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Statement of Need and Reasonableness
for
Proposed Amendments to Environmental Review Program Rules
Minnesota Rules Parts 4410.0200 to 4410.7800

June, 1986

I. SCOPE OF PROPOSED AMENDMENTS

Amendments are being proposed at this time only for selected sections of the existing environmental review program rules, Minnesota Rules, parts 4410.0200 to 4410.7800. The existing rules were adopted in 1982. The EQB staff has monitored the implementation of the 1982 edition of the program rules to determine whether the objectives of the 1982 revision had been achieved, and has reported annually to the EQB on the results of the monitoring. Although the EQB has found that the program is working well in general, several problem areas have been identified. These problem areas are the focus of this present rule amendment process. In January, 1986 the EQB published notice in the State Register that it was soliciting outside information and opinions about revision of the environmental review program rules. A number of suggestions for revisions were received in response to this notice. Some of these have been included in this set of proposed amendments. Others have been deferred for consideration later, as explained in a later paragragh.

The following sections of the rules are proposed for amendment:

4410.0200, subp. 5: definition of "attached units"
4410.0200, subp. 30: definition of "flood plain"
4410.0200, subp. 82: definition of "shoreland"
4410.0500, subp. 1: RGU for mandatory categories
4410.0500, subp. 3: RGU for petition EAWs
4410.0500, subp. 6: EQB authority to change RGU
4410.3100, subp. 6: criteria for granting of variances by EQB
4410.3600, subp. 1: criteria for approval of alternative review
4410.4300, subp. 1: how to interpret mandatory EAW thresholds
4410.4300, subp. 14: industrial, commercial, and institutional mandatory EAW category
4410.4300, subp. 14: parking space mandatory EAW category
4410.4300, subp. 18: sewage systems mandatory EAW category
4410.4400, subp. 11: industrial, commercial, and institutional mandatory EIS category
4410.4600, subp. 1: scope of exemptions
4410.7500, subp. 4: environmental review at the certificate of need stage for high voltage tranmission lines

The EQB expects to consider amendment to mandatory category thresholds and other provisions of the rules at a later time. Consideration of mandatory category threshold changes has been deferred due to the need for additional research and negotiation to arrive at proposed amendments. The only amendment to the thresholds for mandatory EAWs and EISs proposed at this time occurs in part 4410.4300, subp. 18, regarding sewage systems. The other amendments in parts 4410.4300 and 4410.4400 clarify the scope of the categories but do not alter the thresholds. Revisions to the sewage system EAW category thresholds have been included in the present amendment process because these changes will largely resolve the problem of overlapping jurisdiction of local units and the MPCA for residential and commercial projects involving sewer extensions.

II. AUTHORITY

The EQB is authorized to promulgate rules for the environmental review program under Minnesota Statutes ch. 116D.04, subd. 5 (a) and Minn. Stat. ch. 116D.045. General rule-making authority is granted the EQB under Minn. Stat. ch. 116C.04 and 116D.

The EQB is directed by Minn. Rules part 4410.0400, subp. 1 to monitor the effectiveness of the environmental review program rules and to modify them as appropriate to improve their effectiveness.

III. DISCUSSION OF PROPOSED AMENDMENTS

4410.0200, subp. 5. "Attached units" definition:

This amendment involves the deletion of a sentence in the definition of "attached units" and the addition of a similar sentence to the mandatory category descriptions for residential projects, as follows:

4410.0200 subp. 5. Attached units. "Attached units" means in groups of four or more units each of which shares one or more common walls with another unit. ~~Developments consisting of both attached and unattached units shall be considered as an unattached unit development.~~

4410.4300, subp. 19. Residential development. Items A and B designate the RGU for the type of project listed~~:~~. If a development consists of both attached and unattached units, each individual unit in a group of attached units shall be considered as an unattached unit. [continue with remainder of subpart 19.]

4410.4400, subp. 14. Residential development. Items A and B designate the RGU for the type of project listed~~:~~. If a development consists of both attached and unattached units, each individual unit in a group of attached units shall be considered as an unattached unit. [continue with remainder of subpart 14.]

DISCUSSION:

The sentence being amended does not define "attached units," but rather is an instruction for how to compare developments consisting of both attached and unattached units to the mandatory category thresholds for residential projects. Because this instruction is isolated from the thresholds, RGUs are frequently unaware of the instruction and consequently sometimes make errors in determining whether a mixed development meets or exceeds a threshold. Moving the

instruction into the category descriptions will minimize the opportunities for errors of this kind. In addition, changes in the wording of the sentence are proposed to make it clearer that each individual attached unit is to be counted as if it were an unattached unit for projects which include both kinds of units.

