EQB

April 5, 1995

Maryanne Hruby
Executive Director
Legislative Commission to Review Administrative Rules
55 State Office Building
100 Constitution Avenue
St. Paul, MN 55155

RE: Transmittal of a Statement of Need and Reasonableness

Dear Ms. Hruby:

Enclosed is a copy of the Statement of Need and Reasonableness and a copy of the proposed rule amendments relating to revisions to the environmental review program, under which Environmental Impact Statements and Environmental Assessment Worksheets are prepared. These documents are being sent to the LCRAR in compliance with Minnesota Statutes, section 14.23.

The Minnesota Environmental Policy Act, chapter 116D, authorizes the Environmental Quality Board to adopt rules governing the operation of this program. The proposed amendments would make various revisions in the existing process to improve its effectiveness and efficiency.

If there should be any questions regarding this rulemaking or the transmitted documents, please contact Gregg Downing, environmental review coordinator, at 296-8253.

Sincerely,

Michael Sullivan
Executive Director

TDD 612 297-5353 OR 1-800-627-3529

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EQB

STATE OF MINNESOTA
ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed Amendments to the Rules Governing the Environmental Review Program, Minn. Rules, parts 4410.0200 to 4410.7800

STATEMENT OF NEED AND REASONABLENESS

Introduction

This document explains the need for and reasonableness of proposed amendments to the EQB rules governing the Minnesota environmental review program. The amendments are proposed by the EQB to improve the effectiveness and efficiency of the environmental review process.

The EQB is directed by Minn. Rules, part 4410.0400 to monitor the effectiveness of the environmental review process and to take appropriate action to improve the process. As part of its ongoing administrative and assistance functions, the EQB staff keeps track of problem areas in the rules, such as provisions that are ambiguous, misleading, difficult to interpret or apply, not achieving their intended purpose, or otherwise in need of revision. This information is the source of many of the proposed changes.

The source of the most significant revisions being proposed, however, is a several year-long analysis of problems with the process authorized by the Board, conducted by the EQB staff and the staffs of the member agencies of the EQB and supervised by a subcommittee of Board members. Many hours of committee discussion went into the development of the revisions being proposed.

Public input on ideas for revision was obtained at several points throughout the process, including the following:

(1) Notice of solicitation of outside opinion was published in the State Register on January 7, 1991; 11 persons submitted comments in response, which were considered in the development of the report listed in item #2 below;

(2) In July 1991 a written report was presented to the EQB by the staff committee recommending certain changes in the program. This report was accepted by the Board and distributed in August 1991 to persons known to be interested in the process;

(3) In November 1991 a "focus group" meeting of persons of diverse backgrounds with experience in the environmental review process was held by the EQB subcommittee to review the July report;

(4) In April 1992 the Minnesota Environmental Initiative, a non-profit organization dedicated to helping solve environmental problems through constructive dialogue, held a conference on revision of the environmental review process; the conference findings were reviewed by the subcommittee;

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(5) In March 1993 the subcommittee issued a report "Concepts for Revision of the Environmental Review Program" requesting comments, and held two public informational meetings (in April and May 1993); 19 written comments and 5 oral presentations were received; the subcommittee reviewed these comments as part of its process; and

(6) The Minnesota Center for Environmental Advocacy met with the subcommittee several times in the fall of 1993 to discuss the results of a program audit study that it had performed on the environmental review program.

Statement of the EQB's Statutory Authority

The EQB is given authority under Minn. Statutes, sections 116D.04 and 116D.045 to adopt rules to govern the environmental review program. Under these statutes, the Board has the authority to adopt the proposed amendments.

Statement of Need and Reasonableness

Under the Minnesota Administrative Procedure Act, in order to amend rules an agency must prepare a Statement of Need and Reasonableness that summarizes the evidence and arguments that support the need for and reasonableness of the proposed amendments.

This document has been prepared by the EQB staff based on the committee discussions that went into the development of the proposed revisions. For some of the proposed amendments, especially mandatory category changes, the information and argument presented have been developed by the staff of the EQB member agency with the greatest expertise with respect to the proposal.

The following sections of the document summarize the rationale and evidence in support of each proposed amendment to the environmental review rules, in the order of appearance of the parts and subparts in the rule. **The text of the proposed amendments is printed as a separate document.**

Part 4410.0200 DEFINITIONS AND ABBREVIATIONS

Subparts 19, 20, and 21. These three definitions are proposed to be deleted due to the proposed revisions in parts 4410.6000 to 441.6500, concerning assessing EIS costs to the proposer. When these three definitions were adopted, the system for assessing EIS costs involved a cap on the assessment that was related to the cost of the project. The three terms were used to distinguish the actual and estimated costs of the EIS from the portion of the cost of the project. The three terms were used to distinguish the actual and estimated costs of the EIS from the portion of the costs that could legally be assessed to the proposer (this was the "EIS assessed cost"). Currently (due to statutory changes in 1988), the proposer is to be assessed for the entire EIS cost, and therefore it is not necessary any longer to have these terms defined.

Subp. 30. The amendment would simply correct the statutory reference to the proper current statute number.

Subpart 31. This term is no longer used in the rules due to changes elsewhere and can therefore be deleted from the definitions.

Subpart 51. Item F is proposed to be added in order to explicitly acknowledge that pollution prevention actions are a form of mitigation. Pollution prevention planning has become a specific activity of the MPCA since the last time the rules were revised (1988).

Subparts 53, 69, 70, and 82. The changes in these subparts would merely correct the references to the proper current statutory or rule numbers. In subp. 70 the phrase "public waters" would be added because the meaning of "protected wetland" under these rules is the meaning of "public waters wetland" in the current law (Minn. Stat., sec. 103G.005) whereas it was the meaning of the term "wetland" in past statutes.

