MINNESOTA ENVIRONMENTAL QUALITY BOARD
MEETING MINUTES
Thursday June 17, 2004
State Office Building, Hearing Room 5

EQB Members Present: Robert A. Schroeder, Jonathon Bloomberg, Sheryl Corrigan, Jerome Deal, Art Dunn, Gene Hugoson, Susan MacCarville, Mary Mellen, Gene Merriam, Lt. Governor Molnau, and Paige Winebarger

EQB Members Absent: Bruce Bomier, Matt Kramer, Brian Lamb, Dianne Mandernach and Glenn Wilson

I. Adoption of Proposed Agenda and Minutes

Commissioner Hugoson made a motion that the Minutes be adopted and Member Deal seconded. That motion carried.

II. Executive Director's Report:

Michael Sullivan reported that handouts for Board Members included: 1. a letter from Chris Dietzen dated June 14 which included a landowner damage release form, 2. a letter from Chris Dietzen dated June 9 which is a settlement offer regarding costs, 3. Blue Lake color maps of route, 4. Blue Lake revised Findings of Fact, and 5. Blue Lake pipeline routing permit.

Mr. Sullivan stated that EQB staff has issued a contract for soil testing, developed a cost estimate to cover monitoring of the Hutchinson study by staff and that Hutchinson had made some type of offer to the nonsettled landowners but he had no further information on the offer.

III. Committee Reports

IV. Legal Counsel Report:

Legal Counsel: Dwight Wegenius stated that he has been working on a number of EQB issues and that those issues are on the agenda. He said that he had no additional report at this time.

V. Agency Updates:

Commissioner Corrigan wanted to congratulate the Met Council, Regional Transit Board on a bid for an ultra-low sulfur diesel fuel. Because of their leadership and action about 3 million gallons of ultra-low sulfur diesel fuel will be used by half the buses in the metropolitan area which not only means a significant improvement in air quality now but in the future.

VI. Update on the Mandatory EAW Threshold Level Study

Tim Scherkenbach, Coordinator of the Mandatory EAW Threshold Level Study noted four goals of his overview: 1. Update members on the study, 2. Discuss the Beth Anderson thesis "Perspectives on the Environmental Review Process in Minnesota," 3. Talk about the proposed survey of petitioners, and 4. Look ahead.

Mr. Scherkenbach stated that the survey of local governments that serve as responsible governmental units (RGUs) has been sent out to 190 entities involved with the review process in the past four years and that the response rate so far is about 33%. The Pollution Control Agency will use statistical software to analyze the responses, quickly. Both the stakeholders group and the Board will be consulted on what the responses mean and how to interpret that data. Mr. Scherkenbach said that he has been getting input on how the processes are working from both local and state governmental units. Each category has its own dynamics. Our priorities are trying to come up with the most benefit where the activity has been taking place in the mandated categories.

The study is also in communication with the State of Massachusetts, which has a statewide database system to gather information on environmental review on a regular basis. If the Board wants to periodically review what is happening with environmental review and how the system is working, that database system may be a solution.

Commissioner Corrigan asked where this study will be at the legislative planning stage in September, 2004.

Mr. Scherkenbach responded that he hopes to have possible change recommendations on the mandatory categories by July or August with recommendations on process possible in July. Data from the petitioner survey of local government RGUs should be available in July. The study has many different tracks and needs the Boards continuing direction.

Mr. Sullivan stated that EQB staff has developed a list of problems with the existing rules and that those might be included during the legislative planning stage.

Mr. Scherkenbach summarized Beth Anderson's thesis as relatively current. It benchmarked other recent studies on environmental review in Minnesota and surveyed parties about environmental review. Probably the most important aspect of the thesis is that it identifies the relative importance of issues and the barriers of doing environmental work. The challenge for the Board will be to set priorities on where it wants to focus the study. Ms. Anderson used a two part survey: the first survey asked general questions and the second survey asked respondents to answer more in depth questions. Mr. Scherkenbach suggested that he might draw on Anderson's information in developing the board's findings and conclusions.

