

**MINNESOTA ENVIRONMENTAL QUALITY BOARD**  
**MEETING MINUTES**  
**Thursday, April 19, 2007**  
**Pollution Control Agency, Board Room**

**EQB Members Present:** Jonathon Bloomberg, Julie Goehring, Dennis Wenzel, Dianne Mandernach, Susan McCarville, Dana Badgerow, Dan McElroy

**EQB Members Absent:** Mark Holsten, Lt. Gov. Carol Molnau, Glenn Wilson, Gene Hugoson, Randy Kramer, Brad Moore

**EQB Staff Present:** Ann Cohen (for Robert Roche), Michael Sullivan, John Wells, Gregg Downing, Jon Larsen

The meeting was called to order at 9:00 a.m. by Vice Chair Bloomberg, who welcomed two new citizen members to the Board: Julie Goehring of Moorhead and Dennis Wenzel from St. Paul.

**I. Adoption of Consent Agenda and Minutes**

Commissioner Mandernach moved and Commissioner Badgerow seconded approval of the consent agenda and minutes of the March 15, 2007 EQB meeting.

**II. Chair's Report**

There was no report.

**III. Executive Director's Report**

Mr. Sullivan explained handouts and an outline that the Subcommittee on Future EQB Directions is working from in their discussions. He directed members' attention to legislation currently in discussion at the Legislature.

**IV. Legal Counsel Report**

Ms. Cohen indicated that there are no legal issues being addressed at this time.

**V. Report of the Subcommittee on Future EQB Direction**

Vice Chair Bloomberg reported that the subcommittee is looking at the broader mission and purpose of the EQB in an effort to refocus the EQB and map out a future path. The committee is discussing the "lens" or screening tool by which it will evaluate and carry out its task. The first task is looking at existing agency authorities and determining what should be retained, what could be modified, and what existing authorities fit with the conception of what the EQB wants to do in moving forward. Beyond that, the

subcommittee will be looking at what other authorities or tasks and roles the EQB may take on. Bloomberg referred members to the subcommittee's handout.

## **VI. Adoption of *Protecting Minnesota's Waters: Priorities for the 2007-2009 Biennium***

John Wells presented a draft of the report "Protecting Minnesota's Waters: Priorities for the 2007-2009 Biennium," highlighting the charge, vision, and challenges facing Minnesota related to the water supply. The report is prepared for the Legislature and serves as an opportunity for the EQB on behalf of the Administration to recommend priority actions in the coming two years.

Mr. Wells explained that the federal Clean Water Act requires states to assess all waters in the state and conduct Total Maximum Daily Load (TMDL) studies to set pollution reduction goals. In response, the state adopted the Clean Water Legacy Act in 2006. The draft priorities report calls for the Legislature to provide the resources needed to: 1) increase the amount of water quality data collected (Data must be more recent than 10 years old.); 2) accelerate the development of TMDLs; and 3) provide added assistance to landowners to begin dealing with problems. Mr. Wells reported that the four major state agencies involved in implementing the Clean Water Legacy Act are the Department of Natural Resources, Department of Agriculture, Pollution Control Agency, and Board of Soil and Water Resources.

Regarding the proposed water supply priority, Mr. Wells explained that most metropolitan areas have at least one emergency connection to a neighboring community but that St. Paul and Minneapolis lack such an interconnect. He explained that the problem for St. Paul and Minneapolis is the size of the water supply lines at the border being unable to carry the required water flow. The Metropolitan Council is working on a water supply master plan and the first phase of that report was issued to the Legislature in January. Commissioner Badgerow asked that Wells include a graphic showing the sustainability of county water use in the report.

The biennial assessment suggests that the water sustainability analysis should be used as a benchmark to help keep a check on how the state is doing in the area of allocation of water. It also recommends completion of mass water-level measurements of the major Twin Cities water supply aquifers.

Member McCarville inquired if the Metropolitan Council has had an opportunity to comment on the report. Mr. Wells indicated that Council staff has had input but that EQB has not yet been asked to work with the Council's steering committee. Interconnect information has come from the Metropolitan Council and it was involved in the water sustainability assessment.

In response to the Governor's charge of improving protection of the state's wetlands, a 40-page report has been developed by the Board of Water and Soil Resources as an agent of the Clean Water Cabinet. It calls for finding ways to reduce losses, improve administrative efficiency, and improve monitoring of wetland changes by amending the no net loss laws and funding implementation. There currently is no reliable way of knowing how many wetlands are being lost; some counties voluntarily report losses, but for exempted wetlands there is no requirement for reporting.