Subp. 56a. This new definition is added because of the proposed new mandatory category for incineration of PCB-containing wastes at part 4410.4400. The definition adopted is the one used by the PCA in its PCB regulations.

Subp. 83. This term is no longer used in the rules due to changes elsewhere and can therefore be deleted from the definitions.

Subp. 92c. The amendment would simply correct the statutory reference to the proper current statute number.

Part 4410.0400, subpart 4. The reason for the proposed change to the timeframe for legal appeals of RGU decisions is that currently there is a discrepancy between the timeframes for appeal specified in the rules and the statutes. Both the rules and statutes allow 30 days for appeal, but the rules count the time from the date of EQB Monitor notice of the decision while the statutes count the time from the date of the decision. The Attorney General's office has advised the EQB staff that if this difference should become an issue in a court challenge, the court would likely rule that the statutory appeal period prevails. If so, then the timeframe in the rules is incorrect and misleading, and could result in an aggrieved party missing its chance to file a legitimate challenge to a decision. Since being advised by the Attorney General's office of this problem, the EQB staff has been advising inquiring parties that they had best file any appeals within 30 days of the decision, not the EQB Monitor notice.

This rule amendment would end the discrepancy by altering the rule timeframe to be the same as that in the statutes. As a practical matter, most parties likely to be sufficiently aggrieved by a decision to file a legal challenge will have representatives present when decisions are made or will be in frequent contact with the RGU about the decision. The rules prescribe defined timeframes within which decisions must be made, allowing interested parties to anticipate the approximate date of a decision in advance. In addition, the RGU is required to give written notice of its decisions to petitioners and commenters within five working days.

Therefore, while it is common to begin appeal periods with a noticed event, there are sufficient mechanisms in the environmental review process to assure that potentially aggrieved parties can be aware of RGU decisions when they are made to allow appeal to run from the date of the decision itself. Running the appeal period from the date of an EQB Monitor notice would add unnecessary delay to the process without significantly improving the public's opportunity to challenge RGU decisions.

Part 4410.0500, subpart 3, item D. The reason for the addition of this new item is to refine the RGU selection criteria for petitions. Under the existing RGU selection criteria, whether or not the selected RGU has already reviewed and acted upon permit applications is not considered. In several of these instances, the RGU selected has objected to being assigned as RGU on the grounds that having already issued its permits, it cannot be a neutral judge of whether an EAW should be done or not. The EQB finds that there is considerable merit to this argument, since under these circumstances, the RGU cannot order an EAW without casting some doubt on whether its decision to grant the permit was sound. Furthermore, having already acted on its permits, the RGU would itself have no use for the information disclosed through an EAW, and would do the EAW solely to inform other units of government.

Under these circumstances, it would be more appropriate to assign the petition to the unit with the next-most authority over the project. This unit not only will not have compromised its ability to be neutral about the need for an EAW by having already acted on a permit, but will also be able to use the information disclosed in the EAW in its permitting process.

Under this new language, if subpart 5 is applicable in determining which unit of government has the next-most authority over the project, no completed data portion of the EAW is required. It would be an inappropriate burden on the project proposer to require that the data portions of an EAW be completed before an RGU has determined that an EAW is required for the project.

Part 4410.1200. This proposed addition to the EAW content would add to the required EAW content a description of the purpose of the project and, if the project is a public project, identification of the persons who would benefit from any positive impacts of the project. This type of information would help commenters suggest appropriate mitigation in some cases. Without knowing what goals a project is designed to achieve, it is difficult to assess whether changes in process, design or scale which are less environmentally harmful would also meet the project goals.

Part 4410.1300. The existing rules provide that the Chair may approve use of an alternative form to the standard EAW form. Historically, the only alternative forms that have been proposed are the forms used for federal NEPA Environmental Assessments. The purpose and content of federal EA documents are very similar to those of state EAWs, which is not surprising since the state process is modeled on the NEPA process. NEPA EAs must be completed

in compliance with the specific regulations of the federal agency funding or permitting the action in question, which regulations have been reviewed by the Council on Environmental Quality for compliance with NEPA. A properly completed NEPA EA would always be approvable as an alternative EAW (and historically have always been approved); therefore, requiring case-by-case review of EA formats as substitutes for EAWs is an unnecessary and redundant exercise.

Part 4410.1400. Two changes are proposed to the part on EAW preparation. First, the time schedule for completing an EAW that was ordered as a result of a petition would be changed to be the same as that for EAWs initiated in other ways. The current rules specify separate and different time schedules for EAWs depending on how they are initiated. This has resulted in continual confusion for RGUs, and seems to serve no useful purpose.

The second change proposed is to delineate more clearly how it is determined whether an EAW is complete and ready for public review. At present, the rule refers to the "completed" data portions of an EAW but does not specify what this is nor who determines that it is "complete." The EQB staff has historically interpreted the language to mean complete as determined by the RGU. The proposed change would specify in the rule that the RGU determines when the EAW is complete, and would also provide a timeframe within which the RGU must determine whether the proposer's data portion submittal is complete. Ten working days is considered to be the shortest realistic time period for this review.

Part 4410.1700, subpart 7, item D. This proposed revision is necessary to clarify the meaning of the existing criterion in item D. EQB frequently is asked whether the other environmental studies in question include only studies already completed or include studies yet to be undertaken. The SONAR from the 1982 rule amendment process (page 63) is clear that it was existing studies that were contemplated in this rule. The insertion of the word "completed" would clarify the rule language on this point.

