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March 25, 2009

The Honorable Steve Mihalchick
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, MN 55164-0620

VIA ELECTRONIC MAIL AND FAX

RE: Proposed amendments to rules governing the Environmental Review Program;
EQB staff responses to comments.

Dear Judge Mihalchick:

The EQB staff offers the following responses to comments made at the public hearing and in writing as of March 20, 2009. The staff expects to submit additional responses by the end of the rebuttal period on April 1, 2009.

I. EQB proposed modifications to rule amendments. The EQB staff suggests the following modifications to the rules as proposed:

1. Part 4410.0200, subp. 11a. Cumulative potential effects. We propose a modification to line 2.13: delete "relevant; after "factors" add the phrase "determined to be relevant by the RGU." This modification was suggested by the AMC comments, and the EQB staff agrees that it would improve the wording and clearly denote that it is the RGU who determines whether a factor is relevant.
2. Part 4410.0200, subp. 55a. Ordinary high water level. We propose to modify line 2.16 by deleting the reference to part 6120 and substituting a reference to Minnesota Statutes, section 103G:055, subd. 14. The DNR staff has pointed out to us informally that by switching the reference to the statutes instead of the DNR's rules, we would avoid any confusion that may be caused if the shoreland management rules are renumbered as part of the impending amendments to chapter 6120. We believe that the statutory definition has the same substantive meaning as the rule definition, although the exact wording is slightly different.

3. Part 4410.0200, subp. 79a. Sensitive shoreland area. On line 2.21 substitute “or” for “and.” The intent is that any of the conditions listed is sufficient to make a shoreland area sensitive. Thus, the conjunction should be “or” here.

4. Part 4410.0200, subp. 81a. Shore impact zone. During the hearing it was pointed out that the reference in this proposed definition to part 6120.3300, subp. 3 of the DNR’s shoreland management rules is potentially confusing because subpart 3 is quite lengthy. We propose now to simplify the definition to:

Subp. 81a. Shore impact zone. “Shore impact zone” has the meaning given in part 6120.2500, or by a local ordinance if the ordinance specifies a greater size for the zone.

5. Part 4410.4300, subp. 19a. Residential development in shoreland. We propose to add at the end of item A:

“If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.”

In the hearing, a question was raised about how the mandatory category thresholds were applied if a project was partially in and partially out of a sensitive shoreland area. The EQB staff indicated that in similar cases we used a proportional threshold determination technique that is described in subpart 19, residential development, in the context of treating developments with mixtures of attached and unattached units. We propose to explicitly add directions for using that same technique to the shoreland residential category, to cover cases where a project is in both sensitive and nonsensitive shoreland areas and also partly in and partly out of shoreland.

6. Part 4410.4300, subp. 20a. Resorts, campgrounds, and RV parks in shorelands. We propose to add the following language as a new paragraph following item B:

“If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the

number of units in each type of area by the applicable threshold for each area, equals or exceeds one.”

The reason for proposing this addition is the same as for the proposed change to item 19a immediately above, i.e., to clarify how to apply the category thresholds if a project is only partly in shoreland or sensitive shoreland.

7. Part 4410.4300, subp. 36a. Land conversions in shoreland. In item A, on line 14.6 insert “or more” after “800” and on line 14.7 insert “or more” after “1320.”

8. Part 4410.4400, subp. 14a. Residential development in shoreland. We propose to add at the end of item A:

“If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.”

The reason for this modification is as described in response #6 above; this subpart is the EIS analogue and should be treated in the same manner.

9. Part 4410.4400, subp. 26. Resorts, campgrounds, and RV parks in shorelands. We propose to add the following language as a new paragraph at the end:

“If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.”

The reason for modification is the same as for response # 7; this subpart is the EIS analogue.

II. Responses to other comments; (no modifications are proposed).

1. Part 4410.3610, subp. 2, item D. "AUAR small project drop-out provision." The Minnesota Center for Environmental Advocacy (MCEA) continues to object to the policy that a small project that otherwise would not require review can be dropped out of an ongoing AUAR analysis by the RGU. The MCEA objected to this concept during the earlier "phase 1" rulemaking in 2006; this objection was the primary reason the EQB withdrew this proposal during that rulemaking. The EQB continues to believe that removing a small project from the AUAR is legally permissible and not detrimental, except in unusual cases, to the purposes of AUAR review.

Because of MCEA's earlier objection, the EQB chose to add the first sentence to item D when it re-proposed the drop-out provision in this rulemaking. The proposed first sentence makes explicit that the ordering of the AUAR does not create an obligation to review any particular specific project that may arise within the AUAR boundary during the preparation of the AUAR that would not otherwise exist (absent the order for the AUAR).

