

**PUBLIC NOTICE**  
**EQB SEEKS INPUT ON PROPOSALS FOR AMENDING**  
**ENVIRONMENTAL REVIEW RULES REGARDING**  
**“CUMULATIVE IMPACTS OR EFFECTS”**

In August 2006 the Environmental Quality Board (EQB) issued a Request for Comments on possible amendments to the Environmental Review program rules (chapter 4410) and in December 2006 issued Supplemental Request for Comments on additional amendments to the same rules. Included among the possible amendments were various rule provisions concerning the treatment of “cumulative impacts” or “cumulative potential effects.” The proposed revisions to the “cumulative impacts/potential effects” rule provisions were conceptual at the time of those notices. (Past documents can be viewed at the EQB website ([www.eqb.state.mn.us](http://www.eqb.state.mn.us)) by selecting “Amending the Environmental Review program rules – Phase 2” under Ongoing Projects and Studies.)

**The EQB is now seeking further public comment on more specific proposals for amendments.** Attached to this notice is a memorandum prepared by the EQB staff indicating specific potential amendments to various rule provisions that deal with “cumulative impacts” or “cumulative potential effects,” along with an explanation or rationale for those revisions. In some cases, optional possible revisions are given.

The EQB is requesting interested persons to review and comment on these proposals. Comments or questions should be directed to:

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**Comments will be accepted through Monday, June 25, 2007.** Following analysis of the comments, the EQB staff expects to draft actual proposed rule amendments, and the accompanying Statement of Need and Reasonableness material, and to request the Board to authorize formal rulemaking.

The EQB is particularly interested in comments about the following topics:

- (1) Preferences among the options identified as A, B and C under Issue I as explained in the Attachment;
- (2) If a commenter prefers a different option as a solution to Issue I, a detailed description of that option and a discussion of the differences between that option and options A, B or C and why that option is preferred;
- (3) Ideas for augmenting or improving the “enhancements” for options B and C identified under the Issue I discussion;
- (4) Comments about the proposals for “enhancements” for Options B and C; &
- (5) Any suggestions for improving the clarity of any of the amendments.

# ATTACHMENT

## PROPOSALS FOR AMENDING ENVIRONMENTAL REVIEW RULES REGARDING “CUMULATIVE IMPACTS OR EFFECTS”

May 2, 2007

This memorandum has been prepared by EQB staff to present to the public the current EQB thinking on amending the Environmental Review program rules (chapter 4410) regarding the treatment of “cumulative impacts” or “cumulative potential effects.” It is based upon material discussed with the Board at its April 19, 2007 meeting. This memorandum is organized around three “issues” relating to the general topic of cumulative impacts or effects: (1) a response to the opinion of the Supreme Court in a 2006 case concerning cumulative impacts or effects; (2) the fact that the content requirements for EAWs, EIS, and AUARs do not explicitly include treatment of cumulative impacts or effects; and (3) a response to an opinion of the Court of Appeals in another 2006 case regarding the treatment of cumulative analysis in AUAR documents.

### **ISSUE I: responding to the Supreme Court opinion from the Citizens Advocating Responsible Development (“CARD”) vs. Kandiyohi County case.**

For many years, environmental review practitioners have been uneasy over inconsistencies in the EQB’s rules with respect to cumulative impacts (or cumulative effects). This topic has regularly come up in discussions of problems with the existing rules, but no one was ever able to offer satisfactory ideas for how to amend the rules, so the rules were left as they were adopted in 1982. Specifically, the following inconsistencies exist in the rules:

(1) the rules define “cumulative impacts” (in a manner very similar to that used by the federal government and other states) but this term is used only in the Generic EIS section of the rules;

(2) the rules use term “cumulative potential effects” in the criteria for determining if a project has the “potential for significant environmental effects,” and hence requires an EIS, but this term is not defined nor is it used anywhere else in the rules;

(3) nowhere in the rules for EAW, EIS or AUAR preparation is it actually stated that cumulative impacts/effects must be considered in the analysis (although the EAW and AUAR forms ask about this topic and some amount of “cumulative” analysis is almost always done in review documents).