Commissioner Corrigan pointed out the importance of addressing the applicant side of the projects. Past studies have tended to do a very good job of collecting information from RGUs but the board should also include project proposer opinions.

Mr. Scherkenbach said the study is trying to figure out how to do that. The study may have to talk to consultants who work with the applicants or pull together focus groups from specific categories.

Commissioner Hugoson stated that he would caution relying only on the consultant information because consultants may have inherent bias.

Mr. Scherkenbach responded that they are in the process of deciding how to get not only the consultants, but the proposers responses, because each perspective is unique. He could put together a list of approaches and the Board could decide the direction the study should take.

Member Winebarger asked whether RGU accountability is within the scope of the study.

Mr. Scherkenbach responded that the scope of the study is to focus on mandatory categories, gather information necessary, and review how the process is working. The open-ended questions in the second survey could allow the board to assess the accountability question.

Mr. Scherkenbach said they also needed public response from the survey and the stakeholders group and others have suggested that the study focus on petitioners. He said he thought it would be important to get some information from petitioners on whether the system is working. The study intends on picking a representative sample from the over 200 petitioners in the past four years. It is also collecting information from local and state governments, proposers or applicants as well as the petitioners. If the board has no problem with this, the plan is to send out the survey with responses back in four weeks.

Member Bloomberg asked if the board has information on how many petitions have been granted over that time. Mr. Scherkenbach responded that about 20 percent of the petitions have been granted.

Member Bloomberg suggested that the relevant question is whether a petition was granted and how that provides insight on mandatory category thresholds.

Mr. Scherkenbach responded that the board asked him to evaluate mandatory category thresholds to see if they are reasonable as set now. Petitioners deal with projects that are below the thresholds. Another part of the equation is how much information people may have outside of a mandatory category. Finally there is a burden on petitioners to raise, provide, or suggest that there may be a potential for significant environmental impact. The study is trying to gather information from all the parties involved in mandatory categories so that the board can make an informed decision about thresholds.

Member Deal said that the percentage of return from each of those different classes of government would give you an idea of who is interested in the study. He is interested in the county response and whether any counties are having trouble with mandatory category thresholds in environmental review.

Mr. Scherkenbach responded that some of the initial responses show that people who work with environmental review on a regular basis have less trouble than people who work with environmental review on an occasional basis.

Mr. Scherkenbach stated that next month he will report on results from the RGU portion of the survey, provide an update on the petitioners survey, and offer preliminary recommendations on a database system.

VII. *Vice Chair Election edited

Chair Schroeder stated Mr. Bomier has been Vice Chair for the past year. Chair Schroeder made a motion that Mr. Bomier serve as Vice Chair for the next year and Director Dunn seconded. A unanimous voice vote carried.

VIII. *Request for *Amicus Curiae* intervention by EQB in the Appeal of *Citizens Advocating Responsible Development (CARD) et al v, Kandiyohi County and Duininck Brothers, Inc., Interveno*

Legal Counsel Wagenius gave procedural background to the Board on the Amicus Curiae request. The Environmental Policy Act that creates the environmental review program was enacted in 1973. Between 1973 and 1982 the EQB had a huge role in environmental review. There was a substantial change to the legislation in 1982. Now you have the statutes and authority to promulgate rules to establish the program to be consistent with the rules. When issues come up in specific cases of environmental review the legislature has provided in statute in subdivision 10 of 116D.04 that there is District Court review of four primary environmental review decisions that are made by whichever is the responsible governmental unit. A District Court in a declaratory judgment action will determine whether the decisions were appropriate. At the end of that section it provides that the EQB Board may initiate judicial review of the decisions and may intervene in any proceeding brought under this subdivision. What is being brought to you now is a lesser level of participation in a specific case. In a pending judicial action that someone else has brought regarding an environmental review decision the issue is whether to file an Amicus Curiae brief.

