

Environmental Review Program Rules

Minnesota Rules, Chapter 4410

Statement of Need and Reasonableness

(Rulemaking authorized July 2007)

I. INTRODUCTION

This document explains the need for and reasonableness of proposed amendments to the EQB rules governing the Minnesota Environmental Review Program. It summarizes the evidence and arguments that the Board is relying upon to justify the proposed amendments. It has been prepared to satisfy the requirements of Minnesota Statutes, section 14.131 and Minnesota Rules, part 1400.2070.

This proposed rulemaking would amend or add 25 subparts of the Environmental Review rules in chapter 4410. This rulemaking is the second phase of an amendment process for the Environmental Review program rules undertaken by the EQB since 2003. The amendments made in the first phase went into effect in October 2006. The rule amendments are presented in part V of the document along with the SONAR information specific to each. Preliminary to part V are sections providing SONAR information about the rule amendments in general.

A. Environmental Review Program Rules

The Minnesota Environmental Review Program, established by the Minnesota Environmental Policy Act of 1973, has been in existence since 1974. The program operates under rules adopted by the Environmental Quality Board, which are binding upon all state agencies and political subdivisions of the state. The rules contain three basic parts: the procedures and standards for review under this program; listings of types of projects either for which review is mandatory or which are exempted entirely from review under this program; and procedures and standards by which a unit of government may conduct discretionary environmental review. Mandatory review can either be in the form of an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS). The lists of types of projects subject to those requirements are generally referred to as the "mandatory categories." The lists of exempt projects are referred to as "exemptions categories" or sometimes just "exemptions." The list of mandatory EAWs is found at Minnesota Rules, part 4410.4300, mandatory EISs, at 4410.4400, and exemptions, at 4410.4600.

B. Development of proposed amendments; public comment

In February 2005 the EQB published a Request for Comments on possible amendments at approximately 50 subparts of the environmental review program rules in chapter 4410. After reviewing comments, the Board decided to divide the possible amendments into two groups: those that could be made ready for rulemaking in the short term and those which would take longer to develop. The Board chose to move forward with rulemaking on the first group in what was referred to as the "phase 1" amendment process, while deferring rulemaking on the other group until a later "phase 2" rulemaking process. The "phase 1" amendments went into effect at the end of October 2006. This rulemaking is the "phase 2" process. The amendments proposed at this time include several new ideas for amendments that were not listed among the 50 amendments in the original, February 2005 Request for Comments. Several important developments occurred during the intervening months that created the need for additional developments, including two major court decisions affecting the program. The current rulemaking also includes several amendments that were withdrawn during the phase 1 rulemaking.

The EQB officially started the phase 2 rulemaking by publishing and distributing a Request for Comments specific to the amendments proposed in this rulemaking phase on August 14, 2006. Comments were accepted through October 16, 2006. A Supplemental Request for Comments was published on December 11, 2006 indicating that several additional potential rule amendments had come to the EQB's attention through comments on the original Request for Comments or because of new developments. Comments were received on the Supplemental request through January 31, 2007. An additional Request for Comments was published on June 18, 2007, with comments received through July 16, 2007, due to legislative action in the 2007 session that required the EQB to adopt a rule requiring an EIS for the release of genetically engineered wild rice. For sake of rulemaking economy, that amendment has been combined into the phase 2 rulemaking effort.

Two of the most significant proposed revisions were put out for informal public comments between the Request for Comments and the notice of the draft rules. These amendments were the creation of new mandatory EAW and EIS categories for projects in shorelands and revisions to the treatment of cumulative impacts or cumulative potential effects throughout the rules. For the shoreland categories, a revised proposal developed in response to comments on the Request for Comments was distributed to known interested parties, noticed in the *EQB Monitor*, and posted at the EQB website on May 7, 2007. A discussion paper outlining possible optional approaches to issues over cumulative impacts and was also distributed and noticed in the same manner and at the same time. Comments were accepted on both topics through June 25, 2007. The Board reviewed draft proposed amendments and SONAR material, as well as the informal comments that had been received by June 25, and authorized rulemaking at its July 19, 2007 meeting.

C. Alternative Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact the EQB secretary, at Environmental Quality Board, 300 Centennial Building, 658 Cedar Street, St. Paul, MN 55155; telephone: 651/201-2464; fax: 651/296-3698. TTY users may call the Department of Administration at 800-627-3529.

II. STATUTORY AUTHORITY

The Board's statutory authority to adopt the rule amendments is given in the Environmental Policy Act, Minn. Stat. 116D.04, subds. 2a(a), 4a & 5a and 116D.045, subd. 1. Under these provisions, the Board has the necessary statutory authority to adopt the proposed rules amendments. In addition, one proposed amendment, the creation of a mandatory EIS category for release of genetically engineered wild rice is required by Minnesota Laws, 2007, chapter 57, article 1, section 140.

III. COMPLIANCE WITH VARIOUS STATUTORY REQUIREMENTS

A. Regulatory analysis of factors required by Minnesota Statutes, section 14.131
Minnesota Statutes, section 14.131, sets out six factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (6) below quote these factors and then give the EQB's response.

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

As with the existing rules, the proposed amendments will affect primarily persons who propose to develop projects that have, or may have, potential for significant environmental effects. The greatest impacts would occur to those proposers whose projects would require an EAW or EIS under the proposed rules but not under the current rules. These would be proposers of projects located in shoreland areas affected by the proposed mandatory EAW categories at part 4410.4300, subparts 12, item C, 19a, 20a, and 36a and EIS categories at part 4410.4400, subparts 9, item C, 14a, 26, 27, and 28. The types of shoreland area projects involved would be nonmetallic mining, residential developments, resorts, RV parks, and campgrounds and other projects disturbing certain amounts of shoreland. The amendments would also affect proposers of projects involving the release of genetically engineered wild rice into the environment.

One of the proposed amendments may make review under the rules more rigorous in some cases, which may have an effect upon some proposers in terms of time and cost. That amendment is the proposed new subpart 5a within the Alternative Urban Areawide

Review (AUAR) process at part 4410.3610. The added procedures proposed at part 4410.3610, subp. 5a, would add additional scenarios to the analysis in some AUARs, the costs of which would accrue in most cases to the proposer of the project that necessitated the additional procedures of subpart 5a. These would be proposers of projects which either meet mandatory EIS criteria or are otherwise of substantial size.

The various amendments to rule provisions concerning cumulative potential effects may appear on the surface to require additional review or more rigorous review, but in actuality are merely adding explicit language to the rules that corresponds to requirements that now exist under the current rules, as interpreted by the Minnesota Supreme Court, or to long-standing practice. In section IV, under the discussion of the proposed amendments to parts 4410.0200, subpart 11a, and 4410.1700, the SONAR describes the how the Minnesota Supreme Court has interpreted the existing rules in terms of the obligation of an RGU to take into account "cumulative potential effects" in determining if an EIS is required. The rule amendments proposed at those parts are intended to explicitly work the directive given by the court into the rule language itself to make the rule much clearer about what an RGU must do. The EQB is not trying to impose any requirements beyond those that already exist according to the Minnesota Supreme Court. As for the amendments regarding addressing cumulative potential effects in EAWs (4410.1200), EISs (4410.2300, H) and AUARs (4410.3610, subp. 4), the language being added would merely explicitly state what has been the EQB's guidance and RGUs' common practice, for many years. Although none of the rules cited now mentions cumulative potential effects (or cumulative impacts), EAWs, EISs, and AUARs routinely address such impacts (if often incompletely). EQB's guidance and forms for EAWs and AUARs explicitly call for treating cumulative-type effects, and to the knowledge of EQB staff, no one has ever challenged the need to address such impacts despite the fact that the rule language does not now mention them explicitly. Thus none of these amendments concerning cumulative-type effects would actually add any additional burdens on proposers or RGUs; they would merely state those obligations more clearly in the rule language itself.

Otherwise, the amendments proposed are expected either to have no affect or to make the rule processes more efficient by eliminating confusion and disputes about interpretation. This would apply to the amendments at: 4410.0200, subp. 81, 4410.1100, subps 2 & 5, 4410.3100, subp. 2a, 4410.3610, subp. 2, and 4410.4600, subps. 1 & 26. All of these amendments are intended to make the rule language correspond more closely with the existing interpretation or application of the rules, and as such, would not change the meaning of the rules from its current interpretation. As with the current rules, the beneficiaries are expected to be project proposers, units of government and the general public.

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

As the proposed RGU for any EISs on releases of genetically engineered wild rice, the EQB would incur significant costs during EIS scoping and preparation, but would be authorized to charge those costs to the project proposer under parts 4410.6000 to

4410.6500. The only other costs that the EQB will incur in the implementation of the rules will be for the costs of time and materials for updating guidance materials to incorporate the rule amendments. These costs will be minimal.

Counties and cities with developable shoreland will experience additional costs for review under the various proposed new mandatory EAW and EIS categories for projects in shoreland areas. In many cases they are expected to pass all or most of those added costs on to the proposers of the projects undergoing review. In the case of any EISs, cost charge-back would be authorized by parts 4410.6000 to 4410.6500. Although MEPA is silent about cost recovery for EAW preparation, local units have authority under their enabling statutes to charge fees for such costs, and many of them already routinely do that. Other local units that to date have not adopted such ordinances may choose to do so if they are affected by the proposed new shoreland project categories. Additional information about the added costs likely to be created by the EAW and EIS category amendments is presented in section III.A (5) below.

The only other amendment likely to result in increased costs is that at part 3610, subp. 5a, which would add additional scenarios to the analysis in some Alternative Urban Areawide Reviews. The costs of the additional review would likely be borne by the proposer of the large project(s) within the AUAR area that resulted in the need for the additional scenarios.

None of the amendments proposed would be expected to have an effect on state revenues. The only revenues raised would be for the direct reimbursement of state agency costs for EIS preparation.

- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule, and**
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.**

Because of the overlap between these two factors as they relate to this rulemaking, factors #3 & #4 are discussed jointly in this section. Most of the proposed amendments are considered by the EQB to be clarifications of the rules as they now stand (and as interpreted by the Minnesota Supreme Court with respect to treatment of cumulative potential effects). As such, these amendments impose no additional costs or intrusions, and hence there are no less costly or intrusive alternatives possible.

For the rule amendments that impose additional requirements, the EQB did consider alternative approaches. Regarding the two proposed revisions in the Alternative Urban Areawide Review (AUAR) process, at part 4410.3610, subparts 2 & 5a, the original amendment concepts (considered in the earlier Phase 1 amendment process in 2005 and 2006) were to prohibit removing a project from an AUAR once started and to prohibit the use of the AUAR process to review a specific development project. In view of public comments received in opposition to these proposed prohibitions, the EQB instead developed and opted for the additional procedural requirements expressed in these two

subparts. The amendments being pursued avoid the original outright prohibitions and instead seek to resolve the perceived problems in the existing rules through some additional opportunities for public input into the review. The steps that are proposed to be added are no more than the minimum needed to accomplish the purpose.

The EQB also explicitly considered several optional ways to amend the rule provisions regarding how to treat cumulative-type impacts. The EQB staff developed several optional approaches to amending the rules with respect to cumulative potential effects or cumulative impacts in light of a 2006 Minnesota Supreme Court decision (which is discussed in section IV of the SONAR). These options were discussed with the Board in April 2007 and a memorandum describing them was distributed to known interested parties (and made available at the EQB website and noticed in the EQB Monitor with an opportunity to file written comments through June 25, 2007). A copy of that memorandum is attached as Attachment 1.

The EQB originally proposed a set of mandatory EAW & EIS categories for projects in shoreland that was very different from the one in the proposed rules. That proposal, described in the August 2006 Request for Comments, was considerably lengthier and more complicated. It contained 48 different EAW thresholds and 26 different EIS thresholds, whereas the proposed rule amendments include 12 EAW and 6 EIS thresholds. The original proposal was modified to the present form due to concerns from local governments that the rules would be too complicated to successfully administer. Thus, the proposed rules represent a less intrusive and less costly set of thresholds for local units to implement than the original proposal considered. Further details about the development of the proposed shoreland categories is contained in section IV.

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The primary cost increases that would be caused by the proposed amendments are the costs attributable to an increase in the numbers of EAWs and EISs done because of the newly created mandatory EAW and EIS categories for projects in shorelands at part 4410.4300, subparts 12, item C, 19a, 20a, and 36a and part 4410.4400, subparts 9, item C, 14a, 26, 27, and 28. The additional costs would be expected to be borne primarily by the proposers of the projects in question. Some local RGUs may also experience increased costs if they have not and do not adopt ordinance provisions allowing them to charge their costs for preparing EAWs and EISs on to the project proposers. The cost of an individual EAW usually ranges from less than \$1,000 to perhaps \$15,000, with probably \$5,000 to \$10,000 being typical for shoreland projects, depending on how much data must be gathered and the extent of the issues involved.

In order to make estimates of the new costs to be imposed by the creation of the new EAW & EIS mandatory categories, the EQB sent a survey to counties and to 57 cities with extensive shoreland areas to obtain data on the characteristics of projects in shorelands over the past decade. A copy of the survey is attached as Attachment 2. The survey was focused primarily on residential projects because that type of project is

known to be the most common type of project in shorelands, and therefore the type for which the proposed thresholds might create large numbers of additional required reviews, as well as the type of projects for which local units would be most likely to have substantial information. In terms of the mandatory categories being proposed, the survey directly obtained data relating to the following rule subparts and items: 4410.4300, subparts 19a, items A, B, C and D; and subpart 36a, item C; and 4410.4400, subpart 14a, items A & B; and subpart 27. The survey did not directly address the proposed new categories for nonmetallic mineral mining; resorts, RV parks and campgrounds; and projects altering large amounts of shoreline or the shore impact zone (at 4410.4300, subpart 12, item C; and subpart 20a; and 4410.4400, subpart 9, item C; and subpart 26).

Thirty-one of the 87 counties returned the survey. Ten cities returned the survey; although this is not a high-percentage response it does include several fast-growing metro area suburbs and several cities in Greater Minnesota. The EQB staff examined the data obtained in two ways. The first was by aggregating (or pooling) the data to get statewide profiles of the nature and sizes of shoreland developments relating to the proposed new mandatory categories. The second was to examine the reports from each local unit to determine how often the proposed new categories would likely require any given unit to prepare EAWs & EISs.

The first analysis done was to pool the data from all responders for "ordinary" residential development (i.e., not including the access lot and resort conversions categories) by type (based on the classes of residential development used in the mandatory categories) and size class to obtain a statewide frequency distribution of residential projects according to size over the last decade. Separate totals were made for "sensitive" shoreland areas and nonsensitive shoreland areas. The frequency distributions are shown on Graph 1, which is Attachment 3.

The graph reveals that the vast majority of typical residential projects in both sensitive and nonsensitive shorelands are very small – less than 10 units. Because of this fact, even the lowest proposed residential mandatory threshold (not counting access lots and resort conversions) – which is 15 units for sensitive shorelands in certain cases – is greater than the size of the vast majority of residential shoreland projects. This indicates that the adoption of the residential thresholds proposed will not have a drastic effect in terms of the numbers of new EAW or EISs required, nor have a drastic overall impact in terms of costs. Without the frequency distribution data, the EQB had been concerned that perhaps the proposed thresholds would create an unmanageable number of additional reviews for local units. The data demonstrate that that problem will not occur (unless the thresholds were lowered to less than 10 units).

The second way in which the EQB staff analyzed the survey data was to tally the relative frequencies of new EAWs that would result from each proposed residential category covered by the survey. The following table gives the total number of additional EAWs that would have been required by each new mandatory category threshold in all local units over the entire ten-year record (if the proposed new category thresholds had been in

place). For most of the categories the data are separated according to projects in “sensitive” and “nonsensitive” shoreland as well as the total.

<u>Proposed category subpart & item #</u>	<u>#projects reported over threshold</u>	
19a, A Total (sensitive/nonsensitive)	77	(41/36)
19a, B Total (sensitive/ nonsensitive)	8	(3/5)
19a, C Total	11	
19a, D Total (sensitive/ nonsensitive)	7	(0/7)
36a, C Total (sensitive/ nonsensitive)	3	(1/2)

The data in the table reveal that the great majority of additional EAWs likely to be caused if the proposed categories are adopted would be due to the thresholds at subpart 19a, item A, which would apply to residential projects that contain less than 50% open space or are dense relative to the shoreland standards for single, unsewered lots. These types of residential projects would have required nearly an order of magnitude more EAWs with the new thresholds in place than any of the other types of project categories, and about the same number of EAWs would have been required for projects in sensitive and nonsensitive shoreland areas. Most likely, this reflects the fact that the majority of residential shoreland projects are conventional “lot-and-block” designs which would not meet the 50% open space criterion.

The distribution of the additional EAW numbers in the table implies that the cost of the proposed EAW categories will be borne most heavily by project proposers whose shoreland projects use conventional lot-and-block designs. In contrast, few EAWs can be expected to be required from proposers of resort conversions or of PUD/conservation subdivision-type residential projects designed to preserve open space (19a, B), or due to the inclusion of access lots in residential developments 19a, C). Except for resort conversions (19a D), the data reveal that approximately the same number of EAWs would be required in sensitive and nonsensitive shoreland areas.

