September 12, 2007

TO: EQB Members
FROM: Gregg Downing
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SUBJECT: Explanation of modifications proposed to the definition of "cumulative potential effects" and the factors to be considered when determining if an EIS is required due to cumulative potential effects.

As noted in the annotated agenda, the EQB staff is proposing modifications to the rule amendments regarding cumulative potential effects. This memorandum shows how the revised versions differ from the July versions by the use of strikeout and underlining. It also presents the updated SONAR text explaining the revised versions.

Definition of Cumulative Potential Effects.

Subp.11a. **Cumulative potential effects**. "Cumulative potential effects" means the effect on the environment that results from the incremental effects of the project in addition to other projects in the environmentally relevant area which might reasonably be expected to affect the same environmental resources, including future projects actually planned or for which a basis of expectation has been laid, regardless of what person undertakes the other projects or what jurisdictions have authority over the projects.

Significant cumulative potential effects can result from individually minor projects taking place over a period of time. In analyzing the contributions of past projects to cumulative potential effects it is sufficient to consider the current aggregate effects of past actions; it is not required to list or analyze the impacts of individual past actions, unless such information is necessary to describe the cumulative potential effects.

In determining if a basis of expectation has been laid for a project, the RGU must consider: whether any applications for permits have been filed with any units of government;; whether detailed plans and specifications have been prepared for the project; whether future development is indicated by adopted comprehensive plans or zoning or other ordinances; whether future development is indicated by historic or forecasted trends;; whether sufficiently detailed information is available about the project to contribute to the understanding of cumulative potential effects; and any other relevant factors that indicate whether the project is reasonably likely to occur.

Revised SONAR text:

The proposed definition merges two sets of ideas. The "base" for the definition is the existing definition of "cumulative impacts" which in turn was adapted (in 1982) from the federal NEPA definition. To the base, the EQB proposes to add the guidance given by

the Minnesota Supreme Court in the *CARD* case about the geographic and temporal limits on what other projects need to be taken into account in the review of specific projects. The guidance limits:

- geographical scope to "projects in the surrounding area that might reasonably be expected to affect the same environmental resources" and
- temporal scope to "specific projects actually planned or for which a basis of expectation has been laid."

The EQB proposes one revision to the "base" definition NEPA definition of cumulative impacts. The EQB believes that the sentence "Cumulative potential effects can result from individually minor but collectively significant projects taking place over a period of time" should be changed to "Significant cumulative potential effects can result from individually minor projects taking place over a period of time." EQB believes the emphasis in the original sentence was misplaced: the point here is whether the individual projects could result in cumulative potential effects; not whether these effects are "collectively significant." The original sentence implies that all cumulative potential effects are significant by definition which is not true.

The EQB also proposes to make two changes in the geographic scope limits set by the Minnesota Supreme Court. The first is to replace "natural resources" with "environmental resources." The rationale for this change is that "environment" is a defined term (at 4410.0200, subp. 23) and it includes historic and aesthetic resources as well as "natural resources." It is not clear whether the Minnesota Supreme Court realized that its wording might at least appear to exclude certain resources that come under the EQB's definition of "environment."

The second change proposed regarding the geographic scope of a cumulative potential effects inquiry is to replace the phrase "surrounding area" with the phrase "environmentally relevant area." The term "surrounding area" has no apparent link to the cumulative potential effects area and is therefore inappropriate and inadequate, sometimes implying too limited a geographic scope and sometimes too great a scope. This change is needed and reasonable because the cumulative potential effects analysis must be linked to the area in which these effects occur.

Using the phrase "surrounding area" in the rule would frequently overly limit the extent of the geographic area in which the RGU must consider cumulative potential effects. One approach to a solution would be to try to define or describe "surrounding area" as a flexible term whose size varies depending on the nature and magnitude of the various impacts from a project. This would likely be confusing to many people however, who would not expect "surrounding area" to have a variable meaning. The EQB has chosen a different approach, which is to substitute the different term, "environmentally relevant area." This term better conveys the meaning that the EQB believes is necessary and appropriate to the assessment of cumulative potential effects. This term conveys the correct idea, that the RGU must determine what the relevant geographic area is within which to consider what other projects may also impact the same environmental resources. The environmentally relevant area for most projects will likely vary by type of impact.

Some impacts are of short-range effect; others possibly have effects over a great distance. Based on the nature and magnitude of each type of impact from the project, the RGU should determine the environmentally relevant area that is pertinent to each impact.

The EQB also proposes to include guidance to RGUs about what to consider when addressing the question of whether a "basis of expectation has been laid" for a project in the environmentally relevant area. This phrase was not defined by the Minnesota Supreme Court. It will be helpful to RGUs to have additional guidance about the meaning of this phrase. The EQB proposes a list of five factors that an RGU should consider when making the determination of whether a "basis of expectation has been laid" for a project in the environmentally relevant area. In assessing the expectation, an RGU should consider the likelihood a project will occur and the sufficiency of information about it.

The first two factors relate to actions by a project's proposer that indicate an intention to proceed with a project: applying for a permit or preparing detailed plans. These are reasonable factors to consider because either the time or expense or both involved in either of those actions would indicate a intent by the proposer to proceed with a project.

The third and fourth factors also may provide an RGU the basis to define a reasonable expectation for a project, even though the information about a project may be less specific in terms of ownership, design or timing. An adopted comprehensive plan or ordinance applicable to the environmentally relevant area may lay a basis of expectation for a project when the plan or ordinance reflects a community's current and best judgment not only that development of a specific type is desired, but also that it is reasonably expected in the foreseeable future. A project may be reasonably viewed as expected when it is indicated by a community's analysis of historic trends or a specific forecast and is described, even generally, in a plan or ordinance. For example, it would be reasonable to define a residential development as an expected project in a community along a major transportation corridor whose neighboring communities have experienced residential development moving in its direction.