Amicus Curiae means friend of the court, which means in this case, that the Board is considered an independent party. Typically any litigation involves only the parties that have a direct interest in the matter. The Amicus Curiae status was established by the courts because occasionally the court will benefit from an independent third party coming in with special expertise or experience. The procedure that the court has established is that the potential amicus has to go to the court within a very short time period after a case is started. Because that timing did not allow Board consideration or decision, the Chair signed the leave to file an amicus brief which left the door open to file the brief. The Chair put this topic on the agenda for your decision and that is the appropriate thing to do.

Lt. Governor Molnau asked if it was possible for Board Member agencies to see the content of the brief before it is filed so that agencies can respond before a brief is filed.

Legal Counsel Wagenius said that if that procedure would be followed it would be a bit unusual. Litigation is normally the domain of the attorneys so the attorney who is assigned to handle the matter will draft the brief and file it. He said he had no problem with members having input into the brief. Legal Counsel Wagenius continued with the procedural background. When you file a petition as an amicus the court decides whose party your position is most similar to. In this case, what we presented for the right to file a brief made our potential position closest to the respondents. What the court said is that the Board would file its brief 7 days after the respondents. The appeal process here would work as follows, the county files the record of its decision and when that is filed at the court that triggers the 30 days the appellants have to file their brief, which triggers the 30 days that the respondents have to file their brief. And then 7 days after that the amicus brief would file its brief. Depending on the

arguments made by the respondents we may not have to file a brief because the EQB would only duplicate arguments that have already been made.

Commissioner Merriam joined vocalizing the concerns of the Lt. Governor. How common or often has the EQB filed an amicus brief.

Legal Counsel Wagenius responded that this is something that the Board has done reluctantly. The Board has initiated review on one case and there is no precedent on an amicus brief. Many requests come from folks at the declaratory judgment stage in district court and with some regularity staff provides affidavits which could be considered mini amicus participation. But to the best of my knowledge the EQB Board has not filed an amicus before.

Lt. Governor Molnau said that the Board, or for expedient reasons the Chair, needs to decide whether it wants to file the amicus brief, is that correct.

Legal Counsel Wagenius stated that the Board has filed a motion for permission to file an amicus brief and the court has granted that. There is an expectation in the court that the EQB will file a brief according to the schedule set up by the court but, in light of the courts condition that there not be duplicative arguments, he could advise the Court that there is no need to file a brief.

Member McCarville asked under what circumstances this brief could affect state agencies or departments.

Lt. Governor Molnau responded that any time you make a public decision adding to the foundation of a court case finding it can be used in the future for case law. Also, if the Board files the amicus we as a Board are taking a position and there could be liability issues.

Commissioner Hugoson said that he is concerned that we are setting precedent and that could have implications down the road. There are many cases that result from various actions that might ask this Board to get involved and there are any numbers of reasons why we would or would not want that involvement.

Chair Schroeder suggested that this is exactly the kind of discussion he wanted to hear on this item. The Chair said that there may be some merit to consider action in this specific matter and the authority of the Board.

Mr. Jon Larsen, EQB staff summarized that the item before the Board for amicus request from the Citizens Advocating Responsible Development group in Kandiyohi County concerned over Kandiyohi County's decision to permit two gravel pits that are in close proximity to each other. Kandiyohi County did in fact prepare and issue for public review and comment an environmental assessment worksheet, concurrently but independently for these two projects. The last step of the environmental review process is the environmental impact statement need decision and Kandiyohi County made a negative declaration on the need for an environmental impact statement on both these cases. The Citizens Advocating Responsible Development decided to dispute that pair of decisions in District Court. The District Court found in favor of the citizens group and ordered the preparation of an environmental impact statement. Kandiyohi County and the proposers of the project are now

appealing to the Court of Appeals. Citizens Advocating Responsible Development have come to the EQB with a petition, a letter request asking for this amicus brief from the Board. In your packet there is an extensive memorandum detailing some of the issues that were outlined in the request.