Commissioner Badgerow asked what processes are in place now to elevate the awareness of the EQB report so that before final funding decisions are made the data and recommendations can be delivered into the hands of legislative policymakers. Mr. Wells responded that the report will be sent to the chairs of the Environment and Agriculture committees and to the chair of the LCCMR. A press release will also be distributed. Commissioner McElroy asked that the word "biennium" in the title be deleted, as it is misleading if the three year range is adopted. Alternately, the report could reference the coming two year biennial period, 2008-09.

A motion to adopt the report "*Protecting Minnesota's Waters: Priorities for the 2007-2009 Biennium*," as amended by discussion and the errata sheet, was made by Commissioner McElroy and seconded by Commissioner Badgerow. The motion passed unanimously.

## **VII. Phase II Amendments to the Environmental Review Program Rules; New Mandatory Categories for Projects in Shorelands**

Gregg Downing presented information regarding Phase 2 rule amendments. To orient new members, he provided an overview on the background of rulemaking. He explained that the purpose of his presentation is to get EQB approval to proceed to the comment portion of the process. Mr. Downing introduced Peder Otterson and Paul Radomski from DNR, who assisted in the process. Mr. Downing explained that mandatory categories are lists of types of projects that automatically need review; existing rules have 36 EAW categories and 24 EIS categories. None of the categories was designed to deal specifically with the issue of shoreland development, and with increasing development pressures being placed on shorelands the Board has decided to create new categories. The DNR was asked to take the lead in the shoreland issue and the complexity of their proposal has been reduced to 12 EAW thresholds and 7 EIS thresholds without undermining the general principles of a "sensitive shoreland" concept and giving credit for "doing the right thing." Existing rules and statutes defining "sensitive shorelands" are found in various Minnesota Rules according to their sensitivity to certain factors and relating to either residential or commercial/industrial projects.

Mr. Downing indicated that an informal request for comments is the next step in the rulemaking process and asked the Board's permission to move ahead with that activity

and a draft rule amendment would be brought before the Board in July based on those comments. Commissioner McElroy asked that the Economic Development Association of MN and the Minnesota Association of Professional County Economic Developers be added to the list of concerned associations.

Commissioner Badgerow moved that the process continue and staff move to the next step of obtaining comments regarding the proposal. Commissioner Mandernach seconded the motion. The motion passed unanimously.

### **VIII. Phase 2 Amendments to the Environmental Review Program Rules; Cumulative Impacts/Cumulative Effects—Possible Options for Amendments**

Mr. Downing addressed the Board regarding rule amendments relating to “cumulative impacts.” He explained that “cumulative impacts” is not always the term that will be used, but it is the term used most often to refer to the general concept and for simplicity he would use the term “cumulative impacts.” The concept has to do with taking into account the impacts of past, present and future projects when examining the impacts of a specific project—the aggregate impact of the project under review in the EAW and all of the other projects that were there in the past, exist currently, or may come in the future. At the federal level, in other states, and in Minnesota this concept is the most difficult for people to deal with. Many small impacts can add up to a significant aggregate impact; each project alone may be okay, but taken in the aggregate a problem results. The issue is how to avoid having that happen and still have a process that can be carried out. Since the early 1980s, the wording used in Minn. Rules, chapter 4410, has been confusing and there is no way of knowing why it was worded as it was. There currently exists a definition of “cumulative impacts” that is the same definition the federal government and other state governments use; but in the rest of the rules, it is only referred to again in that way is in the section on generic EIS’s. The definition is never applied to the review of specific projects. Elsewhere the rules use the term “cumulative potential effects,” which is not defined.

Mr. Downing explained that this discrepancy in language became an issue with the court case Citizens for Responsible Development (CARD) versus Kandiyohi County. The case went to the Supreme Court and the decision was made last year. Issues about the treatment of cumulative impacts were central to the case and particularly how the Supreme Court dealt with it. The EQB filed an amicus brief in which , the EQB stated that its interpretation was that cumulative impacts, as defined, applied throughout the rules, despite the fact that it wasn’t the term used. The Supreme Court stated that wording differences in the rules must reflect real differences and interpreted what they thought the words of the rules actually meant, associating cumulative impacts with a broad analysis. They distinguished that from “cumulative potential effects,” which applies in a project-specific situation and has a narrower viewpoint. The Court set geographic and temporal limits on what an RGU needs to consider in deciding if an EIS

is needed on a specific project. In terms of geography, the Court said that you look at projects in the surrounding area that might affect the same natural resource; in terms of temporal effects, you look at projects at are actually planned or on which a basis of expectation has been laid.