Part 4410.2100, subpart 1. This revision is complementary to that proposed at part 4410.2300, item H, and is proposed for the same reasons. Please refer to that section for the rationale for this change.

Part 4410.2100, subpart 11. In 1988 the EQB amended the rules to add the language of subpart 11 as an explicit procedure for the termination of an EIS if the project was downsized significantly or otherwise modified to the extent that the need for the EIS went away. This procedure that been used approximately three times since 1988, and its use in practice has revealed flaws that were not anticipated when the language was drafted. The current revision is intended to correct those flaws.

The first flaw to be corrected is that the current process fails to distinguish between those modified projects that still exceed a mandatory EAW threshold from those that do not. The current termination process fails to require preparation of an EAW for

modified projects that exceed mandatory EAW thresholds. This is not always a problem because in some cases there may already be an EAW for the original (larger) project which also describes the impacts from the reduced project reasonably well. However, in other cases it may not be possible to anticipate the impacts of the revised project from the original EAW, in which cases unless a new EAW is prepared it is very difficult for interested parties to meaningfully comment on whether the EIS should be terminated or not.

One way in which this can happen was well-illustrated by one of the three actual cases of EiS termination already experienced. In this case, the original EAW had been prepared solely for purposes of scoping the EIS and, in accord with standard practice, had in response to many of the form's questions simply indicated that the topic would be studied in detail in the EIS without providing much factual information about the topic itself. Therefore, when this EIS was proposed to be terminated there was little factual information available upon which to decide if termination was justified. (In this case, the problem was solved by preparation of a new EAW.)

The revision proposed to deal with this flaw is to specifically require (at item A) preparation of an EAW to accompany the termination notice if the modified project exceeds any mandatory EAW thresholds. If the modified project does not exceed any mandatory threshold, no EAW would be prepared unless required at the discretion of the RGU or in response to a new citizen petition.

The second flaw in the current process is addressed in the second paragraph of the subpart. Under the current process, the RGU issues a notice of impending EIS termination, then, after reviewing any comments received, makes the final termination decision. However, in at least one past case, the RGU assumed that the notice was the decision. In view of this experience, the EQB staff believes that it would be better to revise the process so that no post-comment period action is needed by the RGU unless objections are raised in the comment period to termination.

Part 4410.2100, subpart 12. This amendment is proposed to correct a discrepancy between the EIS content and EIS cost provisions of the rules (parts 4410.6000 to 4410.6500) that stems from the fact that those respective sections of the rules date from different times. The cost provisions date from 1977. When the EIS process was overhauled in 1982 and scoping was added, no provision was added to link the EQB's authority to alter a cost agreement (between the RGU and the proposer) with the scope of the EIS itself. This amendment would provide that linkage and allow the EQB to adjust the scope of the EIS to the extent necessary to conform to its revision of the EIS cost.

Part 4410.2300, item G. The purpose of this proposed amendment is to strengthen the directive in the rules about the exploration of alternatives to the project as proposed in the EIS. Although according to statute, examination of appropriate alternatives is a

key feature of an EIS, and is essential to state agency compliance with MEPA, many EISs fail to examine any alternatives to the project as proposed except the "no-build" alternative which is explicitly mandated to be included in all EISs.

This amendment would mandate that all EISs address all types of potential alternatives. If the RGU believed that discussion of a certain type of alternative was not appropriate or reasonable for the project in question, it would address that type of alternative by simply providing a brief explanation of its rationale for excluding an alternative of that type. This explanation may be developed in the EIS scoping phase and incorporated into the scoping decision, but it would also be incorporated into the EIS text.

The proposed rule would establish a two-part test for whether an alternative needs to be included in the EIS analysis: (1) is it potentially superior to the proposal from an environmental standpoint and (2) would it meet the underlying need for or purpose of the project? These two criteria have been implicit in the program for some time but do not appear in the rules themselves. The EQB staff's guidance booklet, Guide to the Rules (June 1989), discusses the two criteria on page 22. In order to better assure that the RGU examines all reasonable alternatives, it is proposed to add the criteria to the rules themselves.

The list of types of alternatives that must be addressed proposed in the amendment was developed by examination of similar lists in the environmental review rules of the federal government and a number of other states that already use such lists (e.g., New York).

A second clarification about treatment of alternatives in an EIS is also included in this item. Currently, the rules are ambiguous about the proper treatment of alternatives that seemed "reasonable" at the time of scoping but later, after preliminary analysis, turn out not to be reasonable for some valid reason. The proposed language here would clarify that such alternatives should be discussed in the EIS only to the extent necessary to explain how and why it was determined that further, complete analysis was not appropriate.

Part 4410.2300, item H. This revision is complementary to that for part 4410.2100, subpart 1. The issue behind these proposed changes is the question of to what extent an EIS is to deal with all issues of an environmental nature versus only those of potential significance. The statute states that an EIS "analyzes its [the proposed project'] significant environmental impacts" (Minn. Stat., sec. 116D.04, subd. 2a) whereas the existing rules state that an EIS shall include a "thorough but succinct discussion of any direct or indirect, adverse or beneficial effect generated" (part 4410.2300, item H) (emphasis added). Although the rules go on to specify that the discussion shall "concentrate on those issues considered to be significant as identified by the scoping process" and that the "data and analysis shall be commensurate with the

importance of the impacts," the existing rules appear to require coverage in an EIS of minor environmental issues which the statutory language appears to exclude entirely. This is an important practical distinction because much effort is expended by most RGUs during EIS scoping on deciding exactly what issues will be included.