While the frequency distribution data provides comfort that the proposed categories will not create an unmanageable burden overall, it does not answer the question of what the probable cost of the new categories would be. A different analysis of the survey data is needed for that. The survey results can be used to make estimates of the numbers of additional reviews and their costs that would be projected to result if the proposed mandatory categories are adopted. The estimates will be done separately for counties and cities.

Counties. First, an estimate of the total costs of the increased review must be estimated. While the survey provided for responses back to 1997, many responders could only supply data from the past few years. Thus, to make good estimates of the actual number of EAWs per year it would be better to use only the last few years of record where the data is more complete. Thus, for this estimate the data from 2004, 2005 & 2006 only was be used. The compiled data for 2004-2006 for each proposed category for which data is available from the county survey responses is shown in the following table:

<u>Proposed category subpart & item #</u>	<u># projects over threshold 2004-6</u>
19a, A	39
19a, B	4
19a, C	4
19a, D	7
<u>36a</u>	<u>0</u>
Total	54

Since the data comes from 3 years of record, to get an annual estimate the numbers would be divided by 3; however, since the data came from 31 of all 87 counties to extrapolate from the sample to the whole state, the numbers would be multiplied by approximately 3. Since those two calculations would cancel each other out, the numbers in the above table are already approximate yearly estimates of the total number of additional EAWs likely to be required to be done by counties due to each of the listed proposed shoreland categories, if adopted.

The total of 54 EAWs per year would represent an increase in total numbers of EAWs prepared per year of approximately $\frac{1}{4}$ to $\frac{1}{3}$, since typically 150-200 EAWs are currently prepared each year statewide for all reasons. These estimates do not account for the possibility that some projects will be scaled-back or redesigned to avoid the need for an EAW; such an effect is known to occur based on past experience with existing EAW categories, although its magnitude cannot be quantitatively estimated. In the case of shoreland projects, the existence of lower EAW thresholds for higher density projects might cause some developers to redesign conventional lot-and-block developments as conservation subdivisions, for instance. As noted above, the costs of the additional EAWs most likely will fall heaviest on proposers of conventional lot-and-block-type subdivisions.

Cities. A similar methodology can be used for the city data, except that since most of the ten cities had records back to 1997, all ten years of record can be used for the city estimates.

<u>Proposed category subpart & item #</u>	<u># projects over threshold 1997-2006</u>
19a, A	39
19a, B	5
19a, C	0
19a, D	1
<u>36a</u>	<u>1</u>
Total	46

To convert these numbers into estimated yearly projections for EAWs they need to be divided by 10 (for ten years of record) and multiplied by an appropriate factor to adjust the results to represent all cities, not just those which returned the survey ($57/10 = 5.7$). This gives an estimate for cities of $(46/10 \times 5.7 =)$ 26 EAWs per year, or about $\frac{1}{2}$ of the

number estimated for counties. Again, the heaviest burden would likely fall on proposers of conventional lot-and-block subdivisions.

To get the overall estimated costs of the proposed new categories, the above numbers can be multiplied by the estimated cost range for typical EAWs. To get a low-end cost, the price of an EAW is assumed to be \$5,000. A high-end estimate will use double that cost per EAW, \$10,000.

		Low estimate	High estimate
Counties	54 EAWs	\$270,000	\$540,000
Cities	26 EAWs	\$130,000	\$260,000
Total	81 EAWs	\$400,000	\$800,000

As noted above, these monetary costs of preparing additional EAWs will fall largely upon the proposers of the projects because the RGUs will pass their costs on to the proposers. How the costs would be allocated among project proposers would depend on how many projects a given developer would do. The EQB staff has no specific information about the number of projects per proposer. However, anecdotal information indicates that there are many persons and companies involved in lakeshore development. Since the total number of EAWs is projected to be less than 100, it seems very unlikely that any given developer would ever do more than 10 projects requiring an EAW in a given year. Thus, an outside estimate of any proposers additional costs would be 10 projects X (\$5,000 – 10,000)/ project = \$50,000 to \$100,000 per year due to the new categories. The EQB would expect that the vast majority of proposers would only have at most one or two projects that would require an EAW in a given year, leading to a cost of \$5,000 to \$20,000 for most proposers whose projects are affected at all. As noted earlier, the vast majority of shoreland residential projects are smaller than even the lowest proposed threshold. Also as noted previously, these costs are most likely to fall upon developers of conventional lot-and-block developments; proposers could lower the additional costs of environmental review by designing more conservation subdivisions or PUDs that contain more open space and avoid high densities of lots or units. Some projects can be designed to be totally exempted from environmental review pursuant to the proposed exemption category at part 4410.4600, subpart 12, item B.

The above estimates were derived from statewide compilations of the survey data. They do not directly address the question of whether – even though the “average” impact on RGUs will not be severe – might the categories impose an undue burden to prepare EAWs or EISs on specific RGUs? This is an important question to address because shorelands are not uniformly distributed around the state, and some areas are experiencing much more growth than others.

To address that question the EQB staff examined each returned survey to determine how many new EAWs or EISs would have been required in any given calendar year for that RGU if the proposed thresholds had already been in effect (assuming the same projects as

reported would have been applied for). This analysis showed that out of all the county and city responses:

- Eight times a single RGU would have needed to prepare two or three EAWs in a given year due to any one of the proposed categories.
- Once an RGU would have had to prepare 5 EAWs due to a single category in the same year and twice an RGU would have had to prepare 4 EAWs due to a single category
- Twice an RGU would have been required to prepare 6 EAWs in a single year due to all the categories combined.

The “worst-case” situation revealed by the data is that twice an RGU would have had to prepare six EAWs in a one year due to the proposed categories as a whole. The specific RGUs in those two cases happened to be the City of Maple Grove and Sherburne County. Both Maple Grove and Sherburne County have a fair number of lakes, are experiencing rapid growth and have a recent history of preparing many EAWs. Thus, it is reasonable to assume that the effect of the proposed categories would have in the case of those two local units represents the high end of the spectrum of what would result if the proposed categories are adopted. Few RGUs would likely ever be in the position of needing to prepare a similar number of EAWs per year, and those that would are likely to have the resources and experience to be able to handle the effort needed.

The surveys sent to counties and cities did not include questions about the frequencies of resorts (other than resort conversions), RV parks, and campgrounds for reasons explained earlier. We know from past experience, however, that there are many fewer of these kinds of projects overall than residential projects. Based on that fact, and the above analysis of residential projects likely due to the proposed categories it can be concluded that only a few EAWs will result each year from the new category proposed as subpart 20a, and any given RGU is unlikely to need to prepare more than one EAW per year at the most.

The survey requested data on projects of the type covered by proposed new category part 4410.4300, subpart 36a, item C. Among all the county and city returns, there was only one case where a past project would have required an EAW due to this proposed category. (Interestingly, however, two projects would have been large enough to have required preparation of a mandatory EIS due to the corresponding new category at 4410.4400, subpart 27.) It is not possible to make any quantitative estimates of the numbers or costs of review that might be due to the other two items in subpart 36a, dealing with shoreline and shore impact zone alterations because those categories use threshold parameters for which no past data would be available. In view of the fact that none of the proposed thresholds for which estimates could be made show any drastic impacts, the EQB would be surprised if any resulted from these proposed categories.

EIS costs. With one exception, the above discussion of numbers and costs of new reviews has not addressed EISs. EISs in general are much rarer than EAWs; while 150 to 200 EAWs may be done in a typical year, usually fewer than ten to fifteen EISs are done.

The county and city survey data show the following numbers of projects by proposed category that would have exceeded the proposed EIS thresholds:

	Cities	Counties
Subpart 14a, item A	19	4
Subpart 14a, item B	2	4
Subpart 27	2	
Total	23	8

Extrapolating these data statewide on an annual basis using the same methodology as was done above for the EAW cost estimates yields these results: counties: 8 EISs/10 years X 3 = 2.4 EISs; cities: 23 EISs/10 years X 6 = 14 EISs for cities; and a combined total of 16.4 per year. If this projection turns out to be accurate, the proposed mandatory EIS categories for shoreland projects could approximately double the number of EISs done per year.

However, the EQB would expect these numbers to be an overestimate of what would actually occur if the proposed EIS thresholds are adopted. The data in the above table indicate that 19 of the 31 cases where projects would have been over the proposed EIS thresholds were projects in cities to which the thresholds for "denser" projects as proposed at subpart 14a, item A apply. It is likely that many of those projects could have been designed to preserve more open space or with a lesser unit density, in which case the higher thresholds of item B would have applied instead.

The costs of these EISs would fall to the project proposers because of the charge-back provisions of MEPA. EIS costs vary greatly depending on the nature and complexity of the projects. For the types of projects that would require EISs due to the proposed shoreland categories, an EIS would likely cost from \$100,000 to \$250,000. Using this cost range and the statewide projections calculated above, the total annual costs of EISs due to the mandatory categories would range from \$1,640,000 to \$4,100,000.

Other than the new shoreland project EAW & EIS categories, the only proposed amendment likely to cause cost increases is the added process at part 4410.3610, subp. 5a, which would add additional scenarios to the analysis in some Alternative Urban Areawide Reviews. The cost of this additional analysis is estimated to range from \$10,000 to \$20,000 in any given AUAR. These costs would be no greater than would have been experienced if the projects had been reviewed through the EIS procedures. The costs of which would accrue in most cases to the proposer of the project that necessitated the additional procedures of subpart 5a.

(6) the probable costs or consequences of NOT adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

Shoreline property owners, local governments, and taxpayers benefit economically as a result of the amenities that good shoreland management preserves: clean water, fish and wildlife, and natural beauty. The DNR has assembled many facts in the document "An Assessment and Rationale for the Alternative Shoreland Management Standards" (June, 2006) (available at the DNR's website at: http://files.dnr.state.mn.us/waters/watermgmt_section/shoreland/ALT6120_Companion_Report.pdf) relating to the economic benefits from preserving lake and shoreland quality. To the extent that the proposed rules will assist in preserving such qualities, failure to adopt the proposed shoreland categories would result in costs due to the loss of some of the benefits represented. However, no way is known to quantify the magnitude of the loss that would be associated with failure to adopt the categories.

If the proposed rule amendments are not adopted, the costs and consequences can be grouped into four categories: (1) those due to inefficiencies caused by confusion or misinterpretation of provisions that would be clarified if the amendments were adopted; (2) those due to foregoing improved effectiveness of the program due to not adopting certain amendments; (3) those due to the need to process citizen petitions for some projects in shorelands that would automatically require review or be exempt from review if the proposed new mandatory and exemption categories were adopted; and (4) those due to not correcting the error made by the Court of Appeals regarding how the designated AUAR boundary relates to the geographic scope of technical analyses in the AUAR.

Confusion over the meanings of rules and misinterpretations of rules lead to a waste of resources and associated costs, although it is not possible for the EQB to make a meaningful estimate of the costs that would result if the various ambiguities and unclear rule provisions are not corrected through these amendments. This would apply mostly if the amendments clarifying how to treat cumulative-type impacts were not adopted. Although the EQB could amend its guidance to direct RGUs and others to follow the directives given in the decision of the Minnesota Supreme Court, it is the experience of the EQB staff that many people rely primarily on the rules themselves for basic information about how to proceed. Thus, if the rules are not amended to correspond in wording to the interpretation of the Minnesota Supreme Court, the present situation in which the apparent meaning of the rules is not sufficient to convey what the court has given as the interpretation will persist, and will tend to mislead, or at least confuse, some proposers and RGUs.

Regarding the costs or consequences of foregoing improved effectiveness of the program due to not adopting these amendments, the area of the rules where the greatest improvements in effectiveness lie is the changes to the AUAR process at part 4410.3610, subparts 2 and 5a. Without the additional procedures proposed, the potential will continue to exist for certain projects to avoid review of their environmental consequences according to accepted state standards. This has the potential for projects to be approved without a complete understanding of their environmental consequences. It also has the potential to contribute to lawsuits over incomplete review of certain projects with the accompanying time delays and associated costs. There has already been one lawsuit over an AUAR where one of the basic issues was whether sufficient alternatives to a specific

project were analyzed in the AUAR, the issue that the proposed new subpart 5a procedures are intended to address.

Citizen petitions on shoreland projects are very common. Perhaps half of the 50 to 60 petitions filed annually are on residential projects in lakeshores. Some of these petitions would be rendered unnecessary if the proposed new mandatory EAW & EIS and Exemption categories are adopted. This will save citizens the trouble of preparing and filing petitions and local RGUs the time and resources to process them and decide on the need for an EAW. Since many lakeshore project petitions are quite contentious, avoiding the debate over whether or not an EAW should be done can benefit everyone, even the project proposer (especially proposers whose projects fit the proposed exemption category at part 4410.4600, subpart 12, item B). These benefits would be foregone if the mandatory categories are not adopted.

As explained in section IV regarding the proposed amendments at part 4410.3610, subpart 5, item A, the EQB believes that a fundamental error was made by the Court of Appeals when it declared that an AUAR analysis does not need to consider impacts or sources of impacts outside of the designated AUAR boundary. If that error is not corrected through this rulemaking, a basis for incomplete and ineffective review and mitigation of some impacts in all future AUARs will continue to exist.

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

It is possible for a given project to require review of its environmental impacts under requirements of the National Environmental Policy Act as well as the Minnesota Environmental Policy Act. The federal process prescribes environmental documents similar to state EAWs and EISs and uses processes similar in general outline although different in details to the Minnesota process under chapter 4410. Almost always, it is public projects such as highways, water resources projects, or wastewater collection and treatment that require such dual review. In the few cases where dual review is needed, specific provisions in the Environmental Review rules provide for joint state-federal review with one set of environmental documents to avoid duplication of effort. These provisions are: part 4410.1300, which provides that a federal Environmental Assessment document can be directly substituted for a state EAW document and part 4410.3900, which provides for joint state and federal review in general. Neither of these provisions will be affected by the proposed amendments.

There is one specific area of these proposed amendments that would perpetuate a difference between state and federal review processes. This difference is in the terminology used for cumulative-type impacts. The federal NEPA process uses the term "cumulative impacts" while the proposed amendments would use the term "cumulative potential effects." Further, the definition proposed for cumulative potential effects is not identical the federal definition of cumulative impacts. The state's proposed definition modifies the federal wording to explicitly take into account the decision of the Minnesota Supreme Court in a recent case) discussed elsewhere in the SONAR.

In almost all cases, the differences between the state and federal specifications for cumulative-type will have no effect at all on the review. Almost all reviews under chapter 4410 are exclusively state reviews with no federal involvement. Thus, there is no reason why the differences would even be noticed. The rare cases where there could be an effect would be the few joint state-federal reviews that are done. In those few cases, there would be a need to be aware of and deal with the differences in definitions in the terms. Fortunately, joint state-federal reviews are almost always done by experienced consultants and state and federal agency employees who are capable of dealing with complex governmental regulations. Therefore, the differences in terminology that the rule amendments may create would not be expected to create significant problems.

B. Other SONAR Content Required by Statute

1. Performance-based rules

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

The goal of the environmental review program is to obtain useful information about potential environmental effects of proposed projects and how they can be avoided or mitigated. The structure of the rules promotes flexibility for units of government in obtaining this information. The rules specify the types of information that are needed, but the Responsible Governmental Unit chooses how it will obtain the information.

Except for a very few of the proposed amendments, the present rulemaking does not substantially affect the procedures of Environmental Review, but rather either makes minor adjustments in the procedures or alters the thresholds at which review is required. And for those few amendments that do alter the procedures in a substantial way (amendments to the AUAR process at part 4410.3610) the additional procedures involve only a basic public notice, review and comment process. Consequently, this rulemaking does not substantially alter the procedural flexibility of the rules.

2. Additional Notice

Minnesota Statutes, sections 14.131 and 14.23, require that the SONAR contain a description of the agency's efforts to provide additional notice to persons who may be affected by the proposed rules or explain why these efforts were not made. The EQB is using the following elements to provide additional notice in this rulemaking:

- Posting on the EQB Website. The rulemaking notices, the proposed rule amendments, and the SONAR will be posted at the EQB website.
- Publication of the rulemaking information in the *EQB Monitor*. The Monitor is a bi-weekly electronic publication of the EQB concerning events in the

environmental review program and is routinely examined by many persons and organizations with a potential interest in environmental review activities.

- Press Release to Major Circulation Newspapers. We will send a press release about the rulemaking to newspapers throughout the state.
- Mailed or emailed notice to persons who have previously expressed interest or who are known to likely be interested in the major rule amendments: mandatory categories for projects in shorelands; amendments to the treatment of cumulative potential effects; and EIS requirement for releases of genetically-engineered wild rice; most of these persons have previously contacted EQB in response to the Requests for Comments issued.

Our Notice Plan also includes giving notice required by statute. We will mail the rules and rulemaking notice to everyone who has registered to be on the EQB's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. We will also give notice to the Legislature per Minnesota Statutes, section 14.116.