4410. 0200, subp. 30. "Floodplain" definition.

Subp. 30. Flood plain. "Flood plain " has the meaning given in ~~part 6120.5000 of the Department of Natural Resources~~ Minnesota Statutes, section 104.02.

DISCUSSION:

The definition cited in the existing rule and the proposed citation in Minnesota Statutes are identical. The reason for the proposed amendment is to avoid possible future confusion which would result if the cited rules should be renumbered. Some rules cited in the environmental review program rules have been renumbered several times over the years, resulting in confusion.

4410.0200, subp. 82. "Shoreland " definition.

Subp. 82. Shoreland. "Shoreland" has the meaning given in ~~parts 6120.0200 to 6120.0500~~ 6120.0100 to 6120.3900 of the Department of Natural Resources.

DISCUSSION:

Because of several editorial errors during the renumbering and revision of DNR rules, the numbers given for the DNR rules defining shoreland are not correct any longer. The amendment would give the proper citations.

4410.0500, subp. 1. RGU for mandatory categories.

Subp. 1. RGU for mandatory categories. For any project listed in part 4410.4300 or 4410.4400, the governmental unit specified in those rules shall be the RGU unless the project will be carried out by a state agency, in which case that state agency shall be the RGU. For any project listed in both parts 4410.4300 and 4410.4400, the RGU shall be the unit specified in part 4410.4400. For any project listed in two or more subparts of 4410.4300 or two more subparts of 4410.4400, the RGU shall be determined as specified in subp. 5.

DISCUSSION:

The proposed amendment has three aspects to it. The first involves a change in the assignment of an RGU for certain projects which will be carried out by state agencies. The second involves a simplification

of the RGU selection process for projects meeting or exceeding the thresholds for a mandatory EIS and mandatory EAWs, where the categories list different units as RGU. The third aspect is a more explicit statement of the selection procedure for projects meeting or exceeding the thresholds for EAWs in two or more categories with different RGU designations or EISs in two or more categories with different RGU designations.

The 1977 edition of the environmental review program rules assigned responsibility for review to any state agency for its own projects. Under the 1982 rule edition, state agencies are assigned as RGU for projects requiring mandatory review only if the appropriate mandatory category names that public agency as the RGU. (A state agency would be RGU for discretionary environmental review of its own projects, however.) The record from the 1982 rule revision does not indicate that this change was intentional, and it is suspected by EQB staff that it resulted inadvertently and was overlooked because of the extent of the revisions. According to the principle that the governmental unit with the greatest responsibility for supervising or approving a project is the appropriate RGU, state agencies ought to serve as RGU for their own projects. It should be noted that most state agency projects are highway projects, for which MnDOT is assigned as RGU by the mandatory highway project categories.

The second proposed change is intended to avoid delays in the initiation of a mandatory EIS. The existing rules do not distinguish between a situation where a project fits both an EIS category and an EAW category for which different RGUs are named, and a situation where a project fits two EAW categories with different RGUs named. In either case, an RGU must be selected by agreement of the prospective RGUs or by action of the EQB Chair. While this selection procedure is appropriate where two (or more) EAW categories are involved, it imposes an unnecessary additional step at the start of an EIS. This additional step has sometimes caused delays in the EIS process while the prospective RGUs negotiated about which would be RGU and about how the EIS would be done. In addition, in some cases the RGU assigned by the EAW category has relinquished its claim to serve as RGU contingent upon being given review authority over draft and final EIS documents and the scoping decision prior to the documents being approved by the RGU for public distribution. This prior review has sometimes delayed the EIS process and, in the view of EQB staff, gives the agency insisting on prior review a degree of control over the EIS process neither contemplated during the development of the rules nor necessary to the preparation of an adequate EIS.

The proposed amendment would eliminate negotiation between governmental units as the method of RGU selection in cases where projects fit both a mandatory EIS and mandatory EAW categories (unless it fit two or more mandatory EIS categories with different RGUs named). Instead, the RGU named by the EIS category would automatically serve as RGU, and any governmental units named as RGUs by EAW categories would simply participate in the EIS process as

would any other party. This change will result in a more efficient and less confusing way of determining which unit is RGU for an EIS and will therefore expedite the initiation of the EIS process. It should be noted that should an inappropriate RGU ever be assigned due to this amendment, the RGU responsibility could be changed by the EQB under its authority given in part 4410.0500, subp. 6.

