

**MINNESOTA ENVIRONMENTAL QUALITY BOARD**  
**MEETING MINUTES**  
**Thursday, September 15, 2005**  
**State Office Building, Hearing Room 5**

**EQB Members Present:** Dana Badgerow, Sheryl Corrigan, Brenda Elmer, Gene Hugoson, Susan McCarville, Gene Merriam, Robert A. Schroeder, and Paige Winebarger

**EQB Members Absent:** Jonathon Bloomberg, Jerome Deal, Matt Kramer, Dianne Mandernach, Lt. Governor Molnau, and Glenn Wilson

**I. Adoption of the proposed Agenda for the September 15, 2005 meeting and Minutes from the August 18, 2005 Environmental Quality Board Meeting**

Commissioner Corrigan made a motion that the minutes and proposed agenda be adopted and Member Elmer seconded. The motion was approved on a voice vote.

**II. Executive Director's Report:**

Michael Sullivan stated that the results are in from polling each of the Board members on their availability for a special Board Meeting. The date for the meeting will be Friday, December 9<sup>th</sup>. There are 12 members available that day.

Mr. Sullivan stated that the Recreational Trails Rules received final approval and are being filed in the State Register. The publication date is September 26, 2005. The rules will officially be effective on October 3, 2005.

**III. Legal Counsel Report:**

Robert Roche stated that the Minnesota Supreme Court set a date for an oral argument for the CARD matter. The date is October 11, 2005 at 9:00 am at the Minnesota Supreme Court.

Mr. Roche stated that his office is representing the Pollution Control Agency and will be filing paperwork to try to get the lawsuit dismissed within the next week. Mr. Roche will keep the Board posted.

Chair Schroeder asked for questions.

Member McCarville asked what they hope to gain by filing this lawsuit. Mr. Roche stated that they are trying to get an Environmental Assessment Worksheet prepared on this particular feedlot. Under the Minnesota Environmental Policy Act, the rules state that if you are dissatisfied with an environmental review decision, a lawsuit should be brought in the county where the project is supposed to take place. The lawsuit is supposed to be brought against the governmental unit responsible for preparing the EAW. The reason why this group of plaintiffs

chose to sue the EQB and the PCA in Ramsey County District Court rather than suing Polk County in Polk County District Court, can only be speculated. They are seeking an EAW.

Member McCarville asked if they wanted to stop the project or make it smaller. Mr. Roche could only speculate, but stated that frequently when an environmental review is ordered there can be some negotiation that might modify the project. Sometimes a project proposer walks away from the project if they have to go through an Environmental Review process.

#### **IV. Update and discussion of draft Environmental Review rule amendment language**

Gregg Downing, EQB staff, stated that each Board Member received, at their place this morning, two documents. One is a copy of the rule amendments, as in the Board packet except with numbers in the left hand margin corresponding to the item numbers on the other document which is another copy of the table of 50 items to use to follow along at the meeting.

Mr. Downing stated the draft of the rule for this board meeting incorporates those items that the Board gave the go ahead to proceed on at last month's meeting. Those being delayed do not appear in the document. Some items have just a place holder because the language has not been drafted yet. That language should be ready by next month.

Mr. Downing stated that the items for which the action to be taken is already described in the table of 50 items will not be dealt with in detail. Mr. Downing indicated that this applied to the following items: 7, 10, 11, 16, 18, 19, 24, 32, 34, 37 and 44. Mr. Downing stated he would be highlighting the items where the wording of the rule involves a significant change.

On the first page, in the definitions and abbreviations section, Mr. Downing pointed out that there is still a definition of the word "agency" that refers to the State Planning Agency, which has not existed since 1991. This will be removed.

Regarding item #3, the definition of hazardous waste, Mr. Downing stated that the EQB staff is working with the staff at the Pollution Control Agency to decide if the list of citations needs to be changed. Staff hopes to have an answer by the next meeting.

For item #8, part 4410.1100, petition process, the issue was the decision making process dealing with a petition covered in subp. 6. The rule does not now say anything about whether the RGU can take into account mitigation or regulation that would be applied to the project. After discussion with Mr. Roche, the best way to assure consideration of mitigation or regulation is to direct the RGU to take into account the same four factors that are taken into account when making the decision on the need for an EIS after the EAW is done. One of those factors does take into account mitigation and regulation by public agencies. The staff is proposing to add in the mitigation and regulation aspect by citing those same four factors that are taken into account elsewhere in the process.