The proposed language at item H of part 4410.2300 (along with that at part 4410.2100, subpart 1) is intended to realign the rules more closely with the statutory language. The first language change is to insert the qualifier "significant" in reference to the impacts to be analyzed, as in the statutory language, and at item H to delete the qualifier "any". The second change, at item H, is to delete the sentence "[t]he discussion shall concentrate on those issues considered to be significant as identified by the scoping process," and add clauses indicating that data and analyses should be commensurate with "the relevance of the information to a reasoned choice among alternatives and to consideration of the need for mitigation measures" and that the RGU should weigh the importance of the information against the cost of obtaining it when deciding on the level of detail of data and analysis needed in the EIS. These changes would shift the focus towards the purpose of the information -- better decision making -- and away from merely responding to public controversy.

A third change would occur in the final sentence of item H concerning the treatment in an EIS of differences of opinion. Here, again, the modifier "significant" would replace the more general phrase "the effects the project may have."

Part 4410.2400. This revision is needed to correct a typographical error in the section caption.

Part 4410.2500. This section of the rules concerning the treatment of incomplete or unavailable information is basically a paraphrase of the similar section of the general federal NEPA guidance issued by the Council on Environmental Quality. Since the current rule was adopted in 1982, the CEQ updated and significantly changed its guidance on unavailable and incomplete information. This proposed amendment to the EQB's rules will realign the Minnesota rules with the latest federal guidance.

The single most significant change here is the deletion of the directive that the RGU "weigh the need for the project against the risk and severity of possible adverse impacts were the project to proceed in the face of uncertainty" and to include in this a "worst case analysis." This provision has always been at odds with the nature of the state EIS process because in the Minnesota process, in contrast to the federal process, the EIS does not include a decision about which alternative is best -- that type of decision is left to post-EIS permitting processes. Thus, it has always been out of place in the state EIS process rules to specify a standard for project decision-making, regardless of whether information is known or uncertain. The proposed revised language sticks to providing guidance about presentation of information: what is

known, and the relevance of what is not known to the decisions that must be made.

Part 4410.2800, subpart 4. This proposed change complements those at parts 4410.2100, subpart 1 and 4410.2300, item H regarding clarifying that an EIS need only discuss significant impacts. A change is needed here because the criteria for determining EIS adequacy must parallel the guidance for EIS content.

The phrase to be added at the end of the subpart is needed to amplify the guidance about what level of detail is needed in the analysis of each issue covered in an EIS. The criteria added here indicate that level of detail needed for an issue depends on the significance of the impact and the level of detail of information useful to the decision makers.

Part 4410.3100, subpart 4. This amendment would simply correct an incorrect reference in the existing rules.

Part 4410.3200. It is proposed to delete this entire rule part because it fails to comply with the enabling statute and probably should have never been included as part of the environmental review rules in the first place.

The narrower issue is that the scope of the rule is more limited than the scope of the statute. Subdivision 9 of Minn. Stat., sec. 116D.04 authorizes the EQB to review for conformance with MEPA "any state project or action significantly affecting the environment or for which an EIS is required." The rule restricts the scope of review to "any project wholly or partially conducted by a state agency if an EIS or Generic EIS has been prepared." Projects permitted by state agencies, but not at least partially conducted by state agencies, are covered by the statutes but not the rule. Further, in theory there could be projects "significantly affecting the environment" but for which no EIS is done, and these would also be covered by the statute's but not the rules' scope.

Review by the Board under subdivision 9 is rare: it has only been considered twice in 20 years. When the issue first arose, in 1989, the Attorney General's office advised the EQB staff that if the Board invoked its authority to review the action in question, the procedures to be followed should not be based on part 4410.3200 because of the discrepancy with the statutes.

The preferred method for resolving the statutory vs. rule discrepancies is to delete this entire part and in later rulemaking create a more appropriate rule elsewhere, possibly in chapter 4405.

Part 4410.4000. [this would be a new part; number may be different in adopted rule]. This proposed addition would create an explicit authorization for the use of Tiered EISs. Tiered EISs are already in use, but because their use is not explicit in the current rules, they have to date been labeled as an EIS and Supplemental EISs, or explicitly approved as Alternative Review by EQB action under part

4410.3600. These methods have succeeded in "legalizing" tiered EISs as needed, but it is preferable and clearer in meaning to create a special form of EIS process called a Tiered EIS.

As stated in the proposed language, a tiered EIS process is the most effective way to accomplish environmental review where the decision-making process that the review supports itself proceeds in stages or "tiers." The most common situation in which this occurs is the siting of some type of facility. Often, the most feasible way to site something is to: first, choose "candidate search areas" within which there may be several suitable sites; second, choose the best search area; and third, pick the best site in the chosen search area. Such a process has (at least) two tiers of decisions (e.g., choose the best search area, choose the best site in that search area).

With a tiered EIS process, in each tier of decision-making, the appropriate information to assist in the choice to be made in that tier is prepared. The level of detail and site-specificity of the information increases as you move from one tier to the next, and only issues "ripe" at the particular stage of decision-making are discussed in that particular tiered EIS.

The federal NEPA process has recognized the tiered EIS concept for a number of years, and it is frequently used in the federal process for the siting of facilities which could be located at many different locations. The most notable use of it in Minnesota, although it is officially established as an approved Alternative Review, is the Dual-Tack Airport Siting Process conducted by the Metropolitan Council and the Metropolitan Airports Commission. This siting process actually involves a five-tiered decision-making process, each with the equivalent of a tiered EIS.

It should be noted that the current rules do include a definition of "tiering," at part 4410.0200, subpart 88, although the term is used only in part 4410.3800, Generic EIS, in referring to the incorporation by reference of information from a broader, Generic EIS into a more project-specific EIS.