The third aspect of the amendment is intended to direct prospective RGUs to the section of the rules explaining how to resolve which unit is RGU for projects in multiple EAW or multiple EIS categories. An explicit statement of the need to consult subp. 5 in subp. 1 will reduce the chances of review being initiated by the wrong unit.

4410.0500, subp. 3. RGU for petition EAWs.

Subp. 3. RGU for petition EAW's. If an EAW is ordered in response to a petition, the RGU that was designated by the EQB to act on the petition shall be responsible for the preparation of the EAW. The EQB Chairperson or designee shall determine an RGU to act on the petition as follows:

A. if a state agency proposes to carry out the project, it shall be the RGU;

B. for any project of a type for which a mandatory category is listed in part 4410.4300, the RGU shall be the governmental unit specified by the mandatory category for projects of that type, unless the project will be carried out by a state agency; or

C. for any project of a type for which there is no mandatory listed in part 4410.4300 and which will not be carried out by a state agency, the RGU shall be selected in accordance with subp. 5.

DISCUSSION:

The existing rules leave some "loose ends" regarding to which governmental unit a petition should be assigned. This proposed amendment would give the EQB Chair or designee complete guidance in assigning an RGU.

The amendment would make the RGU the unit which would have been RGU had the project been large enough in scale to fit a mandatory category, unless the project will be conducted by a state agency, in which case that agency will become RGU. If there is no mandatory category for projects of the type, the RGU will be the unit with the greatest responsibility for supervising or approving the project pursuant to subp. 5.

4410.0500, subp. 6. Exception [to normal RGU selection].

Subp. 6. Exception. Notwithstanding subparts 1 to 5, the EQB may designate, within five days of receipt of the completed data portions of the EAW, a different RGU for the ~~preparation of an EAW~~ project if the EQB determines the designee has greater expertise in analyzing the potential impacts of the project.

DISCUSSION:

The current wording leaves it ambiguous whether the RGU assigned by EQB for preparation of an EAW would also serve as RGU for an EIS, if an EIS is required for the project. The proposed amendment clarifies this ambiguity.

4410.3100, subp. 6. Granting variance.

Proposed amendment:

Subp. 6. Granting variance. At its first meeting more than ten days after the comment period expires, the EQB shall grant or deny the variance. A variance shall be granted if:

A. the RGU consents to the variance; ~~and~~

B. on the basis of the variance application and the comments, construction is necessary in order to avoid excessive and unusual economic hardship, or to avoid a serious threat to public health and safety. Unusual economic hardship is ~~means that the~~ hardship ~~is~~ caused by unique conditions and circumstances which are peculiar to the project and are not characteristic of other similar projects or general economic conditions of the area or state ~~and that the hardship is~~. It does not include hardship caused by the proposer's own action, or inaction, if the hardship was reasonably foreseeable;

C. on the basis of the variance application and the comments, the construction for which the variance is sought will not have a serious adverse effect on the environment; and

D. on the basis of the variance application and the comments, the construction for which the variance is sought is separable from the remainder of the project and would not have the effect of eliminating from consideration any feasible and prudent alternatives or mitigation measures likely to be presented in an EIS.

DISCUSSION:

The criteria for granting a variance were developed for the 1982 rule revision in a theoretical context because there were no criteria specified in the former rules and only one case in which a construction variance was sought had ever arisen. Consequently, the EQB did not have the benefit of actual experience in granting variances in drafting the criteria. Within the past year, however, the EQB has acted on two variance applications. Experience with both applications has revealed that the criteria are incomplete with respect to consideration of the environmental consequences of a

proposed variance, and unreasonably restrictive with respect to the extent to which the project proposer is responsible for an economic hardship.

The existing rule requires, at subp. 4, that the variance application contain information about the environmental consequences of the variance and how the variance would affect the purposes of environmental review and subsequent approvals. However, this information is not made part of the consideration of whether the variance should be granted in the criteria of subp. 6. In light of the two variance cases handled recently by EQB, it is clear that the extent of environmental effects which could result from the construction to be allowed by the variance should be a very important factor in a decision; after all, the purpose of the entire program is protection against avoidable environmental effects. Before a variance is granted, there should be a reasonable assurance that significant environmental effects will not result. This is addressed in the proposed amendment by the requirement that the construction "will not have a serious adverse effect on the environment."