Regarding item #9, part 4410.1200, EAW content, Mr. Downing indicated this adds a requirement that the EAW have an assessment of the compatibility of the project with approved local plans. Commissioner Corrigan asked what the assessment of compatibility means. Mr.

Downing replied that in most cases it is simply a description of whether the project as proposed is consistent with the provisions or requirements of the local plans.

Mr. Downing said for part 4410.1700, decision on need for EIS, there are two items covered. First, item #12, paragraph B, is a timeframe change. It allows for an extension of time to gather additional information before making a decision, if it is agreed to by the RGU and the proposer. Second, item #13 in subp. 3, form and basis for decision, the requirement deletes that if there is a positive declaration decision to do an EIS based on EAW (to include a proposed scope for the EIS in the positive declaration document ordering an EIS). The scope would be postponed. As noted in previous meetings, there has been a lot of trouble with RGU's being able to specify a scope at the same time as they ordered an EIS.

Commissioner Hugoson asked if the change would result in a delay in the process. Mr. Downing stated that on paper it would appear that this would delay thing, but in practice it probably would not because nobody follows what is in the existing rule. The staff feels that it is unrealistic to expect the RGU to deal with the issue of whether they should or should not do the EIS and then when making the decision to do the EIS, at the same time to go on and figure out the scope and the schedule for the public meeting. In items 13 and 15, the staff is proposing to change the process so that the RGU makes the decision, and then they move into another process where they set the scope. The staff thought it would be more consistent with what actually happens.

Commissioner Hugoson asked what the ramifications or penalties would be if the RGU's do not follow the rules as they are now. Mr. Downing stated that if any of the timeframes of the rule are not met, the statute indicates that the remedy is to go to District Court to try to get an order that immediate action be taken. With all the cases involving this rule that Mr. Downing is familiar with, even though there has been a delay, it has been an inadvertent delay where the unit of government did not realize they needed to do multiple things at one meeting. There has been no case where the proposer had to go to court to get the process to move along. Under the current process, the delays are pretty short, 1-2 months in length. The problem is that what is actually being done by the RGU and what they are supposed to do, do not match up in terms of the exact procedures and timeframes. The staff is proposing to change the procedures and timeframes to better accommodate what the RGU's actually do.

Commissioner Hugoson questioned whether this revision would perhaps take some of the onus off the local RGU in making the EIS need decision. If they had to do the scoping at the same time they made the decision, it might prevent some of them from moving in that direction. Mr. Hugoson stated that from what Mr. Downing just described, it seems like it does not make a difference anyway. It seems to Mr. Hugoson, where the whole environmental review process is convoluted compared to what any other states have to go through. Mr. Hugoson stated that this is unique to Minnesota.

Mr. Downing said for items #17 and #46, the issue is an apparent inconsistency in the statutes. On one hand, the statute says that an RGU can not begin the preparation of an EIS until they receive a cost payment from the proposer of the project. Also, the statute says they have 280 days to complete an EIS timed from the notice of preparation of the EIS. The idea was to

reconcile those two requirements. In working with Mr. Roche, they have identified a solution, but it has not been worked out in detail. The staff hopes to report back next month on the resolution of those two issues.

Mr. Downing indicated that for item #20, it was the first of several items dealing with the AUAR process, part 4410.3610, alternative urban areawide review process. Item #20 is a clarification of which types of industrial projects qualify for review through the AUAR process. The staff is proposing to eliminate the definition of light industrial project. Instead, the rule will simply state you can not review an industrial-type project that meets any of the EAW or EIS categories in the list. Also, there would be one change in the list: to eliminate EAW subpart 18A, which deals with sewage collection systems. By taking it off this list, sewer systems would be allowed to be reviewed through the AUAR process.

For item #22, the issue is whether or not if after an AUAR process has begun, it should be acceptable for the RGU to remove a small project within that area and proceed to permitting on its own, if that small project on its own does not require review. The EQB staff had always believed that was allowable. A question came up about whether it should be. The staff proposed in the Request for Comments not to allow this to happen anymore. There were many negative comments about that. One of the comments suggested instead of a prohibit, the EQB should establish some kind of public process by which comments can be received about the advisability of letting that project go. The language proposed sets up such a process. It indicates that after an AUAR is started, the RGU can not remove a project from the area without going through a public comment procedure.

