

Minnesota Environmental Quality Board
Proposed Revision of Rules Governing the Environmental Review Program –
“Phase 2”

Summary of Comments Received and Options/Staff Recommendations
November 2006

Based on Comments Received in Response to the Request for Comments, dated August 7, 2006

Note: all comments received are posted as a pdf file at the EQB website

This document follows the same format as the document used in the Request for Comments stage of the “Phase 2” rulemaking (to explain the reasons for the proposed amendments and the nature of the proposed amendment) and gives a summary of the comments received for each rule provision proposed to be amended along with either a staff recommendation on how to proceed or a list of optional ways to proceed. The possible amendments are presented in the order that the affected rule parts appear in the present rule. The text of the existing rule (chapter 4410) can be found at the website of the Revisor of Statutes, www.revisor.leg.state.mn.us,

Rule Number	Summary of Comments	Options or Staff Recommendation
1. 4410.0200, subp. 81. Definition of “sewered area”	A few comments were received on this amendment. All supported broadening the definition to cover all types of ownership. No compelling arguments were made about making the definition consistent with DNR rules.	EQB staff recommends proceeding to amend the wording to cover all types of ownership situations. This could be done by deleting the words “publicly owned, operated, or supervised”.
2. 4410.1100, subp. 2. Citizens’ petition process; petition content	No comments were received on this proposal.	The EQB staff recommends proceeding to add language stating that the material evidence for the petition must physically accompany the petition.
3. 4410.1100, subp. 2. Citizens’ petition process; EQB	One comment was received. The MCEA supports the amendment but suggests adding the word “immediately” to assure no time is	The staff recommends proceeding with adding language providing that if a petition is found incomplete by the EQB Chair or designee, the

handling of incomplete petitions	lost in returning an incomplete petition to the petitioners to give them a chance to correct the deficiencies.	petition must be returned to the petitioners' representative with an explanation of why it is incomplete. Staff is undecided about the consequences of adding "immediately," as suggested by the commenter, and would like to consider the issue further before making a recommendation.
4. 4410.1700, subp. 7, item B. EIS need criterion #2: "The cumulative potential effects of related or anticipated future projects."	<p>Three commenters addressed this proposed amendment. The MN Association of Counties and Winthrop and Weinstine, on behalf of the Builders' Association of the Twin Cities, advocated adhering to the interpretation given by the Supreme Court in the CARD vs. Kandiyohi County case, and not expanding the scope of cumulative analysis beyond the scope given in that guidance. On the other hand, MCEA advocates that EQB take this opportunity to start with a clean slate re cumulative analysis and adopt federal NEPA guidance.</p> <p>Also, MCEA advocates that as part of dealing with cumulative analysis issues, EQB also amend the EIS and AUAR content provisions of the rules to clarify coverage of cumulative analysis in each.</p>	<p>The EQB staff believes that the commenters have presented the two options open to the Board. To properly compare them, we need to evaluate federal case law (based on research by the AGO) regarding the meaning of "cumulative impacts" analysis under NEPA. We need to learn whether federal guidance is clear, and if it is, how adopting it would differ from following the guidance of the Supreme Court in CARD. Once that information is available, then the Board will need to decide which option it prefers.</p> <p>EQB staff agrees with MCEA's suggestion that the EIS and AUAR content provisions should be amended to clarify requirements for cumulative analysis. This would involve adding amendments at rule parts 4410.2300 and 4410.3610, subp. 4.</p>
5. 4410.3610, subp. 2. AUAR process; use for review of individual projects	MCEA strongly opposes this amendment, as a matter of law. They contend that ordering an AUAR presumes a finding that all development within the AUAR boundary has potential for significant environmental effects, and therefore requires an EIS-equivalent review under MEPA. Under this interpretation, it is contrary to law to allow a project to drop out of an AUAR review for any	<p>Based on past discussion with legal counsel during Phase 1, the EQB staff believes that MEPA and the nature of the AUAR process do not prohibit the dropping out of an AUAR a project which itself does not exceed a mandatory EAW threshold, contrary to the position of MCEA. Consequently, staff advocates proceeding with the amendment.</p> <p>Regarding the procedural additions suggested by</p>

	<p>reason.</p> <p>The Builders’ Association of the Twin Cities (“BATC”) supports the general intent of the amendment, but reserves judgment until the actually wording is proposed. The City of Elk River also supported the intent of the amendment.</p> <p>MCEA & BATC both suggest additions to the procedures for the public notice and RGU decisions, if the EQB proceeds with this amendment.</p>	<p>MCEA and BATC, staff agrees with adding them. This would include notice in the EQB Monitor and a 30-day deadline after the comment period for an RGU decision</p>
<p>6. 4410.3610, subps. 3 & 4. AUAR Order & analysis; implications of setting the AUAR boundary</p>	<p>Comments from MCEA and Elk River support this amendment.</p> <p>BATC reserves judgment until the actual language is drafted, and expresses a concern that the provision provide certainty with respect to the geographic boundaries and scope of cumulative analyses in an AUAR.</p>	<p>The EQB staff recommends that the Board proceed to clarify that analysis of impacts and impact sources is not intended to be limited to the area inside the AUAR boundary.</p>
<p>7. 4410.3610, subp. 5a (new subpart).</p> <p>AUAR process; additional procedures required when certain large specific projects reviewed.</p>	<p>BATC advocates dropping the “50% of the area” trigger for invoking the extra procedures proposed for this part; they believe this trigger is arbitrary. BATC also advocates dropping the provision that would allow alternative development scenarios to be outside of the AUAR area. They also suggest several minor wording improvements.</p> <p>MCEA generally supports the amendment as proposed but advocates adding clarification on dealing with cumulative analysis (also see #4 regarding this comment) Elk River also supports the amendment.</p>	<p>EQB staff recommends that the Board should pursue this amendment, but choices need to be made about whether to retain or drop the “50% of the area” provision and the provision allowing development scenario options to be outside the AUAR area.</p>