3. Section 14.127 analysis; Agency Determination of Cost of Complying for Small Business or Small City

Minnesota Statutes, section 14.127, requires the agency to determine if the cost of complying with most proposed rules in the first year after the rules take effect will exceed \$25,000 for any small business or small city. A small business is defined as a business (either for profit or nonprofit) with less than 50 full-time employees and a small city is defined as a city with less than ten full-time employees. Although this analysis is not required to be included in the SONAR, the EQB has chosen to put it here, as it is related to the information provided under sections A.5 and A.6 above.

The EQB has determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small city but probably would exceed \$25,000 for one or more small businesses. As explained elsewhere, cities can charge their environmental review costs to the project's proposer.

The type of business for which the proposed rule amendments would have likely financial implications would be shoreland real estate development companies. Probably most or even all of that type of company would be expected to be a "small business" by the definition used in this statute. Based on the analysis of section A.(5) above, it can be concluded that it is likely that a number of additional EISs will be required each year due to the proposed mandatory EIS categories; a few might also result from the additional EAWs that would be required due to the proposed mandatory EAW categories. Since the cost of any EIS would be expected to be \$100,000 or more, it is quite likely that this rulemaking will result in costs greater than \$25,000 to one or more small businesses in the first year of implementation.

IV. RULE-BY-RULE ANALYSIS OF NEED AND REASONABLENESS

A. Introduction

Throughout this section, to distinguish the rule amendments from the explanation and justification of the amendments, the rules are indented. Amendments to the existing rules are shown by ~~strikeout~~ and underlining. The rules are presented in the order that the existing rules now appear in chapter 4410.

B. Amendments to definitions at part 4410.0200:

1. Subp 9a. Common open space. "Common open space" means a portion of a development permanently set aside to preserve elements of the natural landscape for public or private use, which will not be developed or subdivided and is either owned in common by the individual owners in the development or by a permanently established management entity. Common open space does not include the area within 25 feet of any structure, any impervious surface, or the area between buildings within an individual cluster of buildings when the development is designed using clustered compact lots or clustered units or sites to create and preserve green space, such as in a conservation subdivision, planned unit development, or resort.

This definition is needed because the term common open space is used as a threshold factor in proposed new mandatory EAW categories at part 4410.4300, subparts 19a & 20a and EIS categories at part 4410.4400, subpart 14a. Whether or not certain projects will require an EAW will depend in part upon whether the amount of common open space on the parcel equals or exceeds 50%. Thus, it must be clear to the RGU what qualifies as common open space. The existing shoreland rules, chapter 6120, do not have a definition of this term, and experience shows that there can be disputes over whether certain areas should be counted as common open space. To avoid such disputes, this term needs to be defined.

This definition is based on a similar definition in "Minnesota's Alternative Shoreland Management Standards" (December 12, 2005) developed through the work of the Shoreland Standards Update Advisory Committee and available at the DNR Division of Waters web site, http://files.dnr.state.mn.us/waters/watermgmt_section/shoreland/Alt6120_12_12_2005.pdf. The key components of this definition are: (1) it includes only areas permanently set aside to preserve green space; (2) the areas included must be held in common ownership of some type; and (3) certain areas are specifically excluded that might be claimed by some to be "open" but which do not preserve green space (such as impervious surfaces) or are not in reality usable by all the owners (areas very close to buildings and between nearby buildings).

2. **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, an RGU must determine whether a project is reasonably likely to occur and, if so, whether sufficiently detailed information is available about the project to contribute to the understanding of cumulative potential effects. In making these determinations, 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; and any other relevant factors.

This new definition is part of the EQB's attempt in this rulemaking to clarify and correct a number of problems that have existed for many years with how the environmental review rules address (or fail to address) impacts of a cumulative nature that are due to multiple projects, past, present and future, in addition to the project under review. Various terms are in use for this type of effect: cumulative impact, cumulative effect, and cumulative potential effect. The current environmental review rules define the term “cumulative impact” (at 4410.0200, subpart 11) in a manner very similar to (and derived from) the federal NEPA definition of the Council on Environmental Quality regulations (40 CFR section 1508.7). However, that term is used only once in the rules, in the section on criteria for ordering a Generic EIS (4410.3800, subpart 5, item G). The term is never used in connection with the review of specific projects. Surprisingly, the content and procedural rules for preparing EAWs, EISs, and AUARs never mention cumulative-type analysis at all. The criteria for ordering an EIS after preparing an EAW at part 4410.1700, subpart 7, include a factor, item B, that reads “the cumulative potential effects of related or anticipated future projects,” however the term “cumulative potential effects” is not defined.

For many years, the EQB staff considered the two terms used in the rules (cumulative impacts and cumulative potential effects) to be synonymous, and often also used the term “cumulative effects” as having the same meaning. In a recent case (*Citizens Advocating Responsible Development vs. Kandiyohi County Board of Commissioners and Duinink*

Brothers, Inc, 713 N.W.2d 817 (Minn. 2006), the EQB filed an amicus brief arguing that the terms were synonymous. In its decision, however, the Minnesota Supreme Court rejected the EQB's argument and found that "the cumulative potential effects of related or anticipated future projects" was not equivalent to applying the definition of "cumulative impacts." The Court distinguished between a broader scope of review associated with the term "cumulative impacts" as it is used in conjunction with the Generic EIS process, and a narrower focus associated with the term "cumulative potential effects" as used in conjunction with review of specific projects. For a project specific EIS need determination, the court held that an RGU is required to consider specific projects already planned or for which a basis of expectation has been laid. The court also held that for a project specific EIS need determination, a cumulative effects analysis is limited geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources as the proposed project, such as a nearby lake.

In the aftermath of the Minnesota Supreme Court's decision in *CARD*, the EQB is faced with the question of what to do about the terminology in the rules. After discussing its options at the April 2007 Board meeting, the EQB issued an informal request for comments to known interested parties (and also posted notice in the EQB Monitor and at the EQB website) based on a memorandum titled "Proposals for Amending the Environmental Review Rules Regarding 'Cumulative Impacts or Effects'" (Attachment 1.) The memorandum identified three options regarding the choice and definition of the terms to be used in the rules. Option A was to leave the rules as they were and rely on the Minnesota Supreme Court's opinion and EQB guidance for the correct interpretation of the rules. Option B was to incorporate the Minnesota Supreme Court's interpretation into the rule language, including adding a definition of "cumulative potential effects" defined as in the Court's opinion. This option would also retain the existing definition of "cumulative impacts," which would continue to apply only to Generic EISs. Option C was to redefine "cumulative impacts" to have the meaning given by the Minnesota Supreme Court to the term "cumulative potential effects," and to replace "cumulative potential effects" with "cumulative impacts" throughout the rules. The chief advantages noted for option C was that it would avoid confusion between two terms and align Minnesota's terminology with that of the federal government and most other states that have similar programs.

After reviewing the comments and analyzing the implications of the three options, the EQB has chosen Option B as the best course of action, and hence proposes to add a definition of "cumulative potential effects" to the rules and to use that term throughout the rules in reference to the review of specific projects. The definition of "cumulative impacts" at 4410.0200, subpart 11 will be retained, but that term will only be used in reference to Generic EISs. That usage will be consistent with the analysis provided by the Minnesota Supreme Court.

The EQB has determined that it is very important to preserve the distinction made by the Minnesota Supreme Court between a broader scope of cumulative analysis appropriate to a GEIS and a narrower scope appropriate to review of specific projects. If that is not

preserved in this rulemaking, some might infer that the EQB intended to remove or diminish the distinction found by the Court about the relative breadth of reviews of cumulative-type effects in a GEIS and project-specific review documents. The EQB believes that it is important not to establish any such presumption or implication because it maintains that the distinction found by the Court is reasonable and it does not wish to take any action that may be construed to weaken or diminish that distinction.

Some commenters who favored Option C asserted that some public confusion might result from using two terms for cumulative-type analysis. However, in terms of the operation of the rules, having two definitions will not cause problems. Each definition will have its own clear sphere of influence which will not overlap. Only the EQB can order a GEIS, and hence only the EQB needs to apply the definition of "cumulative impacts." No other RGUs need worry about that term. In all other environmental review situations, the operative term and definition will be "cumulative potential effects" and that term will have the meaning given it by the Minnesota Supreme Court.

There will be some infrequent situations where a joint state-federal review may occur in which cumulative-type effects analysis must be considered. The fact that Minnesota and NEPA will use different terms with slightly different definitions will call for the affected RGUs and their consultants to pay attention to these differences and make some adjustments, mostly in the way they describe things in the environmental review documents. This will likely be somewhat of an inconvenience, but it will be infrequent and affect only a few RGUs and consultants, most of whom are relatively sophisticated in environmental review and therefore capable of easily dealing with this small difference.

Quite a few commenters, especially business interests and the Association of Counties, preferred Option A, which would have left the rules alone. The EQB did not choose Option A because it felt obligated as a matter of public policy to make the rules best express the meaning given by the Minnesota Supreme Court. Persons involved in the environmental review process should not need to study a somewhat complicated Minnesota Supreme Court opinion to find instructions on how to deal with cumulative-type effects. Those instructions should be included in the rules.

The EQB can understand why many would be concerned that rule amendments could alter the meaning already given by the Court. However, the EQB believes that it can incorporate the interpretation of the Court into the rules without distorting the meaning.

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 adding the sentence “[i]n 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,” to provide guidance about how to treat past projects that have contributed to a significant cumulative potential effect to which the project under review would also contribute in environmental review analysis. This is one aspect of cumulative analysis that has been historically troublesome, especially in the federal NEPA review process. Specifically, the issue is whether the past projects must be individually identified and their contributions itemized, or whether the ‘current situation’ may be taken as the aggregate sum of all past projects and used in lieu of any attempt to itemize past project contributions. The sentence proposed to be added would provide that the latter course of action, taking the existing conditions as the aggregate effect of everything past, is the standard to be used in an EIS. The wording of the sentence has been adapted from federal Council on Environmental Quality (the federal body that oversees NEPA) guidance issued on this question (memorandum from James L. Connaughton, Chairman, CEQ, titled “Guidance of the consideration of past actions in cumulative effects analysis,” June 24, 2005). The language does include a qualifier that provides that in a case where there are good reasons why individual past projects should be considered in the analysis, that is the proper procedure to follow. Otherwise, as the CEQ memorandum states: “Generally, agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions.”

The EQB 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 sufficiency of information 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 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 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 be 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 final factor in the list ("any 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 or of the sufficiency of information about the project. An example would be a situation where the RGU knows that financing has been secured for the project.

3. Subp. 55a. Ordinary high water level. "Ordinary high water level" has the meaning given in part 6120.2500, subpart 11 [which is: "the boundary of public waters and wetlands, and shall be an elevation delineating the highest water level which has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly that point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial. For watercourses, the ordinary high water level is the elevation of the top of the bank of the channel. For reservoirs and flowages, the ordinary high water level is the operating elevation of the normal summer pool."]

This term is used in the proposed new exemption threshold for residential projects in shorelands at 4410.4600, subp. 12, item B and in the definition of "shore impact zone". The term is intended to be used as defined in the cited DNR rule, which deals with shoreland management. It is reasonable for the definition in the environmental review rules to be consistent with the definition in the shoreland rules because they address the same topic.

4. Subp. 79b. Sensitive shoreland area. "Sensitive shoreland area" means shoreland designated as a special protection district pursuant to part 6120.3200 and shoreland riparian to any of the following types of public waters:
- A. lakes or bays of lakes classified as natural environment pursuant to part 6120.3000;
 - B. trout lakes and streams designated pursuant to part 6264.0050;
 - C. wildlife lakes designated pursuant to Minnesota Statutes, section 97A.001, subdivision 2;
 - D. migratory waterfowl feeding and resting lakes designated pursuant to Minnesota Statutes, section 97A.095, subdivision 2; or
 - E. outstanding resource value waters designated pursuant to part 7050.0180.

As explained in the SONAR materials justifying the proposed new mandatory categories for projects in shorelands (parts 4410.4300 & 4410.4400), one of the key elements of those categories is to have lower thresholds for review in shorelands of waters that are especially sensitive to disruption by development projects. Thus, a definition of "sensitive shoreland area" is necessary and reasonable as part of this rulemaking.

The type of definition that has been selected is a list of types of waters whose shorelands are biologically sensitive, and which have been recognized as such by other legal classifications. Only shorelands of water classes listed in the definition will be considered as "sensitive."

The first type of designated shoreland area included under the definition is the "special protection district" designated pursuant to DNR shoreland management rules. Criteria for establishing these districts include presence of: vulnerable or nutrient-susceptible bays, areas adjacent to inlets and outlets, and areas with broad and extensive littoral zones or wetland fringes. These districts are established for two basic purposes. The first purpose is to limit and properly manage development in areas that are generally unsuitable for development or use due to flooding, erosion, limiting soil conditions, steep slopes, or other major physical constraints. A second purpose is to manage and preserve areas with special historical, natural, or biological characteristics. Special protection lakes are unique sensitive water bodies such as shallow or land-locked lakes that support or have supported significant aquatic plant, fish or wildlife populations. There are numerous constraints to development, such as hydric soils or erodible land. Rare, endangered, or special concern species may use the lake or surrounding shorelands.

These lakes currently have low to moderate development, and they are especially vulnerable to the consequences of development.

The second class of shorelands covered by the definition is lakes classified as "natural environment" by the DNR. These lakes often have extensive areas with less than 15 foot water depth, and these healthy systems usually have abundant aquatic plant communities. Because of their shallowness, these lakes are more vulnerable to water surface use. Boat traffic on shallow lakes can result in an increase in phosphorus concentrations. This phosphorus can then stimulate growth of attached or planktonic algae, thereby degrading or eliminating important aquatic plant communities. In addition, boat traffic on shallow lakes and in littoral areas can damage or destroy aquatic macrophytes.

Minnesota's trout lakes are important oligotrophic (low productivity) lakes designated by the DNR. The addition of pollutants, such as plant nutrients like nitrogen and phosphorus, which accompanies development can contribute to eutrophication, a particular problem in oligotrophic lakes. Trout streams designated by the DNR require high water quality and cool temperatures and are vulnerable to non-point sources of pollution due to development within their shorelands and watersheds. "Outstanding resource value waters" are designated by Pollution Control Agency rules due to high water quality, wilderness characteristics, unique scientific or ecological significance, exceptional recreational value, or other special qualities which warrant stringent protection from pollution.

Designated wildlife and migratory waterfowl feeding and resting lakes across Minnesota play an important ecological role for waterfowl. These lakes have an abundance of aquatic plants and invertebrates, which makes them valuable to ducks and other wildlife. However, these aquatic plant communities are vulnerable to shoreline activities. The few remaining pockets of undeveloped shoreline, both in the prairie and forested areas of the state, are under increased pressure for development. Given that realization, increased environmental review could help the wise development of these significant natural resources.

5. Subp. 81. **Sewered area.** "Sewered area" means an area:
 - A. that is serviced by a wastewater treatment facility or a ~~publicly owned, operated, or supervised~~ centralized septic system servicing the entire development; or[B unchanged.]

The importance of this definition is that it is used as a factor in the residential project mandatory EAW and EIS categories (parts 4410.4300, subp. 19 & 4410.4400, subp. 14). In those categories, a higher threshold applies to "sewered areas" than to unsewered areas. The SONAR from the 1982 rulemaking when this term was introduced indicates that a centralized septic tank system serving the entirety of a project and owned by the homeowners collectively was intended to be included in this definition. However, the wording of the definition is ambiguous about this, which has led to confusion and differences in the interpretation of the term from one case to another. Some people have

interpreted "publicly owned" to mean only owned by a unit of government while others have interpreted it to include collective ownership by the homeowners. In the 2006 Phase 1 rulemaking, the EQB proposed to amend the definition by inserting "or homeowner owned" after "publicly owned." Commenters suggested expanding the definition to include systems with other types of ownership also, arguing that there was no good justification for limiting the definition based on system ownership. In addition, discussion by EQB member agencies of the comments received from the Builder's Association about this definition revealed confusion about the amendment and how it relates to similar definitions in the rules of other agencies. Consequently, the EQB withdrew this amendment from the Phase 1 rulemaking to reconsider it in view of these facts. The EQB is now proposing to amend the definition to delete all reference to system ownership or control, so that all centralized septic tank systems serving the whole development will count as "sewered areas."

Current DNR shoreland management rules distinguish between areas served by public sewer where smaller lot sizes are allowed and areas not served by public sewer. While this is an important distinction in the shoreland rules, it is less so in the new mandatory categories for shoreland development proposed in this rulemaking that do not rely on this distinction. The elimination of this distinction (smaller lot sizes on lots served by public sewer) is based on scientific evidence that underscores the increased impacts that smaller, more intensely developed lakeshore lots can have on water quality and habitat, regardless whether they are served by public sewer or not.

6. Subp. 81a. Shore impact zone. "Shore impact zone" means land located between the ordinary high water level of a public water and a line parallel to it at 50% of the structure setback distance as established by part 6120.3300, subpart 3, or by local ordinance, whichever is greater.

This term is used as threshold factor in the proposed new mandatory EAW category at part 4410.4300, subpart 36a, item B, dealing with land conversions in shorelands. It is therefore needed and reasonable to define this term. The definition is reasonable because it is taken from the existing DNR shoreland management rules, at part 6120.3300, subpart 3. However, a modification is made to allow for the fact that some local governments have adopted ordinances setting larger setback distances than specified in the DNR's rules; in these cases, the larger setback distance of the local ordinance will define the shore impact zone size.

