potlatch expansion were subject to mitigation in determining whether the Potlatch project had the potential for significant environmental effects. However, the court did not evaluate whether the environmental effects were subject to mitigation "by ongoing public regulatory authority," as set forth in the EQB rules. In determining whether a project has a potential for significant environmental effects, a governmental entity may consider "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority[.]"[198] MPCA argued that it complied with the rules

194. DNR Comment Letter (Respondent's Appendix at A-1 to A-6, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

195. *Potlatch*, 569 N.W.2d at 218.

196. DNR Comment Letter (Respondent's Appendix at A-1 to A-6, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)).

197. *See supra* notes 169, 183 and accompanying texts.

198. MINN. R. 4410.1700, subp. 7(C) (2001). *See also supra* note 31 and

because it considered such mitigation. According to MPCA, SFRA required the DNR—a state agency with ongoing regulatory authority—to monitor the level of compliance with and efficacy of the GEIS mitigation strategies.[199] The environmental groups responded that under SFRA, the timber harvesting and forest management guidelines are voluntary, and that voluntary guidelines cannot constitute mitigation by ongoing public regulatory authority.[200] Although the parties briefed the issue in detail, the *Potlatch* opinion did not discuss the matter. By remaining silent, the court of appeals squandered an opportunity to offer meaningful guidance regarding the use of the GEIS and presaged a conflict that would resurface nearly five years later.[201]

A third flaw in the *Potlatch* opinion is a factual error. In discussing the environmental review process for the Potlatch expansion, the court stated that "[b]ecause the MPCA has no expertise in forestry and wildlife management, it delegated its responsibility for evaluating the impact of increased timber harvesting to the Minnesota Department of Natural Resources (DNR)."[202] This language appears virtually verbatim in the environmental groups' appellate brief.[203] Use of the term "delegation" to describe MPCA's actions and DNR's involvement is factually incorrect. MPCA did not delegate responsibility for making an EIS decision to DNR. Rather, as MPCA's agenda item and issue statement presenting the EAW to the MPCA Citizen's Board makes clear, "[D]uring the preparation of the EAW and the responses to comments, the MPCA staff *sought the assistance from the DNR* to review information submitted by Potlatch regarding timber issues and to prepare responses to comments on these issues."[204]

accompanying text. Note that the EQB rules only require an RGU to *consider* whether environmental effects are subject to mitigation by ongoing regulatory authority in determining if a project has the potential for significant environmental effects. The rules do not require that measures be subject to "ongoing regulatory authority" to constitute "mitigation" under MEPA.

199. *See supra* notes 181-82 and accompanying text.

200. *See supra* note 179 and accompanying text.

201. *See infra* Parts III. and IV.

202. *Potlatch*, 569 N.W.2d at 214.

203. *See* Appellants' Brief at 4, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391) ("[t]he MPCA, although the RGU for the proposed expansion, has no expertise in forestry and wildlife management, and therefore delegated responsibility for evaluating the environmental effects of increased timber harvesting to the Minnesota Department of Natural Resources.").

204. MPCA Environmental Planning and Review Office, Potlatch Oriented Strand Board Plant Expansion Issue Statement, Nov. 28, 1995 at 3 (Appellants'

MPCA staff "gratefully acknowledge[d]" the "invaluable assistance from the DNR staff members involved in this effort."[205] Rather than characterizing MPCA's decision to involve DNR as "delegation" to a more knowledgeable agency, the *Potlatch* court and the environmental groups should have praised MPCA staff for seeking DNR's assistance. In fact, the EQB regulations implementing MEPA specifically allow such an interdisciplinary approach in EIS preparation.[206] Applying the same interdisciplinary principle to an EAW constitutes good government, not "delegation."

The *Potlatch* case has also been the subject of some unwarranted criticism. One commentator recently criticized *Potlatch* and *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*[207] for the courts' alleged unwillingness to conduct a thorough review of administrative agency compliance with MEPA's procedural requirements.[208] According to the commentator, *Potlatch* and *Iron Rangers* applied "the deferential arbitrary and capricious standard" rather than the standard of review under the Minnesota Administrative Procedure Act ("MAPA"),[209] resulting in the courts' failure to "make the distinct inquiry of whether the agency followed proper procedure in making its determination."[210] To prevent future purported lapses, the commentator advocates that Minnesota courts conduct an invasive procedural and substantive review of a governmental entity's decision on the need for an EIS.[211] The alleged justification for this novel standard of review arises from MEPA's broad policy goals, which the commentator suggests establish substantive standards.[212]

Appendix at A-238, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)) (emphasis added).

205. *Id.*

206. *See* MINN. R. 4410.2200 (1995) (stating that "[a]n EIS shall be prepared using an interdisciplinary approach[,]" that an RGU "may request that another governmental unit help in the completion of the EIS[,]" and that another governmental unit "shall assist in the preparation of environmental documents on any project for which it has special expertise or access to information.").

207. 531 N.W.2d 874 (Minn. Ct. App. 1995).

208. 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, 1006 (2000) [hereinafter Bettison].

209. MINN. STAT. § 14.69 (2001).

210. Bettison, *supra* note 208, at 971.

211. *Id.* at 995-1006.

212. *See id.* at 999-1000 (stating that "[t]he substantive elements of MEPA can be found principally in MEPA's language directing state government to 'use all practicable means . . . to create and maintain conditions under which human

A "procedural and substantive" standard of review for negative EIS declarations is rooted in a fundamental misapprehension of MAPA and MEPA. Contrary to the commentator's assertions, there is no distinction between the "deferential arbitrary and capricious standard" and the standard of review for agency actions under MAPA. Indeed, MAPA expressly provides that Minnesota courts may reverse or modify an agency action if that action is "[m]ade upon unlawful procedure . . . [u]nsupported by substantial evidence in view of the entire record as submitted . . . or [a]rbitrary and capricious."[213] Advocating an "in-depth evaluation of the

beings and nature can exist in productive harmony . . . ") (citing MINN. STAT. § 116D.02 (2001)). Bettison errs in concluding that MEPA's policy goals establish a "substantive element." MEPA Section 116D.02 contains language nearly identical to the policy goals of NEPA Section 101, 42 U.S.C. § 4331 (2002), which Bettison acknowledges does not establish enforceable standards of conduct and does not create a cause of action. Bettison, *supra* note 208, at 969 n.8, and 999-1000 n.181. Similarly, Minnesota courts have not transformed MEPA's broad policy goals into substantive standards. *See supra* note 20.

213. MINN. STAT. § 14.69(c), (e)-(f) (2000). As Bettison notes, the federal Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), establishes a standard of judicial review that is "essentially identical" to MAPA. Bettison, *supra* note 208, at 978, n.51. In reviewing agency decisions on the need for an EIS under NEPA, federal courts apply the APA's arbitrary and capricious standard, not an anomalous "procedural and substantive" review. *See, e.g.,* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 375-78 (1989) (noting that the APA's arbitrary and capricious standard is narrow, and that an agency must have the discretion to rely on the "reasonable opinions of its own qualified experts" even if a court might not make the same judgment); Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 178-79 (3d Cir. 2000) (citing *Marsh* and applying the arbitrary and capricious standard in upholding an agency's decision under MEPA to forego preparation of an EIS after preparing an Environmental Assessment); Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (if an agency has taken a "hard look" at the possible environmental effects of a proposed action, its decision on the need for an EIS is "a substantive question left to the informed discretion of the agency proposing the action" and is subject to review under the arbitrary and capricious standard); Sierra Club v. United States Forest Serv., 46 F.3d 835, 838 (8th Cir. 1995) (applying the arbitrary and capricious standard in reviewing an agency's EIS decision under MEPA to determine whether the agency "considered relevant factors or made a clear error of judgment"); Audubon Soc'y of Cent. Ark. v. Dailey, 977 F.2d 428, 434 (8th Cir. 1992) (observing that an agency's decision whether to conduct an EIS "involves mixed questions of fact and law," and holding that federal courts "review[] agency treatment of such questions under the deferential arbitrary and capricious standard"); North Carolina v. Fed. Aviation Admin., 957 F.2d 1125, 1128 (4th Cir. 1992) (in applying the arbitrary and capricious standard to an agency's EIS decision, "a court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment"); Sierra Club v. United States Dept. of Transp., 753 F.2d 120, 126 (D.C. Cir. 1985) (an agency has "broad discretion" in determining whether an EIS is necessary, "and the decision is reviewable only if it

agency's actions [under MEPA]" by employing a standard of review that begins "as a procedural inquiry [and] ends as a substantive one"[214] in order to "reestablish the 'action-forcing' nature of MEPA"[215] is simply a clarion call for judicial activism. Minnesota courts are capable of ensuring strict adherence to MEPA's procedures without employing a standard of review that invites the court to substitute its judgment for that of the RGU. If an RGU genuinely fails to comply with MEPA's procedures,[216] then its

was arbitrary, capricious or an abuse of discretion"). *See also* Daniel R. Mandelker, NEPA LAW & LITIGATION §§ 8.6-8.7 (2d ed. 2002) (discussing arbitrary and capricious standard of review under NEPA). Federal courts, therefore, defer to "the informed discretion of responsible federal agencies" in examining environmental review issues within an agency's "technical expertise." *Marsh*, 490 U.S. at 377 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)). A court may not "substitute its own judgment for that of the agency," *Kleppe*, 427 U.S. at 410 n. 21, or reject on substantive grounds an agency's decision to proceed with a project after environmental review is complete. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227-28 (1980) (per curiam). *See also Hoffman*, 132 F.3d at 14 (stating that "the ultimate scope of judicial review" of an agency's decision on the need for an EIS is "narrow," and that "[t]he judiciary must not interject itself into an area where the choice of action to be taken is one confided by Congress to the executive branch"); North Carolina v. Fed. Aviation Admin., 957 F.2d at 1128 (observing that "the ultimate standard of review [of an agency's EIS decision] is a narrow one," and that "the court is not empowered to substitute its judgment for that of the agency").