As a result, the Board must make a choice on whether or not and how to amend the rules in light of the Supreme Court's opinion. The staff memo defines a number of options the Board can take. The memo also deals with two independent issues related to cumulative impacts or effects; the first is correcting the problem that the rules don't actually tell you when you're doing an EAW or EIS that you have to consider cumulative effects or impacts. Staff feels it is important to put that language into the Rules.

Commissioner McElroy asked if the informal request for comments is the vehicle for presenting all options to the groups who are interested in making a comment? Mr. Sullivan responded that was correct and suggested some type of matrix to make the process and options more easily understood. Commissioner McElroy inquired if there were other occasions when terms or interpretations had been brought into question and requiring possible amendments to the rules. Mr. Sullivan responded that the most recent case was the CARD case, where a former EQB member recommended that the EQB wash its hands of the matter, leave the rules as they are, and refer inquiries to the Supreme Court's opinion. There was one other occasion when this happened in regard to a transmission line between Duluth and Wisconsin. The issue arose about that line serving a new coal-powered power plant and how the environmental review on the process ought to factor in. Mr. Sullivan did not recall that the Court upheld that argument in the final analysis but there was much discussion.

Commissioner Badgerow said that Mr. Downing's summary made it clear that our rules are deficient. The EQB could defer to the Supreme Court decision, but the fact remains that the rules are internally inconsistent and that the Board has an obligation to its constituencies to make the rules clear. Moving to the next step could provide insight as to what the options might be.

Mr. Downing continued with his presentation, stating that the rules are silent on provisions specifying the content of EAWs, EIS, and AUARs. Additionally, a correction to what staff believes to be a mistake made by the Court of Appeals in the *MN Center for Environmental Advocacy vs. City of South St. Paul* (referred to as the River's Edge case) and how to treat cumulative impacts in an AUAR. Mr. Downing explained what an AUAR is and how the court in the above case confused AUAR boundary with the boundary used for the technical analysis of cumulative environmental impacts. To correct the Court's error, the EQB needs to add language to the AUAR rules stating that the boundary of the AUAR chosen by the RGU does not limit the geographic area that must be considered in the technical analysis.

There were two citizens who appeared to present testimony before the EQB regarding phase II rulemaking. David Aafedt from Winthrop and Weinstine spoke on behalf of the Builder's Association of the Twin Cities. Mr. Aafedt remarked that the Builder's Association of the Twin Cities feels that the Court of Appeals interpreted the rule as it was intended to be interpreted and it gave clarity where it had been lacking for the previous 25 years in the environmental review process. The Builder's Association is concerned that the proposed language appearing on page 6 of the April 11, 2007 memo will only add more confusion and add to much more litigation taking another 25 years for the issue to be resolved. The Builder's Association has made these comments to the EQB in the Phase II Rulemaking process and will continue to do so and participate actively throughout the process. The Builder's Association is satisfied with the interpretation of the Court of Appeals ruling.

Janette Brimmer, Legal Director for the Minnesota Center for Environmental Advocacy, addressed the Board, asking to be included with development interest groups going forward as they had not previously been on the list. MCEA has been interested in the process for many years and were parties in both pieces of litigation that Mr. Downing referenced, as an amicus with the National Wildlife Federation in the CARD case and supporting the EQB position; MCEA was also the primary party in the River's Edge case. As regards cumulative impacts, Ms. Brimmer addressed comments made by Board members related to whether and to what extent the Supreme Court decision should be followed and to what extent is that desirable. MCEA argues that EQB not artificially tie itself to that opinion; the EQB should interpret the laws that it administers. It appears that what the Supreme Court said is that the rules have spoken unclearly; but it is important that the EQB not tie itself to that interpretation. Incorporating what the opinion says of the rules is also not desirable because the opinion is complicated and not clear and the EQB would then be taking something that was trying to interpret an unclear rule and incorporate it into new rules. MCEA urges the EQB to follow the federal law, as do other states. There is a large body of case law and existing rules already utilize the same definition that federal law uses. Existing guidance has referred to federal guidance. The Counsel on Environmental Quality has a very detailed and helpful guidance that EQB has long referred to as it relates to cumulative impacts and government units or project proposers already look to. MCEA has researched the federal law and uses it for federal environmental review cases. There is much to wade through, but MCEA feels that the guidance is there. As regards being more prescriptive and trying to draw geographic boundaries, MCEA advocates against that. There is enough federal guidance that MCEA feels the state can do its own guidance. Sometimes a cumulative impact that might need to be examined could change. Sprawl is a perfect example of the cumulative impacts that are needing to be dealt with. It didn't look like a big deal when it was only Bloomington and Bloomington was half the size and density that it is now. A different geographic area may be incorporated as time goes on. It will be beneficial for EQB to not be too prescriptive but make general statements and then utilize guidance effectively, allowing

