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The Silencing of the Minnesota Environmental Policy Act: The Minnesota Court of Appeals and the Need for Meaningful Judicial Review

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THE SILENCING OF THE MINNESOTA ENVIRONMENTAL POLICY ACT: THE MINNESOTA COURT OF APPEALS AND THE NEED FOR MEANINGFUL JUDICIAL REVIEW

Stacy Lynn Bettison†

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I. INTRODUCTION

There was once was a town in the heart of America where all life seemed to live in harmony with it surroundings. The town lay in the midst of . . . prosperous farms, with fields of grain and hillsides of orchards. . . . Foxes barked in the hills and deer silently crossed the fields . . . countless birds came to feed on berries . . . . The countryside was, in fact, famous for the abundance and variety of its bird life . . . . Then a strange blight crept over the area and everything began to change. Some evil spell had settled on the community: mysterious maladies swept the flocks of chickens; the cattle and sheep sickened and died. Everywhere was a shadow of death . . . . There was a strange stillness. The birds, for example—where had they gone? Many people spoke of them, puzzled and disturbed. The feeding stations in the backyards were deserted . . . . No witchcraft, no enemy action had silenced the rebirth of new life in this stricken world. The people had done it themselves.

And so wrote Rachel Carson in her landmark book, *Silent Spring*. Published in 1962, Carson’s dire prophecy of human impact on the environment hastened the nation into addressing the perilous effects of toxic chemicals, most notably the insecticide DDT. Along with other important events—the 1969 oil spill in the Santa Barbara channel, the federal government’s plan to dam the Colorado River and flood part of the Grand Canyon, the scientific proof that automobile exhaust causes urban smog—Carson’s book spurred the growing environmental movement, leading to new laws affecting air, water and land.

1. RACHEL CARSON, SILENT SPRING 1-3 (1962).
2. See id. Dichloro-diphenyl-trichloro-ethane (DDT) was one of the most widely used chemicals to control insects on agricultural crops and insects that carry diseases such as malaria and typhus. See Environmental Health Center, A Division of the National Safety Council (visited Feb. 5, 2000) <http://www.nsc.org/ehc/ew/chems/ddt.htm>. DDT had devastating effects on bird populations because birds preyed on the insects exposed to DDT. The effect of DDT in birds was that they laid thin-shelled eggs that would break during incubation. See Environmental Defense Fund, 25 Years After DDT Ban, Bald Eagles, Osprey Numbers Soar (visited Apr. 7, 2000) <http://www.edf.org/pubs/newsreleases/1997-jne/e_ddt.html>. The EPA canceled most DDT use under the Federal Insecticide, Fungicide, and Rodenticide Act in 1972. See id.
3. See PERCIVAL ET AL., ENVIRONMENTAL REGULATION, LAW, SCIENCE AND POLICY 3 (2d ed. 1996). Congress passed numerous environmental protection laws
articulation of preservationist ideals combined to create a national recognition of human impact on the natural environment.

This emerging national awareness produced the National Environmental Policy Act (NEPA),\(^4\) one of America's first significant environmental laws. The purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; and to promote efforts which will prevent or eliminate damage to the environment . . . ."\(^5\) This national legislation was recognized as being the "broadest and perhaps the most important" of the many environmental statutes passed in the early 1970s.\(^6\) It requires that the federal government "use all practicable means and measures" to "foster and promote" environmental values so that "man and nature can exist in productive harmony."\(^7\) NEPA mandates that government agencies follow certain procedures to assess adverse environmental impacts that major projects or actions of the federal government might cause.\(^8\)

\(^5\) Id. § 4321.
\(^6\) Calvert Cliffs' Coordinating Comm'n v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).
\(^7\) 42 U.S.C. § 4331 (a).
\(^8\) See id. § 4332(2)(C). The first cases construing NEPA concluded that, in addition to providing a procedural component, Congress intended to create substantive obligations on the government to protect environmental values. See Calvert Cliffs', 449 F.2d at 1112 (quoting 42 U.S.C. §4331(a)); see also Environmental Defense Fund v. Corps of Eng'rs, 470 F.2d 289, 298 (8th Cir. 1972) (stating that Congress intended to require federal agencies to give effect to the environmental goals of NEPA). The Supreme Court later stated that NEPA imposed only procedural requirements on agencies. See Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980):

[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has
Minnesota is among many states that passed similar legislation declaring a state policy that would, like NEPA, "encourage productive and enjoyable harmony between human beings and their environment . . . ." Providing a parallel procedural mandate to NEPA, the Minnesota Environmental Policy Act (MEPA) requires state agencies to consider the adverse environmental impacts of any major state action. If a potential for significant environmental impact exists, an agency must prepare an environmental impact statement (EIS) that describes the action in detail and analyzes its significant environmental impacts. To determine whether an EIS is necessary, the agency must first prepare an environmental assessment worksheet (EAW). Surprisingly, state agencies prepare few EISs each year because the agencies almost invariably conclude through the EAW that the proposed project has no potential for significant environmental impact.

Minnesota courts have been instrumental in defining the obligations of agencies under MEPA. While the Minnesota Supreme Court has decided some MEPA issues, many of the contours of MEPA's present landscape were hewn by the Minnesota Court of Appeals. In recent years, the court of appeals has considered the specific issue of whether an agency's decision to forego an EIS because there is no potential for significant environmental impact (also known as a "negative declaration") should be upheld. In several cases, the court of appeals deferred

considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Id. (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).


11. See id. § 116D.03, subd. 2a.

12. See id. § 116D.03, subd. 1(a)(b).

13. According to an Environmental Quality Board (EQB) staff member, EISs are uncommon, in part, because agencies often wish to avoid the time and expense of an EIS and instead attempt to have the EAW approach the content level of an EIS. Telephone Interview with Jon Larsen, Principal Planner, Environmental Quality Board (Jan. 26, 2000); see also John H. Herman & Charles K. Dayton, Environmental Review: An Unfulfilled Promise, Bench & B. of Minn., July, 1990, at 32 (observing that the EIS is usually avoided).

14. See, e.g., In re American Iron and Supply Co.'s Proposed Metal Shredding Facility in Minneapolis, Minn., 604 N.W.2d 140 (Minn. Ct. App. 2000); Pope
to the agencies’ expertise in determining the potential for significant environmental impact and upheld the agencies’ decisions. In two of those cases, discussed at length herein, the court of appeals upheld negative declarations even when the agencies failed to follow MEPA’s strict procedures. The court of appeals did not recognize that the Minnesota Administrative Procedure Act (MAPA) governs the standard of review in MEPA cases. By not applying the appropriate standards as articulated in MAPA, the court failed to make the distinct inquiry of whether the agency followed proper procedure in making its determination. Instead the court reviewed the decision against the deferential arbitrary and capricious standard. Most likely motivated by a desire not to second-guess agency decisionmaking, the court has twice declined to enforce the procedural requirements of MEPA.

In doing so, the court has undermined the efficacy of MEPA. At one time, MEPA was seen as a procedural safeguard to ensure that agencies thoroughly examined and considered the environmental impacts of major state actions before they commenced. An overly deferential Minnesota Court of Appeals, however, has relegated MEPA from its designated role to the functional equivalent of a mere policy statement. The intended potential for MEPA to be a muscular framework for environmental protection exists partially, if not primarily, in its procedural mandates, like its federal antecedent NEPA.

Permitting agencies to depart from procedures, the Minnesota Court of Appeals has abandoned the concept of judicial review and overlooked the principles of administrative law that govern it: courts must defer to agencies on substantive matters that necessarily require the expertise of the agency; however, courts should not defer to agencies when determining whether the agency followed required procedure.

Passed at a time of mounting awareness of and increasing concern about environmental degradation due to human activity,
MEPA is intended to ensure that governments make informed decisions and thus avert the daunting, yet very possible, reality that humans might one day be the primary cause of the silent spring envisioned by Rachel Carson. Yet, without any recognition by the court of appeals that MEPA creates strict procedural obligations on agencies, the intended effect of MEPA is lost.

This article will examine the instances in which the Minnesota Court of Appeals has abdicated its judicial function of determining when agencies have properly complied with MEPA's procedures. This article will discuss how the line between deferring to agency expertise and requiring strict compliance with procedure has blurred. NEPA, upon which MEPA is framed, is useful to understanding the distinction between procedural and substantive review. Part II will outline the relevant provisions of MEPA and the regulations directing agency decision-making, and it will discuss the provisions governing judicial review under MAPA. It will also outline judicial review of cases arising under NEPA. Part III will analyze the Minnesota Court of Appeals’ approach to reviewing agencies' decisions regarding the necessity of an EIS and will highlight the ways in which the court of appeals has collapsed substantive compliance into the separate and more exacting procedural requirements of MEPA. Part IV will suggest the proper legal standards of review under MEPA, specifically the negative declaration decisions. It will outline the analysis that the Minnesota Supreme Court should conduct to ensure that agencies' substantive decisions receive deference and that nothing less than strict procedural compliance is demanded of agency decisionmaking under MEPA.

II. MEPA, EQB REGULATIONS, AND THE ADMINISTRATIVE PROCEDURE ACT

The EIS is the heart of MEPA. The statute focuses primarily on the standards for determining when an EIS is necessary and the information to be included in an EIS. Likewise, the regulations promulgated by the Environmental Quality Board (EQB), the agency created to implement MEPA, concentrate on the EIS as the analytical tool that examines a proposed project’s significant

16. See supra note 1.
18. See id.
environmental impacts.  

A. EIS and EAW Preparation

MEPA's substantive and procedural requirements are triggered when "there is potential for significant environmental effects resulting from any major governmental action . . . ." Before such an action may begin, the "responsible governmental unit" (RGU) shall prepare "a detailed environmental impact statement." An EIS "shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated." By comparison, NEPA provides that an EIS shall discuss the environmental impact of actions; adverse environmental effects that are unavoidable; alternatives to the proposed action; "the relationship between the short-term uses of the environment and the maintenance and enhancement of long-term productivity;" and irreversible and irretrievable

19. See ENVIRONMENTAL QUALITY BD., GUIDE TO MINN. ENVIRONMENTAL REVIEW RULES 1 (1998) [hereinafter GUIDE TO MINN. RULES].