A key component in a finding that a basis of expectation has been laid for a project with regard to these factors is some predictability of the nature and extent of a project's likely environmental effects. Without this predictability it would be questionable whether a basis of expectation had been laid. In the example cited, however, that expectation can reasonably said to occur in the case of residential development of a planned density. In contrast, this may not be the case with other planned or zoned development, such as industrial parks, where there may be little basis for predicting the type of development and the environmental footprint it is likely to have.

Finally, an RGU should consider historic or forecasted development trends in determining if a basis of expectation has been laid for a project. Historic or forecasted development trends may also provide sufficient specificity outside of a community's comprehensive planning and zoning procedures to establish a basis of expectation. An example would be the trends in shoreland development identified by state or local

planners that indicate a likelihood for future shoreland development. The environmental implications of such development would be sufficiently well-defined for use in a cumulative effects analysis.

The fifth factor ("whether sufficiently detailed information is available…") is a reasonable factor to include because an RGU should not be required to engage in speculation or to consider hypothetical situations in analyzing cumulative potential effects. It would not be reasonable to include a project in an analysis if no meaningful information would be gained by doing so.

The final factor in the list ("other relevant factors…") provides for the possibility that in given circumstances there may be other factors, or combination of factors, that would serve as indicators of the likelihood that a specific project will take place in the future. An example would be a situation where the RGU knows that financing has been secured for the project.

EIS Need Decision Criteria.

4410.1700, subp. 7. **Criteria.** In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered:

[A unchanged]

B. ~~The~~ cumulative potential effects ~~of related or anticipated future projects~~.

[C and D unchanged.]

In applying item B, the RGU shall consider the following factors: <u>whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect;</u> the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project.

In applying item C, the RGU may rely only on mitigation measures which are specific and which can be reasonably expected to deal with the identified environmental impacts of the project.

Revised SONAR text:

The amendments concerning item B are part of the EQB's attempt in this rulemaking to correct problems relating to effects of a cumulative nature. The explanation of the general problem and its background is given in the section on the amendments at part 4410.0200, subpart 11a. The amendment involving deletion of words at item B is not intended to be substantive. The words proposed for deletion here are included in the new

definition of "cumulative potential effect" at part 4410.0200, subpart 11a. Therefore, they should be deleted in item B to avoid redundancy.

The EQB proposes to add to this subpart a list of factors that an RGU must consider when determining if the project under review has the potential for significant environmental effects due to the cumulative potential effects to which it contributes. The Minnesota Supreme Court's decision in *CARD* does not provide this type of guidance. This list of factors is intended as a guide for RGUs in thinking about the cumulative potential effects relative to a project. The ideas behind the listed factors were derived in part from the regulations of other states with similar environmental review programs, in particular, California.

There is a need to provide guidance to RGUs because not every instance where a project makes a contribution to a cumulative potential effect – even if the cumulative effect is indisputably significant – requires preparation of an EIS on the project. The EQB proposes the factors listed here as guidance to help RGUs sort out which instances require preparation of an EIS from those which do not.

The proposed first factor is needed and reasonable because the first consideration an RGU should make is whether the aggregate effect to which the project is contributing is significant or not. If the aggregate effect is not significant, then no EIS is warranted on the basis of cumulative potential effects, whatever the contribution from the project may be.

The second factor, whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect, is reasonable because the magnitude of cumulative potential effects might be easier to see where a single project contributes significantly to the aggregate effect. However, the EQB does not assert that a project must be the sole cause, or even a primary cause when dealing with the issue of cumulative potential effects. Neither does the EQB believe that any contribution whatsoever from a project requires that an EIS be prepared.

The third factor, the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect, acknowledges that in certain cases the State or a local unit of government may have studied a particular cumulative-type impact and devised a specific plan of mitigation to deal with it. One example would be a TMDL plan adopted by the Pollution Control Agency for a watershed. Another example might be a comprehensive stormwater management plan adopted by a local unit of government consistent with state and federal regulations to mitigate the effects of stormwater discharges on a receiving water body. If such a mitigation plan exists, and if the project under review will adhere to the requirements of that plan (so as to mitigate its contribution to the aggregate effect), there would be no benefit in further studying the cumulative potential effect with respect to the project in question through an EIS. While examples of such plans are rare at present, more are likely to be developed in the future as increasing attention is paid to dealing with cumulative potential effects.

With the fourth factor, the efforts of the proposer to minimize the contributions from the project, the EQB argues that it is reasonable for an RGU to take into account the extent to which the contributions have been reduced by the proposer even if there is not an overall mitigation plan in effect to deal with the cumulative potential effects in question. In many cases specific measures to mitigate or avoid contributions to cumulative potential effects will be known, even if no overall plan to mitigate these effects has been developed by any governmental unit. The mitigation measures may or may not be required by federal or state law or by local ordinances. If the proposer incorporates such methods to a sufficient degree, preparing an EIS to further study the cumulative potential effects would serve no useful purpose. Thus, the RGU should take into account the degree to which the proposer has taken advantage of ways to minimize the project's contributions in deciding if an EIS is warranted due to cumulative potential effects. One possible example of the use of this factor would be a case where there is a cumulative potential effect from stormwater runoff. Even if there is no overall stormwater management plan, many techniques for reducing and managing stormwater are well known. If a project proposer incorporated state-of-the-art management techniques into their project design to minimize contributions to stormwater runoff, those efforts should be taken into account by the RGU in determining if an EIS is required due to the cumulative potential effects of stormwater discharges.