214. Bettison, *supra* note 208, at 1000-01.

215. *Id.* at 996. MEPA is not "action-forcing" and does not analyze the substantive merits of a proposed project. Rather, environmental review under MEPA is an information-gathering procedure designed to evaluate the environmental consequences of a proposal that requires "major governmental action." *See supra* note 21 and accompanying text. *See also* Coon Creek Watershed Dist. v. State Envtl. Quality Bd., 315 N.W.2d 604, 605 (Minn. 1982) (noting that an EIS is an informational document that examines environmental consequences, explores alternatives, and discusses mitigation measures); *Potlatch*, 569 N.W.2d at 218 ("[e]nvironmental review is a process of information gathering and analysis").

216. Bettison asserts that MPCA in *Potlatch* "failed to comply with the procedures [of MEPA] on their face." Bettison, *supra* note 208 at 1005. In actuality, MPCA acted appropriately in relying upon the official opinion of DNR, the agency with expertise in forestry and wildlife management. *See supra* note 185 and accompanying text. DNR determined that a project-specific EIS for the Potlatch expansion would duplicate the GEIS by employing the same information database and the same modeling assumptions to assess the effects of timber harvesting. *See supra* notes 194-95 and accompanying text. Note also that in *Potlatch*, the parties agreed that the court of appeals should determine whether MPCA's decision not to conduct an EIS was arbitrary and capricious, or was unsupported by substantial evidence in the administrative record. Appellants' Brief at 14-15, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391); Respondent MPCA's Brief at 10-12, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391).

actions are arbitrary and capricious under MAPA and will be set aside.[217]

B. The EQB Considers the Status of the Timber Harvesting GEIS

As the parties were litigating the *Potlatch* case, Boise Cascade Corporation approached MPCA with a proposal to expand its Kraft pulp and paper mill in International Falls, Minnesota.[218] Boise Cascade wanted to expand the facility to increase wood consumption by 100,000 cords annually, to a total of 700,000 cords per year.[219] As with the Potlatch expansion, the EQB rules required an EAW for the Boise Cascade project as a result of increased air emissions.[220] MPCA, the governmental entity that the EQB rules designate as the RGU for projects increasing air emissions by more than 100 tons per year, again turned to DNR for assistance in evaluating the environmental effects of increased timber harvesting

217. *See, e.g.,* Trout Unlimited v. Minn. Dept. of Agric., 528 N.W.2d 903, 909 (Minn. Ct. App. 1995) (holding that the Department of Agriculture's decision not to perform an EIS was arbitrary and capricious, where the Department of Agriculture ignored DNR's, MPCA's, and the Department of Health's recommendations to conduct an EIS, failed to analyze potential environmental effects, and assumed that monitoring or permitting would eliminate any significant effects). *Trout Unlimited* considered whether the Department of Agriculture's decision on the need for an EIS complied with MEPA's procedural dictates, was supported by substantial evidence in the administrative record, and was arbitrary and capricious. *Id.* at 907-09. In *Boise Cascade*, 644 N.W.2d at 464-65, the Minnesota Supreme Court confirmed that determining the need for an EIS under MEPA "is primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented," and that Minnesota courts should "review the decision not to prepare an EIS for whether it was unsupported by substantial evidence in view of the entire record as submitted or was arbitrary and capricious." *See infra* Part IV.B.

218. Boise Cascade began the information gathering process for an EAW regarding the expansion of its International Falls mill in September 1995. Intervenor-Respondent Boise Cascade's Brief at 4, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96).

219. MPCA, Environmental Assessment Worksheet for Boise Cascade Pulp Mill Efficiency Improvement and Boiler No. 2 Projects, International Falls, Minnesota, at 20 (Feb. 17, 1999) (Respondent MCEA's Supreme Court Appendix at R-58, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)) [hereinafter Boise EAW].

220. *See* Boise EAW, *supra* note 219, at 1 (Respondent MCEA's Supreme Court Appendix at R-39) *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)) (noting that MPCA must prepare an EAW for the project under MINN. R. 4410.4300, subp. 15A, because the project was predicted to increase generation of a regulated air pollutant emitted by the expanded facility by 100 tons or more per year). *See also supra* note 132 and accompanying text (discussing the Potlatch expansion).

associated with the Boise Cascade expansion.[221] DNR concluded that the increased harvest "is of the type and extent envisioned in the GEIS analysis," and that it was "reasonable to infer that the environmental consequences of this project, in terms of timber harvest, do not differ substantially from the conclusions reached in the GEIS."[222] Significantly, however, DNR stated that the GEIS did not evaluate "landscape-level habitat fragmentation effects,"[223] and that "further research is necessary to identify how timber harvest and forest fragmentation cumulatively effects the landscape-scale distribution of habitat types over time."[224] MPCA, with DNR's assistance, ultimately completed a 165-page EAW in February 1999 and circulated the document for public comment.[225]

During the public comment period, MPCA received twenty-two comment letters.[226] The most significant was a letter from the Minnesota Center for Environmental Advocacy ("MCEA"), which stated that the EAW had a "fundamental flaw."[227] MCEA noted that the EQB rules allow "project-specific environmental review" to use the information in a generic EIS "if the EQB determines that the generic EIS remains adequate at the time the specific project is subject to review."[228] The environmental review rules, MCEA correctly observed, require the EQB to determine that a generic EIS is adequate for use in project-specific environmental review.

221. Boise EAW, *supra* note 219, at Appendix B, BCC International Falls Kraft Pulp & Paper Mill Improvement Project, DNR Project Evaluation (Respondent MCEA's Supreme Court Appendix at R-124 to R-137, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

222. Boise EAW, *supra* note 219, at Appendix B, at 14 (Respondent MCEA's Supreme Court Appendix at R-137, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

223. *Id.* *See supra* note 102 and accompanying text (discussing "landscape-level" and "site-level" effects).

224. Boise EAW, *supra* note 219, at Appendix B, at 14 (Respondent MCEA's Supreme Court Appendix at R-137, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

225. MPCA North District Operations and Planning Section, Issue Statement, Boise Cascade Efficiency Improvement Project, Feb. 22, 2000 at 2 (Respondent MCEA's Supreme Court Appendix at R-196, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

226. *Id.*

227. Letter from James L. Erkel, Attorney and Forest Project Director, Minnesota Center for Environmental Advocacy ("MCEA"), to Craig Affeldt, Project Manager, MPCA 1 (Apr. 7, 1999) (Respondent MCEA's Supreme Court Appendix at R-188, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

228. *Id.* at 2 (Respondent MCEA's Supreme Court Appendix at R-189, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)), citing MINN. R. 4410.3800, subp. 8 (1999).

MPCA and DNR could not rely on the GEIS in evaluating the Boise Cascade project, MCEA maintained, because "[t]he EAW contains no indication that EQB reached a determination that the [now five year old] GEIS remains adequate for use in regard to assessing the potential for significant environmental effects of the production expansion at Boise Cascade's mill."[229]

MCEA's comment precipitated an MPCA inquiry to the EQB regarding the ability to rely upon the GEIS in reviewing the Boise Cascade project.[230] The EQB responded that the environmental review rules prohibited MPCA's reliance on the GEIS until the EQB determined that the study remained adequate.[231] As a result, the EQB would make an adequacy determination by following its normal procedures—it would accept written and oral comments at regularly scheduled EQB meetings.[232] In making the determination, the EQB would evaluate whether there was "substantial new information or new circumstances" since completion of the GEIS in April 1994 that "may significantly affect the potential environmental effects or the availability of prudent and feasible alternatives with lesser environmental effects."[233]

The EQB accepted written comments regarding the continued adequacy of the GEIS and conducted a public meeting at which it received oral comments.[234] Persons challenging the continued adequacy of the GEIS raised three issues. First, they criticized the analytical model that the GEIS used to simulate timber harvests, arguing that it overestimated tree growth and underestimated environmental effects.[235] Second, they maintained that the GEIS employed assumptions regarding forest management and mitigation that in practice had not been implemented.[236] Third,

229. *Id.*

230. EQB Proposed Findings of Fact and Conclusions of Law, In re Determination Whether the Timber Harvesting GIES Remains Adequate, Dec. 20, 1999, at 2 (Respondent MCEA's Supreme Court Appendix at R-303, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)) [hereinafter EQB GEIS Findings].

231. *Id.*

232. *Id.*

233. *Id.* at 2-3 (Respondent MCEA's Supreme Court Appendix at R-303 to R-304, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)) (citing MINN. R. 4410.3000, subp. 3.A (1999)).