20. Id. At the date of publication, whether a state agency action is "major" has not been litigated in the Minnesota courts. By comparison, NEPA's parallel provision, 42 U.S.C. § 4332 (2) (C), which requires an EIS for any "major Federal action" has been construed numerous times by various courts. See, e.g., Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975) (stating that federal action may be a part of a larger federal action and still require a separate EIS); Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 327 (9th Cir. 1975) (holding state-funded airport terminal and parking garage projects were not so closely interwoven with those receiving federal funds as to make the project "federal action"); RESTORE: The North Woods v. United States Dep't of Agric., 968 F. Supp. 168, 175 (D. Vt. 1997) (concluding major federal action under NEPA may encompass action by nonfederal actors if federal agency has authority to influence nonfederal activity).

21. The RGU is the agency, county or other unit of government "with the greatest authority over the project as a whole." GUIDE TO MINN. RULES, supra note 19, glossary. The issue of whether the designated RGU was the appropriate unit to conduct environmental review of the proposed project has been litigated only once in Minnesota. See Iron Rangers for Responsible Ridge Action v. Iron Range Resources, 531 N.W.2d 874, 882-83 (Minn. Ct. App. 1995).

22. MINN. STAT. § 116D.04, subd. 2a.

23. Id. The statute also provides that the EIS shall "analyze those economic, employment and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decisionmaking process, the environmental impact statement shall be prepared as early as practical in the formulation of an action." Id.
commitments of resources involved in the project.\textsuperscript{24}

The threshold question in determining whether a major government action requires an EIS is whether that proposed project has the potential to significantly affect the environment.\textsuperscript{25} The RGU bases the decision of EIS necessity on the EAW and the comments it receives during the comment period.\textsuperscript{26} The EQB's regulations enumerate the required contents of an EAW.\textsuperscript{27} The EAW and the comments received serve as the basis for one of two possible conclusions by the RGU: 1) the proposed action has no potential for significant environmental effects (negative declaration); or 2) the proposed action has the potential for significant environmental effects and the RGU must prepare an EIS.

\textsuperscript{24}42 U.S.C. § 4332(C) (i)-(v) (1994).
\textsuperscript{25}Notably, the threshold question of whether an action has the potential to significantly affect the environment is buried in the middle of MEPA in section 116D.04, titled “Environmental impact statements.” See Minn. Stat. § 116D.04, subd. 2a. It is apparent that the statute focuses on the EIS, rather than the EAW.
\textsuperscript{26}See id. This initial assessment in the EAW serves also to determine the proper scope of an EIS, should one be necessary. See Minn. R. 4410.1000, subp. 3.
\textsuperscript{27}The Council on Environmental Quality (CEQ) is the agency responsible for promulgating rules to carry out NEPA. See 42 U.S.C. §§ 4332, 4342 (1994). The regulations are found at 40 C.F.R. pts. 1500-08 (1999).

The regulations provide that the EAW shall address at least the following major categories:

A. identification including project name, project proposer, and project location;
B. procedural details including identification of the RGU, EAW contact person, and instructions for interested persons wishing to submit comments;
C. description of the project, the purpose of the project, methods of construction, quantification of physical characteristics and impacts, project site description, and land use and physical features of the surrounding area;
D. resource protection measures that have been incorporated into the project design;
E. major issues identifying potential environmental impacts and issues that may require further investigation before the project is commenced;
F. known governmental approvals, reviews, or financing required, applied for, or anticipated and the status of any applications made, including permit conditions that may have been ordered or are being considered; and
G. if the project will be carried out by a governmental unit, a brief explanation of the need for the project and an identification of those who will benefit from the project.

Minn. R. 4410.1200.
The regulations recognize that in some instances there will be insufficient information to adequately determine whether the potential for significant impact exists. If the RGU "determines that information necessary to a reasoned decision about the potential for, or significance of, one or more possible environmental impacts is lacking, but could be reasonably obtained" the RGU must either make a positive declaration or postpone the decision for thirty days to obtain the missing information. The rules also establish the following criteria the RGU must use to determine the potential for significant environmental effects: type and extent of impact; cumulative effects of related or future projects; the role of mitigation; and the extent to which effects can be controlled by studies undertaken by other agencies or the project proposer.

If the RGU makes a positive declaration, it must then prepare an EIS. Positive declarations are, however, rare. Statistically, EIS preparation is the exception rather than the rule. The EQB does not have a formal method for collecting data on the number of EAWs and EISs prepared each year. Information for 1996 is available, however, and it indicates that RGUs prepared 137 EAWs and two EISs. It is arguable that simply because there are only two
to three EISs completed each year does not mean the statute is not working, or that the purposes of MEPA are being frustrated. It is not my intention to argue that environmental review in Minnesota is ineffective. Rather, I point to these numbers in part because they are surprising, given the statute and the low threshold of "potential" to significantly impact the environment. From my discussions with various administrators working in environmental review, the consensus seems to be that the content of EAWs tends to be more intensive than perhaps the statute intended. RGUs have every incentive to complete an overly thorough EAW to avoid the preparation of an EIS. Not surprisingly, much of MEPA litigation concerns the RGU's decision not to prepare the more analytical and comprehensive EIS.

B. Judicial Review of Agency Actions

The principal issue in cases where a party challenges an agency's decision not to prepare an EIS is substantially the same in

35. See supra note 13.
36. See supra note 13. Herman and Dayton note that the EQB has recognized the low numbers of EISs prepared and even stated the following in a 1985 report:

It is difficult to reconcile [the EAW purpose] with the reality that an EAW almost never leads to an EIS. It seems that either most projects being screened through the EAW process do not merit consideration for an EIS or that the EAW process is being used in practice to substitute for an EIS... If the latter is true, then the role of the EAW process should be reevaluated.

See Herman & Dayton, supra note 13, at 33 (citing 1985 EQB report). Herman and Dayton argue that the EAW as a decisionmaking tool is ineffective, especially in light of the low threshold of the need for an EIS: "The EAW's purpose is simply to say whether such potential effects 'might' or 'possibly' could occur and whether further review is needed." Id. at 36. "In a state of 4 million, it is inconceivable that there are fewer than ten projects, permits and funding decisions warranting full scale environmental review." Id. at 37. They also argue that when the EIS is avoided by the supposedly more comprehensive EAW, a meaningful and more advanced review of cumulative effects and alternatives to the proposed project is lost. See id. at 33, 37.

Herman and Dayton also note that the Minnesota Supreme Court has failed to use the "searching 'strict procedural compliance' standard adopted in other states and the federal cases." Id. at 36. They state that "[l]egal precedents have not engendered strong implementation [of MEPA], because of a limited number of cases and the Court's failure to utilize those limited cases as a vehicle for strong direction." Id. at 37.

37. See, e.g., In re American Iron and Supply Co.'s Proposed Metal Shredding Facility in Minneapolis, Minn., 604 N.W.2d 140, 142 (Minn. Ct. App. 2000).
both federal and state cases: whether the agency was required under the provisions and regulations of the statute to prepare an EIS. The difference between the federal and state cases, however, is the standard of review used to evaluate the agency's decision.

Since the Supreme Court recognized NEPA as imposing only procedural requirements on agencies, courts primarily review an agency's compliance with the procedures of NEPA. Innately procedural, NEPA does not dictate particular substantive results. Rather, it ensures informed decisionmaking by government bodies. If the agency complies with the procedures, presumably a well informed and reasoned decision follows. As such, federal courts set aside agency action if procedures are disregarded; however, substantive review is limited and agencies have a wide latitude of discretion.

Unlike courts construing NEPA, Minnesota courts have not yet circumscribed MEPA to contemplate a procedural element only. Minnesota courts, I argue, must review both the agency's compliance with procedure and its substantive decision. The following section will outline the standards of review used in agency action in general and in environmental review cases, both state and federal.

39. See infra notes 51, 64-68 and 69-73.
40. See supra note 8 (discussing Strycker's Bay and the Supreme Court's declaration that NEPA is a procedural statute).
41. See Strycker's Bay, 444 U.S. at 225.
42. See id.
43. See id.
44. "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered opinion...." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978).
45. See Strycker's Bay, 444 U.S. at 225 ("NEPA was designed 'to insure a fully informed and well-considered decision,' but not necessarily 'a decision the judges of the Court of Appeals or of this court would have reached had they been members of the decisionmaking unit of the agency.'") (citing Vermont Yankee, 435 U.S. at 558).
46. This article does not examine what substantive obligations MEPA imposes on acts. Other "Little NEPAs" or SEPAs (state environmental protection agencies) might require certain substantive results, such as requiring agencies to avoid the detrimental environmental impacts addressed in the EIS or EAW.
1. Standard of Review Generally in Agency Actions

MEPA provides that "[a]ny aggrieved party may seek judicial review pursuant to chapter 14."\(^{47}\) Minnesota Statute chapter 14 is MAPA.\(^{48}\) Like the federal Administrative Procedure Act (APA), MAPA provides a process for agency rulemaking, adjudications, and other decisionmaking, and entails the procedural rights for those challenging agency action.\(^{49}\) Also, like the federal APA, MAPA articulates the scope of judicial review of agency action.\(^{50}\)

The standards of judicial review in the federal APA and MAPA are essentially identical. Both statutes provide that agency actions may be set aside if such actions 1) violate a constitutional right or provision; 2) exceed the agency’s statutory powers or jurisdiction; 3) are made in contravention of procedure; 4) are contrary to law; 5) are unsupported by substantial evidence or 5) are arbitrary or capricious.\(^{51}\)

Minnesota case authority holds that an agency’s decision is upheld unless it “reflects an error of law, the determinations are arbitrary and capricious, or the findings are unsupported by the

\(^{47}\) MINN. STAT. § 116D.04, subd. 9 (1998).
\(^{50}\) See id. §§ 14.57–68.
\(^{51}\) See 5 U.S.C. § 706 (2) (1994); MINN. STAT. § 14.69. Specifically, the federal APA provides that agency action may be set aside if that action is:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [adjudications] . . . .