Legal Counsel Wagenius stated that we don't find precedent for an amicus brief filed by the Board but this is a standard procedure in general. An amicus brief is fairly common in appeals. The county intends to pursue this matter of the distinction between cumulative effects and cumulative impacts at the Court of Appeals level.

The Board and its staff treat cumulative effects and cumulative impacts as synonymous statements. They are set out in the Guide to Environmental Rules and are set out in EAW Guidelines, especially in relating to question 29 on the EAWs. The court made a ruling that those terms are not synonymous so that is contrary to this Board and the staff's views of those terms. The court then went on and applied cumulative impacts analysis. You would think that cumulative impacts would have been applied but that is not what happened. The whole discussion in the District Courts decision on cumulative impacts as that term is defined looked at past, present and future and is not in that section of the District Courts analysis. Rather it is in the type, extent, and reversibility of environmental effects.

Legal Counsel Wagenius stated that the county has argued that only the potential affects of this individual project should count in making the courts determination. That issue was not expressly dealt with by District Court so now the county is free to raise this before the Court of Appeals. Your staff believes that such a narrow focus would be detrimental to environmental review.

Commissioner Merriam added that the problem is that in promulgating the rules we defined cumulative impacts with a very broad all inclusive definition and then in establishing the criteria we used another term. Our remedy here is to change the rules.

Commissioner Corrigan said she agreed with Commissioner Merriam but rule changes take time and there may not be time in this particular case. Is the Board vulnerable?

Legal Counsel Wagenius stated that the court decision on this particular case will take place way before a rule change could happen.

Commissioner Corrigan asked whether there is a risk of a decision by the Court of Appeals that would not be in our favor.

Legal Counsel Wagenius stated that clearly this would be speculative but that depends on how the county pursues this issue. The appellants have the burden in prevailing and they won at the district court level so the chances of an unfavorable decision in the Court of Appeals are less than 50 percent.

Member Deal said just like Commissioner Merriam he would hate for EQB to have to use the amicus brief but this may be an instance where we might have to. The situation does go back to the rules not being written correctly, he doesn't support the amicus brief but the court is asking for help.

Chair Schroeder said that the court is granting the EQB status based on our special requirements.

Member Bloomberg asked other than the prospective interpretations that the EQB has, is there anything in the rulemaking record around these provisions that clarifies our intent?

Legal Counsel Wagenius deferred to Mr. Larsen, EQB staff.

Mr. Larsen suggested that he could not speak to what might be in the statement of need and reasonableness or the administrative law judge's record at the time of the ruling but he can provide background on the language that is in our rule. We find the two different terms used in our rule, one is in the definitions and abbreviations that actually defines environmental impact and the other statement in the criteria for the need for an EIS where the term cumulative impacts is used rather than cumulative effects.

Mr. Larsen said he believed the definition came from the attempt to be consistent with federal use of the application of the term the Council on Environmental Quality and their regulations that interpret rules for the National Environmental Policy Act. They define cumulative affects as the impact on the environment which results from incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertake such other actions. In our rule, virtually all of those words are used to support the definition of cumulative impacts rather than cumulative effects and that illustrates the interchangeability of those terms at the time of the rules promulgated.

Member Bloomberg said that if the amicus brief is filed that we should consult the administrative record and make sure that we didn't make any inconsistent statements in the rulemaking and to see if there is support from the record for our position.

Mr. Sullivan said EQB staff have been checking the statement of need and reasonableness (SONAR) and have found that there is not distinguishing information in SONAR, but that staff will go back and recheck.

Commissioner Corrigan summarized what she has heard from the Board in regard to this matter today. The terms cumulative impacts and cumulative effects is significant and even though the chances of the Appeals Court deciding not in our favor is less than 50/50 there is still that chance. She said that the amicus brief is a defensive posture and that we want to make sure that the court understands our position. The down side of an unfavorable Appeals Court ruling would be a precedent and could change the interpretation from the bench. The Commissioner said that in her mind the prudent way to go would be to file the brief, put up a good defense and then pursue rulemaking so that we have the consistency that this Board wants.