The lack of clarity finally caught up with us in a dispute between a group of citizens (“Citizens Advocating Responsible Development” or “CARD”) and Kandiyohi County over two gravel mining proposals. When the county prepared EAWs for these projects but decided that neither required an EIS, those decisions were challenged in court by the CARD organization. The case eventually made its way to the state Supreme Court. The issues primarily dealt with in the Supreme Court’s opinion are issues about the proper treatment of what the rules now term “cumulative potential effects.” One of the Court’s

conclusions was that the EQB's long-standing interpretation of the rule provisions regarding cumulative-type analysis was wrong. (EQB had filed an *amicus* brief arguing that the meaning of cumulative impacts as defined should apply throughout the rules despite the wording differences.) This finding by the Supreme Court is forcing EQB's hand to finally deal with the cumulative-analysis issues in the rules.

The EQB staff presented three basic options as a response to the CARD opinion to the EQB at its April 2007 meeting and the EQB agreed that stakeholder opinions about these (and other possible options) should be sought. These options are described below and their basic features are summarized and compared in a table at the end of this memorandum.

**Option A:** do not amend the rules in response to the CARD case; rely on Supreme Court opinion.

Under this option there would be no amendments to the definitions or to part 4410.1700. Instead, EQB would direct program participants to the opinion of the Supreme Court in the CARD case for direction on how to handle cumulative analysis issues. Likely, the relevant parts of the case would be incorporated into the EQB's guidance documents. In its guidance the EQB could expand on the Court's interpretation if it chose, but the rules would be left as they were when the Court made its interpretation. This would be the most conservative of all approaches. (Note: there would be amendments to the rules relating to cumulative analysis issues II and III, as described below, but those amendments are unrelated to the issues of the CARD case.)

**Option B:** incorporate the Supreme Court's interpretation into the rule language.

Under this option, the EQB would concur with the interpretation of the Supreme Court in the CARD case but amend the rules to express that interpretation more clearly in the rule language itself. The Supreme Court had to provide an extensive analysis to reach its interpretation; this demonstrates that the existing rule language is on its face difficult to understand and correctly apply. This option would seek to make the wording of the rules more clearly express the interpretation given by the court so that a reader is guided toward the proper interpretation by reading the rules themselves. This option preserves the wording by which the Supreme Court differentiated the broad cumulative impacts approach of a GEIS from the narrower cumulative potential effects approach appropriate to project-specific review.

The following amendments would be made in the rules indicated:

- At 4410.0200, subpart 11a add a definition of "cumulative potential effects:"  
"Cumulative potential effects" means the effect on the environment that results from the incremental effects of the project in addition to other projects in the surrounding area which might reasonably be expected to affect the same environmental resources, including future projects actually planned or for which a basis of expectation has been laid, regardless of what person undertakes the other projects or what jurisdictions have authority over the projects. Cumulative potential effects can result from individually minor but collectively significant projects taking place over a period of time.

- (The definition of “cumulative impacts” given at 4410.0200, subpart 11 would be left unchanged, and this term would continue to appear in the rules only in the section on Generic EISs.)
- Part 4410.1700, subpart 7, item B would be amended thusly: “cumulative potential effects of ~~related or anticipated future actions;~~” The new definition of “cumulative potential effects” added at 4410.0200, subp. 11a will encompass the meaning formerly conveyed (according to the Supreme Court) by the deleted words, thus they are redundant here.

**Option C:** Concur with the Supreme Court interpretation, but revise our terminology. This option seeks to preserve the interpretation of the Supreme Court but switch to the more universally-used term “cumulative impacts” instead of “cumulative potential effects.” The federal government and most other states that do environmental review use the term “cumulative impacts” for the concept. However, by amending the rules to have only one term (cumulative impacts) instead of two (cumulative impacts and cumulative potential effects) we would lose the distinction between the terms which the Court used as a main support for the principle that cumulative potential effects analysis for a specific project is narrower than the cumulative impact analysis in a GEIS. Thus, part of the Court’s interpretation would no longer be relevant to the rules if amended this way.

The following amendments would be made in the rules indicated:

- at 4410.0200, subpart 11, redefine “cumulative impacts” to mean what Supreme Court interpreted “cumulative potential effects of related or anticipated future projects” to mean. The definition would read as for the Option B definition of “cumulative potential effects.”
- At part 4410.1700, subpart 7, item B the wording would be amended: “cumulative impacts ~~potential effects of related or anticipated future actions;~~” The amended definition of cumulative impacts will encompass the meaning formerly conveyed (according to the Supreme Court) by the deleted words, thus they are redundant here.

**Possible Additions to Options B and C:**

Staff have identified three possible “enhancements” that could be added to Options B or C that would create additional guidance about what phrases used by the Supreme Court mean or how to consider the significance of a cumulative-type effect.