5 U.S.C. § 706 (2). By comparison, MAPA provides that agency action may be reversed or modified if it is:

- (a) In violation of constitutional provisions; or
- (b) In excess of the statutory authority or jurisdiction of the agency; or
- (c) Made upon unlawful procedure; or
- (d) Affected by other error of law; or
- (e) Unsupported by substantial evidence in view of the entire record as submitted; or
- (f) Arbitrary or capricious.

MINN. STAT. § 14.69.
The party seeking review of the agency's action has the burden of proving that the agency's decision meets one or more of the listed criteria in MAPA.

In Minnesota, a reviewing court affords "substantial judicial deference" to the fact-finding processes of the agency. In addition, a court will not reverse an agency determination if there are various approaches to a matter or even if the court would have concluded differently had it been the fact-finder. It will find that an agency's decision was arbitrary or capricious, however, if the decision "represents [the agency's] will and not its judgment." The court reviews the administrative record and determines whether there is substantial evidence to support the agency's decision. In addition, courts defer to an agency's interpretation of its own rules or regulations and the statute that it administers. Minnesota courts review de novo, however, an agency's interpretation of a statute. Finally, courts do not defer to an

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54. *See id. at 884.

55. *See In re American Iron and Supply Co.’s Proposed Metal Shredding Facility in Minneapolis, Minn., 604 N.W.2d 140, 145 (Minn. Ct. App. 2000) (citing White v. Minnesota Dep’t of Natural Resources, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997)).


59. *See American Iron and Supply, 604 N.W.2d at 144; see also No Power Line, Inc. v. Minnesota Envd. Quality Council, 262 N.W.2d 312, 320 (Minn. 1977) (stating that when reviewing questions of law, courts need not defer to agency expertise). Courts do defer to an agency interpretation of a statute that the agency administers if the interpretation is not in conflict with the statute’s purpose and the intent of the legislature. See Geo. A. Hormel & Co. v. Asper, 428 N.W.2d 47, 50 (Minn. 1988) (“[A]n agency’s interpretation of the statutes it administers is entitled to deference and should be upheld, absent a finding that it is in conflict
agency's decision to sidestep procedures, and will reverse an agency determination if procedure has been disregarded.\textsuperscript{60}

By comparison, in \textit{Citizens to Preserve Overton Park, Inc. v. Volpe},\textsuperscript{61} the United States Supreme Court articulated the various standards under the federal APA. In \textit{Overton Park}, the Secretary of Transportation authorized expending federal funds for the construction of a six-lane interstate highway going through a public park in Memphis, Tennessee.\textsuperscript{62} Citizens and environmental coalitions challenged the action on various grounds, including that the Secretary failed to follow statutory procedures.\textsuperscript{63}

Before the Court could review the Secretary’s actions, it noted that it first must decide which standard of review to apply.\textsuperscript{64} The Court explained that there were “six separate standards” in the federal APA.\textsuperscript{65} The Court first considered the federal legislation that governed the Secretary’s actions\textsuperscript{66} and analyzed the obligations of the Secretary by considering that which was left to agency discretion, those procedures that the agency must follow, and areas where there was no law governing certain actions.\textsuperscript{67} After

\textsuperscript{60}See, e.g., Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep’t of Health, 375 N.W.2d 496, 501 (Minn. Ct. App. 1985) (reversing agency decision because it was based upon unlawful procedure); Northern Messenger, Inc. v. Airport Couriers, Inc., 359 N.W.2d 302, 305 (Minn. Ct. App. 1984) (reversing and remanding agency decision when it failed to follow proper procedure); see also MINN. STAT. § 14.69 (c) (1998); cf. City of Moorhead v. Minnesota Pub. Util. Comm’n, 343 N.W.2d 843, 849-50 (Minn. 1984) (determining that the agency used proper procedure in rendering its decision).


\textsuperscript{62}See id. at 406-07.

\textsuperscript{63}See id. at 408-09.

\textsuperscript{64}See id. at 413.

\textsuperscript{65}Id. at 415 n.30.

\textsuperscript{66}The statutes at issue were the Department of Transportation Act and the Federal-Aid Highway Act, both of which provided that the Secretary of Transportation could not approve any “program or project that requires the use of public parkland unless (1) there is not feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . .” \textit{Id.} at 411 (quoting 23 U.S.C. § 138; 49 U.S.C. § 1653(f) (1964)).

\textsuperscript{67}See id. at 414-17.
considering the agency’s duties, the Court concluded that three separate standards of review applied: whether the Secretary acted within the scope of his authority; whether the choice made was arbitrary, capricious, or an abuse of discretion; and whether the Secretary’s actions followed the necessary procedural requirements.  

Clear from Overton Park is the threshold necessity of examining the statute to determine what obligations it imposes, what regulations apply, how much discretion the agency possesses, and what procedures an agency must follow. Only after an inquiry into the agency’s duties can a court determine which standard of review it must use to evaluate the agency’s actions.  

Different statutes impose different duties on the agency and, as such, varying standards of review will apply. In Overton Park, the Court found that Congress had “specified only a small range of choices that the Secretary” could make. Therefore, the Court considered whether the Secretary “acted within the scope of his statutory authority.” In addition, the Court determined it must also review the substantive nature of the decision under the arbitrary and capricious standard. Lastly, because the statute imposed certain procedural requirements on the Secretary when determining if a highway project could proceed, the Court considered whether the Secretary’s actions followed the necessary procedures. Overton Park teaches that the standard of review turns on what obligations and duties the statute creates.

2. **Scope of Judicial Review under MEPA**

When reviewing negative declarations, the Minnesota Court of Appeals has stated that it reviews the agency’s decision for whether it was “unreasonable, arbitrary, or capricious.” Curiously, the court of appeals has never, in the environmental review setting,

68. See id. at 415-17.

69. If, for instance, a statute provides no procedural obligations, then obviously it is unnecessary to determine whether the agency decision was made without observance of procedure.

70. Id. at 416.

71. Id.

72. See id.

73. See id. at 417.

relied on MAPA, despite MEPA’s declaration that MAPA governs judicial review. The Minnesota Supreme Court relied on MAPA in Reserve Mining Co. v. Herbst, when it considered whether the decisions of two state agencies denying permits for disposal sites for taconite tailings was well founded. The court did make clear that MAPA governed the standards of review of agency decisionmaking. The deferential standard of “unreasonable, arbitrary or capricious” in environmental review cases traces back to a 1988 Minnesota Supreme Court case reviewing a city council’s zoning decision. Historically, zoning decisions are reviewed

75. Other Minnesota cases reviewing agency actions cite to and apply MAPA. See, e.g., Nevels v. State Dep’t of Human Servs., 590 N.W.2d 798, 800 (Minn. Ct. App. 1999) (citing MINN. STAT. § 14.69(d), (e) (1998) to review Department of Human Services decision); Bastian v Carlton County Highway Dep’t, 555 N.W.2d 312, 317-18 (Minn. Ct. App. 1996) (citing MINN. STAT. § 14.69 (d), (e) to review Department of Labor determination); Central Tel. Co. v. Minnesota Pub. Util. Comm’n, 556 N.W.2d 696, 701 (Minn. Ct. App. 1984) (citing MINN. STAT. § 14.69 (d), (f) to review Public Utilities Commission action); Northern Messenger, Inc. v. Airport Couriers, Inc., 359 N.W.2d 302, 305 (Minn. Ct. App. 1984) (citing Minn. Stat. § 14.69(c) to review Minnesota Transportation Regulation Board decision).

76. 256 N.W.2d 808, 823 (Minn. 1977).

77. See id. at 828.

78. See id.

79. See Trout Unlimited, Inc. v. Minnesota Dep’t of Agric., 528 N.W.2d 903, 907 (Minn. Ct. App. 1995). (Technically, the first review of an agency’s negative declaration occurred in Minnesota Pub. Interest Group v. Minnesota Environmental Quality Council, 237 N.W.2d 375 (Minn. 1975). In that case the court declared that the agency had a “rational basis” for not requiring an EIS and thus the agency’s decision was not arbitrary or capricious. See id. at 382. Although the Minnesota Supreme Court was the first court to set the standard of review in negative declaration cases, I do not use this case in my analysis here because the Minnesota Court of Appeals has not relied on it in its negative declaration cases, but has instead relied on the line of cases that follow).

In determining the standard of review, the Trout Unlimited court stated “We review the Commissioner’s decision [negative declaration] to determine whether it is unreasonable, arbitrary, or capricious.” Id. (citing Carl Bolander, 502 N.W.2d at 207).

In Carl Bolander, the plaintiff sought a license from the City of Minneapolis to operate a recycling facility in Minneapolis. See Carl Bolander, 502 N.W.2d at 205. Bolander applied to the city for the license, but the city council determined that before it would issue a license to operate, an EAW must be prepared pursuant to MEPA to assess the potential for environmental harm. See id. at 206. The issue before the Minnesota Supreme Court was whether the city council’s decision denying Bolander a license on the basis that an EAW was necessary was “unreasonable, arbitrary, or capricious.” See id. at 207 (citing Swanson v. City of Bloomington, 421 N.W.2d 307, 313 (Minn. 1988)). While the issues in Carl Bolander concerned MEPA and EAWs, the more narrow issue dealt with the city council’s determination not to issue Bolander a license for his recycling facility. While MEPA issues were present, the primary issue concerned a
under a highly deferential standard, as compared to the five standards outlined in MAPA.  

A Minnesota court reviewing a negative declaration typically begins by stating that judicial review is limited to determining whether the agency's decision was unreasonable, arbitrary or capricious. To determine whether an agency decision is arbitrary or capricious, the court determines whether the RGU's decision was based on substantial evidence in the record. Stated another way, the review focuses on "the legal sufficiency of and the factual basis for the reasons given." An agency's decision will also be

municipality's refusal to grant a license. See id. at 205-06.