Part 4410.4300, subpart 1. The change proposed would revise the way in which EAW mandatory category thresholds would be applied to projects, specifically with respect to projects that are expansions, additions to, or extensions of past projects.

The existing rules (and, in fact, all previous editions of these rules back to 1974) do not explicitly state how to treat the existing part of a development or facility when determining if a proposed project which is an expansion, addition, or extension requires an EAW. However, it has always been the interpretation of the EQB that only proposals yet to be approved and built are to be included when applying the thresholds -- i.e., existing development is not to be counted, even if it can be argued that when the existing development was built an EAW or EIS should have been required because the then future stages of the project (the present project) should have been included as part of the project under the

phased actions or connected actions provisions.

It is recognized that because of the policy of not counting anything already approved or built, a potential loophole exists through which review can be circumvented. By segmenting larger projects into smaller pieces and staging them over time without revealing the true size of the whole upfront, proposers can avoid EAW thresholds even though the whole project, if considered together, would exceed the thresholds. The proposed amendment would close this loophole by explicitly establishing a new policy for treating existing stages or components of a project when applying the EAW thresholds.

Under the proposed new policy, existing stages or components would be required to be included as part of the project when comparing the project to the EAW thresholds, unless those stages or components (1) were already reviewed through an EAW or EIS or (2) were begun prior to September 28, 1982. The September 28, 1982 date was chosen as the starting point for including existing stages because that was the date of effectiveness of the 1982 edition of the program rules, following the major revision of the process in 1980 legislation; most of the present mandatory categories date from that time (although some were modified in 1986 or 1988-9).

Part 4410.4300, subp. 14. Industrial, commercial and institutional facilities. Item C is proposed to be deleted because it is obsolete. Working in coordination with the Federal Emergency Management Agency, virtually all flood-prone communities and counties in Minnesota have now been identified and converted from the "emergency" to the "regular" state of flood plain management. With the adoption of the new shoreland rules in 1989, the DNR began an aggressive program of prioritizing cities and counties, providing training and grant money to those given notification. Once notified, the city or county had two years to adopt the new rules into its local zoning ordinances. This process is essentially now complete. One of the elements of the new shoreland rules was a greatly-expanded rivers classification system. This reduced the need for expanding the wild and scenic rivers program.

With the above changes in place, the issue is no longer <u>adoption</u> of new programs, but local administration and enforcement of existing programs. Therefore, the requirements of item C are no longer applicable.

Part 4410.4300, subp. 15. Air pollution. The words "or modification" are proposed to be added to extend the coverage of this mandatory category to modifications of air emission facilities which will increase emissions by the same threshold amount as for new facilities. From an environmental standpoint, it is immaterial whether 100 tons of a pollutant come from a totally new facility or a modification of an existing facility. The omission of modified facilities from this category when the rules were adopted in 1982 was probably an unintentional oversight.

Part 4410.4300, subp. 17. Solid waste. All the changes proposed in this subpart relate to altering the reassignment of the RGU for the various solid waste mandatory categories for projects that occur within the Twin Cities metropolitan area. The MPCA is proposed to assume responsibility for these projects in the metro area. The MPCA is already responsible for these projects if not in the metro area. The change is needed because of statutory changes made in 1994 that eliminated the Metropolitan Council's role in solid waste planning for the metropolitan area. That special role was the reason that the Council was assigned as RGU in the 1982 amendments to the rules. With the elimination of that role by the Council, responsibility for serving as RGU should be transferred back to the MPCA.

Part 4410.4300, subp. 18. Wastewater. The threshold for collection system expansions in item A would be raised for cities of all sizes, including those which discharge to systems operated by Metropolitan Council Wastewater Services (MCWS) or the Western Lake Superior Sanitary District (WLSSD). Presently, EAWs are required for sewer projects with design flows of 500,000 gallons per day within 1st and 2nd class cities or the MCWS or WLSSD systems, 100,000 gpd for 3rd class cities, and 50,000 gpd for 4th class cities and unincorporated areas. Over the most recent three-year period, the MPCA has prepared EAWs for approximately 15 projects per year under the sewage system category, more than half of which were sewer extensions. This level of review is believed to be unjustified because the majority of the sewer extensions are relatively minor expansions of much larger systems, and because the increases in wastewater flow accompanying sewer extensions usually occur gradually over a period of many years.

Furthermore, problems which have been cited as associated with sewer systems, i.e., construction erosion, the degradation or loss of wetlands, seepage from sewer lines, and the potential for secondary development, are addressed by permit programs for runoff from construction sites and the preservation of wetlands, and by the application of minimum standards for sewer construction and maintenance. The potential for impacts from secondary development will also continue to be addressed through state and local requirements for environmental review and permitting.

In item B, a clarification is proposed stating that an EAW is not mandatory for a domestic wastewater treatment expansion unless it increases the design flow capacity of the facility by at least 50% AND it is an increase of at least 50,000 gallons per day. This is consistent with past and present policy of the MPCA that the preparation of EAWs should not be mandatory for projects that involve relatively minor expansions of existing, small treatment facilities.

Regarding new item C, the rules currently provide for mandatory EAW categories for certain types of industrial facilities which may involve the generation of industrial wastewater. Examples are petroleum refineries, fuel conversion facilities, mineral mining and processing, and pulp and paper processing. These and other

industrial project may also require environmental review because of their potential air emissions (under subpart 15). However, because there is currently no EAW category pertaining directly to the generation of industrial wastewater, some major industrial projects may not be subject to mandatory review. Examples would be food processing and the manufacture of wood products other than pulp or paper.