Member Deal said that he thought that the Board should be prepared to file the brief and that the Board should convey the authority to the Chair to file the brief if there is a problem.

Legal Counsel Wagenius suggested that Chair Deal is correct that we should be preparing to file the brief because we have a basic defined position. Board members could review the brief, discuss the brief but it should not be a Board item on the agenda. There would be only seven days to add refinements to respond to the specific arguments that have been made by the parties.

Mr. Sullivan stated that once the decision is made to go forward with the matter, at least technically it is a matter for the Attorney General's office to make the decisions on. As legal counsel had mentioned earlier in the meeting, the common practice is that there is a conversation between the lead counsel and the Chair and Board. What legal counsel is saying is that he would prefer that this item not be an agenda item for approval as much as there is agreement that there is a review process.

Commissioner Hugoson stated that he cautioned the Board that if we go down this road that someone will be inundated with requests for amicus briefs from that point forward and he is concerned with the precedent it sets.

Director Dunn asked if there was anything that would stop any of the other agencies from filing an amicus brief on this issue or does the Attorney General office have the ability to file a brief.

Legal Counsel Wagenius responded that the EQB is the only entity to file a motion for leave to file an amicus brief.

Member Deal moved that the Board should allow counsel to prepare the brief and that the Board give the Chair authority to decide whether to file the brief and Member Bloomberg seconded that motion.

Commissioner Corrigan asked if we need to make sure that the agencies that want to review the brief have an opportunity to do so.

Legal Counsel Wagenius suggested that he will circulate the brief when it has been prepared.

Chair Schroeder asked for a voice vote, the ayes were more numerous than the no votes, the motion carried.

IX. *Trimont Wind Project Permit Approval

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Mr. David Birkholz, EQB staff, summarized the Trimont Wind 1 project as a 100.5 MW Large Wind Energy Conversion System. The Board is being asked to issue a site permit to Trimont Wind I, LLC in Kimball Township and Cedar Township in Jackson and Martin counties, respectively. Trimont submitted an application to the EQB for a site permit to construct, operate, maintain, and manage the wind system and associated facilities.

Trimont Wind I, LLC is unique in Minnesota because it involves a financial partnership between landowners and project developers. Landowners in typical wind projects lease their wind rights to an operating company and in this particular project they are partners.

Pursuant to the new EQB rules, the Trimont project is the first project for which the EQB prepared an Environmental Report for the PUC at the Certificate of Need stage. The PUC issued its Order granting that Certificate of Need on June 2, 2004.

The Trimont Project includes up to 67 wind turbine generators mounted on freestanding tubular towers with a capacity of 1.5 MW. The project outline area is 22,400 acres in Martin and Jackson counties. Other components of the project include a concrete and steel foundation for each tower, pad-mounted

step-up transformers, an underground electric energy collection system, an overhead 34.5 kV feeder system, and all-weather roads of gravel or similar material.

The energy from the proposed project will be delivered to Xcel Energy's Martin County substation located in Cedar Township. The project will fulfill Great River Energy's Renewable Energy Objective, and Trimont has an agreement with GRE to purchase the electricity generated.

The site permit been reviewed pursuant to the requirements of the Wind Siting Rules 4401 and a list of procedural documents has been prepared. The public was advised of the permit, the draft site permit was provided for the public to review, the public was given a time period to submit written comments, and a public meeting was held in Trimont. Well over 75 people showed up at the environmental review portion and public meeting where EQB staff and representatives of the Permittee were available to answer questions.