The Carl Bolander court appropriately relied on Swanson, 421 N.W.2d at 313, for determining the proper standard to review the city council's actions. Swanson also concerned a zoning matter and the Swanson court relied on White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174 (Minn. 1982). See Swanson, 421 N.W.2d at 311. The White Bear court noted that "[t]he court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked." Id. The White Bear court considered whether the City Council of White Bear Lake acted arbitrarily and capriciously in denying an application for an amended special use permit to install a 10-foot by 50-foot mobile trailer office on the shore of White Bear Lake. See White Bear, 324 N.W.2d at 175.

Minnesota Statute sections 462.351-.365 govern the procedures for municipal planning. Specifically, section 462.361 provides for judicial review of any governing body's decision. The municipal planning chapter does not refer to Chapter 14, MAPA, as does MEPA in its provision concerning judicial review.

80. Court decisions articulating a standard of review in zoning planning cases under Minnesota Statute sections 462.351-.365 review a city council's decision under a "rational basis" or a "reasonableness" standard. See Hoon v. City of Coon Rapids, 313 N.W.2d 409, 416-17 (Minn. 1981) ("[T]he standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable. Our cases express this standard in various ways: Is there a 'rational basis' for the decision? or is the decision 'unreasonable, arbitrary or capricious?' or is the decision 'reasonably debatable'?")); Campion v. County of Wright, 347 N.W.2d 289, 291 (Minn. Ct. App. 1984):

The setting aside of routine municipal decisions should be reserved for those rare instances in which the City's decision has no rational basis. Except in such cases it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties.

Id.


82. See id. at 880 (citing Swanson, 421 N.W.2d at 313 (reviewing zoning decision of municipal authorities pursuant to Minnesota Statute section 462.361).

83. National Audubon Soc'y v. Minnesota Pollution Control Agency 569
found arbitrary or capricious if the agency relied on factors that the legislature did not intend, if it completely failed to consider an important part of the problem, if it offers an explanation that goes against the evidence, or "if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 84

3. **Scope of Judicial Review under NEPA**

Federal courts considering NEPA issues articulate an altogether different standard of review. Federal courts consider whether the agency's decision was "without observance of the procedure required by law." 85 Courts recognize that NEPA is essentially a procedural statute, and thus agency action taken without observance of procedure will be set aside under section 706(2)(D) of the APA. 86 Courts note that the rigorous procedures of NEPA require a "strict standard of compliance" on the part of the agency. 87 NEPA requires "full, fair, bona fide compliance," 88 because the policies of NEPA are only effectuated when the "prescribed procedures are faithfully followed; grudging, pro forma compliance will not do." 89

While courts reviewing actions under NEPA generally limit

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84. Trout Unlimited, 528 N.W.2d at 907.
85. See, e.g., Save the Yaak Comm'n v. Block, 840 F.2d 714, 717 (9th Cir. 1988). When an agency has decided to go forward with a federal action after it has prepared and considered an EIS, the court determines if the necessary procedures were followed, considers questions of law de novo, and examines the facts to determine whether the agency's decision to commence the project is arbitrary and capricious. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410-21 (1971), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977).
86. See supra note 51 (outlining section 706(2) of the Administrative Procedure Act).
87. Calvert Cliffs' Coordinating Comm'n v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971). In articulating the procedural requirements of NEPA, Judge Skelly Wright noted that NEPA's sponsor, Senator Jackson, characterized the procedures of NEPA as "action-forcing" and observed that Jackson stated that without the full compliance with the procedures, "these lofty declarations [in Section 101] are nothing more than that." Id. at 1112-13. Judge Wright also stated that "a purely mechanical compliance with the particular measures in § 102(2)(C) & (D) will not satisfy the Act if they do not amount to full good faith consideration of the environment." See id. at 1112-13 n.5 (emphasis omitted).
88. Kilroy v. Ruckelshaus, 738 F.2d 1448, 1453 (9th Cir. 1984) (quoting Lathan v. Brinegar, 506 F.2d 677, 693 (9th Cir. 1974) (en banc)).
89. Lathan, 506 F.2d at 693 (emphasis omitted).
review to procedural compliance, that analysis does at times depend in part on certain substantive matters. Consequently, federal courts do in fact engage in a very limited review of substantive decisions. Courts note that NEPA does not dictate particular substantive results, but that the policy behind NEPA is one that seeks "to ensure that an agency has at its disposal all relevant information about environmental impacts of a project before the agency embarks on the project." Consistent with this statement, courts defer to an agency's substantive decision and use the standard of review employed by Minnesota courts—whether the agency's decision was arbitrary or capricious. It is important to note, however, that whether the agency's substantive decision is arbitrary or capricious is a distinct inquiry from whether the agency action is without observance of applicable procedure. The Minnesota Court of Appeals has failed to recognize this distinction, and the resulting holdings are erroneous.

III. ABDICATING THE JUDICIAL FUNCTION: THE MINNESOTA COURT OF APPEALS

In reviewing an agency's negative declaration, the Minnesota Court of Appeals has extended the concept of deference beyond the province of agency expertise, and the court has unduly deferred when considering whether agency action is based upon unlawful procedure. Two cases of recent vintage, Iron Rangers for Responsible Ridge Action v. Iron Range Resources and National Audubon Society v. Minnesota Pollution Control Agency illustrate how the court of appeals has failed to distinguish the substantive and procedural components of MEPA.

90. See discussion infra Part IV.C.
91. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). Compare this requirement with MEPA. MEPA has never been declared to be only a procedural statute.
92. Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994).
93. See Marsh, 490 U.S. at 375-76.
94. 531 N.W.2d 874 (Minn. Ct. App. 1995).
95. 569 N.W.2d 211 (Minn. Ct. App. 1997).
A. Iron Rangers For Responsible Ridge Action v. Iron Range Resources

Originally serving as a local ski area with "the first downhill run cut out of the mountain forest in the mid 1950s," today Giants Ridge Ski Resort is one of the Midwest's "finest resort-style golf courses" with year-round activities. In 1995, the Iron Range Resource and Rehabilitation Board (IRRRB), a quasi-state agency, sought to create what is now a highly rated resort area in Minnesota's northern woods. The IRRRB sponsored the development of a golf course and housing facilities in the Giants Ridge area. Before the project could commence, MEPA required the preparation of an EAW. St. Louis County served as the RGU and determined that an EIS would be unnecessary as there was no potential for significant environmental effects.

Two environmental groups, the Minnesota Center for Environmental Advocacy (MCEA) and Iron Rangers for Responsible Ridge Action (the Rangers), sued the IRRRB and St. Louis County to prohibit the issuance of conditional use permits (CUPs) and the project construction permits before the agency prepared an EIS. MCEA and the Rangers argued, among other things, that the county erred in determining that there was no potential for significant environmental effect because "the project would affect ground and surface water, could harm the barren strawberry, the clustered bur reed, or the floating marsh marigold, and would cause forest fragmentation." The district court granted the IRRRB's and the county's cross-motion for summary judgment.

97. See Iron Rangers, 531 N.W.2d at 878.
98. See id.
99. See id.
100. See id.
101. See id. at 877.
102. Id. In support of prohibiting the issuance of the CUPs and other permits, the plaintiffs also argued that St. Louis County was not the appropriate RGU and could not assume responsibility for environmental review under the statute and the rules. See id. at 882. The court rejected the argument and held that St. Louis County could serve as the RGU. See id. at 883.
103. See id. at 879. The county argued in favor of its cross-motion for summary judgment that the project had no potential for significant effects and thus the county's negative declaration was not arbitrary or capricious. See id.
On appeal, the court considered whether the county's decision that a proposed 18-hole golf course, upgrade of ski trails, and possible future construction of 200 to 250 housing units would not cause significant environmental effects was arbitrary or capricious. The court began its analysis by declaring it would review the county's negative declaration using the arbitrary or capricious standard. The court also outlined the relevant provisions of MEPA and the EAW regulations, and in turn evaluated each of the plaintiffs' complaints.

Beginning with forest fragmentation, the court noted that the Department of Natural Resources' (DNR) comments suggested that such fragmentation could disrupt habitat for various species of birds, but also noted that there was "no data showing there is a population of migratory songbirds in northern Minnesota that would be affected." The court stated that while the DNR was "collecting statewide data on forest fragmentation to develop a forest policy" the county could not be "compelled to prepare an EIS on the basis of speculative factors" because "MEPA does not provide absolute guarantees for environmental resources." The

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104. The resort has 60 kilometers of cross-country ski trails, cleared to 20 feet wide with a groomed surface of 18 feet. See Giants Ridge Golf & Ski Resort (visited Apr. 24, 2000) <http://test1.duluth.com/cc-ski.html>.

105. See Iron Rangers, 531 N.W.2d at 878-79.

106. See id. at 879; supra note 79 and accompanying text.

107. Iron Rangers, 531 N.W.2d at 881.

108. Id. When the court stated that an EIS could not be prepared on speculative factors, it cited Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 829-30 (Minn. 1977), noting parenthetically that "MEPA does not provide absolute guarantees for environmental resources." See id.

Apparently the court was citing to the portion of the Reserve Mining opinion in which that court was considering Minnesota Statute section 116D.04, subdivision 6, which provides that no "permit for natural resources management and development [shall be] granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land, or other natural resources, ... so long as there is a feasible and prudent alternative...” MINN. STAT. § 116D.04, subd. 6 (1998). This subsection is triggered only when an EIS has already determined that there will be significant impairment to the environment due to the proposed project. The Reserve Mining court was considering whether the parties were required to consider the feasibility and prudence of an alternative site. See Reserve Mining, 256 N.W.2d at 829. Specifically, the plaintiff in Reserve Mining was concerned about the safety of certain proposed dams and argued that the statute prevented issuance of a permit when a project might be unsafe. See id. at 829-30.