The first phrase used by the Court that could be amplified upon is “projects in the surrounding area that might reasonably be expected to affect the same natural resources.” In the rule amendments “natural resources” could be changed to “environmental resources,” because “environment” is a defined term and it includes historic and aesthetic resources, as well as “natural resources.” (It is not clear whether the Supreme Court realized that its wording might at least appear to exclude certain resources that come under the EQB’s definition of “environment.”) In addition, a list of factors to consider in determining the meaning of this phrase as it applies in a specific case could be added (if appropriate factors can be identified).

The second phrase that could be further interpreted is “actually planned or for which a basis of expectation has been laid,” as used with respect to future projects. One possibility that staff has identified is to state that an adopted comprehensive plan or zoning ordinance establishes a basis of expectation for projects identified in the plan or zoning, and that filing an application for a permit of some sort means the project is “actually planned.” Other factors to consider could also be added if identified.

The third enhancement identified by staff would be to add wording at part 4410.1700, subpart 7, item B, guiding the RGU about how it should consider the incremental contribution of the specific project under review in view of the total cumulative effect. The rules presently give no guidance about how to think about that topic. (Actually, neither the federal rules nor those of any other state we have examined provides any clear guidance about this either – this question is perhaps the trickiest of all aspects of cumulative-type analysis.) The best idea staff has been able to think of would be to add a list of factors an RGU should consider, without specifying how they must be used.

Possible factors we have identified are:

- the size of the contribution from the project compared to the size of the total aggregate impact;
- the degree to which the project complies with any mitigation measures specifically designed to address the cumulative impact;
- the efforts of the proposer to minimize contributions from the project;
- the size of the contributions from the project compared to those of the likely contributions from reasonable alternatives to the project; &
- the extent to which an EIS on the specific project would be able to address the aggregate impact.

### **Other Options for response to the CARD decision**

In its presentation to the EQB at the April 2007 meeting, the staff noted that there are other possible options for addressing the CARD case issues beyond the 3 options presented by the staff. One option that has been identified through previous comments is to scrap the existing rule language altogether (and ignore the Supreme Court’s interpretation of that language) and instead use the terminology and interpretations from the federal NEPA process. However, to date commenters have not explained in any detail why that option would be superior. Based upon its understanding of the federal case law, EQB staff is skeptical that adopting the NEPA approach would create more clarity in the rules than adopting the Minnesota Supreme Court’s approach.

### **Other Amendments to Rules Relating to Cumulative Impacts/Effects**

In addition to, and independent of, a response to the CARD decision, the EQB is considering whether to make other amendments to chapter 4410 relating to other cumulative-type analysis issues. The second issue is whether to add language explicitly directing that cumulative impacts or effects be considered in preparing an EAW, an EIS, or an Alternative Urban Areawide Review (AUAR) document. The third issue involves correcting an error of interpretation made by the Court of Appeals in a 2006 case relating to how cumulative-type analysis is geographically bounded in preparing an AUAR.

## **ISSUE II: incorporate clear & explicit instructions in rules about including cumulative analysis in EAWs, EISs & AUARs.**

The EQB staff believes that language should be added explicitly directing that cumulative impacts (or effects) be considered in preparing an EAW, an EIS, or an AUAR document. While in practice this is usually done, the rules do not actually explicitly direct that it be done (apparently due to an oversight in the 1982 rulemaking). (The EAW form and AUAR guidance do include a question regarding cumulative effects although the rules upon which it is based do not mention cumulative effects or impacts.) It seems logical to make these amendments at the same time as other amendments regarding cumulative-analysis issues are being made. The rule provisions that would be amended are: 4410.1200, EAW content; 4410.2300, item H, content of an EIS, impacts; and 4410.3610, subpart 4, AUAR content. At part 4410.2300, item H, regarding analysis of impacts in an EIS EQB staff also advocates adding a sentence adapted from recent federal CEQ guidance stating that in dealing with contributions from past projects to cumulative impacts/ effects it is generally sufficient to deal with them as an aggregate, and that it is not normally necessary to identify and quantify the individual past projects. Also, an unnecessary and confusing item that appears to relate to the cumulative-type analysis at 4410.2100, subpart 6, item F, EIS scoping decision content, would be deleted as part of this revision.

The rules would be amended as shown below. The terminology used in the amendment would depend upon whether Option A or B or Option C is chosen for Issue I; the staff has included both choices in the amendments below.