The Department of Natural Resources and Southwest Regional Development 0Commission submitted written comments on the project and both support issuing a permit for the project. Comments from the DNR requested a 180-meter setback from any grassland nesting areas or any wetlands and the applicant has agreed to do that. There was one comment expressing concern about the density of development and the possibility of shadow flicker from the turbines and the EQB staff will continue to monitor developments regarding shadow flicker. The permit does contain a number of setback requirements from roads and residences, which should help to minimize turbine density and shadow flicker.

There are three changes to the permit that were developed in response to concerns raised by Trimont.
1. Turbine Spacing: There are several turbines that are 250 feet from the centerline of the roadway but not from the edge of the right-of-way. If Trimont had to move the turbines, adjacent turbines would also have to be moved to accommodate the 3-x-6 RD separation requirement. An amendment addresses this issue by allowing Trimont to request up to 10% of the turbines be spaced closer than the restriction but if they need more than 10% of the turbines to be closer than required, Trimont would have to ask the Board to consider a further amendment.

2. Another amendment clarifies that it is the edge of the right-of-way not the centerline that establishes the setback requirement. This is the way past permits have been interpreted.

3. A final change concerns the requirement that the permittee provide the EQB with access to its supervisory control and data acquisition system. This access allows the EQB to have data about the performance of each turbine, including data on electricity generated. The EQB has included this requirement in other permits that it has issued but Trimont has a concern that they might violate other requirements imposed by the federal government or national utility organizations. The proposed Permit contains new language recognizing that Trimont will not be required to provide viewer access if to do so would violate other requirements to which Trimont is subject.

Except for the three amendments in this proposed permit the conditions are essentially the same as those included in the other LWECS permits issued by the Board. EQB staff recommends issuance of a site permit for Trimont Wind I, LLC, for the site requested, with the appropriate conditions contained

in the proposed Permit. A resolution is included that adopts the Findings of Fact, Conclusions, and Order and issues a Site Permit for the project to be approved by the Board.

Commissioner Corrigan asked what micro siting is.

Mr. Birkholz responded that micro siting was the actual physical location of the turbine.

Commissioner Hugoson asked where these turbines will hook into transmission lines and whether there are adequate lines there now, how about feeder lines going into the transmission lines.

Mr. Birkholz responded that the transmission lines were a contributing factor to the proposal being accepted. The Lakefield Junction generating facility is located in Cedar Township as well as the Martin County substation so the Trimont project is able to feed into a 345 kV project. Existing next to the gas plant located there is advantageous because the peak of the gas plant is summer and the wind development peak is during the winter. The collection system is underground from each turbine and the design is meant to collect at the access roads and 34.5 feeder lines will feed directly into the Martin County substation.

Commissioner Hugoson then asked if new feeder lines would need to be constructed where lines had not been located before. What would the next stage that the Board would have to address in this matter. Was the public informed about the new feeder lines?

Mr. Birkholz responded that new feeder lines would need to be constructed. The public was informed at the certificate of need stage and at our public hearings of the feeder line construction.

Chair Schroeder asked for a motion on the resolution. Commissioner Hugoson moved the resolution and Commissioner Corrigan seconded. A role call vote was taken which passed 11-0.

PROPOSED RESOLUTION OF THE MINNESOTA ENVIRONMENTAL QUALITY BOARD, June 17, 2004, TRIMONT WIND I, LLC, 100.5 MEGAWATT, LARGE WIND ENERGY CONVERSION SYSTEM SITE PERMIT

EQB DOCKET NO. 03-72-LWECS-TRIMONT

BE IT RESOLVED, that the MEQB approves the proposed Findings of Fact, Conclusions, and Order and issues a Site Permit as proposed by the EQB staff to Trimont Wind I, LLC, for a 100.5 Megawatt Large Wind Energy Conversion System to be located in Martin and Jackson Counties;

BE IT FURTHER RESOLVED, that the Chair of the MEQB is authorized to sign the Findings of Fact, Conclusions, and Order and the Site Permit.

Chair Schroeder asked for a motion to adjourn, Member Bloomberg made the motion and Director Dunn seconded the motion.