Commissioner Corrigan asked for an example of when this has happened in Minnesota and then based on that example, what are the positive and negative aspects of where this is happening. Mr. Downing stated that this has happened a number of times. He explained the specific example of the Bridges project in St. Paul.

Commissioner Corrigan asked how much time the additional public comment process would add on to the schedule. Mr. Downing stated that between a month and six weeks would be added by the proposed amendment. That assumes that if you did not have this process, there would be no time involved in dropping the project out.

Commissioner Corrigan asked if there were adverse comments would the RGU have to prepare a response to comments and notice it or does the RGU just take them into account in the final decision. Mr. Downing stated that the proposed language does not require any special procedures or notice of the decision. It should not take any longer than any typical action that a city council would take. Hopefully, in many cases, there would be no adverse comments.

Member McCarville asked that if there were no negative comments received, would this mean that the RGU could still say it has to be left in the bigger project. Mr. Downing stated that if they had factual reasons to leave it in, they certainly could declare the project to be removed.

For item #21, Mr. Downing stated the issue is whether to allow AUAR's to continue be used for the review of specific projects or whether it should be prohibited. The alternative solution

that the staff recommended would instead require the RGU to go through additional procedures in the review that would take care of a legitimate issue that has been raised about what happens when a specific project gets reviewed through an AUAR.

Proposed new subp. 5a lists the additional procedures proposed when certain specific projects are reviewed. These would not be required when there is not a specific project identified or the projects are not over the EIS threshold or greater than 50% of the area. The purpose of the process would be to assist in identifying appropriate development scenarios and relevant issues to be analyzed in the review. The same criteria for determining if an alternative must be included would be used for the EIS process.

Commissioner Corrigan stated that she has concerns about how the rule changes are being approached and wants to make sure that the Board understands what additional process is being imposed on Minnesotans. Ms. Corrigan asked how much extra time would be potentially added to the AUAR process. Mr. Downing stated the length of time is about a month and a half. Mr. Downing stated that it should be noted that in a number AUAR situations, especially where an extensive area is covered, many of the RGU's already have a voluntary scoping process. So, six weeks is not being added to zero, since the scoping process can be run concurrently, there may not be any time added to the process.

Commissioner Corrigan asked if there is a limitation on the number of alternatives that can be presented to the RGU. Mr. Downing stated that there is nothing in the rules that would limit the number of alternatives that outside parties could suggest. The proposed rule amendment refers to the criteria in the section on EIS scoping for how to decide which of the alternatives need to be included. This is what is used by RGU's in an EIS situation to limit the number of alternatives. The tools that the RGU would use to say which ones they are not going to look at are in section 4410.2300. Mr. Downing quoted from section 4410.2300: an alternative may be excluded from analysis if (1) it would not meet the underlying need for or purpose of the project (2) it would not likely have any significant environmental benefit compared to the project as proposed (3) that another alternative that will be analyzed would likely have similar environmental benefits that substantially rest adverse economic employment for sociological impacts.

Commissioner Corrigan stated a fear that the boundaries of the AUAR, or a specific parcel, or specific aspects would change. Chair Schroeder asked Ms. Corrigan if she had any suggestions. Ms. Corrigan wanted to ask Mr. Downing and Mr. Roche could look at this language and get a better understanding of the time which would be added to this process. Ms. Corrigan also was not sure that everyone was comfortable with the language in section 4410.2300 in terms of screening alternatives.

Commissioner Hugoson asked Mr. Downing if the changes simplify the review for project development or make it more convoluted. Mr. Downing stated that it does add some additional procedures that would be required in cases that meet certain criteria. However, in some of those cases under the current rules, if there is public controversy, development may be tied up in the end and some of that could have been worked through more easily if the AUAR analysis had included more alternatives.

Member Elmer asked if there is a window of time in which someone may file an objection. Mr. Downing responded that when the RGU has finalized the AUAR analysis document and its plan for mitigation, they send that out to everybody who gets an EAW and then the commenters have 10 working days to file an objection from the date of receipt of the final document. If an objection is filed then a procedure starts which could culminate in the dispute coming before the Board. If no objection is filed, then the RGU can proceed and adopt the final document and mitigation plan 15 working days after it is sent out.

For item #26, in part 4410.3800, generic EIS, the additions are new reasons why the Board might want to order a generic EIS. The EQB staff identified another reason since the last Board Meeting, which is being proposed as item L. This language is right out of the statute which authorized animal agriculture generic EIS.