C. Amendments to the citizens' petition process at part 4410.1100:

1. Subp. 2. **Content.** The petition shall also include:
[A to D unchanged.]
E. material evidence indicating that, because of the nature or location of the proposed project, there may be potential for significant environmental effects. The material evidence must physically accompany the petition. It is not sufficient to merely provide a reference or citation to where the evidence may be found.

The amendment would clarify that the “material evidence” required for a petition must physically accompany the petition, and that it is not acceptable to merely provide a reference to where the alleged evidence may be found. This issue arises primarily due to increased use of the internet to obtain material evidence to file with a petition. In some cases, only URL citations to where the evidence can be located on the internet have included with the petition. As the statute refers to “material evidence accompanying a petition,” and because the EQB believes that the burden is upon the petitioners to make a case that an EAW may be required, the EQB believes that the evidence must physically accompany the petition. This should be clarified in the rules.

2. Subp. 5. **Determination of RGU.** The EQB’s chair or designee shall determine whether the petition complies with the requirements of subparts 1 and 2. If the petition complies, the chair or designee shall designate an RGU pursuant to part 4410.0500 and forward the petition to the RGU within five days of receipt of the petition. If the petition fails to comply, the chair or designee shall return the petition to the petitioner’s representative within five days of receipt of the petition with a written explanation of why it fails to comply.

It has been the EQB’s long-standing practice to return all incomplete petitions (those that do not comply with the content requirements at subpart 2) to the petitioners’ representative with a written explanation of why the petition is incomplete. However, the rules do not explicitly provide for this action, and it was called into question in a recent case. The EQB wishes to add language to the rule to explicitly provide for this practice.

D. Amendments to the EAW process:

1. 4410.1200. **EAW content.**
[A to D unchanged.]
E. major issues sections identifying potential environmental impacts and issues that may require further investigation before the project is commenced, including identification of cumulative potential effects;
[F to H unchanged.]

This amendment is one piece of the EQB’s attempt in this rulemaking to correct problems relating impacts of a cumulative nature. For the complete background on the need to correct and clarify those problems see the descriptions of the amendments at parts 4410.0200, subpart 11a, and 4410.1700, subpart 7, item B.

As surprising as it may seem, the EQB’s rules do not actually state at any point that an EAW (or an EIS or AUAR for that matter) must address cumulative potential effects, despite the fact that part 4410.1700, subpart 7, item B, requires an RGU to take into account “the cumulative potential effects or related or anticipated future actions” when determining if an EIS is required. Since the EAW is the vehicle to generate the

information (along with comments upon its content and responses to those comments) upon which the EIS need decision must be based, the EQB has long considered the need to cover cumulative potential effects in an EAW as implicit in the law. In fact, the EAW form explicitly includes a question (# 29) about the need to address these effects. In light of the *CARD* decision and the EQB's response to it, this rulemaking seems the appropriate time to add an explicit statement in the EAW content rules about addressing cumulative potential effects.

The EQB is deliberately choosing to use the word "identification" rather than another term that might seem to fit the situation, such as "analysis." The reason is to provide support for the position that an EAW does not need to fully or exhaustively study any cumulative potential effects to which the project may contribute. The EAW process only needs to identify such impacts and disclose enough information to enable the RGU to decide if the cumulative potential effects create the potential for significant environmental effects (in which case the RGU must proceed to fully investigate the effects in an EIS). Even systematically identifying the presence of cumulative potential effects will in most cases require more work than has been typical of EAWs in the past, as will the need to document whether or not the effects have the potential to be significant, including consideration of how they can be mitigated. However, the EQB acknowledges that one of the greatest concerns of project proposers, RGUs, and their consultants about increased attention to cumulative effects is the worry that it could become a "bottomless pit" of analysis. One step that the EQB can take to address this concern is to be clear that the degree to which cumulative potential effects must be covered in an EAW is much more limited than it would be in an EIS, and is to focus on identifying whether effects of a cumulative nature are potentially significant and not on studying them in detail.

2. 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. The RGU shall consider the following factors: 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; 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.~~
C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project.
[D unchanged.]

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.

The sentence proposed to be added regarding how item C should be applied is also the result of the *CARD* case. In its opinion the Minnesota Supreme Court made two different statements about the necessary certainty of mitigation which could be relied upon in applying the item C criterion to a project. At one point the Court stated that mitigation relied upon needed to be "reasonably expected" to handle environmental problems. At another point the Court stated it needed to be "certain." The EQB believes that the "reasonably expected" statement is more consistent with past cases, and that the Court simply was careless with its wording at the point where the word "certain" was used. To avoid future confusion or disputes over this inconsistent language from the court, the EQB proposes to add the sentence in question to make the point clear that mitigation relied upon need not be "certain," but rather only "reasonably expected" to be able to deal adequately with the environmental impact to which it is to be applied.

E. Amendments to the EIS process:

1. 4410.2300. H. Environmental, economic, employment, and sociological impacts: for the proposed project and each major alternative there shall be a thorough but succinct discussion of potentially significant ~~direct or indirect~~, adverse, or beneficial effects generated, be they direct, indirect, or cumulative. Data and analyses shall be commensurate with the

importance of the impact and the relevance of the information to a reasoned choice among alternatives and to the consideration of the need for mitigation measures; the RGU shall consider the relationship between the cost of data and analyses and the relevance and importance of the information in determining the level of detail of information to be prepared for the EIS. Less important material may be summarized, consolidated, or simply referenced. The EIS shall identify and briefly discuss any major differences of opinion concerning significant impacts of the proposed project on the environment.

The amendments at this item are part of the larger attempt to improve how the rules treat analysis of cumulative-type effects. As noted in the discussion of the amendments to the EAW content rules at part 4410.1200, surprising as it may seem, the EQB's rules do not actually state at any point that an EIS must address cumulative potential effects. Item H does now include reference to "indirect" impacts, which although not defined, can be inferred from the context to be some sort of impacts beyond the direct impacts of a project. EQB's principle guidance document (*Guide to Minnesota Environmental Review Rules*, April 1998) uses the inclusion of indirect impacts as a springboard to bringing cumulative effects into the EIS content requirements, stating: "This provision [4410.2300, item H] requires an EIS to discuss indirect as well as direct impacts. Some indirect impacts are cumulative impacts." (page 5) (Note: this guidance document was written in 1998 when the EQB staff considered cumulative impacts, cumulative effects, and cumulative potential effects to be synonymous.)

In practice, many cumulative potential effects are analyzed in EISs. To the EQB staff's knowledge, no one has ever claimed that they did not need to address cumulative potential effects in an EIS as a matter of law because the term does not appear in the EIS content requirements. However, the appropriate time to add an explicit statement about treating cumulative-type effects in an EIS would be in this rulemaking concurrent with the various other amendments relating to the topic that are being proposed. The term used is "cumulative potential effects" which is defined in an amendment at part 4410.0200, subpart 11a

F. Amendments to the Prohibitions on Final Governmental Decisions at part 4410.3100:

1. **Subpart 2a. Concurrent review of draft permits not prohibited.**
Subpart 1 does not prohibited a governmental unit from issuing notice of and receiving public comments on a draft permit prior to completion of environmental review.

The amendment would clarify that it is permissible for a governmental unit to prepare and give public notice of a draft permit or other draft approval document prior to the completion of the Environmental Review process, provided that no final decisions to grant or issue permits or approvals are made until after the process has been completed.

Recently this practice, although quite commonly done by various RGUs, has been questioned as contrary to the prohibitions stated in subpart 1. The EQB proposes to add this amendment to clarify this issue.

G. Amendments to the AUAR process at part 4410.3610:

1. Subp. 2. **Relationship to specific development projects.**

A. Upon completion of review under this part, residential, commercial, warehousing, and light industrial development projects and associated infrastructure within the boundaries established under subpart 3 that are consistent with development assumptions established under subpart 3 are exempt from review under parts 4410.1100 to 4410.1700 and 4410.2100 to 4410.3000 as long as the approval and construction of the project complies with the conditions of the plan for mitigation developed under subpart 5.

B. The prohibitions of part 4410.3100, subparts 1 to 3, apply to all projects for which review under this part substitutes for review under parts 4410.1100 to 4410.1700 or 4410.2100 to 4410.3000. These prohibitions terminate upon the adoption by the RGU of the environmental analysis document and plan for mitigation under subpart 5.

C. If a specific residential, commercial, warehousing, light industrial, or associated infrastructure project, that is subject to an EAW or EIS, is proposed within the boundaries of an area for which an alternative review under this part is planned or is in preparation but has not yet been completed, the RGU may, at its discretion, review the specific project either through the alternative areawide review procedures or through the EAW or EIS procedures. If the project is reviewed through the alternative areawide review procedures, at least one set of development assumptions used in the process must be consistent with the proposed project, and the project must incorporate the applicable mitigation measures developed through the process.

The prohibitions of part 4410.3100, subparts 1 to 3, apply to all projects for which review under this part substitutes for review under parts 4410.1100 to 4410.1700 or 4410.2100 to 4410.3000. These prohibitions terminate upon the adoption by the RGU of the environmental analysis document and plan for mitigation under subpart 5.

D. The ordering of a review pursuant to subpart 3 does not constitute a finding by the RGU that each potential project within the designated boundary has or may have the potential for significant environmental effects. After an order for review has been adopted under subpart 3, if a specific project for which an EAW or EIS is not mandatory is proposed within the boundaries of

the review area, the RGU may exclude the project from the review process and proceed with its approval by using the following process. The RGU must provide notice of the intended exclusion and the reasons for the intended exclusion in the same manner as for distribution of an EAW pursuant to part 4410.1500. Agencies and interested persons shall have 10 days from date of the notice in the *EQB Monitor* to file comments with the RGU about the proposed removal of the project from the review. If no adverse comments are received within the comment period, the project is automatically excluded from the review and the prohibitions under part 4410.3100 do not apply to the project without further action by the RGU. If adverse comments are received, the RGU must consider the comments and determine whether to include the project in the review or to exclude it within 30 days of the end of the comment period based on whether the project may have the potential for significant environmental effects, taking into account the comments received and the interaction of the project with other anticipated development in its surrounding area.

E. If a specific project will be reviewed through the procedures of this part rather than through the EAW or EIS procedures and the project itself would otherwise require preparation of an EIS pursuant to part 4410.4400 or will comprise at least 50% of the geographic area to be reviewed, the RGU must follow the additional procedures of subpart 5a in the review.

Item B, which appears to be new, is in fact simply being moved up from its current position as the final paragraph of the subpart. This is to assure that it is not overlooked due to the new language being added to this subpart.

The amendment in item C (“.. or is in preparation..”) is proposed to be added because several situations have occurred where the proposer of a specific project desired to proceed with independent review after an AUAR had been started but was not yet completed (while it was “in preparation”). The existing language contemplates that this would only occur before the AUAR work actually began (when it was “planned”). When the rule was originally adopted, it was not realized that quite a few AUARs would take considerably longer to complete than the official timeframe given in the rules. Thus, it was not then realized that there would be situations where an individual project’s review would be significantly extended by remaining under coverage of the AUAR analysis compared to proceeding through an independent EAW even if the independent review was started after the AUAR was already in progress.

Regarding the new item D, the EQB proposes two amendments in this paragraph: (1) add an explicit statement that the ordering of an AUAR does not constitute a finding by the RGU that all potential development within the AUAR area has or may have the potential for significant environmental effects; and (2) add a public notice and comment opportunity prior to any removals of projects from the AUAR review, similar to that proposed but withdrawn in Phase 1. According to the item C, if a specific project

requiring review is known when the AUAR is ordered, the RGU may at its discretion roll the review into the AUAR or review the specific project through the EAW/EIS process. However, the rules do not address what happens if after the AUAR is begun, a proposer of a project of less than mandatory review size wishes to have his or her project area removed from the AUAR, presumably to proceed through the local review process on a faster track than if included in the AUAR. This situation has arisen on a number of occasions, and in such cases it has been the opinion of the EQB staff that nothing in the rules prevents the RGU from removing the project. However, such removal of projects from an AUAR in the past caused concern and opposition in some cases, resulting in a request from the DNR that the EQB address this issue in rulemaking.

The Alternative Urban Areawide Review process was intended as a relatively simple tool to allow a local unit to do a broad-based environmental review without needing to make a case-by-case determination of whether environmental review is otherwise required for all projects within the area. The AUAR rules never intended to create a presumption that each and every possible project that would be proposed within the study area otherwise requires review. If this were the case, it would create a tremendous disincentive to use the AUAR process. It is reasonable to allow smaller projects to "opt-out" of an AUAR through a public notice procedure because anyone can then file a petition requesting review on the project if they believe the project may have the potential for significant environmental effects.

Originally, the option considered was amend the rules to prevent the removal of a project from an AUAR once the process had begun. However, when that option was included in the Phase 1 Request for Comments, comments from a local unit of government official pointed out that adopting that policy would in effect create an absolute moratorium on any development within an AUAR area during the AUAR preparation period, and that it would be a strong disincentive for many units of government to use the AUAR process. Additionally, EQB staff were concerned that this policy seemed to create a presumption that every possible project within an AUAR area met the criteria for requiring an EAW without any factual record to support it. As a result of these issues, the EQB determined to proceed with a different rule amendment, involving a requirement for the RGU to provide public notice and opportunity to comment prior to removing a project from an AUAR review in progress. This amendment was intended to create a minimal process by which commenters could at least be aware of the intended removal and comment if they saw any reason why the RGU should not proceed to drop out the project.

However, some commenters objected on the grounds that they believed that once an AUAR is ordered, all development within the AUAR area is obligated to undergo environmental review, and therefore it is simply not permissible for any project to be removed from the AUAR review unless another form of environmental review then occurred for the project in question. Although the EQB did not agree with that legal interpretation, it withdrew the proposed amendment to give it further consideration. The EQB is now re-proposing the amendment withdrawn in Phase 1 along with an additional sentence (the first sentence of the paragraph) stating that the ordering of an AUAR does

not create a requirement that all developments within the AUAR undergo Environmental Review.

Several revisions of the review process based on Phase 1 comments have also been incorporated into the current amendment proposal. The amendment option proposed would require the RGU to provide notice to interested agencies and persons of the intended removal of the project from the AUAR. Notice would be given in the same manner as for the availability of an EAW, including an EQB Monitor notice. In the Phase 1 rulemaking the EQB had proposed leaving out the Monitor notice to save time. However, some commenters objected that foregoing the Monitor notice would be "contrary to the standard practice and procedure for environmental review decisions." Upon further reflection, the EQB agrees that notice should be given in the Monitor. Interested persons would be given 10 working days from the date of the Monitor notice to file adverse comments. This has been revised since the amendments proposed in Phase 1. At that time, the agencies and persons receiving notice were given a period of 15 working days from the date they received the notice to file adverse comments. This has been changed due to the inclusion of the notice in the EQB Monitor. Due to the lead time required for preparation of the Monitor, 10 working days from the date of its publication corresponds to 15 working days from the date notice would be received by direct mailed notice. It is expected that adverse comments would be in the nature of reasons why either the project on its own would be worthy of review or why the cumulative impact of the project together with the impacts of surrounding development would be worthy of review. If no adverse comments were received within the comment period, the RGU could remove the project from the AUAR without needing to prepare any findings about the environmental implications of doing so. The whole point of the process being added is to provide opportunity for interested persons to supply reasons to the RGU as to why the project should be required to be retained in the AUAR analysis. If this does not happen, there is no reason for the RGU to take the time and effort to prepare documentation about why the project may be dropped out – the presumption is that there is no reason to retain the project in the AUAR. If that presumption is not rebutted by any outside comments, requiring the RGU to go through an official decision process will add time and trouble to no useful purpose. However, if adverse comments were received, the proposed process would require the RGU to make and document its determination according to the same standard as used for ordering an EAW ("may have the potential for significant environmental effects") taking cumulative impacts with surrounding development into account. Due to comments received in Phase 1 rulemaking, the EQB now proposes that a definite time limit for the decision be included, of 30 days, which is the usual timeframe for such decisions elsewhere in the rules.

The final paragraph proposed to be added (item E) states that when a specific project is included in the AUAR area and that project either would require a mandatory EIS on its own or it covers at least half of the AUAR's geographic area, special procedures, which are specified in the new subpart 5a, must be followed. This paragraph would merely call attention to the need for the special procedures, not specify any of them. It is appropriate to place such a paragraph in this subpart because the topic of the subpart is how the

AUAR relates to specific development projects that may be within the area. The discussion of new subpart 5a explains the background and rationale of this amendment.

2. Subp 4. **[AUAR] Environmental analysis document; form and content.** The content and format must be similar to that of the EAW, but must provide for a level of analysis comparable to that of an EIS for impacts direct, indirect, and cumulative potential effects typical of urban residential, commercial, warehousing, and light industrial development and associated infrastructure.