234. EQB GEIS Findings, *supra* note 230, at 3 (Respondent MCEA's Supreme Court Appendix at R-304, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

235. *Id.*

236. *Id.*

they asserted that in 1995 the GEIS did not consider landscape-level effects,[237] even though such an analysis was possible as a result of new timber harvest models.[238]

Persons supporting the continued adequacy of the GEIS noted that criticisms of the GEIS models did not constitute "substantial new information;" the critique simply repeated earlier arguments made prior to the EQB's finding that the GEIS was adequate in April 1994.[239] The GEIS supporters also disputed that too few mitigation measures were in place, asserting that the industry made "extensive" changes in timber harvesting techniques and equipment since 1994.[240] Regarding landscape-level effects, they opined that the GEIS included landscape-level analysis and geographical information even though it did not use the latest models.[241]

After weighing the arguments, the EQB in December 1999 concluded that the GEIS was "no longer as accurate as it was when it was completed," but was "still accurate enough if used, interpreted, and qualified properly in project-specific environmental review to adequately inform decision makers."[242] The EQB declared that objections regarding the GEIS tree growth model did not constitute substantial new information, because EQB considered and dismissed the same argument in determining that the GEIS was adequate in 1994.[243] In addition, the EQB found that the existence of new timber harvesting models did not constitute substantial new information, because there was no new data to include in the models.[244] With respect to mitigation, the

237. *See supra* note 223 and accompanying text (discussing "landscape-level habitat fragmentation effects").

238. EQB GEIS Findings, *supra* note 230, at 3 (Respondent MCEA's Supreme Court Appendix at R-304, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

239. *Id.* at 4 (Respondent MCEA's Supreme Court Appendix at R-305, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

240. *Id.* at 3 (Respondent MCEA's Supreme Court Appendix at R-304, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

241. *Id.* at 4 (Respondent MCEA's Supreme Court Appendix at R-304, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

242. *Id.* at 5 (Respondent MCEA's Supreme Court Appendix at R-306, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

243. *Id.* at 4 (Respondent MCEA's Supreme Court Appendix at R-305, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

244. *Id.* The EQB found that the GEIS used the 1990 FIA forest inventory database, and that the FIA database had not been updated since 1990. DNR and the United States Forest Service began updating the FIA database in 1999, and

EQB determined that the GEIS evaluated the consequences of failing to implement mitigation; MPCA and DNR adjust that information as appropriate in project-specific environmental review.[245] Finally, EQB stated that new models capable of mapping the simulated results of timber harvesting on a landscape level did not render the GEIS inadequate, because RGUs could employ such models when needed on a case-by-case basis.[246]

Shortly after the EQB determined that the GEIS remained adequate, DNR recommended against an EIS for the Boise Cascade project. According to DNR, the "potential effects of the project itself to natural resources are minor, especially when considering the scale of proposed increase, dispersed nature of related activity, and the factors that govern timber markets in this state."[247] In arriving at its conclusion, DNR relied upon the GEIS and the "ongoing implementation of programmatic mitigations authorized under the Sustainable Forest Resources Act (SFRA)."[248] DNR also prepared a sixty-six page response to the EAW comments that MPCA received on timber harvesting issues, which MPCA attached to the Boise Cascade EAW.[249] Relying upon DNR's recommendation, MPCA issued a negative declaration on the need

would complete the update for the entire state in 2003. According to EQB, "[u]ntil the new FIA data are available, any forestry modeling similar to what was done in the GEIS will be based on the 1990 data." *Id.* Although EQB could use the 1990 FIA in the newer models and obtain results "likely [to] be more accurate than those contained in the GEIS," EQB found that such results "would be inferior to those obtained by waiting until the new FIA data are available." *Id.* In addition, EQB found that "[i]f the GEIS analysis were done today with new models, it would need to be updated again in 2003 because the new FIA inventory will constitute substantial new information." *Id.* (Respondent MCEA's Supreme Court Appendix at R-305, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

245. *Id.* at 4-5 (Respondent MCEA's Supreme Court Appendix at R-305 to R-306, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

246. *Id.* at 5 (Respondent MCEA's Supreme Court Appendix at R-306, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

247. Letter from Thomas W. Balcom, Supervisor, Environmental Review and Assistance Unit, DNR, to Beth Lockwood, Supervisor, North District Operations and Planning, MPCA 2, Jan. 24, 2000 (Supreme Court Appendix of Appellants MPCA and Boise Cascade Corp. at A73, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

248. *Id.*

249. DNR, Comments and Responses on Timber Harvest Issues, Proposed Boise Cascade Corporation International Falls Mill Efficiency Improvement Project EAW, Jan. 24, 2000 (Supreme Court Appendix of Appellants MPCA and Boise Cascade Corp. at A75-A143, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

for a project-specific EIS.[250]

C. *The* Boise Cascade *District Court Opinion*

On March 22, 2000, MCEA filed a complaint against MPCA in Koochiching County District Court. The complaint alleged that MPCA's decision not to prepare an EIS for the Boise Cascade project violated MEPA.[251] Boise Cascade Corporation intervened, and the parties filed cross-motions for summary judgment.[252]

In support of its summary judgment motions and in opposition to MCEA's, MPCA advanced many of the same arguments that it relied upon in *Potlatch*. MPCA urged the district court to "carefully review" the *Potlatch* decision, "because the facts and issues concerned timber harvesting effects that closely parallel those pending in th[e] [*Boise Cascade*] case."[253] During the course of environmental review, MPCA argued, it appropriately considered the four criteria in the EQB rules for determining the "potential for significant environmental effects." MPCA also maintained that it considered the type and extent of the Boise proposal's effects, and relied upon DNR's conclusion that the potential effects of the project were minor in the area where Boise Cascade would secure additional timber.[254] Relying upon the extensive discussion of cumulative timber harvesting effects in the GEIS was appropriate, MPCA claimed, precisely because project-specific review of such effects was impossible.[255] MPCA also argued that other environmental studies conducted under SFRA would "anticipate and control" the environmental effects of timber harvesting.[256] Finally, and most significantly, MPCA asserted that the cumulative effects of timber harvesting were subject to mitigation established by SFRA.[257] To implement the GEIS

250. MPCA Findings of Fact and Conclusions, In re Decision on the Need for an EIS for the Proposed Boise Cascade Pulp and Paper Mill Efficiency Improvement Project, Feb. 22, 2000 (Respondent MCEA's Supreme Court Appendix at R-201 to R-213, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)) [hereinafter MPCA Boise Cascade EAW Findings].

251. *Boise Cascade*, 644 N.W.2d at 462.

252. *Id.*

253. MPCA's Brief in Support of Motion for Summary Judgment at 27, *Boise Cascade* (No. 36-C3-00-000173).

254. *Id.* at 34-35.

255. *Id.* at 29-33.

256. *Id.* at 38-42.

257. *Id.* at 35-38.

mitigation measures, the legislature enacted SFRA and created the Forest Resources Council. The EAW identified the mitigation measures set forth in the GEIS and adopted by the Council, as well as the implementation status of timber harvesting mitigation. MPCA concluded that there was "substantial evidence in the record . . . that the Council, the DNR, and others are carrying out legislative mandates to implement the mitigation measures."[258]

Echoing its arguments in *Potlatch*, MCEA responded that the GEIS had a "statewide and generic focus" that was inappropriate for analyzing the project-specific effects of the Boise Cascade expansion.[259] MCEA also argued that the GEIS model assumptions did not accurately reflect forest management policies and practices in place when MPCA reviewed the Boise Cascade project.[260] The *Potlatch* case was distinguishable, according to MCEA, because the mitigation measures relied upon by the court of appeals "have not been fully implemented in the field."[261] MCEA asserted that MPCA's reliance upon SFRA was inappropriate because the statute did not "supersede MEPA," and because the Minnesota Forest Resources Council did not provide "ongoing regulatory authority" sufficient to mitigate the environmental effects of increased timber harvesting associated with the Boise Cascade project.[262] According to MCEA, the Council made policy only, and had no rulemaking, permitting, or enforcement authority. As a result, MCEA concluded that there was no reason to assume the Council's guidelines would reflect the GEIS mitigation measures, and no mechanism to determine the extent of the guidelines' implementation.[263]

The district court granted MPCA's motion for summary judgment, holding that MPCA considered the four factors set forth in EQB's rules in determining that the Boise Cascade proposal did not have a potential for significant environmental effects.[264] The court found that the EAW considered the potential type, extent, and reversibility of any environmental effects of timber harvesting

258. *Id.* at 38.
259. MCEA's Brief in Support of Motion for Summary Judgment at 20, *Boise Cascade* (No. 36-C3-00-000173).
260. *Id.* at 22-25.
261. *Id.* at 25.
262. *Id.* at 26-27.
263. *Id.* at 27.
264. *Boise Cascade*, File No. 36-C3-00-000173 (Koochiching County Dist. Ct. Nov. 15, 2000).