The Reserve Mining court noted that no expert for either side had opined that the dams as designed would be unsafe and concluded that subdivision 6 did not apply when the safety of a structure was undisputed. See id. at 829. In
Iron Rangers' court used Reserve Mining's conclusion that MEPA does not set a standard that guarantees absolute safety from project siting to support the proposition that MEPA does not provide absolute guarantees for natural resources when data is wanting. Because the issues under consideration in each case were distinct and the applicable statutory provisions were different, Iron Rangers' use of Reserve Mining's reasoning was irrelevant to the discussion of whether the agency properly issued a negative declaration in light of the insufficient data. In addition, the court used Reserve Mining as a way out—the court essentially threw up its hands claiming that MEPA makes no guarantees.

The court also concluded that neither NEPA nor MEPA mandates that a negative declaration "be based only on the best available scientific methodology." The county, the court reasoned, was in a difficult position where it had to "make a reasoned analysis of the evidence before it.... Where there are technical disputes and uncertainties, the court must assume that the agency or RGU has exercised its discretion appropriately." The barren strawberry was rare and listed as "of special concern" but not "endangered." According to the court, because the effects of current forest management on the strawberry were unknown, the rule calling for deference to agency determinations

addition, the court looked to NEPA to interpret MEPA and concluded that nothing in either statute dictated that project siting guarantees "absolute safety." See id. at 830. Instead, the statute and regulations only required that the siting for the dam not pose a "significant threat to public health or safety." Id.

109. See Iron Rangers, 531 N.W.2d at 881.

110. Id. Iron Rangers cited Greenpeace Action v. Franklin, 982 F.2d 1342, 1351-52 (9th Cir. 1992), where that court considered whether the plaintiffs' assertions that the National Marine Fisheries Service's data supporting a negative declaration was insufficient or its methodology inadequate. See Greenpeace Action, 982 F.2d at 1351. The court was loathe to require the best scientific data, but instead decided that "adequate data" would serve as the standard. See id. It concluded that Greenpeace was merely asserting a "difference of scientific opinion." Id. Greenpeace had relied on Wild Sheep, where the court held that the Forest Service failed to address "certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS." See id. (quoting Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)). The Greenpeace Action panel distinguished Wild Sheep by stating that in the present case, the Fisheries Service did not completely fail to consider crucial factors as did the Forest Service in Wild Sheep. See Greenpeace Action, 982 F.2d at 1352.

111. Iron Rangers, 531 N.W.2d at 881 (citing to Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 67 (D.C. Cir. 1987)).

112. Id.
when technical uncertainties were present applied, and as such the court was required to "defer to the discretion of the county." 113

In short, the court concluded that because there was a lack of information, the agency need not prepare an EIS. Notwithstanding the regulations that direct agency action in the event that there is insufficient information to make an informed and reasoned analysis, 114 the court equated insufficient information with technical or disputed information. By likening deficient information to technically disputed information, the court failed to require the agency's full compliance with regulations that direct the RGU to either "make a positive declaration . . . or . . . postpone the decision for the need for an EIS . . . in order to obtain the lacking information." 115

The Iron Rangers court next considered the impact on ground and surface water. While the EAW declared a significant impact, 116 the county asserted that there were mitigation measures in place. 117 The RGU had asked IRRRB to conduct a second phase assessment and deferred the issuance of a CUP to provide more time to identify additional mitigation measures. 118 The court found that the possibility of mitigation measures supported the county's negative declaration. 119 In addition, the court noted that "state law and local permit controls regulate the use of herbicides and pesticides, and project compliance with those regulations weighs heavily in favor of a finding of no significant impact for an EIS." 120

113. Id.
114. See supra note 30 and accompanying text (quoting MINN. R. 4410.1200, subp. 2a, which directs agency action if there is insufficient information).
115. MINN. R. 4410.1700, subp. 2a (A)–(B).
116. See Iron Rangers, 531 N.W.2d at 881 ("The EAW states that the golf course construction will have an impact on ground and surface water because of the varied or higher temperature of water runoff and the herbicides used.").
117. See id.
118. See id.
119. See id.
120. Id. The court cited to Lockhart v. Kenops, 927 F.2d 1028, 1033 (8th Cir. 1991) for the proposition that other laws and regulations would prevent any significant impact. In Lockhart, the plaintiff was concerned with a land transfer from the Forest Service to a private owner who wished to build luxury homes on the land. See id. at 1030-31. The court considered whether there might be significant impact due to seepage from the sewage systems into an aquifer that supplied water to Lockhart and her neighbors. See id. at 1033. The court concluded that while studies indicated that there would be some problems, those problems might be cured with proper placement of tanks and that because "the applicable zoning regulations contain stringent requirements for safe sewage disposal," there would be no significant impact. Id.
While mitigation is a valid consideration to determine whether a project has the potential for significant impact, it is only one of four criteria the agency must analyze. In holding that the agency's decision deserved discretion because one of the four factors cut in favor of no potential for significant impact, the Iron Rangers' court did not require compliance with the procedures. In contravention of the regulations, the court upheld a determination by the RGU that was based on only one of the criteria. In addition, permitting the project to proceed on the condition that other studies may be conducted to determine the impact undermines the reason for review—preventing the adverse impact before it occurs. The court deferred to the agency's decision not to follow the regulations.

B. National Audubon Society v. Minnesota Pollution Control Agency

Two years after Iron Rangers, the court of appeals reviewed another RGU's determination that an EIS was unnecessary. In National Audubon Society v. Minnesota Pollution Control Agency, the court upheld the Minnesota Pollution Control Agency's (MPCA) decision that a proposed expansion of the Potlatch Corporation plant near Cook, Minnesota, did not have the potential to significantly impact the environment, and thus did not require an EIS.

In 1995, Potlatch Corporation proposed an expansion of one of its plants and applied to the MPCA for an amendment to its air

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121. See Minn. R. 4410.1700, subp. 7 (A)-(D).
122. See Trout Unlimited, Inc. v. Minnesota Dep't of Agric., 528 N.W.2d 903, 909 (Minn. Ct. App. 1995). The Trout Unlimited court was faced with a similar situation as was presented in Iron Rangers. In Trout Unlimited, the RGU determined that an irrigation project near a trout stream had no potential for significant impact and thus an EIS was unnecessary. See id. at 903. The EAW stated that chemicals found in pesticides could impact the trout stream in several ways, but the RGU ultimately concluded that "monitoring and permit conditions can identify significant impacts and modify or terminate the project if necessary." Id. at 909. The court, unconvinced by the RGU's rationale for not preparing an EIS, stated, "[t]he very purpose of an EIS, however, is to determine the potential for significant environmental effects before they occur. By deferring this issue to later permitting and monitoring decisions, the [RGU] abandoned [its] duty to require an EIS where there exists a 'potential for significant environmental effects.'" Id. (citing Minn. Stat. § 116D.04, subd. 2a (1998)).
123. 569 N.W.2d 211 (Minn. Ct. App. 1997).
124. See id. at 218-19.
125. The MPCA "was established in 1967. Its purpose is to protect Minnesota's
SILENCING OF MEPA

emission permit.126 The plant expansion was expected to increase wood consumption from 178,000 cords per year to 355,000 cords each year.127 It was anticipated that the increase in wood consumption at the plant would clear an estimated 7,600 acres of mature forest each year.128 The EAW focused principally on the impact to air quality and the impact of timber harvesting.129 The EAW based its discussion of the impact of harvesting on the findings of a Generic Environmental Impact Statement (GEIS) on Timber Harvesting and Forest Management in Minnesota.130 The GEIS, completed in 1994, studied the cumulative effects of timber harvesting statewide.131

The GEIS addressed the effects of increased timber harvesting in the state under three situations: "a base level of 4 million cords per year; a medium level of 4.9 million cords per year; and a high level of 7 million cords per year."132 The increased harvest from the Potlatch expansion fell just below the medium harvest level that the GEIS studied.133 The MPCA ultimately delegated its responsibility to determine the impact of timber harvesting to the DNR because the DNR had more expertise in forestry and wildlife management.134 The DNR's Division of Forestry and the Division of Fish and Wildlife split on whether an EIS was necessary: "the environment through monitoring environmental quality and enforcing environmental regulations." About MPCA (visited Apr. 7, 2000) <http://www.pca.state.mn.us/about/index.html>.

126. See Audubon, 569 N.W.2d at 214.
127. See id.
128. See id. Potlatch estimated that "90% of the wood for the proposed expansion will be harvested within the four counties surrounding the Cook facility: Itasca, Koochiching, Lake, and St. Louis counties." Id.
129. See id.
130. See id. The GEIS is discussed generally in the regulations, under the section concerning EISs. See MINN. R. 4410.3800. The rule determines how the GEIS relates to project-specific review:

Preparation of a generic EIS does not exempt specific activities from project-specific environmental review. Project-specific environmental review shall use information in the generic EIS by tiering and shall reflect the recommendations contained in the generic EIS if the EQB determines that the generic EIS remains adequate at the time the specific project is subject to review.

Id. 4410.3800, subp. 8.
131. See Audubon, 569 N.W.2d at 214.
132. Id.
133. See id.
134. See id.
Division of Forestry supported the increased timber harvesting and recommended a finding of no significant impact; the Division of Fish and Wildlife "determined that the increased timber harvesting had the potential for significant environmental effects" and recommended an EIS. Ultimately, the Commissioner of the DNR concurred with the Division of Forestry and recommended a negative declaration. After the comment period, the MPCA found there was no potential for significant impact, and, as such, determined that an EIS was unnecessary.

The plaintiffs sued the MPCA, challenging the negative declaration and seeking an injunction prohibiting the MPCA from granting any permits and invalidating any permits already issued. The district court dismissed the plaintiffs' claims and the plaintiffs appealed. One of the issues before the court of appeals was whether "the MPCA's determination that the Potlatch expansion did not have the potential for significant environmental effects... [was] arbitrary and capricious and not based on substantial evidence in the record."