This proposed amendment is analogous to amendments at parts 4410.1200 and 4410.2300 H and has the intent of explicitly requiring that cumulative potential effects be addressed in an AUAR analysis. In the past, this type of analysis has routinely been included in AUAR analysis (although there have been disputes about what its scope should be) and the EQB staff's guidance for the AUAR form includes specific directions to address these impacts. However, the rules themselves to date do not specifically mention cumulative potential effects in the AUAR process. The term "cumulative potential effects" is defined in an amendment at part 4410.0200, subpart 11a.

3. Subp. 5. **Procedures for review.** The procedures in items A to H must be used for review under this part.
A. The RGU shall prepare a draft environmental analysis document addressing each of the development scenarios selected under subpart 3 using the standard content and format provided by the EQB under subpart 4. A draft version of the mitigation plan as described under item C must be included. The geographic extent of the analyses of direct, indirect and cumulative potential effects conducted in preparing the document is not to be limited by the boundaries set in the order for review under subpart 3. The draft document must be distributed and noticed in accordance with part 4410.1500.
[B to H unchanged.]

The amendment proposed at subpart 5 is a response to a Minnesota Court of Appeals case, *Minnesota Center for Environmental Advocacy vs. the City of St. Paul Park*, 711 N.W. 2d 526 (Minn. Ct. App. 2006). In that case, the City of St. Paul Park prepared an AUAR analysis for development of land along the Mississippi River, much of which was proposed for construction of a large project called River's Edge. The Center for Environmental Advocacy challenged the adequacy of that review, partly on the grounds that the review did not adequately consider cumulative-type impacts on resources outside of the AUAR boundary. In its decision, the Court of Appeals declared that the RGU did not need to consider impacts or sources of impacts outside of the AUAR boundary. Apparently, the court believed that in setting the AUAR boundary an RGU factors in consideration of the scope of analysis – which is not true of any case with which the EQB staff is familiar. The EQB staff believes that a fundamental error was made here by the Court of Appeals. To correct that error, the EQB proposes to amend subpart 5 to state the

AUAR boundary chosen by the RGU is not intended to set any limits on the scope of the technical analysis. It is reasonable for the cumulative impacts analysis to look beyond the AUAR area boundaries because environmental impacts can migrate across boundaries. The term "cumulative potential effects" is defined in an amendment at part 4410.0200, subpart 11a.

4. **Subp. 5a. Additional procedures required when certain large specific projects reviewed.**

A. The procedures of this subpart must be followed in addition to those of subpart 5 if a specific project will be reviewed according to this part and the project would otherwise require preparation of an EIS pursuant to part 4410.4400 or will comprise at least 50% of the geographic area to be reviewed.

B. Prior to final approval of the order for review pursuant to subpart 3, the RGU must conduct a public process to receive comments about the scope of the review. The RGU shall prepare a draft order for review and distribute and provide notice of its availability in the same manner as for an EAW pursuant to part 4410.1500. The draft order for review must include the information specified in subpart 3 and a description of the specific large project or projects to be included in the review comparable to that of a scoping EAW pursuant to part 4410.2100, subpart 2.

C. Government units and interested persons shall participate in the public comment process in accordance with part 4410.1600, except that the purpose of the comments is to suggest additional development scenarios and relevant issues to be analyzed in the review. Comments may suggest additional development scenarios that include alternatives to the specific large project or projects proposed to be included in the review, including development at sites outside of the proposed geographic boundary. The comments must provide reasons why a suggested development scenario or alternative to a specific project is potentially environmentally superior to those identified in the RGU's draft order.

D. The RGU must consider all timely and substantive comments received when finalizing the order for review. The RGU shall apply the criteria for excluding an alternative from analysis found at part 4410.2300, item G, in determining if a suggested additional scenario or alternative to a specific project should be included or excluded and must explain its reasoning in a written record of decision.

E. The RGU shall adopt the final order for review within 15 days of the end of the comment period. A copy of the order and the RGU's record of decision must be sent within ten days of the decision to the EQB and to anyone who submitted timely and substantive comments.

This entire subpart is new. It specifies the additional procedures of review that would be required whenever the AUAR would include a specific development project which either requires a mandatory EIS on its own or covers at least 50% of the geographic (or ground) area within the AUAR boundaries. The EQB had proposed this same amendment as part of the 2006 Phase 1 amendments. However, when the Court of Appeals decision cited in the discussion of the amendments to subpart 5 above was released shortly after the rule hearing, the EQB decided to withdraw the amendment for further study. After consideration, the EQB is proposing the amendment again.

The background to this amendment is that current rule language authorizes an RGU to use the AUAR process for reviewing individual projects (part 4410.3610, subpart 2, paragraph 2) although it was developed primarily to enable the review of an entire geographic area without reference to plans for specific projects. Critics have questioned whether the use of the AUAR process for the review of individual projects reduces the quality of the review compared to what would be achieved if the project was reviewed through the regular EAW/EIS process, and suggested that the rules be amended to prohibit review of a single project that would otherwise require an EIS. That proposal was included with the Phase 1 Request for Comments. Several commenters raised objections to this proposal. One objection was that the EQB could create a disincentive for the master planning of the entirety of a property owner's holdings if doing a master plan would make the whole property a "single project" for environmental review purposes. Another objection was that if this prohibition was established, proposers and RGUs would likely find ways around it anyway, such as withholding formal project applications until after the AUAR was completed or adding "extra" land to the AUAR area so that it was no longer reviewing a single project.

When one large project dominates an AUAR analysis there is a concern that this could have a chilling effect on the analysis of alternative development scenarios that is a key purpose of the AUAR process. Therefore, additional public scrutiny is appropriate when a large project dominates an AUAR to ensure that alternative development scenarios are thoroughly analyzed. The 50% threshold was chosen because at that level a single project so dominates the review that it could have the chilling effects that the amendment is intended to prevent.

The additional procedures that are proposed to be required are specified in items A to D of subpart 5a. The procedures are modeled after the procedures for EIS scoping, as specified at part 4410.2100. First, (item A) the RGU would provide public notice of its intent to prepare an AUAR covering a project for which the special procedures are required. Notice would be given as for an EAW, which is the standard method of providing notification under the environmental review process. The notice would be based on a draft version of the order for review required under subpart 3; the draft order would indicate the boundaries of the AUAR and the development scenarios proposed to be reviewed (including one or more scenarios incorporating the specific project in question). Item B specifies that in response to the notice interested persons and agencies may comment, following the same process and timeline (30 calendar days) as for

commenting on an EAW, about whether additional development scenarios ought to be included, on the basis that such scenarios would likely be less environmentally harmful than the scenarios based on the specific project.

Item C specifies the standard for the RGU's decision on whether or not to add any suggested additional development scenarios. The proposed standard is the same set of criteria that the rules already specify for decisions on which alternatives to include in an EIS analysis, as found at part 4410.2300, item G. Using the same criteria will ensure that the same standards for what alternatives need to be analyzed for a given project apply whether that project is reviewed through an EIS or an AUAR.

Item D sets a deadline for the RGU to make its decision about adding additional development scenarios of 15 working days. This is the same deadline as for an RGU's scoping decision following an EIS scoping process. Item D would also provide that the RGU distribute its finalized order for review and its rationale regarding development scenarios excluded within 10 working days of its decision.

The proposed amendments in items B to D would add about 6-8 weeks (depending on how soon after the comment period the RGU was ready to make its decision) of additional time to the formal steps of the process if the AUAR included a specific project that triggered the need for the additional review. It should be noted, however, that the additional time at this point in the process may be offset by savings in time at later stages due to avoidance of controversy over the issue of whether other alternatives should have been addressed and whatever steps are needed to resolve that controversy if it arises.

H. Amendments to the Mandatory EAW Categories at part 4410.4300:

1. Introduction. All of the proposed amendments in part 4410.4300 are part of an effort to add mandatory categories to the rules that explicitly address types of projects in shoreland areas that may have the potential for significant environmental effects. Shorelands are defined by state law to include the area within 1,000 feet of a lake or 300 feet of a river. Amendments are proposed to existing subpart 12, nonmetallic mineral mining (a new item C) and three new subparts are proposed which would be numbered and captioned as: subpart 19a, residential development in shoreland; subpart 20a, resorts, campgrounds, and RV parks in shorelands; and subpart 36a, land conversions in shoreland. The new subparts are proposed to be inserted in the rules immediately after existing subparts 19, 20, and 36 which cover similar types of projects without reference to shorelands. Some analogous amendments are being proposed to the mandatory EIS categories at part 4410.4400, and one exemption category pertaining to shoreland projects is proposed to be added to part 4410.4600.

The EQB became interested in amending the environmental review program rules to include special mandatory categories for projects in shoreland in 2004. Attachment 5 is a "fact sheet" prepared in 2004 explaining the EQB's early steps toward developing these categories. In February 2005, the EQB asked the DNR to take the lead in developing a proposal for such categories because the DNR is responsible for overseeing the

management of shorelands in the state and for adopting rules for shoreland management (Minnesota Rules, chapter 6120). The DNR established a stakeholder advisory committee from persons who expressed interest in serving on such a committee in their responses to EQB's February 2005 Request for Comments.

The 19-member citizen's advisory committee represented the many public and private interests within the state including resorts, conservationists, government representatives, and lakehome property owners. The following persons, with their representation, were members of the advisory committee:

1 st Name	Last Name	Organization / Company / Representation / Position
Annalee	Garletz	Association of Minnesota Counties; Policy Analyst
Michael	McDonough	Metropolitan Council; Landscape Architect
Dan	Greensweig	Minnesota Association of Townships; Attorney
Jan	Beliveau	Lake Association Representative
Les	Martin	Cedar Lake Conservancy; President
Richard D.	Hecock, Ph.D	Becker County EAW task force
Theresa	Greenfield	McCombs Frank Roos Associates, Inc.; Planner (AICP)
Henry	VanOffelen	Minnesota Center for Environmental Advocacy; NR Scientist
Joseph	Blaha	Citizen; Arden Hills, Minnesota
James	Peters	Peters Sunset Beach Resort
Michael	North	Minnesota Chapter of the Wildlife Society; representative
Molly	Shodeen	DNR Waters Area Hydrologist
Bob	Neal	Minnesota Waters (formerly Minnesota Lakes Association)
Paula	West	Minnesota Waters; Director
Robert	Deutschman, Sr.	Dead Lake Association; President
Dave	Leuthe	DNR Waters Regional Manager
Jeff	Smyser	City of Lino Lakes; City Planner
Karen	Ebert	Minnesota Counties Insurance Trust
Terry	Neff	Aitkin County; Environmental Services Director

Based on input from the advisory group and deriving some of their ideas from an ongoing project in central Minnesota to develop possible revisions to shoreland rules, the DNR developed a proposal for mandatory EAW and EIS categories for residential and other types of projects in shorelands. In August 2006 the EQB included that proposal with the Request for Comments on the "phase 2" amendments. When many commenters complained that the proposal was too complicated to be successfully implemented by local units of government, the DNR and EQB staff developed a simplified proposal taking commenters suggestions into account. The simplified proposal was sent out for informal comments to known interested persons in May 2007; the present proposal takes into account comments received.

2. The need for shoreland categories generally. The information in this section has been extracted from a document prepared by the DNR to assist with this rulemaking. That document is included as Attachment 4. References given in this section and other

SONAR sections applying to shoreland categories refer to the references at the end of the attached document.

The major impetus for the proposal was the significant change in the pattern of development being experienced on the lakes across the state. During the 1960's and 1970's, most shoreland development was directed toward the traditional seasonal cabin or lake home. During the late 1970's and 1980's, the trend was to convert seasonal lakeshore dwellings into year-round lake homes. Finally, the advent of the internet and a diverse economy has allowed many people to work and live in the lake districts across the state. As a result, there are an ever-increasing number of large, modern homes being built on lakes.

As undeveloped lakeshore has diminished, shoreland areas once considered less desirable or more difficult to develop are now being proposed for development. These areas are often low-lying and marshy, with shallow water offshore and frequent beds of aquatic vegetation. These same features often make these areas especially important to the ecology of the lake. Another change being seen is the increase in higher-density residential projects (more units per acre) in shorelands. A type of special concern appears to be projects where most of the units are not actually on the lakeshore, but have access collectively through a few lots on the shore ("access lots"). There is a concern that such developments will result in over use of the lake, and this concern is increased when the lake also has an established public access.

The DNR estimate for total lakeshore dwellings in 2004 was about 225,000 for all lakes in the state. About half of all lakeshore homes are seasonal residences, and 75 percent are located on less than 200 feet of lakeshore frontage (median lot width was 130 feet). Overall, lakeshore development appears to be increasing at an average rate of over 4000 homes per year.

The EQB staff has noted that over the past several years the number of citizens' petitions on lakeshore projects has increased noticeably. While development of Minnesota's lakeshores is nothing new, especially for permanent or seasonal residential development, the diminishing amount of undeveloped lakeshore has led to noticeable changes in the types of development projects being proposed and in the nature of the lakeshores under consideration for development. The increasing pressure of these new developments has led to a recognition that the existing mandatory review categories may no longer be adequate to ensure the needed review of today's lakeshore development projects.

There is widespread concern about the consequences of poor development on water quality and fish and wildlife habitat. Human habitation along the shore usually has a cumulative effect on fish and wildlife habitat, water quality, and biota of lake ecosystems. Lakeshore development increases nutrient inputs to lakes. Many lakeshore homes are serviced by on-site septic systems. According to the PCA, 39 percent of individual sewage treatment systems are failing or pose "imminent" threats, creating a serious potential for nutrient and bacterial contamination (PCA 2004). In addition, the impervious surfaces and lawns associated with shoreland development increase both the

amount of runoff and the quantity of nutrients reaching a lake. Nutrients reaching the lake result in eutrophication. Eutrophic conditions include: higher occurrence of noxious algae blooms, excessive plant growth, loss of water clarity, and low dissolved oxygen. Many lakes will fail to recover even after excessive nutrient additions are eliminated (Genkai-Kato and Carpenter 2005). In addition to water quality degradation, there is frequently loss of habitat associated with shoreland development, which results in the decline of fish and wildlife populations.

In summary, because of the increased development pressure on our lakes there is a greater need to protect resources by ensuring development is done in a manner that considers environmental effects. As a result, new mandatory review categories for shoreland development are needed and reasonable.

3. RGU designation for the new shoreland categories. For all of the proposed new shoreland EAW & EIS categories, the local governmental unit is designated as the Responsible Governmental unit (RGU), the unit responsible to carry out the EAW and/or EIS process. This is appropriate for two reasons. First, all of the proposed new categories have analogous categories in the existing rules, and all of those categories assign the local unit as the RGU. Second, with respect to shoreland management, the local unit is clearly assigned the primary regulatory role under the state's shoreland management law. Throughout the environmental review program, the primary rule for RGU designation is that the unit with the greatest regulatory responsibility is the RGU.

4. Subp. 12. **Nonmetallic mineral mining.** Items A and ~~B~~ to C designate the RGU for the type of project listed:
[A and B unchanged.]
C. For development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 20 or more acres of forested or other naturally vegetated land in a sensitive shoreland area or 40 acres of forested or other naturally vegetated land in a nonsensitive shoreland area, the local government unit shall be the RGU.

This proposed amendment is a special case of the more general amendment at part 4410.4300, subpart 36a, item C. The same thresholds and parameters are involved. The reason for adding this separate amendment is to place the new EAW requirements at a point in the rules likely to be consulted by mining companies and other persons examining the rules to see how nonmetallic mining may be affected. The rationale for this category is covered in the discussion of part 4410.4300, subpart 36a, item C.

It should be noted that item C does not contain the qualifier "to a mean depth of ten feet or more during its existence" that appears in item B which applies to nonmetallic mining that does not occur in a shoreland. This is because the types of impacts that item C is concerned with do not depend on the depth of the

excavation; the critical factor is that the surface vegetation is destroyed or disrupted.

5. Subp. 19a. Residential development in shoreland.

A. The local governmental unit is the RGU for construction of a permanent or potentially permanent residential development located wholly or partially in shoreland of a type listed in items B to E. For purposes of this subpart "riparian unit", means a unit in a development that abuts a public water or, in the case of a development where units are not allowed to abut the public water, is located in the first tier of the development as provided in part 6120.3800, subpart 4, item A.

B. A development containing 15 or more unattached or attached units for a sensitive shoreland area or 25 or more unattached or attached units for a nonsensitive shoreland area, if any of the following conditions is present:

- (1) less than 50% of the area in shoreland is common open space;
- (2) the number of riparian units exceeds by at least 15% the number of riparian lots that would be allowable calculated according to the applicable lot area and width standards for riparian unsewered single lots given in part 6120.3300, subparts 2a and 2b; or
- (3) if any portion of the project is in an unincorporated area, the number of nonriparian units in shoreland exceeds by at least 15% the number of lots that would be allowable on the parcel calculated according to the applicable lot area standards for nonriparian unsewered single lots under part 6120.3300, subparts 2a and 2b.

C. A development containing 25 or more unattached or attached units for a sensitive shoreland area or 50 or more unattached or attached units for a nonsensitive shoreland area, if none of the conditions listed in item B is present.

D. A development in a sensitive shoreland area that provides permanent mooring space for at least 1 nonriparian unattached or attached unit.