likely to result from the Boise Cascade project. "MPCA analyzed an enormous array of potential environmental impacts" relating to the project, according to the court, and "devoted enormous attention to the single issue—timber harvesting—contested by MCEA."[265] In addition, the court held that MPCA considered the cumulative potential effects of related or anticipated future projects, and "used the information in the GEIS exactly as it is required to be used under applicable rules."[266] MCEA's objections to MPCA's use of the GEIS, the court opined, were identical to the comments MCEA submitted to the EQB on the continued adequacy of the GEIS. The EQB considered the criticisms but determined that the GEIS remained adequate for MPCA's use in evaluating the Boise Cascade project. Because MCEA failed to appeal the EQB's determination, the court found the critique of the GEIS untimely.[267] Even assuming MCEA's attack on the GEIS was timely, the court held that the arguments did not establish that MPCA failed to consider the Boise Cascade project's cumulative potential effects.[268]

Regarding "mitigation by ongoing public regulatory authority," the court first noted that proposed mitigation measures must be "more than mere vague statements of good intentions."[269] Under Minnesota law, MPCA could base its determination that the Boise Cascade project did not have the potential for significant environmental effect on mitigation measures that kept the effects below a significance level.[270] The court found that it was not arbitrary and capricious for MPCA to rely upon progress in implementing mitigation under SFRA to address any potential cumulative effects of timber harvesting identified in the GEIS.[271] Recognizing that the mitigation guidelines implemented under SFRA are voluntary, the court nonetheless held that SFRA constituted "an ongoing pubic regulatory authority" because "the Legislature intended the [Minnesota Forest Resources Council] to be the means by which to accomplish the mitigation recommended in the GEIS."[272] SFRA ensures that "DNR, an agency with ongoing regulatory authority will indeed monitor both the level of

265. *Id.* at 9.
266. *Id.*
267. *Id.* at 10.
268. *Id.*
269. *Id.* at 11 (citing *Iron Rangers*, 531 N.W.2d at 881).
270. *Id.*
271. *Id.* at 11-12.
272. *Id.* at 13.

compliance and the effectiveness of mitigation strategies."[273] The court concluded that MCPA acted reasonably, that the decision against an EIS was not arbitrary and capricious, and that substantial evidence in the administrative record supported MPCA's judgment on the Boise Cascade project.

IV. THE TIMBER HARVESTING GEIS INEXPLICABLY IGNORED—*BOISE CASCADE* IN THE COURT OF APPEALS

A. Arguments of the Parties

MCEA appealed the district court's decision in *Boise Cascade*, seeking reversal on three broad grounds: (1) that MPCA improperly relied upon the GEIS; (2) that the timber harvesting effects of the Boise project would not be addressed through "ongoing public regulatory authority"; and (3) that the recommended GEIS mitigation measures had not been adopted.[274] In particular, MCEA alleged that the Forest Resources Council's site-level timber management guidelines differed from the mitigation measures assumed in the GEIS.[275] In addition, MCEA contended that SFRA's programs did not constitute "ongoing public regulatory authority" sufficient to obviate the need for a project-specific EIS on timber harvesting.[276] Finally, MCEA maintained that the district court erred in failing to identify the specific mitigation measures in place and the efficacy of those measures in addressing the potential environmental effects of the Boise project.[277]

MPCA countered that DNR, upon whose expertise MPCA relied in determining that an EIS for the Boise project was unnecessary, considered the specific effects of the project in the context of other ongoing timber harvesting.[278] Regarding mitigation by ongoing public regulatory authority, MPCA argued

273. *Id.* at 14.

274. Appellant MCEA's Statement of the Case at 6-7, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App. 2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002).

275. MCEA's Brief at 21-26, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App. 2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002).

276. *Id.* at 35-41.

277. *Id.* at 30-35.

278. MPCA's Brief at 19-29, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App. 2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002).

that DNR, Boise Cascade Corporation, and other public and private forest owners were carrying out the Forest Resources Council's management guidelines, and that SFRA required DNR and the Council to monitor implementation of the guidelines.[279] Accordingly, MPCA maintained that it was reasonable for the agency to rely upon the guidelines to mitigate the effects of timber harvesting associated with the Boise project. MPCA also contended that Appendix E to the Boise EAW established that federal, state, and local governments would apply the Forest Resources Council's guidelines to the majority of land that would provide timber for the Boise project.[280]

B. The Boise Cascade *Court of Appeals Opinion*

The court of appeals reversed the district court, holding that the record did not "adequately support" MPCA's decision that "the environmental impact of the Boise modification will not be such as to require an EIS."[281] After declaring that the proper standard of review was whether MPCA's decision was unreasonable, arbitrary, or capricious,[282] the court noted that an EAW is a document designed to determine whether a project requires an EIS.[283] The court then recited the four factors that MPCA must consider in determining whether the Boise project had the potential for significant environmental effects such that an EIS was necessary.[284] Upon considering the four factors, MPCA must support its decision on the need for an EIS with substantial evidence in the administrative record. "Substantial evidence," the court explained, is "relevant evidence considered in its entirety that is more than some evidence or a scintilla of evidence,"[285] and is of a quality such that "a reasonable mind might accept as adequate to support a conclusion."[286]

Embarking on its substantive analysis, the court focused on

279. *Id.* at 29-36.
280. *Id.* at 30-32.
281. *Boise Cascade*, 632 N.W.2d 230, 232-33 (Minn. Ct. App. 2001), *rev'd*, 644 N.W.2d 457 (Minn. 2002).
282. *Id.* at 234-35.
283. *Id.* at 235, quoting MINN. R. 4410.0200, subp. 24 (1999).
284. *Boise Cascade*, 632 N.W.2d at 235, quoting MINN. R. 4410.1700, subp. 7 (1999).
285. *Boise Cascade*, 632 N.W.2d at 235.
286. *Id.* (quoting White v. Minn. Dep't of Natural Res., 457 N.W.2d 724, 730 (Minn. Ct. App. 1997) (internal quotation marks omitted)).

MCEA's argument that the recommended GEIS mitigation measures had not been adopted. Quoting the familiar standard that "mitigation measures must be more than 'vague statements of good intentions,'"[287] the court observed that "mitigation is an important criterion to consider when determining the potential for significant environmental impacts."[288] As a result, environmental review documents must discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated."[289] The GEIS identified many mitigation strategies to address the environmental effects of timber harvesting, and the court found that the state was implementing the measures "to some extent."[290] However, the court stated that its review of the record revealed most of the measures were still in the planning stages, and the Boise EAW recognized that "[r]esearch beyond the scope of this EAW" was required to address the certain cumulative timber harvesting effects and to "apply the results [of such research] in developing appropriate mitigation strategies."[291] The court opined, therefore, that the efficacy of the mitigation measures for the Boise Cascade project was "questionable" because:

> A great number of the measures remain inchoate and subject only to future monitoring; there are inaccuracies in and omissions from the GEIS that require further research and investigation; some of the conclusions in the GEIS about mitigation are outdated; and none of the mitigation measures is assured because none is mandated to occur.[292]

As in *Trout Unlimited,* where the Minnesota Department of Agriculture, in deciding that an EIS was unnecessary, simply assumed that monitoring or permitting would eliminate any significant environmental effects,[293] the court found "substantially lacking" any assurances "that reasonable mitigation measures will

287. *Boise Cascade*, 632 N.W.2d at 235 (quoting Iron Rangers for Responsible Ridge Action v. Iron Range Res., 531 N.W.2d 874, 881 (Minn. Ct. App. 1995)).

288. *Boise Cascade*, 632 N.W.2d at 235, citing MINN. R. 4410.1700, subp. 7(c) (1999).

289. *Boise Cascade*, 632 N.W.2d at 236, quoting Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotation marks omitted).

290. *Boise Cascade*, 632 N.W.2d at 236.

291. *Id.* (quoting Boise EAW, *supra* note 219).

292. *Boise Cascade*, 632 N.W.2d at 237.

293. 528 N.W.2d 903, 909 (Minn. Ct. App. 1995). *See supra* note 217.

be in place before the harm is done."[294]

With respect to whether MPCA considered mitigation measures "by ongoing public regulatory authority,"[295] the court stated that the Minnesota legislature enacted SFRA "ostensibly to facilitate the implementation of the GEIS mitigation strategies."[296] However, the court noted that the Minnesota Forest Resources Council—the entity that SFRA created to implement the GEIS—"does not truly perform a regulatory function" because compliance with the guidelines is voluntary.[297] Without assurances that "mitigation measures can be compelled," the court concluded that the potential for significant environmental effects would remain.[298]

Finally, the court distinguished *Potlatch*,[299] rejecting MPCA's argument that the case was the "mirror image"[300] of *Boise Cascade*. "Because we do not have before us the administrative record from [*Potlatch*]," the court opined, "we cannot tell whether or not the two cases are factually mirror images of each other."[301] Nevertheless, the court found that unlike *Potlatch*, where the court of appeals observed that the EAW targeted specific mitigation measures "that have been or will soon be implemented,"[302] the *Boise Cascade* administrative record established that important mitigation measures were not "beyond the guidelines or strategizing stage."[303] In addition, it appeared to the court that "monitoring of the compliance with and effectiveness of mitigation measures is substantially lacking."[304]

C. Evaluating the Court of Appeals Opinion

In reversing the district court, the court of appeals in *Boise Cascade* committed four serious errors. The court improperly substituted its own judgment for that of the Minnesota legislature, wrongly substituted its judgment for that of MPCA, failed to offer a

294. *Boise Cascade*, 632 N.W.2d at 237-38.
295. MINN. R. 4410.1700, subp. 7(c) (1999).
296. *Boise Cascade*, 632 N.W.2d at 237.
297. *Id.*
298. *Id.*
299. 569 N.W.2d 211 (Minn. Ct. App. 1997).
300. *Boise Cascade*, 632 N.W.2d at 237.
301. *Id.*
302. *Id.* (quoting *Potlatch*, 569 N.W.2d at 217 (internal quotation marks omitted)).
303. *Boise Cascade*, 632 N.W.2d at 237.
304. *Id.*

principled distinction of *Potlatch*, and erred in assuming that measures must be required by regulation to constitute mitigation under MEPA. Each of these omissions is discussed in detail below.