Two sub-issues concerned the validity of the negative declaration. The first was whether the mitigation measures that the GEIS recommended justified the MPCA's finding that the Potlatch expansion did not have the potential to significantly affect the environment. The second issue was whether the MPCA evaded project-specific review by relying on the GEIS to determine that there was no potential for significant impact.

135. Id.
136. See id.
137. See id. The MPCA then distributed the EAW for public comment and received 27 comments from private citizens, environmental groups and other government agencies. See id.
138. See id. at 215.
139. See id.
140. Id. The plaintiffs also raised two other issues on appeal. The first was whether the MPCA's negative declaration was arbitrary and capricious because it did not include various adverse scientific opinions and other agencies' comments in the administrative record. See id. The court held that because that information was not part of the administrative record, the RGU was not required to consider the data in making its decision. See id. at 216-17. The second issue concerned the district court's ability to review the negative declaration under the Minnesota Environmental Rights Act (MERA), Minnesota Statute section 116D.03. See id. at 215. The court held that MERA did not provide a cause of action in negative declaration cases. See id. at 218.
141. See id. at 217.
142. See id.
With respect to the first issue, the plaintiffs argued that the MPCA's reliance on mitigation measures was "wholly speculative" and the MPCA had no authority to enforce such mitigation measures.\(^{143}\) The mitigation measures were presumably speculative because the EAW did not address specifically whether the Potlatch expansion had the potential for significant impact.\(^{144}\) Rather, as the court discreetly indicated in a footnote, the GEIS did not include the Potlatch expansion as one of the "possible forest industry expansions" but considered other possible expansions in different areas.\(^{145}\) The MPCA outlined various mitigation measures recommended in the GEIS, including ones already undertaken by Potlatch and "evaluated the status of those measures."\(^{146}\) According to the EAW, Potlatch was presently implementing some of those measures and had reduced adverse impacts.\(^{147}\)

The court determined that the mitigation measures were specific enough and that they would likely be implemented by Potlatch.\(^{148}\) The court reasoned, "while the Potlatch expansion will have some significant environmental impact, the EAW and the GEIS provide and target specific mitigation measures to reduce the impact of any adverse effects."\(^{149}\)

Concerning the second issue, the plaintiffs argued that the MPCA "improperly relied on the GEIS to evade project-specific review."\(^{150}\) The court disagreed, stating:

> In this case, it is questionable whether a project-specific EIS would provide information substantially different

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\(^{143}\) See id.

\(^{144}\) See id.

\(^{145}\) Id. at 217 n.1. The footnote reads:

The EAW noted that while the Potlatch expansion was not included in the list of possible forest industry expansions considered during the preparation of the GEIS's medium harvest level, several of the expansions that were being considered at that time are no longer being considered. The MPCA considered it appropriate to use the GEIS because the Potlatch expansion replaced those projects no longer being considered.

\(^{146}\) Id.

\(^{147}\) See id.

\(^{148}\) See id.

\(^{149}\) Id.

\(^{150}\) Id.
The court further reasoned that because harvesting depends on the discretion of the landowner, there was no meaningful way to identify the specific 7,600 acres of timberland that likely would be cut in the four-county area. Because of this, the court opined, the RGU did not need to conduct a project-specific review.

By permitting the RGU to base its determination that the Potlatch expansion had no potential for significant environmental impact on the GEIS, the court dismissed entirely MEPA's requirement that "[w]here there is the potential for significant 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." In Audubon, the court sanctioned an EAW that did not consider any of the effects peculiar to the Potlatch expansion. As stated above, the court acknowledged in a footnote that the GEIS did not consider the areas that Potlatch wished to harvest but analyzed other areas of the state. Despite the requirement that each project undergo a project-specific review, the impact of Potlatch's expansion was never considered in accordance with the regulations because it was "questionable" whether an EAW or EIS analyzing effects specific to the four-county region would be useful. The

151. Id. at 217-18. At that time, according to the GEIS, "private individuals and corporations other than the forest industry owned approximately 43% of Minnesota timberland; the state owned 21%; counties 17%; the federal government 12.3%; and the forest industry owned 5% of Minnesota's available timberland." Id. at 218.
152. See id.
153. See id. at 217-18.
155. See Audubon, 569 N.W.2d at 217.
156. See id. at 217 n.1.
court's deference to the RGU's decision not to prepare a project-specific EAW or EIS illustrates the court of appeals' deference to an RGU on the most basic matters of binding procedure.

Not only did the court improperly defer to the RGU, but also it plainly ignored EQB regulations that specifically address the relationship that GEISs have to project-specific review. Such regulations provide that "[p]reparation of a generic EIS does not exempt specific activities from project-specific environmental review."\textsuperscript{157} The court apparently concluded that because the RGU claimed that it was difficult, complicated or even useless to prepare a project-specific environmental review, the need for project-specific review was a technical matter that required the court to show deference to the RGU's expertise. The court wrongly found that the need for project-specific review was a substantive matter requiring agency expertise. The rules pertaining to the specificity of review, are clear—they mandate review for each project, and a GEIS is not a substitute.

IV. TWO DISTINCT INQUIRIES: PROCEDURAL AND SUBSTANTIVE REVIEW

To rectify the erroneous legal applications and conclusions of \textit{Iron Rangers} and \textit{Audubon}, the Minnesota Supreme Court should recognize that MEPA requires judicial review of RGU action by at least two standards.\textsuperscript{158} The first standard reviews the agency's substantive determination using the arbitrary and capricious standard.\textsuperscript{159} The second standard considers whether, in making its determination, the agency followed proper procedures as outlined by the rules and regulations. In the environmental review context, this procedural question is perhaps the more critical inquiry because determining which procedures an agency must follow is not a matter that depends on technical judgments, scientific variables or probabilities. Rather, compliance with procedure is a matter within the court's unique expertise, and the RGU does not have the discretion to decide which rules apply and when. For MEPA to serve any useful purpose, this second inquiry must be

\textsuperscript{157} MINN. R. 4410.3800, subp. 8.

\textsuperscript{158} This article focuses on the procedural standards of review that the court has overlooked. It is possible that other standards may be applicable in other cases, and depending on what the litigants challenge, various provisions of MAPA might apply.

\textsuperscript{159} \textit{See Audubon}, 569 N.W.2d at 215.
more exacting, and the agency action is to be set aside if it was the result of unlawful procedure.\textsuperscript{160}

A. The Minnesota Administrative Procedure Act Governs the Standard of Review in MEPA Cases

To reestablish the "action-forcing" nature of MEPA and to give full effect to the intent and purpose with which the Minnesota legislature enacted MEPA, the Minnesota Supreme Court should affirmatively declare that agency decisions under MEPA are reviewed pursuant to MAPA. Without such a pronouncement, Minnesota courts will continue in failing to establish the distinction between the necessity of deference to an RGU’s decisions that necessitate technical expertise and the requirement that the RGU strictly follow MEPA’s procedures.

The current and incomplete standard of review in negative declaration cases first arose in Trout Unlimited, Inc. v. Minnesota Department of Agriculture.\textsuperscript{161} As the first court to review an RGU’s negative declaration, Trout Unlimited stated that the RGU’s determination was reviewed under the arbitrary and capricious standard.\textsuperscript{162} The court relied on Carl Bolander to determine the proper scope of judicial review; however, this reliance on and citation to Carl Bolander was erroneous.\textsuperscript{163}

As stated above, Carl Bolander concerned a licensing decision by the Minneapolis City Council.\textsuperscript{164} As a historical matter, courts have reviewed zoning and local licensing determinations for rationality, typically bestowing in the local zoning authorities a wide latitude of discretion.\textsuperscript{165} Zoning issues and environmental review, however, are clearly separate and discrete legal issues. Not only is zoning often a purely local matter usually handled by a city’s council, but a distinct statute governs it.\textsuperscript{166} The statute applying to zoning decisions refers to the availability of judicial review, but,

\textsuperscript{160} See supra note 51 and accompanying text (citing Minnesota Statute section 14.69 and the federal APA).
\textsuperscript{161} 528 N.W.2d 903.
\textsuperscript{162} See id. at 907.
\textsuperscript{163} See supra note 79 and accompanying text.
\textsuperscript{164} See Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 205 (Minn. 1993).
\textsuperscript{165} See supra note 80 and accompanying text (discussing zoning cases and the "rational basis" or "reasonableness" standard of review used in such cases).
\textsuperscript{166} See MINN. STAT. § 462.351-.365 (1998). Section 462.361 provides for judicial review of zoning decisions.
unlike MEPA, it does not cross reference MAPA as the statute that governs judicial review of zoning decisions. As such, Carl Bolander and its predecessor cases are not the correct precedent for establishing the standard of review in MEPA cases because they concern licensing and zoning decisions.

In addition, it was incorrect to rely on Carl Bolander for the proper scope of review because MEPA provides its own process for judicial involvement in the environmental review process. MEPA specifically states that "[a]ny aggrieved party may seek judicial review pursuant to chapter 14 [MAPA]." The legislature intended that the many standards of MAPA apply, when appropriate, to MEPA issues. Citing case law that concerns zoning and licensing and ignoring the clear legislative directive that MAPA applies in MEPA cases is legally incorrect. Only three cases arising under MEPA have correctly relied on MAPA. Notably, those cases have not been negative declarations but have concerned the adequacy and proper timing of EISs and statutory interpretation. Unfortunately, as the first court to review an RGU’s negative declaration, Trout Unlimited set a bad precedent in the sense that it erroneously relied on Carl Bolander for determining the scope of

167. See Carl Bolander, 502 N.W.2d at 205.
168. Various policy concerns support a very limited review of zoning decisions. The first, and most obvious, is a concern that the judiciary might be the least institutionally competent to review decisions that are based on economic, political and social factors. City planning decisions are fact-intensive endeavors, involving numerous contingencies, factors that the judiciary is arguably least suitably equipped to effectively handle. In addition, there is little need for uniformity for zoning decisions because the subject matter is often peculiarly local. Lastly, substantial delay would result if zoning decisions were subject to a scrutinizing review and would freeze a locale’s progress.
169. MINN. STAT. § 116D.04, subd. 9 (1998).
170. See No Power Line v. Minnesota Envtl. Quality Council, 262 N.W.2d 312, 320 (Minn. 1977) (citing to MAPA and stating that “reviewing court is not bound by the decision of the agency and need not defer to agency expertise” on legal, rather than factual matters); Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 822-23 (Minn. 1977) (reviewing decision to deny permits for construction of on-land disposal taconite tailings and quoting MAPA standards of review); In re University of Minn., 566 N.W.2d 98, 103 (Minn. Ct. App. 1997) (reviewing issuance of air emissions permit for a steam plant renovation pursuant to MAPA).
171. See University of Minn., 566 N.W.2d at 104 (considering Minnesota Pollution Control Agency’s interpretation of the pollution standard in Minnesota statues section 116D.04, subdivision 6); No Power Line, 262 N.W.2d at 325 (analyzing at what point in the project’s proceedings the agency must complete the EIS); Reserve Mining, 256 N.W.2d at 828-31 (considering whether it was necessary to examine alternatives to the proposed project site).
judicial review. This misapplication of the law has contributed to a blurring of the distinction between procedure and substance in MEPA cases.