<p>8. 4410.4300, new subpart. Mandatory EAW Category: Development within shoreland</p> <p style="text-align: center;">AND</p> <p>9. 4410.4400, new subpart. Mandatory EIS categories: Development within shoreland</p>	<p>The great majority of the comments received addressed the proposal for mandatory shoreland EAW & EIS categories. Three alternative schemes to the one proposed in the Request for Comments (the one received from DNR) were suggested: from the MN Association of County Planning & Zoning Administrators (and supported by many individual county officials), from MN Waters, an advocacy organizations for lakes and rivers (and supported by many citizen or lake association letters), and from MCEA. All three are simplifications compared to the original scheme proposed by EQB. The MN Waters and MCEA proposals are very similar but not identical. The MCPZA proposal is the simplest scheme of all.</p> <p>A few citizen commenters advocated that no new laws or rules are needed for shoreland protection. The City of Eden Prairie raised concerns about how specific provisions would adversely impact certain types of municipal development and advocated that those provisions be modified to leave out those types of development.</p> <p>BATC noted that the categories proposed by EQB had not been simplified from the original DNR proposal, although several Board members had expressed concern about the complexity of that scheme, and stated that it would reserve judgment until rules and a SONAR document were available to review.</p>	<p>The EQB staff recommends that the Board develop a category proposal based on study of the various options proposed.</p> <p>The original DNR/EQB proposal (table version only) and summaries of the MACPZA, MN Waters & MCEA proposals are presented in a separate document</p>
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<p>10. AMENDMENTS FOR WHICH LOCATION IN RULES NOT YET DETERMINED.</p>	<p>The EQB proposes to make the following amendments to the Environmental Review program rules, but has not yet identified exactly which rule parts need to be amended to accomplish the intended purposes.</p>	
<p>a. clarify that the Environmental Review program does not apply to quasi-legislative governmental actions, such as planning and zoning actions.</p>	<p>MCEA strongly objected to this amendment. They believe that it is contrary to MEPA and that zoning actions meet the definition of “project” as defined in the rules. They also believe that the AUAR process already covers review of zoning-type decisions and that this amendments would create an inconsistency with the AUAR process. BATC strongly supports this amendment.</p>	<p>EQB staff recommends that the Board proceed with this amendment. Staff does not agree with the legal objections raised by MCEA, and believes that the scope of the program should remain as it has been since its inception (i.e., that it does not cover quasi-legislative actions).</p>
<p>b. clarify when an RGU is considering whether a potential environmental impact will be adequately addressed by possible mitigation (such as when determining the need for an EIS), that the standard is whether the mitigation can be “reasonably expected” to handle the impact rather than that it is “certain” to handle the impact.</p>	<p>BATC indicated that it supports this amendment. MCEA also supports the clarification of the rule, but cautions against a simplistic solution and advocates that EQB review appropriate case law to make sure that the new wording does not depart from the standards for mitigation already established.</p>	<p>EQB staff recommends that the Board pursue this amendment and consult with the AGO regarding appropriate wording to maintain consistency with existing case law.</p>
<p>c. Clarify that an RGU need only consider “adverse” environmental effects when deciding if discretionary review is required.</p>	<p>BATC indicated that it supports this amendment. MCEA argues that this amendment is unnecessary, inconsistent with MEPA, and could create a basis for controversy and litigation.</p>	<p>EQB staff tends to agree with MCEA that the possible unintended consequences of this amendment would likely outweigh any tangible benefits, since the issue it addresses has never come up as a real issue in the history of the program.</p>

Additional amendments suggested by commenters:		
4410.2300, EIS contents	MCEA advocates adding guidance on how to treat cumulative analysis in an EIS, and advocates using NEPA requirements	EQB staff supports general idea, but not necessarily following NEPA – see #4 above for more information.
4410.3610, subp. 4, AUAR contents	MCEA advocates adding guidance on how to treat cumulative analysis in an AUAR, and advocates using NEPA requirements	EQB staff supports general idea, but not necessarily following NEPA – see #4 above for more information.
4410.4600, subp. 1, Scope of exemptions	DNR pointed out that an error was made in the list of rule citations at this subpart when the recreational trails category was added in 2004.	EQB staff supports.