Perhaps the court's gravest oversight was in substituting its judgment for that of the legislature. According to the court, although the legislature "ostensibly" enacted SFRA to implement the GEIS mitigation strategies, the "voluntary" nature of the Forest Resources Council's guidelines imbued the measures with an "evanescent quality" such that the court doubted mitigation would be in place "before the harm is done."[305] In essence, the court of appeals held that SFRA could not comply with the EQB rules requiring MPCA to consider "mitigation by ongoing public regulatory authority"[306] because the Council's guidelines were voluntary.

In reaching its conclusion, the court of appeals misconstrued the EQB rules and utterly disregarded SFRA. As a result, the court violated the doctrine that statutes embracing the same subject matter should be construed to "harmonize with each other and give full effect to all so far as this may reasonably be done."[307] In addition, a court may not act as "a superlegislature to weigh the wisdom of legislation"[308] or evaluate the public policy merits of a regulatory program to implement timber harvesting practices as opposed to voluntary measures.[309] By criticizing the "voluntary" nature of timber harvesting guidelines under SFRA and finding that such guidelines could not constitute appropriate mitigation under MEPA, the court of appeals exceeded the limited mandate of judicial review and engaged in policy-making.

Contrary to the court of appeals' assertion, the legislature's

305. *Id.* at 237-38.

306. *Id.* at 235 (citing MINN. R. 4410.1700, subp. 7(c) (1999)).

307. Minneapolis E. Ry. Co. v. City of Minneapolis, 247 Minn. 413, 418, 77 N.W.2d 425, 428 (1956), quoting Comm'r of Highways v. N. Pac. Ry. Co., 176 Minn. 501, 507, 223 N.W. 915, 917 (1929). *See also No Power Line*, 262 N.W.2d at 323 n.30 (construing MEPA and the Power Plant Siting Act, and declaring that the "general rule is that statutes covering the same subject matter should be construed consistently"); State *ex rel.* Carlton v. Weed, 208 Minn. 342, 344, 294 N.W.2d 370, 372 (Minn. 1940) ("all statutes that relate to the same subject matter were presumably enacted in accord with the same general legislative policy, and . . . together they constitute an harmonious and uniform system of law."); MINN. STAT. § 645.16 (2000) (providing that the "object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature," therefore "[e]very law shall be construed, if possible, to give effect to all its provisions").

308. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

309. *See supra* notes 2-3 and accompanying text.

enactment of SFRA was not "ostensibly" to implement the GEIS. Rather, the legislature enacted SFRA precisely because the GEIS suggested such a policy approach.[310] The GEIS recommended that the state establish a forest resources board to implement timber harvest and forest management mitigation measures.[311] The legislature responded by creating the Minnesota Forest Resources Council under SFRA.[312] Similarly, the GEIS recommended a forest resources practices program to develop site-level timber harvest and forest management practices,[313] so the legislature required the Council to develop such guidelines.[314] Because the GEIS rejected a "command and control" regulatory program as overly costly and unnecessary,[315] the legislature decreed that forest practice guidelines under SFRA would be voluntary.[316] The GEIS also suggested that monitoring was necessary to determine compliance with and efficacy of measures to mitigate the environmental effects of timber harvesting, and that additional research was needed to fill certain information gaps regarding Minnesota's forests.[317] Accordingly, the legislature included extensive monitoring programs in SFRA,[318] and established a research advisory committee to assess the "strategic directions in forest resources research."[319] By

310. GEIS, *supra* note 10, at xxxii-xxxiii.

311. *Id.*

312. MINN. STAT. §§ 89A.03, 89A.05-.06 (2000).

313. GEIS, *supra* note 10, at xxix-xxx.

314. MINN. STAT. § 89A.05 (2000).

315. *See* GEIS, *supra* note 10, at Appendix 4, 4-1 to 4-3 ("to help avoid costly public and private steps," the site-level forest management practices program "should initially be voluntary") and Appendix 4, 4-4 to 4-6 ("compliance [with forest practices programs] is only slightly better where the regulatory practices are mandatory and there is a thorough companion monitoring and compliance enforcement program . . . and any regulatory program of this type can be costly to both public agencies and private concerns."). For example, California has what the GEIS termed "a complex mandatory program." *Id.* at Appendix 4, 4-5. *See generally* Thomas N. Lippe & Kathy Bailey, *Regulation of Logging on Private Land in California Under Governor Gray Davis*, 31 GOLDEN GATE U. L. REV. 351 (2001) (discussing California's program regulating logging on private and state-owned lands). The GEIS found that in 1991, administrative and enforcement expenditures for California's program exceeded $10 million annually. GEIS, *supra* note 10, at Appendix 4, 4-6.

316. MINN. STAT. § 89A.05.

317. GEIS, *supra* note 10, at xxx-xxxi.

318. MINN. STAT. § 89A.07 (2000) (requiring DNR monitoring of broad forest trends, compliance with the Council's guidelines, and the effectiveness of the Council's guidelines and other efforts in addressing the environmental effects of timber harvesting).

319. MINN. STAT. § 89A.08, subd. 3 (2000).

emphasizing the EIS significance criterion related to the mitigation of environmental effects by ongoing regulatory authority, the court of appeals simply cast aside SFRA, the statute carefully designed to implement the GEIS recommendations in the manner that the GEIS suggested.

The court of appeals' second major oversight involved substituting its judgment for that of MPCA. According to the court, the administrative record demonstrated that some mitigation measures "have [not] gotten beyond the guidelines or strategizing stage," and that mitigation effectiveness monitoring was "substantially lacking."[320] Under SFRA, however, site-level mitigation measures will never get beyond the "guidelines stage," because the Forest Resources Council's *guidelines* are *voluntary by design*. Even if MPCA prepared a site-specific EIS for the Boise Cascade project, the voluntary nature of the timber harvesting guidelines would remain unchanged. The court of appeals' complaint that the measures will never be more than guidelines rejects the legislature's policy in enacting SFRA. Moreover, the court of appeals' conclusion that mitigation measures would not be in place simply ignores the administrative record. The Boise EAW includes a nearly forty-page appendix describing the implementation status of mitigation measures promulgated by the Forest Resources Council, DNR, and other public agencies.[321] The EAW also lists the mitigation measures that Boise Cascade Corporation implemented to address the cumulative effects of timber harvesting, including programs to ensure that the loggers selling wood to Boise Cascade comply with the Forest Resources Council's voluntary guidelines and best management practices.[322]

With respect to monitoring, DNR noted that the Council approved a guideline implementation monitoring process and that DNR was collecting field data on the effectiveness of the guidelines.[323] DNR stated that it "is committed to meeting its

320. *Boise Cascade*, 632 N.W.2d at 237.

321. Boise EAW, *supra* note 219, at Appendix E (Respondent MCEA's Supreme Court Appendix at R-142 - R181, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App. 2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002)).

322. Boise EAW, *supra* note 219, at Appendix F (Respondent MCEA's Supreme Court Appendix at R-182 to R-184, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App. 2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002)).

323. DNR, Comments and Responses on Timber Harvest Issues, Proposed Boise Cascade Corporation International Falls Mill Efficiency Improvement Project EAW, Jan. 24, 2000 (Supreme Court Appendix of Appellants MPCA and Boise Cascade Corp. at A82-A83, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App.

responsibilities, in conjunction with the broader [Forest Resources Council], in providing the Legislature with the information required under SFRA."[324] Accordingly, substantial evidence in the administrative record supported MPCA's conclusion that the mitigation measures promulgated under SFRA were being implemented as the GEIS and the legislature intended. By articulating concerns regarding the implementation of timber harvesting mitigation in light of the evidence in the record, the court of appeals simply substituted its judgment for that of MPCA rather than determining whether MPCA acted in an arbitrary and capricious manner.

In holding that voluntary measures do not constitute mitigation under MEPA, the court of appeals committed a third major error. There is no requirement under MEPA that mitigation measures be mandatory or subject to regulatory enforcement. On the contrary, such measures need not be a permit condition or even a contractual obligation for an agency to rely upon them in determining whether a project has a significant environmental effect.[325] As the United States Supreme Court has held, NEPA simply requires that environmental review documents discuss mitigation in "sufficient detail to ensure that environmental consequences have been fairly evaluated," but does not impose "a substantive requirement that a complete mitigation plan be actually formulated and adopted."[326] Similarly, the EQB rules require an agency to *consider* the extent to which environmental effects are subject to mitigation by ongoing regulatory authority[327]—they do not establish that a regulatory program is a prerequisite to MEPA mitigation.