The extent to which the granting of a variance would subvert the purposes of environmental review should also be considered in the granting of a variance. In the two cases dealt with by the EQB, the potential environmental effects of the construction requested were not major issues being addressed by the EIS, and therefore whether or not the variance was granted made little difference to the EIS process. On the other hand, a variance could be requested for construction which would make the EIS a meaningless exercise by precluding a reasoned consideration of alternatives and mitigation measures. The proposed amendment seeks to distinguish between these two cases through the provisions that the construction be "separable from the remainder of the project" and that it would "not have the effect of eliminating from consideration any feasible and prudent alternatives or mitigation measures likely to be presented in an EIS." Variances would be evaluated with respect to this concept in two phases. First, the construction requested would need to be separable from the rest of the project; if the construction were not separable, the variance would represent a commitment to construction of the entire project without benefit of the information from the environmental review process. Second, only if the separable construction does not foreclose consideration of alternatives and mitigation measures for significant issues will a variance be allowed. This second test is necessary because the separable part of the project for which the variance is sought could be the very part with the significant environmental effects. The two part criteria would assure that any construction allowed by a variance would not impair the use of the EIS process as a tool for rational decision-making with respect to significant environmental issues.

The amendment refers to feasible and prudent alternatives and mitigation measures "likely to be presented in an EIS," as opposed to other wording referring more definitely to the content of an EIS. This is because theoretically a variance could be requested on a

project for which an EIS is not mandatory and has not been ordered, and because a variance could be requested early in EIS preparation, before the EIS scope has been set. In such a case, the EQB would consider alternatives and mitigation measures likely to be included in an EIS, based information available at the time.

The proposed amendment would modify the requirement that "the hardship is not caused by the proposer's own action or inaction" by adding the qualifier that if the hardship resulted from the proposer's inaction, the need for taking action to prevent the hardship must have been "reasonably foreseeable." Experience with two variance applications suggests that in one way or another almost all hardships could have been avoided if the proposer had taken certain actions. The current rule fails to distinguish between cases where the proposer could have foreseen the need to act but failed to do so, and those where the proposer could not have been reasonably expected to have foreseen the need to take action. The proposed amendment would allow the EQB to distinguish between these two cases, and would disallow a variance where the proposer brought the hardship upon himself by failure to take action when the need for action was "reasonably foreseeable".

4410.3600, subp. 1. Alternative review approval criteria.

Proposed amendment:

A. [Unchanged.]

B. the aspects of the process that are intended to substitute for an EIS process addresses substantially the same issues as an EIS and uses procedures similar to those used in preparing as EIS but in a more timely or more efficient manner;

C. alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process;

D. [Unchanged.]

E. a description of the proposed project and analysis of potential impacts, alternatives (in those aspects of the process intended to substitute for an EIS process), and mitigating measures are provided to other affected or interested governmental units and the general public;

F to H. [Unchanged.]

DISCUSSION:

These proposed amendments are intended to clarify that an approvable alternative review process need treat projects with the depth of an EIS only where the project is subject to an EIS under the normal environmental review process. All examples of possible alternative review processes of which the EQB staff is aware include the two-tiered type of approach similar to the EAW/EIS system, in which there is some type of case-by-case decision process to decide if projects which do not fit mandatory EIS categories need an EIS.

Until such projects have been determined to require preparation of an EIS, there is no basis for requiring that their review use procedures like those of an EIS or that alternatives be analyzed. The existing language suggests that these features should be part of the alternative process' screening procedures. Since these features are not required in an EAW process, it is unreasonable to require them for the EAW-substitute aspects of an alternative review process. The proposed amendments would rectify this situation.

4410.4300, subp. 1. Mandatory EAW threshold test.

Proposed amendment:

Subpart 1. Threshold test. An EAW must be prepared for projects that meet or exceed the threshold of any of subparts 2 to 31, unless the project meets or exceeds any thresholds of part 4410.4400, in which case an EIS must be prepared.