The proposed new category at item C would establish a threshold for the construction of new or expansion of existing industrial process wastewater treatment facilities. Process wastewater is not intended to include noncontact cooling water, storm water runoff, or animal feedlot runoff. The proposed threshold is based on existing PCA nondegradation regulations for new or expanded discharges. Projects of this magnitude are likely to generate significant local impacts. This category would not apply to industries which discharge to publicly owned treatment facilities. Such discharges are subject to the terms and conditions of pre-existing discharge permits and are also regulated by local jurisdictions under existing programs and subject to state and federal oversight.

Part 4410.4300, subp. 19. Residential development. Item B is deleted for the same reasons as for part 4410.4300, subp. 14. While not every community has a shoreland ordinance, those having high resource value waters or which are subject to high development pressure have been identified and brought into the shoreland management program. A similar case applies to flood plain management.

Part 4410.4300, subp. 20. The caption change recognizes the specific types of development intended for inclusion in this category. The added "expansion" language recognizes that, given the high natural resource values generally present where these facilities are located, expansion has the same potential for environmental impacts as original construction.

Part 4410.4300, subp. 21. The caption change is proposed to generalize the category to airports from airport runways.

Item A is proposed to require EAW preparation for the original construction of a paved airport runway. At present, for reasons that are no longer apparent, only certain extensions of a runway (those that would allow use by jet aircraft) and the construction of a 5,000 or more foot long runway require review under the EQB's rules (the latter is a mandatory EIS at 4410.4400, subp. 15). New paved runways less than 5,000 feet do not require review at all, although those longer require a mandatory EIS. This is illogical. The present scheme would allow construction of a new airport with multiple runways and unlimited support facilities without any mandatory review provided no runway exceeded 5,000 feet.

Construction of a paved runway has potential for a variety of environmental effects, including: noise, land use conversions, including loss of habitat and farmland, wetland encroachment,

stormwater runoff, and also may pose local and regional economic and demographic impacts. The potential for impacts would be increased if the runway was associated with a new airport.

The change in item B is to recognize that the Metropolitan Airports Commission (MAC) is the appropriate governmental unit to serve as RGU for projects conducted by the Commission. Under the RGU selection standards of part 4410.0500, the RGU should be the unit with the greatest responsibility for supervising or approving the project as a whole. In the case of MAC projects, this is clearly the Commission. The Commission has served as the RGU for a series of projects in the past, for which special review requirements were established in state statutes. The new item A would also specify MAC as a potential RGU.

Part 4410.4300, subp. 24. Water appropriations and impoundments. In item B the word "additional" is inserted for clarification. Otherwise, smaller additions to impoundments might be interpreted to require a mandatory EAW once the 160-acre threshold had been passed. It is the size of the addition and not the total size of the impoundment that is the crucial factor.

In item C, "class II dam" has been deleted since it is a hazard classification and does not relate directly to environmental impacts. In place of "class II" dams has been substituted "dams with an upstream drainage area of at least 50 square miles." This will include many of the class II dams, but will also include some dams of lower hazard classification. It is believed that the watershed size is a better indicator of potential environmental impacts than is hazard classification.

Part 4410.4300, subp. 25. Marinas. The new language is for clarification, attempting to specify that an EAW is required when marina size reaches or surpasses 20,000 square feet, and in 20,000 square foot increments thereafter. The original language would require an EAW for every expansion after the initial 20,000 square foot size had been reached.

Part 4410.4300, subp. 26. Stream diversion. "Realignment" is added as an activity that will require an EAW. Realignment often means straightening, which has a serious effect on water flows and stream habitat. The 500-foot minimum length was added so that the category would no longer apply to minor stream alterations; this minimum threshold does not apply to trout streams. Experience has shown that stream diversions of less than this length generally have minimal environmental impacts and do not warrant a mandatory EAW requirement.

Part 4410.4300, subp. 27. Wetlands and protected waters. The proposed changes to these categories provide for different thresholds depending on whether the wetland is within a shoreland zone.

Small, non-public waters (non-protected) wetlands adjacent to lakes provide important fish and wildlife habitat in areas where

lakeshore development has not already degraded or eliminated them. They quite often drop through various permitting "safety nets."

Cumulative impacts to numerous small wetlands can also devastate fish and wildlife resources; the current 40% basin impact threshold is too high. The Wetlands Conservation Act, as a policy document, emphasizes the importance of all wetland basins regardless of type, size, or location. Altering the existing thresholds in the manner described brings the EQB criteria more into line with current public polciy.

The deleted provision was part of the old "water bank" program which was superseded by the wetlands conservation act programs, and no longer exists.

Part 4410.4300, subp. 28. The caption is proposed to be changed because after the other revisions proposed, this subpart will apply only to forestry activities.

Item C is proposed to be moved from this subpart and reinserted verbatim at the proposed new subpart 35 that deals with land use conversions.

Item D is proposed to be moved from this subpart and reinserted in a modified form at the new subpart 35 dealing with land use conversions.

Part 4410.4300, subp. 31. Historic places. Three changes are being proposed to this category.

First, "destruction" of a historic property is being clarified to explicitly include being moved to a new location and partial destruction of the physical structure of the place. In practice, the existing category has been interpreted in this way in the past by the Historical Society and the EQB, and it would be beneficial to make this explicit. The logic behind the interpretation is that in some or many cases the historic value of a designated property derives from its association with its locale (e.g., a remaining example of the type of dwelling built by the earliest settlers in a particular place) or from certain features of a building design rather than from the structure as a whole (e.g., certain details of a building facade might be exemplary of a certain architectural style). In these cases, moving the structure or demolishing part of the structure might destroy the historical value of the place without the literal destruction of the property.