The court of appeals' reliance upon *Trout Unlimited* is equally inapposite.[328] In *Trout Unlimited*, the Minnesota Department of Agriculture decided not to require an EIS for a project under MEPA after ignoring the recommendations of three other state agencies that an EIS was necessary.[329] In addition, the Department of Agriculture failed to analyze any of the project's potential environmental effects, and merely assumed that future monitoring

2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002)).

324. *Id.* at A83.

325. Audubon Soc'y of Cent. Ark. v. Dailey, 977 F.2d 428, 436 (8th Cir. 1992).

326. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).

327. MINN. R. 4410.1700, subp. 7(c) (1999).

328. *Boise Cascade*, 632 N.W.2d at 236-38.

329. *Trout Unlimited*, 528 N.W.2d at 907-09. *See also supra* note 217.

or permitting would eliminate any significant effects.[330] MPCA, in contrast, evaluated the status of current and ongoing mitigation efforts in determining that an EIS was unnecessary for the Boise Cascade project, and relied upon DNR's conclusion that the project did not have a potential for significant environmental effects. As a result, the court's concern that MPCA's actions were in any way similar to those of the Department of Agriculture in *Trout Unlimited* was unfounded.

Finally, in failing to offer a principled distinction of *Potlatch*, the court of appeals committed a fourth mistake. According to the court, it could not determine whether the *Potlatch* case was a "mirror image" of the *Boise Cascade* litigation because the court did not have access to the *Potlatch* administrative record.[331] The court, however, had access to the *Potlatch* opinion, as well as the administrative record for MPCA's decision regarding the Boise Cascade project. In *Potlatch*, the court of appeals held that MPCA properly relied upon the information in the GEIS in preparing an EAW for a wood products facility expansion, and that "the EAW and the GEIS provide and target specific mitigation measures to reduce the impact of any adverse effects."[332] The GEIS that the *Potlatch* court found targeted "specific mitigation measures" was the same GEIS that MPCA relied upon in the *Boise Cascade* case. MPCA determined just over one year after the GEIS was completed that the Potlatch expansion did not require an EIS;[333] the EQB found that the GEIS remained adequate just a few months before MPCA made its EIS decision on the Boise Cascade project.[334] Like the

330. *Id.*

331. *Boise Cascade*, 632 N.W.2d at 237.

332. *Potlatch*, 569 N.W.2d at 217.

333. The EQB found the GEIS was adequate in April 1994. *See generally* GEIS, *supra* note 10. MPCA issued its negative decision on the need for an EIS for the Potlatch project in November 1995. *Potlatch*, 569 N.W.2d at 214.

334. *See supra* Part III.B. The court of appeals' declaration that "there are inaccuracies in and omissions from the GEIS that require further research and investigation" is particularly troubling. *Boise Cascade*, 632 N.W.2d at 237. MCEA submitted extensive comments as EQB evaluated whether the GEIS remained adequate for use in evaluating the Boise project, *see supra* Part III.B., but did not challenge the EQB's decision that the GEIS remained accurate enough for MPCA's use. As a result, the adequacy of the GEIS was not before the court. In addition, Appendix G to the Boise EAW, *supra* note 219 (Respondent MCEA's Supreme Court Appendix at R-185 to R-187, *Boise Cascade*, 632 N.W.2d 230 (Minn. Ct. App. 2001) (No. C6-01-96), *rev'd*, 644 N.W.2d 457 (Minn. 2002)), specifically identifies the statistical uncertainties present in assessing the effects of timber harvesting, and explains how those uncertainties affect the environmental analysis.

Potlatch EAW, the Boise Cascade EAW discussed specific environmental effects likely to result from the project and measures to mitigate those effects.[335] In fact, MPCA's administrative record for the Boise Cascade project documented that implementation of the GEIS mitigation measures—which the *Potlatch* court found adequate in 1997—had progressed substantially since the court of appeals decided *Potlatch*.[336] Distinguishing *Potlatch* on the grounds that mitigation measures were not being implemented, as the court of appeals suggested in *Boise Cascade*, was at best unpersuasive.[337]

V. THE TIMBER HARVESTING GEIS RENEWED—*BOISE CASCADE* IN THE SUPREME COURT

A. Arguments of the Parties

MPCA petitioned the Minnesota Supreme Court to review the court of appeals' decision in *Boise Cascade* because the intermediate appellate court's opinion "nullifies enacted legislative policies and activities, contradicts on-point judicial precedent, and fails to apply established judicial review standards."[338] As a result, MPCA maintained that the case fulfilled the requirements for review.[339] The supreme court agreed and granted MPCA's petition.

In the supreme court, MPCA's argument emphasized SFRA and the voluntary guidelines promulgated by the Forest Resources Council. Because the court of appeals believed "that the voluntary mitigation measures enacted by the legislature in SFRA will not work," the court required that MPCA conduct a project-specific

Under the circumstances, it was improper for the court to suggest that the GEIS was somehow "inaccurate."

335. Potlatch EAW, *supra* note 129, at Attachment 4, 10-32 (Appellants' Appendix at A-208 to A-230, *Potlatch*, 569 N.W.2d 211 (Minn. Ct. App. 1997) (No. C5-97-391)); Boise EAW, *supra* note 219, at Appendices B, C, D, and E (Respondent MCEA's Supreme Court Appendix at R-124 to R-181, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

336. Boise EAW, *supra* note 219, at Appendix E (Respondent MCEA's Supreme Court Appendix at R-142 to R-181 *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

337. Even Bettison, in criticizing the *Potlatch* decision, termed the *Boise Cascade* district court litigation "a sort of '[Potlatch II]' that revisits many of the issues in [Potlatch]." Bettison, *supra* note 208, at 1005 n.219.

338. MPCA's Petition for Review of Decision of Court of Appeals at 1, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (C6-01-96).

339. *Id.*, citing MINN. R. CIV. APP. P. 117, subd. 2(a).

EIS.[340] As a result, according to MPCA, the court of appeals "eviscerated" SFRA[341] and effectively substituted its judgment for that of the agency.[342] Because the legislature is "the ultimate public regulatory authority," MPCA's discussion of the mitigation measures promulgated under SFRA's "carefully crafted legislative scheme" satisfied MEPA's requirement that a governmental entity consider mitigation by ongoing public regulatory authority.[343] MPCA also argued that the court of appeals' decision "cannot be reconciled" with *Potlatch*, where the same court held that voluntary mitigation measures satisfied MEPA.[344] In addition, MPCA maintained that it discussed timber harvest mitigation measures even though MPCA and DNR "concluded in the first instance that the Boise project will not cause significant effects because, simply, the project is small."[345]

MCEA responded that MEPA, not SFRA, controlled MPCA's actions with respect to the Boise project. Given that the Forest Resources Council does not perform a regulatory function, MCEA argued that the court of appeals correctly found SFRA could not compel implementation of the Council's guidelines.[346] As a result, there were no assurances that "mitigation measures are in place and effective," and such voluntary mitigation did not comply with MEPA.[347] MCEA also maintained that MPCA did not conduct the additional analysis that the EQB determined was necessary to rely upon the GEIS in reviewing the Boise project.[348] Finally, MCEA alleged that "[t]he passage of time, the development of superior analytical methods, and MPCA's failure to impose real mitigation requirements on Boise Cascade all differentiate" the case from *Potlatch*.[349]

340. MPCA's Brief at 10, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (C6-01-96).
341. *Id.*
342. *Id.* at 19-20.
343. *Id.* at 19.
344. *Id.* at 18-19.
345. *Id.* at 21.
346. MCEA's Brief at 20-25, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (C6-01-96).
347. *Id.* at 25, 33-39, 42-51.
348. *Id.* at 26-33.
349. *Id.* at 41-42.

B. The Boise Cascade *Supreme Court Opinion*

The Minnesota Supreme Court reversed the court of appeals, holding that MPCA employed the GEIS appropriately under MEPA. MPCA relied upon DNR in evaluating the environmental effects of timber harvesting associated with the Boise project, and DNR determined that the GEIS adequately discussed such effects. With respect to mitigation, the supreme court held that the court of appeals substituted its judgment for that of MPCA and DNR in determining the implementation and effectiveness of the Forest Resources Council's guidelines.

Before analyzing the environmental issues, the supreme court clarified the appropriate standard of judicial review in evaluating agency decisions on the need for an EIS under MEPA. The court stated that the "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by the courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience."[350] According to the court, the legislature "codified the standard of review for [an] agency's decisions in contested case proceedings in the Minnesota Administrative Procedures [sic] Act (MAPA) at Minn. Stat. § 14.69."[351] Although MPCA's EIS decision was not the result of a contested case hearing, the court found MAPA's deferential standard of review appropriate because environmental review involves the "application of an agency's expertise, technical training, and experience."[352] Accordingly, the court reviewed MPCA's decision to determine whether it was "unsupported by substantial evidence in view of the entire record as submitted or was arbitrary and capricious."[353]

Applying the arbitrary and capricious standard, the court easily rejected MCEA's argument that MPCA failed to conduct the additional analysis necessary to rely upon the GEIS. The court found that DNR stated that the Boise project was of the type anticipated in the GEIS, and that MPCA properly relied upon DNR's expertise in determining a project-specific EIS on timber harvesting was unnecessary. The court, therefore, deferred "to the technical expertise of the MPCA and the DNR regarding the use

350. *Boise Cascade*, 644 N.W.2d at 463 (citing Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1988)).