E. A development containing at least 1 unattached or attached unit created by the conversion of a resort, motel, hotel, recreational vehicle park or campground, if either of the following conditions is present:

- (1) the number of nonriparian units in shoreland exceeds by at least 15% the number of lots that would be allowable on the parcel calculated according to the applicable lot area standards for nonriparian unsewered single lots under part 6120.3300, subparts 2a and 2b
- (2) the number of riparian units exceeds by at least 15% the number of riparian lots that would be allowable calculated according to the applicable lot area and width standards for riparian unsewered single lots under part 6120.3300, subparts 2a and 2b.

F. An EAW is required for residential development if the total number of units that may ultimately be developed on all contiguous land owned or under an option to purchase by the proposer, except land identified by an applicable comprehensive plan, ordinance, resolution, or agreement of a local governmental unit for a future use other than residential development, equals or exceeds a threshold of this subpart. In counting the total number of ultimate units, the RGU shall include the number of units in any plans of the proposer; for land for which the proposer has not yet prepared plans, the RGU shall use as the number of units the product of the number of acres multiplied by the maximum number of units per acre allowable under the applicable zoning ordinance or, if the maximum number of units allowable per acre is not specified in an applicable zoning ordinance, by the overall average number of units per acre indicated in the plans of the proposer for those lands for which plans exist.

In item A, a working definition of the term "riparian" is given. This definition is used in various items to distinguish the "nearest-to-the-shore" lots or units from other lots or units. The standard dictionary definition must be modified because under shoreland management rules sometimes no lots are permitted to actually touch the shoreline; when that happens the "riparian" lots are indicated as those in the "first tier" of development as provided in part 6120.3800, subpart 4, item A, of the shoreland management rules.

This proposed new mandatory category and the corresponding EIS category at 4410.4400, subpart 14a treat "unattached" and "attached" residential units in the same way, which is contrary to the practice in the existing residential categories. In fact, the reason for the distinction between these terms is for setting different thresholds for each type in the existing residential categories. This distinction relates to how the units are grouped into buildings: singles, duplexes, and triplexes are "unattached," while quads and anything beyond four-in-a-group are defined as being "attached." However, in the case of residential projects in shoreland areas, the EQB believes that all residential units need to be treated equally – higher thresholds should not apply to attached units. The reason 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. Those impacts are independent of whether the boaters live in unattached or attached units. Issues relating to nonriparian users are probably even greater for attached unit developments than unattached unit developments, since it is more likely that a development with nonriparian access would involve denser, attached unit-type buildings. Therefore, throughout the proposed amendments relating to residential development both types of units are assigned the same thresholds. However, the proposed rules continue to refer to both types of units, rather than just referring to "units," because if they did not use the existing terminology there could be confusion over whether the units specified were unattached or attached. In this SONAR the term "units" (or "lots") will be used for simplicity and it should be taken to include both "unattached" and "attached" units, unless a distinction is made in the text.

Four classes of residential developments are listed in this rule, in items B to E. Items B and C are a pair of categories dealing with "ordinary" shoreland residential developments, whereas D and E deal with special cases involving access lots and resort conversions.

The difference between items B and C has to do with the "density" of the project, in terms of (1) the proportion of the site that is open space; and (2) the number of lots or units compared to a "reference density" taken from the DNR's shoreland management rules in chapter 6120. Item B would apply to projects that are "dense" and item C would apply where the project is not "dense." In terms of open space, the dividing line is proposed to be set at 50%; if the whole development fails to include at least 50% open space (as defined at 4410.0200, subpart 9a), the thresholds of item B apply. In terms of lot or unit density, the reference density is proposed as the density that would be allowable on the site according to lot size standards for single-unit, unsewered lots in part 6120.3300, subparts 2a and 2b of the shoreland management rules. Different standards are specified for riparian lots and nonriparian lots, and the nonriparian standard would apply only in unincorporated areas. If the number of units in the riparian zone, or nonriparian zone if the project is not within a city, exceeds the specified standard by more than 15%, the thresholds of item B will apply.

It is proposed that the lot-unit density standards of chapter 6120 be used for the application of these thresholds, even if different lot-unit density standards are specified in whatever local ordinances actually apply to the project. Some local units, especially cities, have adopted shoreland management ordinances that differ in various respects from the standards in the DNR's rules. In order to have uniform standards for "density" across all governmental units, the EQB proposes to use a single set of standards for items B and C and that is the single, unsewered standards in part 6120.3300, subparts 2a and 2b. This is reasonable because what is desired is simply a point of reference for "dense" vs. "non-dense" projects. As explained below, project density is an important surrogate measure for the potential of projects in shoreland to create environmental impacts.

Originally, the EQB proposed to apply nonriparian density standard of item B, subitem (3) to all development, not only in unincorporated areas. However, in the May-June 2007 informal comments, a city planner who had been a member of the advisory committee pointed out that in many ways the chapter 6120 rules do not work well inside cities, and that in fact most Twin Cities metropolitan area cities had designed their own shoreland ordinances more in keeping with their own planning and zoning. One of his main points was that the chapter 6120 standards had been crafted with rural situations in mind. In view of these criticisms, the EQB and DNR staff decided that it would be appropriate to remove the reference to the chapter 6120 density standards from subitem (3) for areas within cities; the easiest way to do that is to add the phrase at the beginning "if any portion of the project is in an unincorporated area." With this modification, cities will be able to allow higher densities than the "6120 reference densities" in the nonriparian zone of projects without triggering the lower thresholds. However, in the riparian zone, the same chapter 6120 reference density standards will apply in cities and in unincorporated

areas, because of the greater need to preserve the riparian zone as a buffer for the waterbody. This modification recognizes that there are fundamental differences in zoning for projects in shorelands between more highly-developed city situations and the situations in unincorporated areas.

Other than open space, the primary environmental distinction between “dense” and “non-dense” residential developments is that higher density means higher impervious surface coverage. Scientific evidence relates imperviousness to changes in the hydrology, habitat availability, water quality, and fish and wildlife conditions. As impervious surface coverage increases on a lot or in a watershed, the amount of nutrients entering lakes increases. Research consistently shows that when impervious surface coverage exceeds about 10 to 12 percent, water quality is negatively impacted (Schueler 2003).

Higher runoff changes the hydrology of streams. Stream studies from around the country in a variety of urbanized areas have identified a threshold of 10 percent impervious area in a watershed beyond which stream water quality and habitat begin to degrade (Schueler 1994). The mechanisms of the degradation process are well known. As impervious surface increases, surface runoff increasingly dominates over infiltration and groundwater recharge. This allows more rapid runoff and higher peak flows in streams, increases stream bank erosion and sediment loading to the streambed. The result is wider, straighter sediment-choked streams, greater temperature fluctuation, loss of streamside habitat, and loss of in-stream habitat. The naturally variable stream substrate is covered over by sand and silt. Imperviousness is also an important index of the amount of alteration of the landscape. There is a definitive link between fish assemblages and impervious surface cover.

“Dense”-type developments that would be covered under item A would mostly be expected to be traditional lot-and-block, or conventional, subdivisions. Conventional subdivisions spread development throughout a parcel of land without considering natural or cultural features. Item C would typically apply to conservation subdivisions and planned unit developments in the shoreland. A conservation subdivision is a method of subdivision characterized by common open space and clustered compact lots. Critical natural areas, community recreational areas, and common open space are identified and protected, then, buildable areas are identified and a majority of the lots and homes are clustered around these protected areas.

It is reasonable to allow higher environmental review thresholds for conservation subdivision developments since they more often incorporate protection of natural resources in their design. Conservation subdivisions can be a valuable tool for protecting water quality and wildlife habitat. These developments may have less impervious surface coverage than conventional subdivisions of the same size, since houses are clustered on only a portion of the land. Also, vulnerable natural features can be incorporated within the open space, instead of being a part of someone’s lot, as with conventional subdivisions.

Planned unit development (or PUD) is a method of land use or development characterized by a unified site design for a number of dwelling units or dwelling sites on a parcel, whether for sale, rent, or lease, and that incorporates clustering of these units or sites to provide areas of common open space, and a mix of structure types and land uses. These developments may be organized and operated as residential or commercial enterprises such as individual dwelling units, townhouses, condominiums, time-share condominiums, cooperatives, common interest communities, shared-interest communities, or apartment buildings. The same higher environmental review thresholds should be allowed for PUD developments that meet the open space and density standards as for conservation subdivisions.

The threshold values proposed within each mandatory category are based on expert opinion on the magnitude of potential significant environmental issues of variously sized subdivisions, the perception on the distribution of the number of lots created with shoreland subdivisions, and advisory committee and public comments.

Item B includes thresholds of 15 lots or units in a sensitive shoreland area (as defined at part 4410.0200, subpart 79b) and 25 lots or units in shoreland areas that are not sensitive. Item C includes thresholds of 25 lots or units in a sensitive shoreland area and 50 lots or units in shoreland areas that are not sensitive. These proposed thresholds can be best understood in relation to the residential development thresholds in the existing rules. The existing residential thresholds are specified in part 4410.4300, subpart 19. There the thresholds depend on several factors, including whether the project is within a city or not, and if not, whether it is in a sewered area. The threshold also depends upon whether the development consists of "unattached" or "attached" units. The lowest threshold in the existing rules that can apply to a residential development is 50 unattached units, which applies in all unsewered, unincorporated areas. This threshold is the most likely threshold to apply to a shoreland project, since most occur in unincorporated areas, most use on-site septic systems, and most consist of unattached units (single-family lot-and-block subdivisions). Thus, 50 lots or units is a good choice as the point of reference against which to view the proposed new shoreland residential thresholds.

Using 50 lots as a point of reference, the proposed thresholds of items B and C make sense and are reasonable. Obviously, to be worthwhile, new thresholds for shoreland projects need to be lower than the thresholds of the existing rules that otherwise would apply. And to provide for stricter requirements for the "sensitive" shorelands and for higher density projects, two tiers of thresholds need to fit between 0 and 50 units. Using 15 and 25 as intermediate points satisfies this requirement. The proposed thresholds would look like this in reference to the existing 50 unit thresholds: lower-density projects in nonsensitive shoreland areas would have the same 50 lot threshold; both lower-density projects in sensitive shoreland areas and higher-density projects in nonsensitive shoreland areas would have a threshold $\frac{1}{2}$ as great; and higher-density projects on sensitive shorelands would have a threshold a bit less than $\frac{1}{3}$ as great. This is a logical and reasonable scheme which makes sense.

Throughout the process of development of the proposed categories the lowest thresholds considered were in the vicinity of 15 lots. The proposal that accompanied the Request for Comments in August 2006 used all of the following values as thresholds for some class of projects: 16, 20, 24, 30, 32, 40 & 50. Because many commenters complained about the complexity of the original proposal, it was decided to cut back on the distinctions between projects and on the number of different thresholds. The current proposal with 3 different threshold numbers (15, 25, 50) accomplishes this.

Item D would deal with the special case where a residential project included one or more access lots (also referred to as "controlled access lots") intended to provide permanent mooring space for boats belonging to residents of the development who do not own a riparian lot (and therefore are not entitled to the riparian right of direct access.) The proposed category would require an EAW for any residential development that included even one such access lot. (Note: the EAW would cover the whole of the project, not just the access lot.) The issue of access lots has been one of the most contentious lakeshore issues of recent years, primarily because they add to the water surface use of the lake. In essence, the question is: how many boats are too many? How many boats should be parked in the productive zone of lakes, and how many boats should be allowed from a recreational boat safety perspective?

The Minnesota DNR's guideline for public access development is 10 acres/boat. For metro lakes, public access sites are developed to reach a 20 acre/boat standard without resident or commercial additions (e.g., on a 200 acre metro lake, 10 parking spaces in the public access is the design goal). Common standards cited elsewhere are 20 acres per boat on lakes with high-speed watercraft and 9 acres per boat on small lakes with low-powered watercraft. Most Minnesota lakes currently do not exceed these standards. In 1998, boating intensities at peak times on weekend/holiday afternoons averaged about 90 acres per boat (Minnesota DNR 1999). However, many lakes in surrounding states already exceed safe boating capacities, and several Minnesota lakes have also reached that point (especially Metro lakes as boating intensities at peak times on weekend/holiday afternoons averaged about 20 acres per boat; Minnesota DNR 1999). One can estimate that if every lake in the state had the maximum number of lake homes (i.e., using existing state shoreland standard lot dimensions to generate full residential build-out conditions) and 10 percent of those lakeshore residents would be boating on nice summer weekends (DNR boat surveys show that 10 percent of the lake home owners are out boating during high use weekend afternoons), a large percentage of our lakes would exceed safe boating capacity. Surveys show boaters' perception of congestion and crowding on the water in north central Minnesota, went up between 1985 and 1998 (15 percent of boaters thought lakes were crowded in 1998, up from 5 percent in 1985, likely from the increase in size and horsepower of boats as lengths had increased an average of two feet and motor sizes had nearly doubled for this time period). Some local governments have responded to overcrowding with regulations for those waterbodies to promote safe enjoyment of these public spaces.

Given that future development may result in potential overcrowding, and the controversial nature of access lots which may lead to citizen petitions, requiring environmental review for projects including controlled access lots appears appropriate.

Item E would deal with the special case where a residential development contains at least one unit or lot that would result from the conversion of an existing resort or other “commercial PUD” –type establishment (motel, hotel, recreational vehicle park or campground). It is expected based on past experience that the great majority of such conversions would involve resorts, so the discussion here focuses on resort conversions. However, in principle, conversion of any of the other types of commercial PUDs should be treated in a similar fashion.

Resort conversions have recently been a serious issue with the public. Citizens are concerned about the creation of nonconforming lots that may jeopardize or degrade water quality or the environment due to undesirably dense numbers of residential units in the shoreland. Therefore, it is reasonable to require an EAW for resort conversions that convert to a residential development if the proposed densities would exceed the lot-unit reference densities at part 6120.3300, subparts 2a and 2b (the same standards as used for items A and B).

One final aspect of the proposed subpart remains to be explained, item F. The language of item F is borrowed from existing category 19, where the similar language directs an RGU about how to consider adjoining land controlled by the same proposer but which is not presently intended for residential development. The same directive should apply to residential developments in shoreland as in other locations, therefore the language needs to be repeated in the new subpart 19a.

6. 4410.4300, subpart 20a. Resorts, Campgrounds, and RV parks in shorelands. The local government unit is the RGU for construction or expansion of a resort or other seasonal or permanent recreational development located wholly or partially in shoreland, accessible by vehicle, of a type listed in items A or B.
 - A. Construction or addition of 25 or more units or sites in a sensitive shoreland area or 50 units or sites in a nonsensitive shoreland area if at least 50% of the area in shoreland is common open space; or
 - B.. Construction or addition of 15 or more units or sites in a sensitive shoreland area or 25 or more units or sites in a nonsensitive shoreland area, if less than 50% of the area in shoreland is common open space.

This new subpart is analogous to items A and B of subpart 19a discussed immediately above. An alternative approach would have been to incorporate resorts, campgrounds, and RV parks into the categories of subpart 19a, items A and B, since the thresholds are the same. However, it was decided that a better choice would be to have this separate subpart for two reasons. First, trying to add resorts, campgrounds, and RV parks would have made the text of subpart 19a, items A and B more complicated than it already is and would tend to “hide” these sorts of projects amidst the residential project types of subpart

19a. The second is that separating out subpart 20a makes it more likely that project proposers, RGUs, and the public will be able to find and apply this category. Existing subpart 20 is captioned "campgrounds and RV parks." By making these thresholds a new subpart 20a, the chances are maximized that the categories will be found when people examine the rules. The explanation of how the thresholds would work and their justification is the same as given for items A and B of subpart 19a above.

7. 4410.4300, subpart 36a. Land conversions in shoreland.
 - A. For a project that alters 800 feet of the shoreline in a sensitive shoreland area or 1320 feet of shoreline in a nonsensitive shoreland area, the local governmental unit is the RGU.
 - B. For a project that alters more than 50% of the shore impact zone if the alteration measures at least 5,000 square feet, the local governmental unit is the RGU.
 - C. For a project that permanently converts 20 or more acres of forested or other naturally vegetated land in a sensitive shoreland area or 40 or more acres of forested or other naturally vegetated land in a nonsensitive shoreland area, the local governmental unit is the RGU.

These three new thresholds are proposed at subpart 36a to parallel the existing subpart 36 that covers "land use conversion, including golf courses." Items A to C cover three classes of land conversions that may occur in shorelands with potential for significant environmental effects. Item C closely parallels the threshold at subpart 36 dealing with permanent conversion of 80 or more acres of forested or other naturally vegetated land, which is the main reason for locating this new category at subpart 36a.

Item A would deal with the alteration or disturbance of the shoreline itself. Alterations could involve placing riprap or other materials at the shoreline or grading or other physical disruption of the shoreline. The linear distance that would need to be altered would be 800 feet for a sensitive shoreland area or 1320 feet for a nonsensitive shoreland area. It should be noted that in counting the distance altered, the EQB would intend that the count be cumulative for the entire project so that if the alterations were broken into discontinuous stretches, all the stretches would be added. This is consistent with the standard way of counting other linear thresholds in the rules.