DISCUSSION:

The proposed amendment is intended to alert officials of RGUs, project proposers, and other persons to the fact that some projects meeting or exceeding the thresholds of mandatory EAW categories also meet or exceed thresholds of mandatory EIS categories, and that therefore it is an EIS not merely an EAW which must be prepared. Although persons with some familiarity with the program are unlikely to make this sort of error, newcomers to the process are not always aware of the need to check mandatory EIS as well as mandatory EAW categories. The amendment would reduce the chances that the need for an EIS would be overlooked.

4410.4300, subp. 14. Industrial, commercial, and institutional projects.

Proposed amendment:

Subp. 14. Industrial, commercial, and institutional facilities. Items A and B designate the RGU for the type of project listed, except as provided in items C and D:

A. [Unchanged.]

B. [Unchanged.]

C. This subpart applies to any industrial, commercial, or institutional project which includes multiple components, if there are mandatory categories specified in subparts 2 to 13, 16, 17, 20, 21, 23, 25, or 29, or part 4410.4400, subparts 2 to 10, 12, 13, 15, or 17 for two or more of the components, regardless of whether the project in question meets or exceeds any threshold specified in those subparts. In those cases, the entire project must be compared to the thresholds specified in items A and B to determine the need for an EAW. If the project meets or exceeds the thresholds specified in any other subpart as well as that of item A or B, the RGU must be determined as provided in part 4410.0500, subpart 1.

D. This subpart does not apply to projects for which there is a single mandatory category specified in subparts 2 to 13, 16, 17, 20, 21, 23, 25, or 29, or part 4410.4400, subparts 2 to 10, 12, 13, 15, or 17, regardless of whether the project in question meets or exceeds any threshold specified in those subparts. In those cases, the need for an EAW shall be determined by comparison of the project to the threshold specified in the applicable subpart, and the RGU must be the governmental unit assigned by that subpart.

DISCUSSION:

This proposed amendment would make explicit in the rules how to interpret the general mandatory categories for industrial, commercial, and institutional projects. This amendment is needed to avoid confusion about how this category should applied in two types of situations: (1) where the project consists of several components, some of which may be of types for which mandatory EAW categories have been established; and (2) where the project is of an industrial, commercial, or institutional nature, but of a single specific type for which there is a mandatory EAW category. An example of the former situation is a horse racing track, which includes elements of a retail commercial facility, a parking facility, a feedlot, and perhaps highway improvements. All of the specific industrial and commercial facilities for which specific mandatory EAW categories have been established--the subparts are listed in the proposed amendments--represent examples of the latter situation, e.g., power plants, storage facilities, marinas, feedlots, etc. The addition of items C and D is intended to make explicit the proper application of the general industrial, commercial, institutional category in both types of situation.

The amendments would make explicit the interpretation which EQB staff has used over the history of the program, i.e., that the general industrial, commercial, and institutional category is meant to apply to industrial, commercial, and institutional projects for which no other specific category has been established and to projects which include more than one type of facility. When there is a specific category or categories for a type of project, the decision on whether or not a project requires review should be based on the thresholds established in the specific category or categories because those thresholds were set to take into account the unique features and potential effects of that class of project. The thresholds in the specific categories are better indicators of the potential for significant environmental effects than are the thresholds in the general industrial, commercial, and institutional categories, which rely on square footage as an measure of potential for significant environmental effects regardless of the nature of the project. The language of proposed item D would make this explicit.

It should be noted that the supercession of the general by specific categories would include the situation where a project exceeds the square footage threshold of the general EAW or EIS category but fails to meet or exceed the thresholds of its appropriate specific category. E.g., if a project exceeded the general threshold for an EIS but was less than the EAW threshold for its specific category, no environmental review would be mandatory.

Proposed item C would make explicit the applicability of the general industrial, commercial, and institutional category to mixed projects, and the need to compare the total project to the thresholds. This item is needed to make it clear to RGUs that the total project must be considered in determining the need for environmental review, and that if a mixed project in total exceeds the thresholds specified in A or B of this subpart, review is necessary even if none of the components exceeds the threshold of any other mandatory categories. This approach is reasonable because the cumulative environmental effects of mixed projects are greater than the effects of any single component. Application of the general industrial, commercial, and institutional category to the project as a whole provides a way to assess the overall need for environmental review.

4410.4300, subp 15, item B. Air pollution, parking spaces EAW category.

Proposed amendment:

B. For construction of a new parking facility for 1,000 or more vehicles, the PCA shall be the RGU, except that this category does not apply to any parking facility which is part of a project reviewed pursuant to part 4410.4300, subp. 14 or 19 or part 4410.4400, subp. 11 or 14.