Mr. Downing stated for items #27 and #28, both relate to the relationship of project-specific review to an existing generic EIS. Regarding item #27, after dealing with the Blandin Thunderhawk project earlier in the year and the question of whether the forestry GEIS remained adequate, the staff came to the conclusion that additional language did not need to be added because there are other provisions in the rules that would adequately deal with whether or not specific project environmental review could be substituted for a generic EIS. Item 28 deals with the deletion of the second sentence. The issue is whether or not the EQB should continue to be responsible for having to make a decision whenever information from a GEIS is being used as to whether the GEIS remains adequate at that time. The staff decided that this provision is not needed in the rules; it is redundant with other provisions. Mr. Downing indicated that the deletion of the second sentence may be somewhat controversial.

Mr. Downing indicated in items #30 and #31, the thresholds were being revised for the air pollution category and the wastewater systems categories.

For item #33, animal feedlots, Mr. Downing stated that after talking to staff from the Department of Agriculture, it appears that this item is not as ready as thought at the last Board meeting. If the Board proceeds with its plan to deal with the rules in two stages in October and then a special meeting in early December, this item may be ready for the special meeting in December. The Department of Agriculture and PCA process is ongoing, and has had some unexpected delays.

Commissioner Hugoson stated that part of the delay was caused by wanting to go back to the advisory taskforce that had convened to get some additional input.

For item #34, historical places, Mr. Downing noted that the staff has sent the language to the State Historic Preservation Office to see if it is adequate or if they would like to suggest some changes in the exact wording.

For item #49, mandatory EIS categories, fuel conversion facilities, Mr. Downing stated this is one of the two changes that are required by changes by Legislative action. The Legislature in the 2004 session changed the threshold for some ethanol plants. As the language indicates, for

those that are outside seven-county metropolitan area the new threshold is 125 million gallons production per year rather than 50 million gallons per year.

For item #50, part 4410.4600 exemptions, animal feedlots, the language added is based on the change made by the Legislature in the 2003 session which exempts many feedlots.

Commissioner Corrigan suggested that Mr. Roche check how “capacity” is used in this rule and make sure it harmonizes with some of the recent legal decisions.

For item #43, part 4410.5200, EQB Monitor publication required notices, Mr. Downing noted the staff is still waiting for a few of the agencies to get back about whether the permit notices are still current. .

For item #42, part 4410.5600, EQB Monitor cost and distribution, Mr. Downing explained the change would allow EQB to legally publish only by electronic means by e-mailing to people and posting on the website. He noted that publication has been that way since the beginning of the fiscal year. He also noted there is a possibility of adding in the requirement that RGU’s submit to the EQB electronic copies of all environmental review documents that need to be noticed. If that could be done, there could be an electronic library on the EQB website that would simplify access to the documents.

Executive Director Sullivan stated that the staff would be back before the Board with any modifications based on comments received. Also, a draft of Statement of Need and Reasonableness would be available for the October meeting. That document presents the rationale and justification of each of the language changes and is part of the rulemaking process. He advised Board members in addition to the special meeting on December 9, to hold the November regular meeting’s date in the event that the agriculture feedlot language is ready. Some Commissioners would be out of town, but it would provide the rest of the members an opportunity to review that and to take some public testimony. Mr. Sullivan advised that the Board hold the regularly schedule meeting date in December as well.

Member Winebarger asked Mr. Sullivan the status of item #38 on the table.

Mr. Sullivan stated that those topics are in the hands of the DNR and their staff who are working with various stakeholders. In the case of the lakeshore issue, there is some possibility that may come forward sometime in February.

Member Winebarger asked if the stakeholder group the DNR has put together for the lakeshore category has met. Commissioner Merriam stated that he did not know. Member Winebarger asked if the DNR proposal would be ready by February. Mr. Sullivan stated based on the conversations that the EQB staff has had with the DNR staff, that was the timeframe mentioned. Chair Schroeder asked staff to have an update on this at the next Board meeting.

Member Elmer noted that some of the language seemed odd and asked Mr. Downing if it was correct that it came from somewhere in the statute. Mr. Downing stated that the language in item L was taken out of the Legislative authorization for the animal agriculture generic EIS,

which later was also used when the Legislature authorized funding for the scoping of the generic EIS on urban development.

Chair Schroeder asked for additional questions and seeing none, asked for a motion to adjourn. Commissioner Corrigan made the motion to adjourn and Member Winebarger seconded the motion.

The motion was adopted upon a voice vote with no objections stated.