Second, the scope of this category is being proposed to be expanded to cover places listed on the State Register of Historic Places as well as the National Register.

Third, it is being proposed that the EAW requirement not be applied to historic places that undergo historic review under two federal programs. The first is review under the National Historic Preservation Act of 1966 (16 U.S.C. 470), section 106; this review is commonly referred to as "section 106" review. The second is

review pursuant to 49 U.S.C. 303, federal policy of lands, wildlife and waterfowl refuges, and historic sites; this review is commonly referred to as "section 4f" review. These reviews apply to projects sponsored or assisted by federal agencies, including many highway construction projects. The review of historical resources under these programs is typically more rigorous than would be the case with an EAW, and therefore, requiring projects to undergo both would be redundant.

Part 4410.4300, subp. 33. Communication towers. The current category for communication towers is based on well-documented hazards to birds posed by towers over 500 feet tall. However, tower location can be as much a factor in bird mortality as height, as towers located along migration routes or adjacent wetlands used by waterbirds can be a hazard even if they are less than 500 feet tall. A 300-foot height is proposed for communication towers in sensitive areas to recognize that birds typically fly at heights considerably less than 500 feet in the vicinity of wetlands or along river bluffs.

The river valleys and north shore of Lake Superior identified in this category are significant migration routes used by waterfowl, raptors, and passerine birds. A two-mile distance is proposed because these migration corridors are not narrow or precise. Visual impacts also merit consideration in evaluating towers proposed along river valleys and bluffs.

Wetland areas support a disproportionately high number of bird species and densities. Protected waters and wetlands correspond with areas supporting larger concentrations of waterfowl and shorebirds. Protected waters and wetlands are also readily identified by local government units and the 1000-foot distance corresponds with the shoreland zone in many cases. Typically, local flights around marshes, and feeding flights to nearby food sources, occur at low elevations within a 1000-foot distance.

Part 4410.4300, subp. 35. Land use conversions, including golf courses. A new subpart is proposed based on the existing items C and D of subpart 28. These two items deal with the conversion of lands from one use to another and have never fit well under the caption of subpart 28, "agriculture and forestry."

As a practical matter, the project type which most often has required review in the past under items C or D of subpart 28 is golf courses. Large courses often convert 80 or more acres of natural land or farmland to the more intensive use as a golf course. With the 80-acre conversion category "buried" as item D under a subpart with a caption that is somewhat of a misnomer, situations have occurred where RGU officials examining the rules to see if a golf course proposal required an EAW have missed the 80-acre category. This can be easily remedied by this proposed reorganization of the rule items.

Part 4410.4400, subp. 11. Industrial, commercial and institutional facilities. The rationale for these changes is identical to that for part 4410.4300, subp. 14. Please refer to that discussion.

Part 4410.4400, subp. 13. Solid waste. The rationale for these changes is identical to that for part 4410.4300, subp. 17. Please refer to that discussion.

Subp. 14. Residential development. The rationale for these changes is identical to that for part 4410.4300, subp. 19. Please refer to that discussion.

Subp. 20. Wetlands and protected waters. The rationale for this changes is identical to that for part 4410.4300, subp. 27. Please refer to that discussion.

Part 4410.4400, [proposed new subpart]. Incineration of wastes containing PCBs. This revision is necessary to bring the rules into conformance with Minn. Stat., section 116.38, subd. 2 which explicitly prohibits the PCA from permitting or allowing the incineration of wastes containing at least 50 ppm of PCBs (polychlorinated biphenyls) until an EIS is prepared. The primary environmental concern with the burning of PCBs is the emission of hazardous combustion products and their fate in the environment, including human health impacts.

Part 4410.4600, subpart 10. [Exemptions for] Commercial and institutional facilities.

The EQB believes that it was a mistake to include "industrial" activities in this exemption category along with commercial and institutional facilities when this category was established in 1982. At that time, this exemption was set up to be parallel to the mandatory EAW and EIS categories which include industrial, commercial and institutional facilities together. While that grouping is valid for establishing minimum thresholds for review, in hindsight, it can be seen to be invalid when establishing exemption thresholds.

The existing rule language has been interpreted by project proposers in a number of specific instances to exempt industrial projects because they would take place outdoors, and hence, have less "gross floor space" than the specified thresholds for exemption. In at least three cases (including the case of a concrete recycling operation by the Carl Bolander and Sons Company, a case which was ultimately decided in the Minnesota Supreme Court) the EQB has argued that this is an erroneous application of this exemption category, because clearly the types of impacts posed by the three projects were worthy of review. In fact, in two of the cases the impacts were at least partly caused by the fact that the operations did not take place within a building --meaning that for those operations, at least, "gross floor space" was inversely related to environmental impacts.

The floor space-based thresholds are largely based on the

relationship between building size and impacts such as operational output, number of workers, trip generation, etc. Industrial facilities in general must be considered to potentially have greater overall environmental impacts than similarly-sized commercial or institutional facilities because the industrial processes may generate wastes, emissions, noise and other impacts in addition to those more closely-related to building size. Therefore, it is inappropriate to include industrial facilities along with commercial and institutional facilities in this exemption category.

Part 4410.6100.

Subpart 1. The first revision to subpart 1 substitutes the new statutory language regarding the EIS costs for the language used under the older statutes. Next, item C is deleted because the proposer's data collection costs are no longer relevant to the cost that the RGU can assess to the proposer. In item F, new language is added to clarify that scoping costs are legitimate costs of the EIS to be assessed to the proposer; since the existing language precedes the introduction of scoping into the process, it is now unclear whether scoping costs can be assessed to the proposer. In item G, the word "final" is deleted because under the present EIS process the comment hearing is held on the draft not the final EIS.