DISCUSSION:

This proposed amendment is intended to eliminate one of the two most frequently occurring "dual RGU situations." In this case, the MPCA is named as RGU by the air pollution, parking space category and a local unit of government is named as RGU by either the industrial, commercial, and institutional category or the residential category. Frequently, in these situations the local unit initiates the EAW without realizing that it is the RGU only if the MPCA agrees that it should be. (Pursuant to the RGU selection provisions of the rules, in these situations a RGU is selected by consent of all prospective RGUs, or by action of the EQB Chair.) Although the MPCA is normally willing to let the local unit serve as RGU, MPCA must review the proposed EAW to see if the content is satisfactory. This sometimes causes confusion and can lead to delays in the EAW comment period.

The proposed amendment would eliminate the dual RGU situation caused by the air pollution, parking space category. Any project involving parking for 1,000 or more vehicles which meets or exceeds the thresholds for review in the residential or industrial, commercial, and institutional categories would be exempted from the air

pollution, parking space category. Therefore, MPCA would no longer be named as a prospective RGU, and there would be no need for prior negotiation between the local unit and MPCA to determine which will serve as RGU. This change will result in a more efficient and less confusing way of determining which unit is RGU for these projects and will therefore eliminate a source of confusion and delays.

Air quality concerns would continue to be covered in the EAW process. The amendment would affect the stage of review at which the MPCA could review the relevant information, but it would not alter the ability of MPCA to perform its review. Moreover, it should be noted that MPCA can require an air quality permit for any parking facility over 1,000 spaces so that if the EAW process should fail to adequate handle an air quality issue to the satisfaction of MPCA, the issue can be resolved in the permitting process.

4410.4300, subp. 18. Sewage systems mandatory category.

Proposed amendment:

Subp. 18. Sewage systems. Items A and B designate the RGU for the type of project listed:

A. For ~~construction of a new municipal or domestic wastewater treatment facility or sewer system with a capacity of 30,000 gallons per day or more, the PCA shall be the RGU~~ expansion, modification, or replacement of a municipal or domestic wastewater sewer system resulting in an increase in hydraulic capacity of any part of that system by:

(1) 500,000 gallons per day or more in a first or second class city and in any city served by the Metropolitan Waste Control Commission system or the Western Lake Superior Sanitary Sewer District system;

(2) 100,000 gallons per day or more in a third class city not served by the Metropolitan Waste Control Commission system or the Western Lake Superior Sanitary Sewer District system;

(3) 50,000 gallons per day or more in a fourth class city not served by the Metropolitan Waste Control Commission system or the Western Lake Superior Sanitary Sewer District system; or

(4) 50,000 gallons per day or more in an unincorporated sewered area, the PCA shall be the RGU.

B. For expansion or reconstruction of an existing municipal or domestic wastewater treatment facility ~~or sewer system by~~ which results in an increase ~~in capacity~~ of 50% or more ~~over existing capacity or by 50,000~~ of its average wet weather design flow capacity, or construction of a new municipal or domestic wastewater treatment facility with an average wet weather design flow capacity of 30,000 gallons per day or more, the PCA shall be the RGU.

DISCUSSION:

This proposed amendment is intended to resolve two problems with the existing rules. The first is a "dual RGU" problem involving projects fitting both the mandatory EAW category for sewer system expansions (assigned to MPCA) and that for residential or industrial, commercial, and institutional facilities (assigned to a local unit). The problem here is analogous to that discussed previously for subpart 15. The second problem is that three years of experience shows that the thresholds for sewer system and wastewater treatment expansions or improvements were set too low in 1982, and therefore that sewer and wastewater projects too small to warrant mandatory EAWs are now subject to mandatory EAWs. By raising the thresholds to solve the second problem, most of the dual RGU situations will be automatically eliminated.

Prior to the 1982 rule revision, there was no EAW category related to sewer or wastewater projects, and therefore the threshold was set without benefit of prior experience. As a result of this change, the percentage of all EAWs which are for sewage projects went from essentially zero to 20%, making sewage projects the second-most frequently reviewed type of project (residential is first). This drastic increase was not expected nor intended. Many of the projects necessitating review are rather minor sewer extensions or are improvements to municipal wastewater facilities mandated by the federal Clean Water Act. Moreover, many of the wastewater facilities are reviewed through the federal environmental review process in order to receive federal grants. All of the projects are reviewed and permitted by MPCA.