Because MEPA is as much about ensuring informed decision-making as it is about “avoid[ing] and minimiz[ing] damage to Minnesota’s environmental resources,” the procedural component of MEPA is crucial to its effective implementation. The procedural components become critical because they are the process that the RGU uses to disclose information about environmental effects and ways to minimize them. When procedures are not followed, the result is misinformation or insufficient data forming the basis for what might be an erroneous substantive decision on the part of the RGU. In addition, the public is not informed in the manner MEPA intended and thus communities are unable to make certain decisions or provide useful comments about the proposed project.

In light of MEPA’s specific reference to MAPA, the Minnesota Supreme Court should hold that MAPA guides the court’s review of agency action in all MEPA cases. Reliance on inapplicable case law such as Carl Bolander in the negative-declaration setting only undermines the efficacy of MEPA and gives the agency discretion on matters that do not require technical judgments or special

172. See supra note 79 and accompanying text. Despite establishing an incorrect and incomplete standard of review, Trout Unlimited correctly held that the agency’s negative declaration was arbitrary and capricious because it failed to consider the cumulative effects of future projects as required by Minnesota Rule 4410.1700. See Trout Unlimited, Inc. v. Minnesota Dep’t of Agric., 528 N.W.2d 903, 908 (Minn. Ct. App. 1995). In addition, the court held that relying “on monitoring or restrictive permitting procedures to reduce or eliminate those deleterious effects” of the project did not support a negative declaration because “the very purpose of an EIS... is to determine the potential for significant environmental effects before they occur. By deferring this issue to later permitting and monitoring decisions, the Commissioner abandoned his duty to require an EIS where there exists a potential for significant environmental effects.” Id. at 909. The precedential effect of Trout Unlimited, despite the incorrect standard of review, is important because the court required compliance with the rules and noted the important purposes of the EIS, even while evaluating the RGU action under the deferential arbitrary and capricious standard.

173. GUIDE TO MINN. R., supra note 19, at 1; see supra note 92 and accompanying text (noting that courts have recognized the policy of NEPA to be one that ensures that an agency “has at its disposal all relevant information about environmental impacts of a project”).

174. See No Power Line, 262 N.W.2d at 323 (stating that the policies of MEPA can “be advanced through the procedural mechanism of the EIS”).

175. See id.
agency expertise. While agencies enjoy a presumption of sound decisionmaking and discretion for their substantive decisions, limiting judicial review for all agency action under MEPA to the arbitrary and capricious standard gives agencies discretion that MAPA and MEPA did not contemplate.

B. The Procedural Components of MEPA Require a Separate Procedural Review

Once the Minnesota Supreme Court announces the express applicability of MAPA to MEPA, it should determine which of MAPA’s provisions apply to review agency action under MEPA, and, specifically in the negative-declaration context. This determination is made by conducting an Overton Park analysis.176

In Overton Park, the United States Supreme Court combed the statutory provisions of the federal legislation at issue and decided what procedural and substantive obligations the legislation imposed on the agency.177 Likewise, the Minnesota Supreme Court should look to MEPA and determine the types of obligations that MEPA creates. Using MEPA’s federal antecedent as guidance, the Court has declared that NEPA creates procedural obligations only; NEPA does not dictate particular substantive results.178 Before the Court’s declaration that NEPA only required adherence to certain procedure,179 courts regarded NEPA as containing both a procedural and substantive component.

By comparison, MEPA has not been relegated to a procedural statute only. While federal courts only review NEPA actions for procedural compliance, Minnesota courts may review both the agency’s adherence to procedure and its substantive decisions. The procedural components can be found primarily in the EQB’s regulations governing the EAW and EIS preparation process. The 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

177. See supra notes 61-69 and accompanying text.
178. See supra note 8 and accompanying text.
180. See GUIDE TO MINN. RULES, supra note 19, at 7-9.
beings and nature can exist in productive harmony...” Under MAPA, therefore, at least two provisions govern the extent of judicial review: whether the agency action was “made upon unlawful procedure” or was “arbitrary or capricious.”

C. Applying the “Unlawful Procedure” Standard in MEPA Cases

It is crucial that courts apply the “unlawful procedure” standard correctly. In using this standard, courts should carefully distinguish between the procedural obligations and substantive discretion of agencies. In considering MEPA’s procedures, courts should acknowledge that MEPA, like NEPA, requires a “strict standard of compliance.” When an RGU engages in the process of deciding whether a project has the potential for environmental effects, MEPA requires nothing less than complete, fair, and “bona fide compliance.” In both MEPA and its federal equivalent, the environmental policies are only realized when the “prescribed procedures are faithfully followed.” Minnesota courts should require RGUs to follow dutifully the regulations furthering Minnesota’s environmental policies, and this requires an in-depth evaluation of the agency’s actions.

When determining whether the agency has followed proper procedure, a substantive evaluation will, at times, become necessary, and understanding precisely when the substantive analysis emerges is important. For instance, the EQB’s MEPA regulations provide that the RGU shall consider the “cumulative potential effects of related or anticipated future projects” when determining whether the proposed project has the potential for significant environmental effects. The EQB has interpreted this criterion to mean “that cumulative impacts must be weighed along with the project’s direct impacts.” In considering whether the agency followed this procedural requirement, the court must first

181. MINN. STAT. § 116D.02. This language mirrors the language in NEPA that originally was deemed to contain the substantive requirements; see supra note 8 and accompanying text.
182. See supra note 51 and accompanying text.
183. Calvert Cliffs’ Coordinating Comm’n v. United States Atomic Energy Comm’n, 449 F.2d 1112, 1128 (D.C. Cir. 1971); see supra note 87 and accompanying text.
184. See supra note 88 and accompanying text.
185. See supra note 89 and accompanying text.
186. MINN. R. 4410.1700, subp. 7.
187. GUIDE TO MINN. RULES, supra note 19, at 5.
ask whether the RGU considered cumulative impacts. If the EAW entirely omitted a discussion of cumulative impacts or if the RGU’s consideration was “pro forma,” then the RGU failed to follow the regulation requiring analysis of cumulative impacts. If, on the other hand, the EAW discussed cumulative impacts to a certain extent, then the court must look to the actual content of the cumulative impact analysis to determine its validity. At this point the inquiry becomes substantive. While the overarching issue is whether the agency followed procedure, the question has transformed into a substantive review, and, as noted above, the court should defer to the technical expertise of the agency, reviewing only for arbitrariness or caprice. Thus, what began as a procedural inquiry ends as a substantive one.

D. The Effect of Separate Procedural Review

One might question whether separate procedural review is even necessary if it ultimately ends in a substantive evaluation of the RGU’s decisionmaking. A distinct procedural review is critical to a legally correct outcome. An analysis of the Iron Rangers and Audubon decisions illustrate precisely why this separate standard is so essential.

In Iron Rangers, the court misapplied Minnesota Supreme Court precedent to sustain a technical judgment on the part of the RGU. 188 The MCEA alleged that the Giants Ridge expansion would cause substantial forest fragmentation. 189 Although the DNR presented some evidence demonstrating that forest fragmentation would affect the habitat of one bird species, 190 the court concluded that because there was no data proving the existence of a migratory population of the bird in northern Minnesota, an EIS was unnecessary. 191

The Minnesota Court of Appeals, holding that the RGU could not be “compelled” to prepare on EIS on “speculative factors,” drew on Reserve Mining for legal support. 192 The Iron Rangers court

189. See id. at 881.
190. See id. at 878. It is unclear from the opinion whether that data was somewhat inconclusive or incomplete; the opinion does indicate, however, that the DNR had evidence demonstrating that their concerns were more than mere speculation. See id. at 881-83.
191. See id.
192. Id. at 881; see supra note 108 and accompanying text (discussing the use of
attributed to Reserve Mining the rule that “MEPA does not provide absolute guarantees for environmental resources.” Reserve Mining, however, never declared such a rule. Instead, Reserve Mining stated that neither NEPA nor MEPA required that proposed projects guarantee “absolute safety,” and, as such, a dam project’s alleged safety hazard based on speculative factors did not require that the RGU consider alternative locations for the proposed dam. This misuse of precedent resulted from the court’s review of the RGU’s decision without regard for the applicable procedural requirements governing agency action when there is insufficient information to complete an EIS. Instead of declaring that an EQB regulation explicitly directed agency action when there was insufficient information, the court affirmed a procedurally faulty EAW.

The Iron Rangers court saw further justification for its holding that the RGU should not be forced to prepare an EIS on insufficient data by stating that neither NEPA nor MEPA require that a negative declaration be based on the “best available scientific methodology.” Equating best technology with insufficient data, the court concluded that the scarce evidence meant “technical disputes and uncertainties” existed. The court cited Greenpeace Action where the Ninth Circuit declined to require the best scientific data to support a negative declaration, but insisted only on “adequate data.” The concern in Greenpeace Action was which methodologies an agency must use to collect its data and whether those methodologies were sophisticated enough to obtain reliable data. The issues did not pertain to insufficient data but rather which data was better.