Subpart 2. The only revision is here to update the language to eliminate the outdated distinction between the actual EIS costs and the portion assessed to the proposer.

Subpart 3 and 4. These subparts are proposed to be added to assure that EIS scoping costs are understood to be included in the EIS costs assessable to the proposer.

Subpart 5. this subpart incorporates the relevant provisions formerly at part 4410.6300, which will now be deleted.

Part 4410.6300. This part is proposed to be deleted as a rule part, with the provisions still relevant under the current statutes to be remain in the rules as subpart 5 of part 441.6200.

Part 4410.6400. It is proposed to delete all of the existing text except subpart 7 and replace it with two new subparts. The primary cause for the deletions is to remove outdated language concerning EIS assessed costs. In subpart 7 it is proposed to alter the language from "commencing the EIS process" to "commencing preparation of the draft EIS" because with the addition of scoping, the EIS process now begins with scoping, whereas it is not until after scoping is completed that the cost of the EIS content can be determined.

Part 4410.6500.

Subpart 1. The first revision proposed to the payment schedule for EIS costs is contained in new subpart A. This text would add a procedure for the RGU to assess the proposer for its costs of scoping the EIS. The proposed process is kept rather basic because scoping is not generally costly in comparison to the EIS preparation itself, and because if the RGU overcharges the proposer for scoping, the excess can simply be rolled over to cover part of the EIS preparation cost.

In item B (old A) the timeframe for the submission of the proposer's half-cash payment for the preparation of the EIS itself would be modified. It would now occur within ten days of the agreement on EIS costs following scoping. Ten days is more reasonable than the existing figure of 30 days, since it is in the proposer's interest to get the EIS moving. The prohibition on starting the EIS until this payment is received is needed so there can be no disagreement about whether the RGU must receive payment before starting work. Ambiguity on this point could lead to financial loss to an RGU, and ultimately to the taxpayers.

In item C (old B) the amount of and time of the second cash payment to the RGU for EIS work would be modified. Both changes here are needed to cover cash outlays and obligations by the RGU for the work that has gone into the draft EIS. In most cases, by the time the draft EIS is prepared the RGU will have done approximately 90% of the actual work on the EIS; all that remains to be done, basically, is to respond to comments , revise the document as necessary and print it, and go through certain procedural steps. It makes sense, therefore, to have 90% of the estimated cost of the EIS paid to the RGU by this point.

In item D (old C) the language regarding final settlement of cost payments is revised to fit changes in the statutes since the existing rules were written regarding the EIS adequacy determination and the fact that the proposer no longer submits payment through the EQB if the RGU is a state agency.

Subparts 3 and 4. These subparts are proposed to be deleted because due to statutory changes there is no longer any need to specify different mechanisms of payment depending on whether the RGU is a state agency or local unit. Now, all payments are made directly to the RGU regardless of what unit the RGU is.

Subpart 5. This subpart is proposed to be deleted as its provision has been incorporated into item B.

Subpart 6. First, the caption is proposed to be changed to bring attention to the fact that this provision bars state agencies from issuing permits until the proposer has satisfied all EIS cost obligations. A sentence is added to clarify that upon receipt of final payment, the RGU must so notify EQB so that the EQB can in turn notify state agencies that permits may be issued.

Subpart 7. This provision regarding time extensions by the EQB chair is proposed to be deleted as unnecessary. If there are time delays due to cost disagreements or problems in preparing the EIS, it is better to let these be resolved directly by agreement of the RGU and proposer. The chair does not have authority to extend the timeframes for EIS preparation under parts 4410.2100 to 4410.2800, so it would be inconsistent to authorize the chair to extend the timeframes for cost issues.

Small business considerations in rulemaking.

Minn. Stat., sec. 14.115 and Minn. Rules, part 2010.0700 require the Statement of Need and Reasonableness to discuss how the agency has considered five ways of reducing the impact of its rulemaking on small businesses. The five ways are:

(a) the establishment of less stringent compliance or reporting requirements;

(b) the establishment of less stringent schedules and deadlines for compliance or reporting requirements;

(c) the consolidation or simplification of compliance or reporting requirements;

(d) the establishment of performance standards to replace design or operation standards; and

(e) exemption of small businesses from any or all parts of the rule.

Because of the nature of the environmental review program, considerations a to d are not appropriate for these rules. The program does not establish operational restrictions on businesses, but rather is a process to disclose information to be used in making regulatory decisions. The program does not involve reporting requirements, compliance schedules, or operational or design standards on projects.

Regarding consideration e, exemption of small businesses from all or part of the rules, it would be contrary to the basic purposes of the program to exempt a project from review for any reason other than a reason relating to its environmental impact. An impact is an impact, regardless of the size of the proposer of the project.

As a practical matter, for the most part environmental review involves larger businesses simply because most mandatory category thresholds are based on the premise that greater impacts result from larger scale projects, and because most larger scale projects are done by larger sized businesses. This would be particularly true for mandatory EIS projects; it is quite unlikely that a small business would propose a project requiring an EIS.

When a smaller business does have a project that requires environmental review, there is considerable flexibility allowed the RGU in exactly how the review is done and the level of detail of information required from the proposer. This provides a built-in mechanism by which the proposer can avoid being unduly burdened by the process.

CONCLUSION

Based on the foregoing, the proposed amendments to Minnesota Rules, parts 4410.0200 to 4410.7800 are both needed and reasonable.

Dated: March 6, 1995

Cynthia C Jepsen

Cynthia Jepsen, Chair
Environmental Quality Board