the agency to keep up to the moment on science and how we are impacting the world around us and what may be the resource of most concern. As regards the AUAR issue, MCEA was a litigant for a large mixed residential/commercial project that spanned several municipal boundaries, St. Paul Park, Grey Cloud Island township, Cottage Grove was interested and there were annexation issues, and it was right on the Mississippi River and parts of the project were within the designated Mississippi River Critical Area, a state designation, and also corresponded to a national park designation for a river recreation area. If the project had gone forward as proposed, it would not have conformed to some of the zoning requirements relative to the critical area. Cumulative impacts became a big deal in that case and there was an argument from the developer and from the municipality that they didn't have to look outside the boundaries of the project because the project was large and it would look at cumulative impacts. MCEA was concerned about the area attached to the critical area and said that the critical area is a designated ecological unit going from north of the Twin Cities metro area to short of Hastings, it had been so designated for a reason, it was already heavily impacted by development, things like bird species had already been impacted along the Mississippi flyway. There was confusion there and it was clear at oral argument that some of the justices were struggling with project boundaries, cumulative impacts and may have been the first time that they had dealt with that issue. MCEA supports clarification of the rules because project boundaries are not adequate and development trends now push for getting an AUAR instead of an EAW or EIS because it is faster and doesn't require certain things like cumulative impacts. MCEA feels that the EQB needs to fix the problem in wording and speak clearly on cumulative impacts. MCEA will be submitting formal comments.

Commissioner Badgerow moved that the process continue and staff move to the next step of obtaining comments regarding the proposal. Commissioner McElroy seconded the motion. The motion passed unanimously.

## **IX. Technical Representative's Report to the EQB on Environmental Review**

Mr. Downing, Susan Heffron and Bob Patton presented the report to the Board. Mr. Downing reported that the Board asked the technical representatives to review EQB's role as it pertains to environmental review and report back to the EQB with recommendations. To address the question of the EQB's role in environmental review, the Technical Committee held several special meetings and a sub-group was created to go through old documents and find information to present to the larger group. Primarily, the group looked at the EQB's role in reform efforts.

The report also addresses the EQB's historical role. When environmental review was started in 1974, the EQB did all of the review and was responsible for all decisions and all of the EAWs and EISs were done under the supervision of the Board. It became too unwieldy and in 1977, the program was decentralized and the review of almost all projects began at the local level or with state agencies. But everything could be appealed

to the EQB and the EQB spent several years as an appeal body. That worked somewhat better but the EQB's agenda was crowded with issues about environmental review to the point that the Board was hardly able to do much else. In 1980, the statute was changed and the EQB was taken out of the role of appeal body. Today there are a few vestiges of that appeal function, but now the function of the EQB is to oversee the program in a general sense and modify the program and rules or suggest statutory changes. Staff still deal with environmental review on a day-to-day basis, processing petitions, putting out the EQB Monitor, giving notice, answering questions, etc., but the Board's primary role is the reform effort. The technical committee looked at the reform efforts that have taken place since 1990.

Bob Patton, Technical Representative to the Department of Agriculture, reported on the major issues underlying the environmental review reform ideas and discussed the areas of substitution of the EAW process for EIS, perceived delay in EAW/EIS process, lack of checks and balances on RGU decisions, confusion/ambiguity about cumulative impacts, "scope creep," criteria for "potential for significant environmental effects" are subjective, mitigation measures are not followed through, and inconsistency with the venue for appeals of other state agency decisions. Mr. Patton explained that stakeholders tend to see that there may be room for improvement and may ask for change, but when it comes down to it, they often are fearful of what the rulemaking or statutory process may yield.

Susan Heffron, Technical Representative to the Pollution Control Agency, reported that the Technical Committee has two recommendations. The first recommendation is for the EQB to maintain its role as the administrator of the environmental review program. The second recommendation addresses the question of major structural reform of environmental review and recommends that structural reform proceed only under the three conditions outlined in the report on page 5.

Commissioner Badgerow asked members to be sure that with the Board's and EQB's limited resources that time be used to the best of our ability in carrying out the statutory mandate. She asked that the Board move toward continuing to look at the issues and asked that the subcommittee look more deeply at the opportunities available to the Board and that the Board do its very best for its constituencies. She asked that the issue not be taken off the table. Member Bloomberg replied that as a member of the subcommittee he would bring her remarks to the subcommittee discussion.