Greenpeace Action helps in understanding that the issue in Iron Rangers was not about the best science or technical disputes. Instead, there was not enough information to make an informed

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Reserve Mining by the Iron Rangers’ court).
193. Iron Rangers, 531 N.W.2d at 881.
194. Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 830 (Minn. 1997); see supra note 108 and accompanying text.
195. See Iron Rangers, 531 N.W.2d at 877.
196. See id. at 885.
197. Id. at 881; see supra note 110 and accompanying text.
198. See Iron Rangers, 531 N.W.2d at 881.
199. See supra note 110.
201. See id.
decision, and the court itself stated as much: "The effects of current forest management on [the barren strawberry] are unknown. In view of this technical uncertainty, we must defer to the discretion of the county." In the court’s view, insufficient information was tantamount to a technical uncertainty (differing scientific opinion), despite the presence of EQB regulations directing RGU action when there is insufficient information.

A separate procedural review in Iron Rangers would have permitted the court to distinguish between substantive, technical matters on the one hand, and procedural compliance on the other. By recognizing a distinct standard of procedural review, the court could have asked the threshold question of whether the agency’s action was without observance of procedure. Minnesota Rule 4410.1700 provides that if there is insufficient information, the RGU shall either make a positive declaration of potential for significant environmental impact and prepare an EIS or postpone the decision for thirty days to obtain additional information. Because the RGU did neither, the court was obligated to set aside the RGU’s negative declaration. In Iron Rangers, a substantive issue never arose in the procedural analysis because the RGU failed to follow the regulation on its face. As a result, it was unnecessary to consider whether the RGU’s negative declaration, from a substantive standpoint, was arbitrary or capricious. In this sense, the procedural review as a distinct analysis was especially crucial. Without it, the court sustained a negative declaration that failed to observe the necessary procedures.

Audubon represents a more poignant illustration of the necessity of a distinct procedural review. In Audubon, the court of appeals upheld an EAW that failed to consider any impacts specific to the Potlatch expansion, which would result in the clearing of approximately 7,600 acres of mature forest each year. The court concluded that because it was “questionable” whether an EIS would provide information beyond that already found in the GEIS on statewide timber harvesting, and because it might be difficult to evaluate the environmental effects of timber harvesting in the four-county area, a negative declaration was not arbitrary or

202. Iron Rangers, 531 N.W.2d at 881.
203. See id.
204. MINN. R. 4410.1700, subp. 2a; see supra note 30 and accompanying text.
capricious. This holding is the epitome of the court’s incomplete review of RGU compliance with MEPA procedure. An examination of MEPA’s statutory and regulatory requirements demonstrates why this is so.

MEPA provides that “where there is potential for significant environmental effects,” an EIS must be prepared before any major action may begin. The statute also provides that the impacts of the “the proposed action” shall be considered “in detail.” Based on statutory language alone, it is clear that project-specific review is necessary. MEPA does not except project-specific review if the results of such a review are uncertain. Nor does it except project-specific review because it might be difficult to assess a project’s impact. Instead, the statute clearly indicates that an agency must review that specific project’s environmental effects. On this basis alone, the RGU’s failure to consider the four-county area and use only the GEIS was procedurally inadequate and improper.

EQB regulations also require that an RGU analyze a specific project’s effects. Detailed provisions outline the requisite elements of the EAW and precisely what criteria the RGU shall use to determine if the project might adversely affect the environment. In addition, EQB regulations specifically address the role GEISs have in environmental review: “The fact that a generic EIS is being prepared shall not preclude the undertaking and completion of a specific project whose impacts are considered in the generic EIS.” While information contained in a GEIS may be used to assist in analyzing a project’s impacts, the GEIS may not be used as a substitute for specific review.

Yet the Audubon court improperly deferred to the RGU’s determination that clear-cutting 7,600 acres of mature forest each year did not have any potential to significantly affect the environment, a conclusion supported by no information peculiar to the Potlatch expansion. The RGU failed altogether to

206. Id. at 218.
207. MINN. STAT. § 116D.04, subd. 2a (1998); see supra notes 20-22 and accompanying text.
208. MINN. STAT. § 116D.04, subd. 2a; see supra note 22 and accompanying text.
209. See MINN. STAT. § 116D.04, subd. 2a.
210. See GUIDE TO MINN. RULES, supra note 19, at 1.
211. See MINN. R. 4410.1200; see supra note 27 and accompanying text.
212. See MINN. R. 4410.1700, subp. 7.
213. Id. 4410.3800, subp. 9.
214. See supra notes 130 and 157 and accompanying text.
215. See National Audubon Soc’y v. Minnesota Pollution Control Agency, 569
consider the impacts particular to the four-county area because in the RGU's opinion, a view that the Audubon court thought worthy of deference, it was unclear what new information an EIS would reveal. In one paragraph, without a single citation to support its reasoning, the court summarily deferred to the RGU's decision, which essentially determined that the regulations providing for project-specific review were inapplicable to the Potlatch expansion. Yet EQB regulations specifically and explicitly prohibit generic environmental review.

Had the court asked the distinct question of whether the RGU's negative declaration was without observance of procedure, the answer would have been an unqualified yes. Yet, the court did not pursue this procedural inquiry; instead, it limited its review to substantive issues. Like Iron Rangers, the separate inquiry of procedural compliance in Audubon never would have necessitated a substantive review because the RGU failed to comply with the procedures on their face. Thus, as Audubon illustrates, procedural review is a decisive factor in determining the validity of agency action.

The unfortunate precedential effect of Audubon is that future projects may evade project-specific review if a GEIS exists relating to the subject matter of a project. While the GEIS is a tool to

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N.W.2d 211, 218 (Minn. Ct. App. 1997).
216. See supra note 155-56 and accompanying text.
217. See GUIDE TO MINN. RULES, supra note 19, at 1.
218. See Audubon, 569 N.W.2d at 211.
219. At the time of this writing, the Minnesota Center for Environmental Advocacy commenced another suit against the Minnesota Pollution Control Agency—a sort of "Audubon II" that revisits many of the issues in Audubon. The new suit, filed March 22, 2000, in Koochiching County District Court, involves a proposed expansion of the Boise Cascade Corporation's integrated pulp and paper mill in International Falls, Minnesota. See File No. 36-C3-00-173. Presently, production at the mill results in the consumption of 600,000 cords each year; the expansion would increase timber harvesting to 700,000 cords each year. MPCA, acting as the RGU, issued a negative declaration on the project's potential for significant environmental impact. As in Audubon, the MPCA relied on the GEIS on statewide timber harvesting to support its negative declaration.

Before they filed suit, MCEA argued to the MPCA and the EQB that the GEIS could not be used as a basis for determining significant environmental effect because, as the rules provide, the EQB must first determine that the GEIS is adequate before an RGU may cite to the GEIS's findings in their project-specific review. See MINN. RULE 4410.3800, subp. 8. The EQB determined that a GEIS would be deemed "adequate" even when significant change in environmental circumstances exists or substantial new information becomes available that has an effect on the accuracy of the GEIS's findings only if the RGU could address those changes or new information in the project-specific review. The plaintiffs contend
better understand the state- or industry-wide effects of certain actions such as timber harvesting or animal feedlots, it has become an escape hatch for RGU’s seeking to avoid the more intensive, analytical EIS. In sanctioning the use of a GEIS to determine a project’s potential for significant environmental effect, the Audubon court undermined the force of MEPA, gutted the regulations prohibiting the use of the GEIS as a substitute for project-specific review, and weakened the GEIS as a viable method for developing long-term environmental policies, strategies and goals.

V. CONCLUSION

The strength of MEPA is found in the procedural obligations it imposes on agencies when they assess the impact that projects for which they have oversight will have on the natural environment. The force of this statute, however, has been significantly weakened by the Minnesota Court of Appeals and its failure to recognize these procedures as requiring specific action on the part of the agency. The Minnesota Court of Appeals has renounced its own duty of meaningful judicial review by failing to distinguish between deference to agency expertise on substantive decisions and full agency compliance of statutory and regulatory procedural requirements. As such, the procedural mandates found in MEPA and its accompanying regulations are at best forgotten, and at worst ignored.

In their complaint that there are significant changes and new relevant information that the GEIS did not consider. They argue that the RGU acted arbitrarily when it failed to evaluate the changes that have occurred and the new data that has become available since the GEIS was initially prepared (and, as such, the GEIS is inadequate and may not be a tool on which the RGU relies to evaluate environmental impact). Because the GEIS is inadequate to serve as a basis for the negative declaration, plaintiffs argue, the negative declaration was arbitrary and capricious.

Environmental groups originally requested the GEIS on timber harvesting and forest management as the groups were concerned that site- or project-specific environmental review was not adequately addressing the impact that timber harvesting had statewide and believed a GEIS could examine more globally the effects of timber harvesting. See Audubon, 569 N.W.2d at 214. Ironically, the GEIS ultimately hindered the environmental groups’ objective of obtaining accurate information that would prove useful for developing and implementing environmental policies. Telephone Interview with Lisa A. Misher, Attorney, Faegre & Benson, L.L.P. (Feb. 10, 2000); see also Telephone Interview with Jim Erkel, Forest Project Director, Minnesota Center for Environmental Advocacy (Mar. 2, 2000).
The Minnesota Supreme Court should recognize that MAPA governs the standard of review in MEPA cases. Given the procedural and substantive requirements of MEPA, MAPA provides at least two standards that courts must use to review MEPA negative declaration cases: whether the agency action was made upon unlawful procedure and whether it was arbitrary or capricious. Without a distinct analysis of whether the agency followed MEPA’s procedures, this important environmental legislation becomes only a policy statement of good intentions. MEPA was meant to do more. It was intended to create a process that would ensure informed, well-reasoned, and responsible decisionmaking on those activities that might jeopardize the health and welfare of not just the natural environment, but of us all.