351. *Id.*

352. *Id.* at 464.

353. *Id.*

and application of the Forestry GEIS."[354]

Mitigation issues proved more vexing. The court focused on the requirement that MPCA consider, in determining whether the Boise project had the potential for significant environmental effect, the extent to which the project's effects were "subject to mitigation by ongoing public regulatory authority."[355] According to the supreme court, the court of appeals substituted its judgment for that of MPCA and DNR on the need for an EIS. The court found that substantial evidence in the administrative record supported MPCA's decision.[356] This evidence included confirmation that DNR and the United States Forest Service, owners of approximately one-third of the state's forests, were actively implementing the Minnesota Forest Resource Council's guidelines, as were Boise Cascade Corporation and many county governments.[357] As a result, the record confirmed MPCA's conclusion that mitigation "will be in place before any increased harvesting is undertaken."[358]

Turning to the "mandatory" or "voluntary" nature of mitigation, the court declared that the parties' focus on the distinction was "somewhat misleading when the context of our review of the MPCA's decision is recalled."[359] The EQB rules, opined the court, merely require that MPCA *consider* the extent to which ongoing public regulatory authority may mitigate a project's environmental effects.[360] In making an EIS decision, MPCA could review voluntary mitigation measures.[361] More importantly, the court found that "the mitigation measures most relevant to this case" were the timber harvesting guidelines that the Forest Resources Council promulgated under SFRA, and that "the legislature required that those guidelines were to be voluntary."[362]

Although it was "unable to find any requirement in our state's law that the MPCA cannot consider voluntary measures in assessing mitigation,"[363] the court found that MPCA did not rely solely upon voluntary compliance with the Council's guidelines. The Council

354. *Id.* at 465 (citing *Reserve Mining*, 256 N.W.2d at 824).
355. *Id.* (quoting MINN. R. 4410.1700, subp. 7(C) (1999)).
356. *Id.* at 466.
357. *Id.*
358. *Id.* at 467 (citing *Potlatch*, 569 N.W.2d at 218).
359. *Id.* at 467-68.
360. *Id.* at 468 (citing MINN. R. 4410.1700, subp. 7(c) (1999)).
361. *Id.*
362. *Id.* (citing SFRA, MINN. STAT. § 89A.05, subd. 3 (2000)).
363. *Id.*

"may lack any statutory or administrative enforcement mechanism or true regulatory authority," but MPCA was capable of ensuring "that reasonable mitigation measures will be in place when the permit [for the Boise project] is issued."[364] MPCA, the court concluded, has the statutory authority to incorporate the Council's relevant timber harvesting guidelines into permits that MPCA issues for the Boise project.[365]

Justice Paul H. Anderson concurred in the majority opinion, identifying a "weakness" that he perceived "in the majority's mitigation analysis."[366] After a thorough review of the record, Justice Anderson rightly concluded that the majority erred in assuming that MPCA would include timber harvesting mitigation measures in permits issued for the Boise Cascade project. MPCA staff, Justice Anderson explained, stated in testimony on the Boise EAW that the agency often includes measures to mitigate air and water pollution as permit conditions, but it never incorporates the Forest Resources Council's guidelines into MPCA permits.[367] Justice Anderson acknowledged that the majority relied upon timber harvest "mitigation measures implemented and enforced by the United States Forest Service (USFS), the DNR, and certain Minnesota counties," and noted that MPCA's discussion of such measures constituted "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."[368] However, Justice Anderson observed "MPCA did not address these measures as part of its specific findings on mitigation and presumably did not base its final decision on them."[369] Given MAPA's deferential standard of review

364. *Id.* at 467.

365. *Id.* The court accurately observed that the Boise Cascade project would require MPCA to amend the facility's air operating permit under Title V of the Clean Air Act, and to authorize construction of the modified facility under the Clean Air Act's prevention of significant deterioration ("PSD") program. *Id.* at 467, n.9. Although the court states that MPCA would issue two permits, for such modifications MPCA actually issues a single air emissions permit that consolidates the PSD construction authorization and the authority to operate under Title V. *See* MPCA Boise Cascade EAW Findings, *supra* note 250, at 11 (Respondent MCEA's Supreme Court Appendix at R-211, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

366. *Boise Cascade*, 644 N.W.2d at 469 (Anderson, J., concurring).

367. *Id.* at 470.

368. *Id.*

369. *Id.*

Justice Anderson filed a concurring opinion rather than a dissent, but expressed the hope that when deciding issues as important as the Boise Cascade project "MPCA would provide a stronger basis for its decision than was done here."[370]

C. Evaluating the Supreme Court Opinion

The Minnesota Supreme Court's *Boise Cascade* opinion reiterates the proper role of judicial review under MEPA. *Boise Cascade* reinforces the proposition that when an agency adheres to MEPA's procedural dictates, a court must affirm the agency's decision even though the court may have reached a different conclusion.[371] Such judicial deference arises from constitutional separation of powers principles that bar the legislature from delegating administrative acts to the judiciary.[372] The supreme court properly determined that the court of appeals ignored the separation of powers doctrine and substituted its own judgment for that of MPCA. *Boise Cascade* reinforces the "need for exercising judicial restraint and for restricting judicial functions to a narrow area of responsibility lest [the court] substitute its judgment for that of the agency."[373]

Boise Cascade also reverses an outcome inconsistent with the court of appeals' decision on virtually identical facts in *Potlatch*. *Boise Cascade* and *Potlatch* involved MPCA's environmental review of expansion proposals for wood products facilities in northern Minnesota. In both cases, MPCA prepared EAWs and relied upon DNR recommendations that project-specific environmental impact statements on timber harvesting were unnecessary in light of the GEIS. Both EAWs identified specific environmental effects and mitigation measures.[374] In *Potlatch*, the court of appeals found that MPCA employed the GEIS properly and that the measures implemented under SFRA constituted adequate mitigation for

370. *Id.* at 470-71.

371. *See* Cable Communications Bd. v. Nor-West Cable Communications P'ship, 356 N.W.2d 658, 668-69 (Minn. 1984); First Nat'l Bank v. Dep't of Commerce, 350 N.W.2d 363, 368 (Minn. 1984); Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 825 (Minn. 1988) (all holding that when an agency engages in reasoned decision making, a court must affirm even though it may have reached a different conclusion had it been the fact finder). The holding is consistent with federal case law under NEPA. *See supra* note 213.

372. *Reserve Mining*, 256 N.W.2d at 824.

373. *Id.* at 825.

374. *See supra* Part III.C.

purposes of MEPA. The court of appeals' *Boise Cascade* decision, without offering a credible rationale to distinguish *Potlatch*,[375] held that MEPA required a project-specific environmental impact statement to evaluate the effects of timber harvesting. By reversing the court of appeals, the supreme court harmonized the two decisions and provided valuable guidance on applying the GEIS in conducting environmental review of specific projects. Moreover, the supreme court's decision may serve as a guide to other governmental entities regarding the use of the timber harvesting GEIS and other generic environmental impact statements that address activities with regional or statewide effects.[376]

The supreme court's decision in *Boise Cascade* also is important because it represents the court's first attempt to construe SFRA. In so doing, the court accurately declared that "the mitigation measures most relevant to this case are the timber management guidelines promulgated by the MFRC [Minnesota Forest Resources Council] under the SFRA," and that the legislature specified that the guidelines were voluntary.[377] The court's careful attention to the legislature's intent in enacting SFRA is particularly appropriate in the context of environmental review, given that the legislature may pass project-specific measures that modify MEPA's procedures[378] or altogether exclude projects from environmental

375. *See supra* Part IV.C.

376. The EQB rules *require* responsible governmental units to use the information in a generic EIS in project-specific review under MEPA if the generic EIS remains adequate at the time a specific project is subject to review. *See supra* notes 39-41 and accompanying text. The timber harvesting GEIS is currently the only final generic EIS in Minnesota. The EQB is working to complete a generic EIS on animal agriculture that will assess the statewide environmental effects of animal feedlots. *Final GEIS Policy Document Nearly Finished*, GEIS UPDATE (Minn. Envtl. Quality Bd., St. Paul, Minn.), Jan. 2002, at 1, *available at* http://www.mnplan.state.mn.us/eqb/geis/GEIS%20Update%20Jan%202002b.pdf (last visited Aug. 6, 2002). The EQB also prepared a final scoping document for a generic EIS on urban development in Minnesota, but the legislature has yet to provide the EQB with funding to conduct that generic EIS. *See* MINNESOTA ENVIRONMENTAL QUALITY BOARD, FINAL SCOPING DOCUMENT, GENERIC ENVIRONMENTAL IMPACT STATEMENT STUDY ON URBAN DEVELOPMENT IN MINNESOTA (2000), *available at* http://www.mnplan.state.mn.us/eqb/pdf/UDGEISScopingDocFinal.PDF (last visited Aug. 6, 2002). Telephone Interview with George Johnson, GEIS Project Manager, Environmental Quality Board (Aug. 6, 2002).

377. *Boise Cascade*, 644 N.W.2d at 467.