The specific threshold changes are based on the recommendations of the MPCA staff, the staff which is responsible for environmental review of sewage projects as well as the review and permitting of sewers and wastewater treatment facilities. For sewer system expansions, the thresholds are tied to the class of the city and to whether the sewer is tributary to the large systems operated by the sewage authorities of the Twin Cities area or the Duluth area. This differentiation is reasonable because generally speaking, a given sewer extension's significance would be dependent on the size of the system of which it would become a part. The thresholds represent the best judgement of the MPCA staff, based on experience with dozens of sewer extension EAWs over the past three years, as to the cut-off points for the potential for significant environmental effects from such projects in cities of the various sizes.

For wastewater treatment facilities, the thresholds are not altered for new facilities. However, for expansions and reconstructions the threshold is changed by deletion of one of the two existing thresholds, namely that the work will increase capacity by 50,000 or more gallons per day, measured as average wet weather design flow. The threshold of whether capacity will be increased by 50% or more over previous capacity is retained. This change will automatically take into account the size of the expansion relative to the size of the former facility.

Wastewater treatment facility capacities are proposed to be measured in terms of "average wet weather design flow." The current rule uses the very general term "capacity." Because capacity can be measured in several different ways, the term capacity is ambiguous and can lead to confusion about whether the threshold is exceeded. The proposed amendment would clarify the particular measure of capacity to be used in comparing the project to the thresholds.

4410.4300, subp. 19. Residential development. See discussion of 4410.0200, subp. 5.

4410.4400, subp. 11. Industrial, commercial, and institutional projects.

Proposed amendment:

Subp. 11. Industrial, commercial, and institutional facilities. Items A and B designate the RGU for the type of project listed, except as provided in items C and D:

A. [Unchanged.]

B. [Unchanged.]

C. This subpart applies to any industrial, commercial, or institutional project which includes multiple components, if there are mandatory categories specified in subparts 2 to 10, 12, 13, 15, or 17, or part 4410.4300, subparts 2 to 13, 16, 17, 20, 21, 23, 25, or 29 for two or more of the components, regardless of whether the project in question meets or exceeds any threshold specified in those subparts. In those cases, the entire project must be compared to the thresholds specified in items A and B to determine the need for an EIS. If the project meets or exceeds the thresholds specified in any other subparts as well as those in item A or B, the RGU must be determined as provided in part 4410.0500, subpart 1.

D. This subpart does not apply to projects for which there is a single mandatory category specified in subparts 2 to 10, 12, 13, 15, or 17, or part 4410.4300, subparts 2 to 13, 16, 17, 20, 21, 23, 25, or 29, regardless of whether the project in question meets or exceeds any threshold specified in those subparts. In those cases, the need for an EIS or an EAW must be determined by comparison of the project to the threshold specified in the applicable subpart, and the RGU must be the governmental unit assigned by that subpart.

DISCUSSION:

This amendment is proposed for the same reasons as the amendment to pt. 4410.4300, subp. 14.

4410.4400, subp. 14. Residential Development. See discussion of 4410.0200, subp. 5.

4410.4600, Subp. 1. Scope of Exemption.

Proposed amendment:

Subpart 1. Scope of Exemption. Projects within subparts 2 to 26 are exempt from parts 4410.0200 to 4410.7800, unless they have characteristics which meet or exceed any of the thresholds specified in parts 4410.4300 or 4410.4400.

DISCUSSION:

The purpose of this proposed amendment is to make explicit the fact that a mandatory category provision supercedes an exemption provision in situations where a project has aspects which fit the descriptions of both. This amendment is necessary to clarify the proper application of the rules to such situations in order to avoid confusion and errors by RGUs.

4410.7500 Environmental Report at Certificate of Need Stage.

Proposed amendment:

Subp. 4. Alternative Review. The PUC may request EQB approval of an alternative form of environmental review on an HVTL subject to parts 4410.7400 to 4410.7800. The EQB shall approve the governmental process as an alternative form of environmental review if the PUC demonstrates the process meets the following conditions:

A. the process must satisfy the content requirements of part 4410.7500. subp. 3 but in a more timely or more efficient manner;

B. the process must provide that the information required to satisfy the content requirements of part 4410.7500, subp. 3 is prepared for and included in the record of the Certificate of Need hearing conducted on the HVTL under Minnesota Statutes 216B.243; and

C. the process must provide that the information required to satisfy the content requirements of part 4410.7500, subp. 3 is reviewed in the manner provided in part 4410.7100, subps. 5 to 12.