Item B would cover alteration or disruption of ground within the shore impact zone, which is the tier of land between the shoreline and a line at $\frac{1}{2}$ the building setback distance (see definition at 4410.0200, subpart 81a.) This category has a two-part threshold, and to fit the category a project would need to exceed both thresholds: cover at least 5,000 square feet of ground area and comprise at least 50% of the shore impact zone for the project's parcel. Any project meeting both these size criteria in the shoreland would be substantial enough that it may have the potential for significant environmental effects.

Item C proposes two thresholds, one for sensitive and the other for nonsensitive shorelands, of 20 and 40 acres, respectively, of permanent conversion of naturally

vegetated land, including forests. The wording of this category is patterned on that in existing category 36, land use conversions (including golf courses) and also 37, recreational trails, except for the threshold values. Considering that the non-shoreland area threshold in subpart 36 is 80 acres, setting the threshold at 20 acres in sensitive shorelands and 40 in nonsensitive shorelands is reasonable, in view of the importance of shoreland buffering as described below.

The proposed thresholds for all three items in this subpart are based on the consequences of altered nearshore areas on fish and wildlife resources and the value of shoreline buffers. It is necessary and important to require that thresholds be based on the alterations to vegetation and topography since the mismanagement of vegetation and soil has and will adversely impact the natural resources of shoreland areas. The consequences include: erosion and sedimentation to surface waters, which impairs or destroys fish and wildlife habitat; soil sedimentation; the intentional filling of areas that previously held and filtered surface water runoff for a period before drainage or discharge to a waterbody; and the clearing of shoreland vegetation that once provided natural screening of shoreland development and maintained the scenic vistas of our many lakes and streams. Most importantly, the conversion of the shoreline has adverse impacts on water quality.

Shoreline buffers are corridors of natural vegetation along rivers, streams, and lakes which help to protect water quality by providing a transition between upland development and adjoining public water. A shoreline buffer of natural vegetation traps, filters and impends runoff. Buffers stabilize lake and river banks, offer scenic screening of shoreland development, reduce erosion, control sedimentation, and provide habitat for shoreline species. Native vegetation, with its deep root systems and natural duff layer, act like a sponge to hold runoff and associated pollutants.

Alteration or conversion of nearshore zones destroys annual and perennial ground cover for small animals and birds, such as loons. The nearshore areas adjacent to lakes and rivers are considered one of the richest zones for aquatic organisms. This area has an overlap of ecological zones between upland and aquatic habitats where species from both zones live. An additional benefit of shoreline buffers is the shading function that it provides, which can keep the temperature down during the summer. This ecological service is especially important for trout streams. Buffer areas can also cool off warm runoff by slowing down runoff as it flows through vegetation. Additional benefits of cooling are that water will hold more oxygen at lower temperatures and more desirable aquatic life thrives in cooler water.

I. Amendments to the Mandatory EIS categories at part 4410.4400:

1. Introduction. All of the proposed amendments in part 4410.4400, except that at subpart 28, are part of the overall effort to add mandatory categories to the rules that explicitly address types of projects in shoreland areas that may have the potential for significant environmental effects.

The general material presented at the beginning of the mandatory EAW thresholds section at part 4410.4300 about the rationale for new categories specific to shorelands and the designation of RGUs also applies to this section on mandatory EIS categories and will not be repeated here. The material presented here will deal with the rationale for each proposed new mandatory EIS category.

2. **Subp. 9. Nonmetallic mineral mining.** Items A ~~and B~~ to C designate the RGU for the type of project listed:

[A and B unchanged.]

C. For development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 40 or more acres of forested or other naturally vegetated land in a sensitive shoreland area or 80 or more acres of forested or other naturally vegetated land in a nonsensitive shoreland area, the local government unit is the RGU.

This proposed amendment is a special case of the more general amendment at part 4410.4400, subpart 27. The same thresholds and parameters are involved. The reason for adding this separate amendment is to place the new EIS requirements at a point in the rules likely to be consulted by mining companies and other persons examining the rules to see how nonmetallic mining may be affected. As for the corresponding EAW category (at part 4410.4300, subpart 12), it should be noted that item C does not contain the qualifier "to a mean depth of ten feet or more during its existence" that appears in item B which applies to nonmetallic mining that does not occur in a shoreland. This is because the types of impacts that item C is concerned with do not depend on the depth of the excavation; the critical factor is that the surface vegetation is destroyed or disrupted.

3. **Subp. 14a. Residential development in shoreland.**

A. The local governmental unit is the RGU for construction of a permanent or potentially permanent residential development located wholly or partially in shoreland of a type listed in items B to D. For purposes of this subpart "riparian unit," means a unit in a development that abuts a public water or, in the case of a development where units are not allowed to abut the public water, is located in the first tier of the development as provided in part 6120.3800, subpart 4, item A.

B. A development containing 50 or more unattached or attached units for a sensitive shoreland area or 100 or more unattached or attached units for a nonsensitive shoreland area, if any of the following conditions is present:

- (1) less than 50% of the area in shoreland is common open space;
- (2) the number of riparian units exceeds by at least 15% the number of riparian lots that would be allowable calculated according to the applicable lot area and width standards for riparian unsewered single lots given in part 6120.3300, subparts 2a and 2b; or

- (3) any portion of the project is in an unincorporated area.
- C. A development of 100 or more unattached or attached units for a sensitive shoreland area or 200 or more unattached or attached units for a nonsensitive shoreland area, if none of the conditions listed in item B is present.
- D. A development creating 20 or more unattached or attached units for a sensitive shoreland area or 40 or more unattached or attached units for a nonsensitive shoreland area by the conversion of a resort, motel, hotel, recreational vehicle park or campground, if either of the following conditions is present:
- (1) the number of nonriparian units located in shoreland exceeds by at least 15% the number of lots that would be allowable on the parcel calculated according to the applicable lot area and width standards for nonriparian unsewered single lots pursuant to part 6120.3300, subparts 2a and 2b; or
 - (2) the number of riparian units exceeds by at least 15% the number of riparian lots that would be allowable calculated according to the applicable lot area and width standards for riparian unsewered single lots pursuant to part 6120.3300, subparts 2a and 2b.
- E. An EIS is required for residential development if the total number of units that the proposer may ultimately develop on all contiguous land owned by the proposer or for which the proposer has an option to purchase, except land identified by an applicable comprehensive plan, ordinance, resolution, or agreement of a local governmental unit for a future use other than residential development, equals or exceeds a threshold of this subpart. In counting the total number of ultimate units, the RGU shall include the number of units in any plans of the proposer. For land for which the proposer has not yet prepared plans, the RGU shall use as the number of units the product of the number of acres multiplied by the maximum number of units per acre allowable under the applicable zoning ordinance, or if the maximum number of units allowable per acre is not specified in an applicable zoning ordinance, by the overall average number of units per acre indicated in the plans of the proposer for those lands for which plans exist.

The explanations given at part 4410.4300, subpart 19a regarding the definition of “riparian” as used in the introduction to this subpart and the use of “unattached” and “attached” units applies equally to this subpart and will not be repeated here.

The EQB is proposing two threshold levels for “ordinary” residential development (items B and C) and a special threshold (item D) that deals with the special case where the development creates lots or units by the conversion of an existing resort or other commercial PUD-type development. The thresholds of items B and C vary depending on the density of the project and whether it is located in a city or unincorporated area. Here density refers to (1) the proportion of the site that is open space; and (2) the number of

lots or units in the riparian zone compared to a "reference density" taken from the DNR's shoreland management rules in chapter 6120. This is the same density concept that applies to the similar EAW thresholds at part 4410.4300, subpart 19a, and which is explained at that section of the SONAR. The thresholds of item B would apply to all projects in unincorporated areas, regardless of their density. In cities, the lower thresholds of item B would apply to projects that are "dense" and the higher thresholds of item C would apply to projects that are not "dense."

For sensitive shoreland areas, the EIS thresholds proposed are 50 and 100 units, which will apply to unincorporated areas and "dense" projects in cities and to "non-dense" projects in cities, respectively. A 50-unit development in sensitive shoreland of an unincorporated area is a large project, as shown by the development size profiles on graph 1, attachment 3. Considering this and the sensitivity of shorelands to development it is reasonable to set the EIS threshold for these situations at 50 units, which corresponds to the EAW threshold that would most likely apply to these situations under the present rules and which is one-half the size of the most likely existing EIS threshold that would apply.

It is reasonable to set higher thresholds for an EIS in cities than in unincorporated areas. As noted in the SONAR from the 1982 rulemaking when the existing residential threshold system was established, because of their greater infrastructure, community services, and planning cities are in general better able to accommodate human development without major disruptions than are unincorporated areas. However, the higher threshold is proposed only where the project provides sufficient open space and is not overly-dense in terms of units in the riparian zone. The proposed thresholds are considerably lower than the EIS thresholds that now apply in cities. For projects within a in the EIS analysis for many projects the thresholds are 1,000 unattached or 1500 attached units. Because of the biological sensitivity of shoreland areas, as discussed previously at part 4410.4300, the EQB believes it is appropriate to lower the EIS thresholds for projects in shorelands of cities.

As for the proposed shoreland residential project EAW thresholds, it is proposed to apply a threshold in nonsensitive shoreland areas that is twice the size of the threshold for sensitive shoreland areas. It is reasonable to do this due to the differences in the biological sensitivities of the categories of shorelands.

Item D deals with the special case where a residential development creates 20 (sensitive shoreland) or 40 (nonsensitive) lots or units by the conversion of an existing resort or other commercial PUD-type development. The item D thresholds are reasonable given the potential environmental impacts from resort conversions that large and the size frequency distribution of Minnesota resorts: the median number of units is about 10 units per resort and less than 5 percent of Minnesota resorts have more than 40 units. Thus, the item D threshold is quite unlikely to be exceeded. (According to the survey returns explained in section III.A (5) of this SONAR, between 1997 and 2006 only one instance occurred where a resort was converted into a residential project of sufficient size to have exceeded the proposed EIS threshold of item D (and that project may or may not have

exceeded the density standards proposed)). Given the concerns and controversies over resort conversions (and other commercial PUD conversions although they are much less common than resort conversions), it is appropriate to create a mandatory EIS category for such projects with thresholds set at the levels proposed.

4. **Subp. 26. Resorts, Campgrounds, and RV parks in shorelands.** For construction or expansion of a resort or other seasonal or permanent recreational development, accessible by vehicle, adding 100 or more units or sites in a sensitive shoreland area or 200 or more units or sites in a nonsensitive shoreland area, the local governmental unit is the RGU.

This new subpart is analogous to item C of subpart 14a discussed immediately above. As explained for the analogous EAW categories, an alternative approach would have been to incorporate resorts, campgrounds, and RV parks into the categories of subpart 14a, since the thresholds are the same. However, it was decided that a better choice would be to have this be a separate subpart to avoid "hiding" these sorts of projects amidst the residential project types of subpart 14a and to make it more likely that project proposers, RGUs, and the public will be able to find and apply this category by virtue of it having its own subpart and caption. The explanation of how the thresholds would work and their justification is the same as given for subpart 14a above.

5. **Subp. 27. Land conversion in shorelands** For a project that permanently converts 40 or more acres of forested or other naturally vegetated land in a sensitive shoreland area or 80 or more acres of forested or other naturally vegetated land in a nonsensitive shoreland area, the local government unit is the RGU.

This subpart proposes two thresholds, one for sensitive and the other for nonsensitive shorelands, of 40 and 80 acres, respectively, of permanent conversion of naturally vegetated land, including forests. The wording of this category is patterned on that in existing the EAW category at 4410.4300, subpart 36, land use conversions (including golf courses) and also 37, recreational trails, except for the threshold value.

Currently, there are no EIS thresholds based on land conversion. However, because of the special sensitivity of shorelands and the increasing development pressures on shorelands, it is appropriate to establish an EIS category for land conversions in shorelands. The proposed threshold in nonsensitive shoreland is set at 80 acres, which is the same as the existing EAW threshold for nonshoreland projects. The proposed threshold for sensitive shoreland areas is set at 40 acres which is $\frac{1}{2}$ the existing EAW threshold for non-shoreland projects. Both thresholds are twice the corresponding proposed EAW thresholds at part 4410.4300, subpart 36a. Considering the potential environmental impacts of shoreland alterations as described in the rationale for part 4410.4300, subpart 36a, the proposed thresholds are reasonable.

6. Subp. 28. Genetically engineered wild rice. For the release and a permit for a release of genetically engineered wild rice for which an EIS is required by Minnesota Statutes, section 116C.94, subdivision 1, (b), the EQB is the RGU.

This new subpart establishes a mandatory category for preparation of an EIS for any project proposed in Minnesota that would involve the release and a permit for a release of genetically engineered wild rice. The 2007 session of the Minnesota Legislature enacted a law making this specific requirement (Laws of Minnesota, Chapter 57, Article 1, Section 141). The wording of this category follows the language of the enactment of that session law.

Currently there are no EIS thresholds for release of any genetically engineered organisms; hence this new category. There is a requirement for an EAW at chapter 4410.4300, subpart 35. This is for release of any genetically engineered organism that requires a permit under chapter 4420 or for genetically engineered organisms covered by a significant environmental permit program of a permitting state agency. This new EIS requirement goes beyond that and is specific to genetically engineered wild rice only.

The Minnesota Department of Agriculture has a significant environmental permit program, authorized at Minnesota Statutes 2006, Chapter 18F- Genetically Engineered Organisms. Under that statute, wild rice is specifically named as an Agriculturally Related Organism (chapter 18F.02, Definitions, subdivision 2a). Wild rice is subject to the Department of Agriculture permit program if produced by genetic engineering methods.

A further requirement of Laws of Minnesota, Chapter 57, Article 1, Section 142 applies the requirement to prepare an EIS in essentially all cases. It eliminates the availability of exceptions or exemptions from environmental review to any permit covered by a qualified federal program, or application by an individual permit applicant seeking an exemption from the board or permitting state agency. The requirement for an EIS for the release and a permit for a release of genetically engineered wild rice is uniform.

J. Amendments to the Exemptions at 4410.4600:

1. Subpart 1. **Scope of exemptions.** Projects within subparts 2 and 26 27 are exempt from parts 4410.0200 to 4410.6500. Projects within subparts 3 to 25 and 27 are exempt from parts 4410.0200 to 4410.6500, unless they have characteristics which meet or exceed any of the thresholds specified in part 4410.4300 or 4410.4400.

This amendment merely corrects inaccurate citations in subpart 1 that occurred as part of a rulemaking in 2005. At that time the EQB adopted new mandatory EAW and exemption categories for certain types of recreational trails, which added a new subpart 27 to the list of exemptions. That new subpart should have been cited as for subparts 3 to 25, which is the list of "project-type" exemptions, which apply to projects because of the

type of physical activity involved. However, instead subpart 27 was grouped with subpart 2, which is a list of "standard" exemptions which is based on the permitting status of a project (e.g., it is exempt because all permits have already been issued). At the same time, subpart 26, governmental activities, which is akin to subpart 2 and which formerly had been grouped with subpart 2, became grouped with the "project-type" subparts. No one noticed these errors until after the rules had gone into effect. The amendment proposed would place subparts 27 and 26 within their proper groupings, as should have been done when the rules were adopted.

2. Subp. 12. **Residential development.** The following projects are exempt:
[Item A unchanged.]

B. Construction of less than 10 residential units located in shoreland, provided all land in the development that lies within 300 feet of the ordinary high water level of the lake or river, or edge of any wetland adjacent to the lake or river, is preserved as common open space.

C. [see text of existing item B]

This new exemption is part of the addition of new mandatory categories to the rules for projects in shorelands. The idea was suggested by commenters during the informal comment period in May and June 2007. The Wildlife Society, which had been a participant in the process since the DNR advisory committee, suggested that since protection of shoreland as a buffer was so important, it would be appropriate to create an exemption category for projects that incorporated a good buffer zone. Acting on that suggestion, DNR and EQB staff developed this proposed exemption. Because projects that are exempted are not eligible for even discretionary environmental review, it is important to be conservative in designing exemption categories. Hence, the EQB proposes to limit this exemption to projects of 9 or fewer units. However, as shown by the survey data analyzed in section III, the great majority of residential shoreland projects are in this size range.

This proposed category would only apply to a project if all of the land within the development site that lies within the specified 300 foot zone is dedicated as common open space. The only uses that would be allowable in order for the exemption to apply would be open space-oriented uses; no structures would be allowed. The 300 foot zone would be measured from the ordinary high water level (as is defined in the DNR's shoreland management rules) of the lake or river, unless there were a wetland "fringe" along the lake or river (where the wetland actually emerges from the edge of the lake or river), in which case the distance would be measured from the delineated edge of the wetland.

Three hundred feet was chosen as the necessary size of the buffer zone for several reasons. First, this distance corresponds to twice the building setback distance for natural environment-classed lakes. Most of the anticipated development pressure is on this class of lake (or bays of lakes). Second, this distance has been effectively used elsewhere to protect water quality while providing open space amenities for communities. In addition, while the recommended buffer depth for wildlife habitat varies by species, protecting

diverse riparian wildlife habitats and communities requires some buffers of at least 300 feet (Wenger 1999).