The EQB does not believe that any provision exists in the law – nor was it the EQB's intent when creating the AUAR process – to imply that the designation of a geographic area for an AUAR review establishes a requirement for the review of all potential projects within the area. Use of the AUAR process is voluntary on the part of the RGU and the RGU has complete discretion in choosing the boundaries of the area to be included. Also, the existing rules give the RGU the option of reviewing specific projects within the AUAR boundary that do require an EAW or EIS through the EAW or EIS process rather than the AUAR process. These facts argue against the idea that the AUAR order creates an obligation for review of projects within the boundary. If no obligation for review is created by the AUAR order, why should it not be permissible to remove a small project from the review after it has been ordered?

If there is a sound technical reason why the project proposed for removal should not be dropped out, that reason can be revealed through the proposed notice and comment process. That, in fact, is the purpose of adding the notice and comment process to the rules: to provide a mechanism to screen whether the project should be retained in the AUAR analysis.

MCEA also objects to the length proposed for public comments on a proposed project removal. The proposed rules would provide for a 10 business day comment period (from the date of the *Monitor* notice). The EQB believes that 10 business days is sufficient for the purpose of these comments. The scope of comment is limited in these cases. It should not be necessary to have a comment period as long as for the review of EAWs or EISs, where the scope of comment covers many technical topics. It is always a goal of the EQB to expedite the procedural aspects of the program whenever possible. The program is frequently criticized for delaying projects unduly. Where a comment period need not be 30 days, the EQB believes that a shorter period is appropriate.

2. Part 4410.3610, subp. 5, item A. Geographic boundary of AUAR review. With the amendments at this provision, the EQB attempts to correct the misinterpretation given by the Court of Appeals in the *MCEA vs. City of St. Paul Park* case. This amendment is supported by the MCEA but opposed by the Association of Minnesota Counties (AMC). AMC advocates that the rules should instead require an RGU to consider the scope of the needed technical analyses prior to setting the AUAR boundary. We believe that would be a problem for several reasons and are convinced that it would create a serious disincentive for RGUs to use the AUAR process, perhaps crippling it.

Connecting the boundary to impacts would force an entirely different outlook on the AUAR boundary from what it is now. Now, RGUs define the boundary based on planning and development factors. If the geographic range of potential impacts were to be taken into account in setting the AUAR boundary, it would necessarily force the expansion of most AUAR areas; this would inherently make the review more complex and more expensive.

AMC complains about the uncertainty of the boundaries of a cumulative potential effects analysis; those uncertainties would be at least as troublesome when the RGU is trying to define the AUAR boundaries as when trying to do the AUAR technical analysis. We do not see how requiring the RGU to face those issues sooner would make them easier to deal with. It would likely force RGUs to hire consultants to help them with the planning of the AUAR boundary, whereas now consultants are generally needed only to perform technical analyses; again this change would increase the costs of the AUAR process.

Finally, the proposed modification does not make sense. The AUAR boundary is the analogue of the property boundary for a single project. That boundary is fixed and does not expand or contract depending on the geographic range of the impacts of the project. Similarly, the AUAR boundary should be independent of the geography of the impacts.

3. Part 4410.3610, subp. 5a. New “scoping” procedures for AUAR. The Builders’ Association of the Twin Cities opposes one of the two proposed situations to which new procedures of item 5a would apply, namely, the situation where any single project would cover at least 50% of the geographic area of the AUAR.

The idea of applying a scoping process to AUARs involving large specific projects was developed as a response to criticism about allowing AUARs to review specific projects at all. Originally, the EQB proposed to ban the use of AUARs in cases where specific projects had been proposed. That idea was countered by commenters at the Request for Comments stage in the “phase 1” amendments. Taking those comments into account, the EQB decided to take a different approach. The following statement appeared in the 2006 SONAR:

“The EQB was persuaded by the comments that trying to prohibit the review of specific projects through the AUAR process was not likely to be effective, could lead to distortions of the process, and could inhibit good planning in some cases. On the other hand, the EQB recognizes that there is some merit to the proposition that an EIS may provide a more rigorous review of a specific project than the AUAR process. In

particular, the EIS content requirements are stronger in regard to the nature of alternatives that must be addressed in the review. Consequently, the option proposed in this rulemaking is to continue to allow the use of the AUAR procedure to review single specific projects, but to require some additional procedures to improve the analysis of alternatives in some cases. The cases in which the additional procedures would be required are either when a specific project exceeds a mandatory EIS threshold (and would therefore require preparation of an EIS if not reviewed through the AUAR procedures) or when any specific project comprises at least one-half of the AUAR area." (SONAR, January 7, 2006, page 29.)