Mr. Sullivan summarized the issue of the structural question and that in dealing with it there are two statutes, one drives policy and departmental review, the other drives who can sue whom and when based on environmental issues. The EIS is the only place where there is a requirement that alternatives to a proposed project or action be outlined, discussed, or discovered and that doesn't necessarily happen in an EAW. Much of the conflict on the structural side of things plays out in terms of one group wanting more EISs because it generates a record that allows there to be more effective participation in

the other statute. The other group looks at the EIS that says an EIS is going to take a lot of time and money, and that putting more information in the EAW would avoid an EIS. Much discussion over the years is based around finding a middle ground.

Ms. Heffron remarked that they are suggesting there not be environmental screening, but they are suggesting that in order to be successful that the three items outlined in the Technical Representatives' report be included to make the review effort more successful than it has been in the past.

**X. Annual report on Federal Programs for the Management of High Level Radioactive Waste**

Mr. Sullivan explained to the Board that this report was previously completed by the State Planning Agency, which became the Office of Strategic and Long Range Planning. The Office of Strategic and Long Range Planning is now gone, but the Director of the Office of Strategic and Long Range Planning did not go away, and that is Commissioner Badgerow. This report is one that the Board is not required by statute to approve, but through common usage, precedent and historic relationships, it has always been brought to the Board for review and comment prior to it being handed to the Director of the Office of Strategic and Long Range Planning, who is charged under the statute with transmitting it to the Legislature.

Jon Larsen, EQB staff, reported on the Annual report on Federal Programs for the Management of High Level Radioactive Waste. Yucca Mountain, Nevada has been identified since 2002 as the national repository for spent nuclear fuel and other high level nuclear waste. The report is an update based upon the most recent previous report and updated information. The purpose of the report is to discuss issues and events on the national scale that affect Minnesota's ability to continue to rely on nuclear power and the issue of our disposal of spent nuclear fuel. The Department of Energy will apply to the Nuclear Regulatory Commission to license that facility as the repository. The application will be submitted to the NRC by June 2008. The earliest possible time that waste could be received at Yucca Mountain would be 2017. There has been various litigation in the past, principally from the state of Nevada contesting this designation. Most of the litigation has been resolved and the courts have dismissed everything except the issue of the storage safety standards. The EPA has revised the storage standards from 10,000 years to 1 million years.

Monitored retrievable storage, an interim strategy to store spent nuclear fuel until Yucca Mountain is open is still a possibility. A private effort in Skull Valley, Utah has been proposed and contracts were signed. The Bureau of Land Management and Bureau of Indian Affairs have this initiative.

Most storage around the country occurs onsite at reactor locations. In Minnesota, Monticello has been re-licensed out to the year 2030; Prairie Island's license is valid until 2013-14. Xcel Energy is expected to apply for re-licensing at Prairie Island. About 20% of power generated in Minnesota used nuclear power.

There was a minor incident at Monticello that caused the reactor to be shut down for 2 weeks. That has been resolved and Monticello is operating at rated power. The NRC has given Monticello and Prairie Island a "green" rating, which is satisfactory. A new item in the report is that Minnesota has become part of the State Agreement Program that the NRC runs. This gives Minnesota, along with 34 other states, the ability to have autonomy in deciding routes for transportation of nuclear waste throughout the state.

The intended audience for this report is the Environment and Natural Resources committees of the Legislature and the subcommittees dealing with finance.

Kristen Eide-Tollefson asked to speak to the EQB regarding the nuclear waste report. She expressed disappointment that it is not yet before the Legislature and hopes that future reports are delivered in a more timely manner. Commissioner Badgerow explained her position as regards the Office of Strategic and Long Range Planning and pledged that the report would be in appropriate hands before final budget decisions are made. Mr. Sullivan reassured Board members that in future the report would be handled in a more timely manner.

Ms. Eide-Tollefson commented on the tech rep report that it was interesting to see all of the issues boiled down and the summary of alternatives is on target. She reported her disappointment to find that in her community some local units of government are adopting the EAW as their application for development. She commented that the tech rep recommendation is that the first condition for revisiting structural reform should be clearly defined problem and opportunity. As to opportunity, there are powerful new tools, such as GIS, for integrating geographic information data. GIS is a powerful tool not just for technical assessment but for public engagement and involvement in the process of assessing priorities at the local level for environmental protection. These tools are becoming more common. She expressed support for the work of the Board.

Commissioner Badgerow moved and Member McCarville second a motion to adjourn the meeting. The motion passed unanimously.

The meeting was adjourned at 11:50 a.m.