Subp. 5. Exemption. If the EQB accepts the PUC's process as an adequate alternative environmental review procedure, the PUC shall be exempt from the requirement under part 4410.7500, subps. 1 to 3, for preparing an environmental report on an HVTL. On approval of the alternative environmental review procedure, the EQB shall provide for periodic review of the procedure to ensure continuing complicance with the requirements and intent of the environmental report requirement. The EQB shall withdraw its approval if review indicates that the procedure no longer fulfills the intent and requirements of the Minnesota Environmental Policy Act and parts 4410.7400 to 4410.7800. A project in the process of undergoing review under an approved alternative environmental review process shall not be affected by the EQB's withdrawal of approval.

DISCUSSION:

This amendment would add two subparts to this rule establishing a new alternative review process which could be applied to the environmental report requirements for high voltage transmission lines (HVTL's) at the certificate of need stage. The intent of the process set out in these subparts is to eliminate duplication by reducing repeated consideration of similar issues in the environmental report and the certificate of need application at the need certification stage for HVTL facilities. As this proposed amendment eliminates unnecessary duplication of environmental information, it will provide for more efficient use of staff time in the certificate of need process, while allowing the PUC to make the certificate of need decision within the six month time frame required by statute. The proposed amendmend also retains the integrity of the environmental report requirements in the PUC alternative review process.

The proposed subpart 4 would allow the PUC to request EQB approval of an alternative form of environmental review for an HVTL. However, before the EQB approves of an alternative form of environmental review the PUC must demonstrate that their process meets certain conditions. These conditions include: satisfying the content requirements of the environmental report identified in 4410.7500 Subp. 3., preparation of and inclusion of the information required in Subp. 3., in the record of the certificate of need hearing, and that the process provide for review and circulation of the information required in Subp.3, in the manner provided in part 4410.7100, subps. 5 to 12.

The proposed subpart 5 would exempt the PUC from the prescribed environmental report requirements on HVTL's during the certificate of need stage, if the EQB determines that the PUC's review process is adequate. This amendment also provides for periodic review by the EQB of the alternative review procedure to insure compliance with the requirements and intent of the environmental report. The EQB may also withdraw its support if the procedure no longer fulfills the intent and requirements of the Minnesota Environmental Policy Act and the environmental report requirements at the certificate of need stage.

IV. IMPACT OF AMENDMENTS ON SMALL BUSINESSES

Minnesota Statute, section 14.115 requires special consideration of the impacts of proposed rules on small businesses, unless the rule is exempt under Minnesota Statutes, section 14.115, subd. 7. These proposed amendments, with the single exemption of the variance criteria, do not directly affect small businesses because they relate to review requirements imposed on units of government. The indirect effects of the amendments on small businesses are anticipated to be positive or negligible, because most changes are merely clarifications of the existing rules, and the one change in the thresholds for doing EAWs and EISs covers only municipal sewage treatment systems and raises the thresholds so that fewer EAWs will

result.

The proposed amendment to the variance criteria theoretically affects small businesses directly. However, it is unlikely that any small business will actually be affected by amendments to these criteria because it is very unlikely that any small business will request a variance; to date only three variances have been requested, all by large businesses. The proposed change in the variance criteria are intended to clarify and improve the explicit criteria for granting a variance. As such, the amendments should have a positive impact toward all businesses by improving the EQB's capacity to handle variance requests. It is impossible to quantify the effects of the changes.

The nature of the variance criteria automatically provides a flexibility in application which allows consideration of the needs of small businesses. In particular, the language requires consideration of whether economic hardship necessitating the variance request is "excessive" and "unusual," where "unusual" in part relates to the peculiar characteristics of the project's proposer. These terms allow the EQB to consider the hardship in the context of the proposer's unique economic situation. In consequence, it is unnecessary to provide separate provisions for variances for small businesses.

V. FISCAL IMPACTS

The proposed rule amendments will result in a decrease in the overall costs of environmental review, because of the increases in the thresholds for mandatory EAWs for sewage systems. The other amendments should not alter the costs of review because they are clarifications of the responsibility for review, not changes in the need for review.

The amendments will have a positive impact on the costs to businesses for environmental review by eliminating sources of confusion and delay.