3. Subp. 26. **Governmental activities.** Proposals and enactments of the legislature, rules or orders of governmental units, adoption and amendment of comprehensive and other plans, zoning ordinances, or other official controls by local governmental units, rezoning actions by a local governmental unit unless the action would be primarily for the benefit of a specific project or projects, adoption and amendment of plans by state agencies, executive orders of the governor or their implementation by governmental units, judicial orders, and submissions of proposals to a vote of the people of the state are exempt.

The EQB has a long-standing interpretation that quasi-legislative actions are not subject to this program; this distinction draws a line between “projects” and “plans,” the former being subject to the program and the latter not. Adoption of plans by state agencies and local units and zoning decisions by local units, with the caveat described, are considered not subject to the program, and to the knowledge of the EQB staff have never been the subject of an EAW or EIS in the history of the program.

This distinction is based on the definition of “project” at part 4410.0200, subp. 65, and the exemption category at subpart 26 where certain governmental actions are explicitly declared exempt. Curiously, the existing language of subpart 26 (adopted in 1982) fails to explicitly list some types of actions that seem very similar to some that are included. For instance, the rule includes “rules or orders of governmental units” but does not also list local ordinances. Nor is the adoption of comprehensive plans or other local plans or state agency plans of any sort listed. It is difficult to see why the missing actions were not placed on the list, as they clearly appear to meet the criteria used in the rulemaking. The 1982 SONAR states: “The categories included in this category area do not represent project-specific actions. These actions may affect the environment indirectly (i.e., by appropriating money, providing general authority, etc.) however, these actions are followed by other governmental action that will implement the action and directly affect the environment. Environmental review is more reasonable at the point of implementation.” (page 163).

“Project” is defined as “a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly.” (4410.0200, subp. 65) Comparing the use of the word “indirectly” in the 1982 SONAR to its use in the definition of “project” (also from 1982), indicates an ambiguity about whether a governmental action that “indirectly” affects the environment is or is not within the program – the SONAR indicates that it is not but the definition suggests that it is. The ambiguity is settled for those governmental actions that are clearly listed in subpart 26, but for those not listed in subpart 26, some doubt

remains – although consistency of application argues that similar but unlisted quasi-legislative actions must also be exempted.

In the case *Minnesotans for Responsible Recreation vs. Department of Natural Resources & All-Terrain Vehicle Association of Minnesota* (October 1, 2002, CX-02-404, C8-02-420 & C5-02-441), the Minnesota Court of Appeals addressed the question of the distinction between projects and plans and ripeness for environmental review. The court concluded that for purposes of MEPA a project “is a definite, site-specific, action that contemplates on-the-ground environmental changes, including changes in the nature of the use.” The court also concluded that the system plans for recreational trail development that were challenged in the case were “too broad and speculative to provide the basis for meaningful environmental review.”

The EQB believes that the court’s opinion in this case supports the inclusion of the missing quasi-legislative actions in the list of exemptions at subpart 26. The court’s logic parallels that of the 1982 SONAR in concluding that environmental review should occur only when definite site-specific information becomes available. Broader, conceptual-level governmental actions are not appropriate for environmental review. At the state agency level, this would include exempting the adoption and amendment of plans. At the local level, it would cover adoption and amendment of comprehensive plans and other plans, ordinances, and related “official controls,” but not rezoning done primarily to pave the way for specific known projects.

V. LISTS OF WITNESSES & EXHIBITS AT HEARINGS

A. Witnesses

The EQB anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Gregg Downing and Jon Larsen, EQB staff, will testify about the development and content of the rules.
2. The following staff of the Department of Natural Resources will be available to provide information about shoreland management, the scientific basis for proposed mandatory categories for projects in shoreland, and the process by which the mandatory categories were developed: Peder Otterson, Division of Waters, Paul Radomski, Division of Ecological Services & Matt Langan, Environmental Review Section, Division of Ecological Services.

B. Exhibits

In support of the need for and reasonableness of the proposed rules, the EQB anticipates that it will enter the following exhibits into the hearing record. (Note: some of the listed Exhibits have been made Attachments to the SONAR document; others will be introduced into the hearing record.)

SONAR Attachment 1. "Public Notice: EQB seeks input on proposals for amending Environmental Review rules regarding "cumulative impacts or effects," May 2, 2007, by EQB staff.

SONAR Attachment 2. Shoreland Projects Survey; data request to local governmental units by the Environmental Quality Board, May, 2007

SONAR Attachment 3. Graph 1: frequency distribution of shoreland residential projects reported by RGUs 1997 to 2006 by size category.

SONAR Attachment 4. Background Information In Support of the Statement of Need and Reasonableness for the EAW and EIS Shoreland Threshold Categories, by Minnesota DNR staff, April 2007.

SONAR Attachment 5. Fact sheet: "Lakeshore development category (new): Environmental Quality Board study of mandatory threshold levels for environmental review," November 2004.

Requests for Comments documents and resulting public comments

Informal comments documents and public responses, June & September 2007

Memorandum from James L. Connaughton, Chairman, CEQ, titled "Guidance of the consideration of past actions in cumulative effects analysis," June 24, 2005 (cited at part 4410.2300)

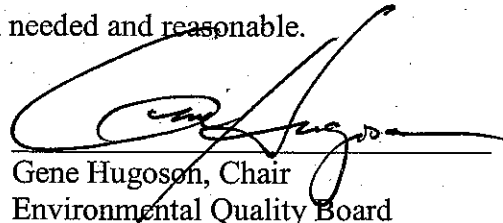
Minnesota Supreme Court *CARD* opinion

EQB *amicus* brief in *CARD* case

VI. CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

Dated: 9-27-07


Gene Hugoson, Chair
Environmental Quality Board

Supplement

To Statement of Need and Reasonableness, signed September 27, 2007, For Revisions to the Environmental Review Program Rules, Chapter 4410

This document explains the need for and reasonableness of four additional amendments to the Environmental Review program rules that the Environmental Quality Board has decided to add to the group of proposed amendments authorized in July 2007. These amendments would revise the following parts of the rules:

- 4410.0400, subpart 4, Appeal of final decisions,
- 4410.1000, subpart 5, Change in proposed project; new EAW,
- 4410.1700, subpart 5, Distribution of decision [on the need for an EIS] &
- 4410.4600, subpart 7, [Exemption for] Storage facilities.

The Board approved the addition of these amendments to this rulemaking on May 15, 2008 and directed the Chair to add a Supplement addressing these amendments to the existing SONAR, signed on September 27, 2007. Because rulemaking hearings on the amendments authorized in July 2007 were still pending, the EQB decided to include these four amendments as part of that rulemaking rather than adopt them through an independent rulemaking procedure.

Specifically, this document supplements section IV of the SONAR with respect to the four additional amendments. Sections I to III & V of the SONAR are not affected by the addition of the four proposed rule amendments.

IV. Rule-by-Rule Analysis of Need and Reasonableness

4410.0400, subpart 4. **Appeal of final decisions.** Decisions by an RGU on the need for an EAW, the need for an EIS, and the adequacy of an EIS and the adequacy of an Alternative Urban Areawide Review document are final decisions and may be reviewed by a declaratory judgment action initiated within 30 days of the RGU's decision in the district court of the county where the proposed project, or any part thereof, would be undertaken.

Explanation: This amendment would make explicit in the rules that an RGU's decision on the adequacy of a final AUAR analysis document (which includes the mitigation plan) is a final decision that is appealable in district court, in the same manner as for decisions about the adequacy of EISs. This is implicit due to the fact that the AUAR document is a substitute for EISs (as well as for EAWs) that would otherwise be required, but the rules would be clearer if an explicit statement of this were made. There have been legal challenges to AUAR adequacy decisions in the past.

4410.1000, subpart 5. **Change in proposed project; new EAW.** If, after a negative declaration has been issued but before the proposed project has received all approvals or been implemented, the RGU determines that a substantial change has been made in the proposed project or has occurred in the RGU's project's circumstances, which change

may affect the potential for significant adverse environmental effects that were not addressed in the existing EAW, a new EAW is required.

Explanation: As part of the Phase 1 amendments adopted in 2006, the phrase "or has occurred in the RGU's circumstances" was added to this subpart. The original intent was to refer to the circumstances surrounding the *project*, not the circumstances of the *RGU*. However, in its draft of the rules given to the Revisor's office, the EQB staff used the pronoun "its" rather than the word "project." The Revisor's office attempted to improve the wording by replacing this indefinite pronoun with a specific noun, but mistakenly chose "RGU's" rather than "project's" as the word to substitute. Unfortunately, throughout the rulemaking process no one noted that the wrong word had been used in the amendment. The current amendment would merely correct this error and return the meaning to that originally intended by the EQB.

4410.1700, subpart 5. **Distribution of decision** [on the need for an EIS]. The RGU's decision shall be provided, within 5 days, to all persons on the EAW distribution list pursuant to part 4410.1500, to all persons that commented in writing during the 30-day review period, and to any person upon written request. All persons who submitted timely and substantive comments on the EAW shall be sent a copy of the RGU's response to those comments prepared under subpart 4. Upon notification, the EQB staff shall publish the RGU's decision in the EQB Monitor. ~~If the decision is a positive declaration, the RGU shall also indicate in the decision the date, time, and place of the scoping review meeting.~~

Explanation: In the Phase 1 amendment adopted in 2006, the EQB made a change to the rules at part 4410.2100, subpart 4, item A, that affected the timing of the notice for a scoping review meeting following a "positive declaration" on the need for an EIS. That amendment, which required the proposer of the project to make payment to the RGU for the expected cost of scoping prior to notice of the scoping meeting, created a conflict with the requirements of this subpart. This subpart requires notice of the meeting to be issued within 5 days of the EIS need decision, while the amendment at part 4410.2100, subpart 5 requires the notice to be published within 15 days after receipt of the proposer's cost payment. In most cases, these two timeframes are not compatible.

The preferred way to resolve this conflict is to delete the requirement in this subpart that the notice of the positive declaration include notice of the scoping review meeting. Notice of the scoping meeting will occur later as a separate notice, after receipt of the scoping cost payment. While this change would require the RGU to issue an extra public notice, it would have the benefit of providing more time for the RGU staff to prepare information about the intended scope of the EIS to include in the notice of the scoping review meeting. Having better information prior to the meeting should facilitate better comments from the public on the scope of the EIS.

4410.4600, subpart 7. [Exemption for] **Storage Facilities**. Construction of a facility designed for or capable of storing less than 750 tons of coal ~~or more~~, with an annual

throughput of less than 12,500 tons of coal, or the expansion of an existing facility by these respective amounts, is exempt.

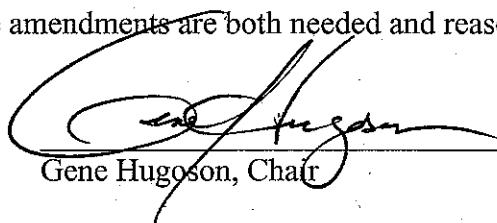
Explanation: The EQB staff recently noticed while proof-reading a document that cited this rule, that the extraneous words "or more" occur in this infrequently-used exemption category. Staff speculates that this phrase was inadvertently carried over into this exemption in 1982 because it is frequently used in the mandatory EAW and EIS categories for similar types of projects. While the phrase does not affect the interpretation of the exemption, it ought to be removed.

VI. CONCLUSION

Based on the foregoing, the proposed rule amendments are both needed and reasonable.

Dated: _____

6-25-08



Gene Hugoson, Chair

Supplement #2

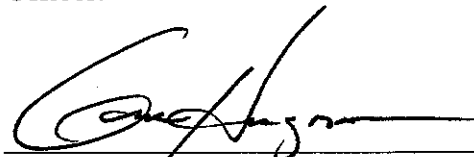
To Statement of Need and Reasonableness, signed September 27, 2007, For Revisions to the Environmental Review Program Rules, Chapter 4410

This document supplements section III of the SONAR with respect to the requirement that the EQB consult with the Minnesota Department of Finance (now Minnesota Management & Budget) regarding the fiscal impact and fiscal benefits of the proposed rule on units of local government.

The EQB requested assistance from the Department of Finance in evaluating the fiscal impacts upon local units of government by means of a letter dated October 5, 2007, accompanied by copies of the proposed rule amendments and the SONAR. A copy of that letter is attached to this Supplement.

The EQB received a response memorandum from the Department of Finance dated January 9, 2008, a copy of which is attached to this Supplement. The memorandum summarizes the evaluation by the Executive Budget Officer.

Dated: 12-19-08


Gene Hugoson, EQB Chair

Attachments to this Supplement:

Letter to Department of Finance, dated October 5, 2007

Memorandum from Department of Finance, dated January 9, 2008



Environmental Quality Board

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October 5, 2007

Ms. Peggy Lexau
Executive Budget Officer
Minnesota Department of Finance
Room 400 Centennial Bldg.
658 Cedar St.
St. Paul, MN 55155

Re: In the Matter of the Proposed Amendments to Rules of the Minnesota
Environmental Quality Board Governing the Environmental Review Program,
Minnesota Rules, chapter 4410; Governor's Tracking #AR 344

Dear Ms. Lexau:

Minnesota Statutes, section 14.131, requires that an agency engaged in rulemaking consult with the Commissioner of Finance "to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

Enclosed for your review are copies of the following documents on proposed amendments to the rules for the Environmental Review program.

1. The Governor's Office Proposed Rule and SONAR Form (signed by Board Chair Gene Hugoson).
2. The 9/26/07 Revisor's draft of the proposed rule.
3. The SONAR (signed 9/27/07 by Chair Hugoson).

I am also delivering copies of these documents to the Governor's Office.

If you or any other representative of the Commissioner of Finance have any questions about the proposed rule amendments, please feel free to call me at 651/201-2476. However, I will be on vacation during the period October 15 through October 30. If you should have any questions during that time period you could contact Michael Sullivan, EQB Executive Director, at 201-2462

Please send any correspondence regarding this matter to me at the following address: Gregg Downing, Minnesota Environmental Quality Board, 300 Centennial, 658 Cedar Street, St. Paul, MN 55155..

Yours very truly,

Gregg Downing
Environmental Review Coordinator



MINNESOTA DEPARTMENT OF
FINANCE

January 9, 2008

TO: Gene Hugoson, Chair – Environmental Quality Board
Gregg Downing, EQB Environmental Review Coordinator

FROM: Britta Reitan, Executive Budget Officer *BR*

RE: M.S. 14.131 Review of Proposed Amendments to Minnesota Rules Chapter 4410
Governing the Minnesota Environmental Review Program

BACKGROUND

The Environmental Quality Board proposes amendments to Minnesota Rules Chapter 4410, which governs the Minnesota Environmental Review Program. The proposed changes would amend or add 25 subparts of the environmental review rules. Pursuant to M.S. 14.131 the Board has asked the Commissioner of Finance to help evaluate the fiscal impact and fiscal benefit of the proposed rule on local units of government.

EVALUATION

On behalf of the Commissioner of Finance, I reviewed the proposed rules and related Statement of Need and Reasonableness (SONAR). My evaluation is summarized below:

- 1) One of the most significant proposed changes for local governments is the creation of new mandatory Environmental Assessment Worksheet (EAW) and Environment Impact Statement (EIS) categories for projects located on shorelands.
- 2) The proposed rule will increase the number of EAWs and EISs that need to be completed by local government units.
- 3) The EQB has included an extensive assessment of the impact in terms of the number of EAWs and EISs that would need to be completed under the proposed rule change.
- 4) The EQB surveyed counties and cities with extensive shoreland and based estimates of the impact on the response to those surveys. The impact on individual counties and cities will vary depending on the quantity and type of shoreland development taking place in those communities.
- 5) The EQB asserts in the SONAR that the local units of government will not likely have to bear the cost of producing additional EAWs and EISs because the cost of the production can be passed on to the proposers of the development projects.
- 6) The cost to local governments of producing EISs can be recouped from the project proposers under provisions in the Minnesota Environmental Policy Act.
- 7) The cost to local governments of producing additional EAWs will depend on local policies and ordinances. Some local governments could experience increased costs if they do not have and do not adopt ordinances allowing them to charge their costs of preparing EAWs to project proposers.

- 8) An additional component of the rule changes relates to the obligation of the responsible unit of government to take into account "cumulative potential effects" in determining if an EIS is required for a project. This change is proposed because the Minnesota Supreme Court interpreted the existing rules to require units of government to consider "cumulative potential effects" in their evaluations. These changes should not add costs to local government units because they are intended as clarifications to existing rules and consistent with the majority of current practice.
- 9) The EQB published a Request for Comments on August 14, 2006 and accepted comments through October 16, 2006. Supplemental Requests for Comments were published on December 11, 2006 and June 18, 2007. There has been substantial opportunity for concerned parties to become aware of and participate in the rule making process.

Based on this information, I believe the EQB has adequately explored the fiscal impact on local units of government through their survey and analysis. It is likely that as a result of these rule changes there will be some fiscal impact on local units of government. The magnitude of the impact depends on the extent to which local governments pass the costs of increased requirements and services to project proposers. Local units of government that commonly produce EAWs and EISs will likely have cost recapture processes already in place. Those local governments that have not had to complete many EAWs and EISs previously would likely be the ones that may incur costs as the result of the rule change.