378. *See In re* Am. Iron & Supply Co., 604 N.W.2d 140, 143 (Minn. Ct. App. 2000) (Minnesota legislature passed a statute requiring that MPCA conduct an EAW on a metal shredding facility to determine whether an EIS was necessary, even though the project did not meet or exceed a mandatory EAW threshold

review.[379]

In addition, *Boise Cascade* is significant because it confirms that the standard of review under MAPA applies to agency decisions even if an agency does not hold a contested case proceeding. MAPA section 14.69, which the supreme court construed, establishes the "scope of judicial review" for "contested cases"[380] under sections 14.63 through 14.68.[381] MPCA's decision on the need for a project-specific EIS did not involve a contested case, but the supreme court concluded that MAPA's standard of review nonetheless applied on the grounds of separation of powers. Quoting *Reserve Mining*,[382] the supreme court declared it was a "bedrock separation of powers principle that the legislature may not delegate to the courts duties which are essentially administrative in character."[383] Because environmental review requires agencies to apply technical expertise, the court found MAPA's standard of review appropriate.[384] At least one court of appeals decision involving environmental review relied upon MAPA,[385] but *Boise Cascade* appears to be the first decision in which the Minnesota Supreme Court expressly states that MAPA applies to decisions by responsible governmental units under MEPA.

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under MINN. R. 4410.4300).

379. *See supra* note 45.

380. As the Minnesota Supreme Court recognized, a "contested case" is a proceeding before an administrative 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." MINN. STAT. § 14.02, subd. 3 (2000). *See also Boise Cascade*, 644 N.W.2d at 464 n.8. A contested case hearing is an adversarial proceeding before an administrative law judge, with the right of the parties to cross-examine witnesses and offer rebuttal evidence. MINN. STAT. § 14.60, subds. 1-4 (2000). During the proceeding, the administrative law judge receives probative evidence, applies privileges recognized by law, and may exclude evidence on the grounds that it is incompetent, irrelevant, immaterial, or repetitious. *Id.* at subd. 2.

381. MINN. STAT. § 14.69 (2000) (stating that in a judicial review under section 14.63-.68, the court may affirm the agency decision, remand the case for further proceedings, or reverse or modify the decision).

382. 256 N.W.2d at 824.

383. *Boise Cascade*, 644 N.W.2d at 464 (internal quotation marks omitted).

384. *Id.*

385. *See In re* Univ. of Minn., 566 N.W.2d 98, 103 (Minn. Ct. App. 1997) (citing MAPA as the applicable standard of review in evaluating whether the university violated MEPA procedure by entering into a contract that might prejudice the ultimate decision on a project before determining that a final EIS was adequate). Bettison mistakenly concludes that the Minnesota Court of Appeals has never relied upon MAPA "in the environmental review setting." Bettison, *supra* note 208, at 981-82.

Although the opinion provides useful guidance on the standard of review under MEPA and the use of the GEIS, the majority in *Boise Cascade* errs in asserting that MPCA permits could incorporate timber harvesting mitigation measures. As Justice Anderson correctly observes in his concurring opinion, MPCA has never incorporated timber harvesting mitigation measures into the agency's permits.[386] Staff testimony before the agency's Citizen Board during the Boise Cascade environmental review process also suggests MPCA has no intention of instituting such a practice.[387]

Integrating the Forest Resources Council's voluntary timber management guidelines into air or water permits would exceed MPCA's statutory mandate. MPCA's authority extends to meeting "problems related to water, air and land pollution in the areas of the state affected thereby . . ."[388] DNR's powers and duties entail the "charge and control of all the public lands, parks, *timber*, waters, minerals, and wild animals of the state and the use, sale, leasing, or other disposition thereof . . ."[389] If MPCA incorporated timber harvesting and forest management guidelines into a permit regulating air emissions or water discharges, the agency would surpass its grant of authority from the legislature and encroach upon DNR's powers. Under MAPA, an agency that exceeds its statutory jurisdiction acts unlawfully.[390]

Of equal importance, an MPCA permit that includes the Forest Resources Council's guidelines as regulatory directives is inconsistent with SFRA. The Minnesota legislature could have adopted a command and control regulatory program, complete with a permit system and judicial enforcement, in response to the GEIS. Instead, the legislature adhered to the policy recommendations of the GEIS and enacted SFRA, a statute authorizing the promulgation of voluntary timber management guidelines. Including the Council's voluntary guidelines as

386. *Boise Cascade*, 644 N.W.2d at 470 (Anderson, J., concurring).

387. *See id.* (quoting a member of MPCA's environmental review staff stating that "we have not advocated carrying those [timber harvesting guidelines] over into permits").

388. MINN. STAT. § 116.01 (2000).

389. MINN. STAT. § 84.027, subd. 2 (2000) (emphasis added).

390. MINN. STAT. § 14.69(b) (2000). *See also* Cable Communications Bd. v. Nor-West Cable Communications P'ship, 356 N.W.2d 658, 668 (Minn. 1984) (stating that "[a]gencies are not permitted to act outside the jurisdictional boundaries of their enabling acts"); Gibson v. Civil Serv. Bd., 171 N.W.2d 712, 715 (Minn. 1969) (stating that an appellate court may reverse an agency decision "where it appears the agency has not kept within its jurisdiction").

enforceable terms in MPCA permits is diametrically opposed to the legislative intent that SFRA embodies. Such conduct would also run counter to the state's regulatory policy, which declares agencies must avoid "overly prescriptive and inflexible" programs that increase "costs to the state, local governments, and the regulated community and decreas[e] the effectiveness of the regulatory program."[391]

Justice Anderson's concurring opinion offers cogent and persuasive analysis in all but one respect. The opinion incorrectly declares that MPCA "presumably did not base its final decision on" the timber harvesting mitigation measures implemented and enforced by the United States Forest Service, DNR, and Minnesota county governments.[392] MPCA failed to specifically articulate in its mitigation findings on the Boise EAW that it was relying upon implementation of such measures.[393] However, Appendix B to the Boise EAW, which MPCA's findings reference,[394] notes that the entities committed to meeting or exceeding the Forest Resources Council's guidelines own approximately seventy-five percent of the timber estimated to provide the additional wood for Boise Cascade's project.[395] The administrative record, therefore, clearly establishes that MPCA considered United States Forest Service, DNR, Boise Cascade Corporation, and county implementation of timber harvesting mitigation in determining that a project-specific EIS was unnecessary. Justice Anderson accurately observes that MPCA's findings could have been more explicit, but the

391. MINN. STAT. § 14.002 (2000).

392. 644 N.W.2d at 470.

393. *See* MPCA Boise Cascade EAW Findings, *supra* note 250, at 9-11 (Supreme Court Appendix of Respondent MCEA at R-209 to R-211, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)) (stating that the cumulative effects of timber harvesting are subject to "ongoing implementation of programmatic mitigation measures authorized under the Minnesota Sustainable Forest Resources Act," and referencing findings that discuss SFRA).

394. *Id.* at 10 (Respondent MCEA's Supreme Court Appendix at R-210 *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)).

395. Boise EAW, *supra* note 219, at Appendix B at 8 (Respondent MCEA's Supreme Court Appendix at R-131, *Boise Cascade*, 644 N.W.2d 457 (Minn. 2002) (No. C6-01-96)). The entities include Boise Cascade Corporation, estimated to own twenty-three percent of the wood; the United States Forest Service, estimated to own eight percent; DNR and other state agencies, estimated to own twenty-four percent, and county governments, estimated to own twenty percent. Private sources own the remaining twenty-five percent. *Id.* Because individual owners may sell to loggers who implement the guidelines, in excess of seventy-five percent of the wood harvested for the Boise Cascade project may be cut by loggers complying with the Council's forest management practices.

administrative record contradicts the assertion that MPCA failed to rely upon evidence documenting statewide implementation of timber harvesting mitigation measures.[396]

VI. CONCLUSION

The state of Minnesota spent nearly five years and $875,000 in assessing the cumulative effects of timber harvesting in the GEIS. In *Potlatch*, the court of appeals reviewed the first application of the GEIS to project-specific environmental review and held that MPCA used the GEIS as envisioned in MEPA. The second application of the GEIS, however, proved more problematic. Ignoring *Potlatch* and the intent of the legislature, the court of appeals in its ill-conceived *Boise Cascade* decision held that MPCA's application of the GEIS violated MEPA, and that the Boise project required an environmental impact statement on timber harvesting despite the state's extensive earlier study and the EQB's decision that MPCA must use that study in analyzing the Boise project.

As this article demonstrates, the Minnesota Supreme Court rectified the court of appeals' error by reversing that court's *Boise Cascade* decision, and holding that the administrative record supported MPCA's decision not to require an environmental impact statement. In so doing, the Minnesota Supreme Court employed the correct judicial review standard, and reaffirmed the court of appeals' analysis in *Potlatch*. Despite the inaccuracies in the majority's opinion and Justice Anderson's concurrence, the *Boise Cascade* decision offers essential insights on the application of the GEIS. It should serve as an effective guide for MPCA and other governmental entities in evaluating future projects under MEPA.

396. *See supra* notes 393-95 and accompanying text. *See also Boise Cascade*, 644 N.W.2d at 466 (stating that "the record indicates that the DNR and the United States Forest Service (USFS), who own approximately one-third of all forested land in Minnesota, are actively implementing mitigation measures," and "[t]he record also indicates application of similar measures on certain county and federal lands").