The EQB continues to believe that the "50% of the area" threshold makes sense in the context of why the amendment was proposed in the first place. The amendment seeks to improve the analysis of alternatives where the AUAR involves large specific projects. A threshold of size is needed for this purpose that relates to the extent to which the AUAR is "about the specific project" rather than based on generalized development in the AUAR area. Where the specific project's size is above 50% of the area, the review will tend to be more about the specific project than about the rest of the area's development. Opponents have not proposed an alternative threshold, but only oppose the concept in principle. The EQB believes that the principle behind the threshold is sound, as stated in the quoted material from the 2006 SONAR.

4. Part 4410.4300, subp. 19a and part 4410.4400, subp. 14a. New mandatory EAW & EIS categories for residential projects in shoreland. Mr. Geer, Zoning Administrator for Kandiyohi County, questions the disparity in the mandatory threshold that would apply to clustered developments compared to traditional lot-and-block developments. The residential shoreland categories proposed at these subparts are not written using the terminology "clustered" or "lot-and-block," however, it is acknowledged that the lower thresholds of the "B" items would generally apply to traditional lot-and-block" type developments whereas the higher thresholds of the "C" items would generally apply to conservation subdivisions and planned unit developments.

As the SONAR notes (pages 46 & 47), both of the latter types of subdivisions use clustering and compact lots to provide larger amounts of common open space. Lot-and-block subdivisions typically divide the whole project area among lots owned by individuals, resulting in little common open space. Because the percentage of common open space is a determinant of which thresholds will apply, there is a definite distinction between the thresholds for these different styles of subdivision. The thresholds would be in the ratios of 15:25 or 25:50 for the EAW categories and 50:100 or 100:200 for the EIS categories, or overall about 1:2. It must be noted, however, that the common open space issue is not the only determinant of which threshold level applies. If a clustered-type development includes a high number of units compared to the "reference density" listed in the rules, the lower thresholds will apply to them regardless if they have much common open space.

The EQB staff continues to believe that the SONAR presentation for subpart 19a and the more detailed discussion in SONAR Attachment 4, beginning on page 13, adequately

justify the idea of establishing lower review thresholds for projects that do not preserve natural features and habitat through the use of common open space or that crowd too many units onto the site. As noted above, the ratio of the lower and higher thresholds as proposed is about 1:2. Mr. Geer describes this as a "dramatic disparity." However, a 1:2 ratio between thresholds is common throughout the EQB's rules wherever a tiered system of thresholds is established. Compare, for example, the industrial/commercial thresholds at part 4410.4300, subp. 14, the residential thresholds at part 4410.4300, subp. 19, the corresponding EIS categories at parts 4410.4400, subps. 11 and 14, or the exemptions at parts 4410.4600, subps. 10 and 12. The EQB believes that the proposed shoreland residential threshold ratios are in line with those of the rest of the rules.

Mr. Geer suggests that the use in the SONAR discussion of the descriptor "dense" for lot-and-block type developments was intended to be pejorative and to subtly influence the reader to have a negative view of that type of development. The EQB staff, on the other hand, believes that it used the term "dense" with respect to residential developments only as a convenient label to distinguish between the styles of development to which the criteria of the "B" items applied and those to which they do not apply (and which would then fit the thresholds of item C). It was not our intent to imply that the styles of development to which the adjective "dense" was applied are "bad" compared to the non-dense styles of development. However, we do believe, for the reasons stated in the SONAR, that the "dense" developments do pose a higher potential for significant impacts and therefore justify lower thresholds.

The Geer letter also asserts that the SONAR presents contradictory arguments regarding groupings of units, arguing on page 44 that grouping does not matter with respect to impacts and then on pages 45 to 47 that grouping does matter with respect to impacts. However, what the SONAR states on page 44 is that "some of the important potential issues from shoreland residential projects depend only on the number of units, not upon how they are grouped. These issues are those relating to water surface use and the impacts on the lake ecosystem from boat use." On pages 45 to 47, the discussion is about other impacts, such as preservation of ecological and natural resources on the shoreland. Thus, the statements on page 44 are not in contradiction to those on pages 45 to 47. Also, it should be noted that the SONAR discussion on page 44 is about why the shoreland residential category does not use the terms "attached" and "unattached units," as are used for the existing residential category at subpart 19. The EQB has not disposed of this terminology because it believes that the grouping (or clustering) of units in shoreland does not make any difference to the overall impacts, but rather because for shoreland development "grouping" can be better described in terms of common open space and unit density.

5. Part 4410.4600, subp. 26. Exemption of certain governmental activities. MCEA and other commenters have objected to the amendment of the governmental activities subpart. The EQB stands by the discussion provided in the SONAR which explains and justifies the distinction between conducting environmental review for "projects" and not conducting review for "plans." We believe that the proposed amendment merely

completes the otherwise incomplete list of types of governmental activities that are in the realm of "plans."

Thank you for consideration of our responses.

Sincerely,

A handwritten signature in cursive script that reads "Gregg Downing".

Gregg Downing
Environmental review Coordinator