- At 4410.1200, EAW content, item E would be amended: “E. major issues sections identifying potential environmental impacts and issues that may require further investigation before the project is commenced, including identification of cumulative potential effects/ cumulative impacts;”
- At 4410,2100, subpart 6, EIS scoping decision content, item F, would be deleted as it is unnecessary and confusing:
  - F. ~~identification of potential impact areas resulting from the project itself and from related actions which shall be addressed in the EIS;~~
- At 4410.2300, item H, content of an EIS, amend as follows: “H. Environmental, economic, employment, and sociological impacts: for the proposed project and each major alternative there shall be a thorough but succinct discussion of potentially significant ~~direct or indirect,~~ adverse, or beneficial impacts /effects generated, be they direct, indirect, or cumulative. Data and analyses shall be commensurate with the importance of the impact and the relevance of the information to a reasoned choice among alternatives and to the consideration of the need for mitigation measures; the RGU shall consider the relationship between the cost of data and analyses and the relevance and importance of the

information in determining the level of detail of information to be prepared for the EIS. Less important material may be summarized, consolidated, or simply referenced. The EIS shall identify and briefly discuss any major differences of opinion concerning significant impacts of the proposed project on the environment. In analyzing the contributions of past projects to cumulative impacts/cumulative potential effects it is sufficient to consider the current aggregate effects of past actions; it is not required to list or analyze the impacts of individual past actions, unless such information is necessary to describe the cumulative impact/cumulative potential effects of all past actions combined.”

- At 4410.3610, subpart 4, AUAR content, amend as follows: “Subp. 4. **AUAR document form and content.** The content and format must be similar to that of the EAW, but must provide for a level of analysis comparable to that of an EIS for direct, indirect, and cumulative potential effects/ cumulative impacts typical of urban residential, commercial, warehousing, and light industrial development and associated infrastructure.

### **ISSUE III: correct the error made by the Court of Appeals in the River’s Edge project AUAR case**

The third cumulative-analysis issue is also the result of a court case, *Minnesota Center for Environmental Advocacy vs. the City of St. Paul Park*, commonly referred to as the “River’s Edge case” after the name of the project involved. In that case, the City of St. Paul Park prepared an Alternative Urban Areawide Review analysis (a substitute for EAWs or EISs allowable under certain conditions) for development of land along the Mississippi, much of which was proposed for construction of a large project called River’s Edge. The Center for Environmental Advocacy challenged the adequacy of that review, partly on the grounds that the review did not adequately consider cumulative-type impacts on resources outside of the AUAR boundary. In its decision, the Court of Appeals declared that the RGU did not need to consider impacts or sources of impacts outside of the AUAR boundary. Apparently, the court believed that in setting the AUAR boundary an RGU factors in consideration of the scope of analysis – which is not true of any case with which the EQB staff is familiar.

The EQB staff believes that a fundamental error was made here by the Court of Appeals. To correct that error, the EQB can amend its rules to state the AUAR boundary chosen by the RGU is not intended to set any limits on the scope of the technical analysis.

The following amendment would be made at part 4410.3610:

“Subpart 3. **Order for review; geographic area designation and specification of development.** The RGU shall adopt an order for each review under this part that specifies the boundaries of the geographic area within which the review will apply and specifies the anticipated nature, location, and intensity of residential, commercial, warehousing, and light industrial development and associated infrastructure within those boundaries. The geographic extent of the

analyses of direct, indirect and cumulative potential effects/cumulative impacts conducted under subpart 5 is not limited by the boundaries set under this subpart\*. The RGU may specify more than one scenario of anticipated development provided that at least one scenario is consistent with the adopted comprehensive plan. At least one scenario must be consistent with any known development plans of property owners within the area. The RGU may delineate subareas within the area, as appropriate to facilitate planning and review of future development, and allocate the overall anticipated development among the subareas.”

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\* The EQB staff invites commenters to suggest alternative language that would make the intended point clearer than the sentence suggested.

**NOTE: Table comparing Issue I, options A, B & C follows on next page.**



## Comparison Summary of features of Issue I, Options A, B & C

|                                                               | Option A                                                                | Option B                                                                                                                                                                                                          | Option C                                                                                  |
|---------------------------------------------------------------|-------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
| Rule amendments?                                              | No                                                                      | Yes                                                                                                                                                                                                               | Yes                                                                                       |
| Term(s) used in rule                                          | Cumulative impacts for GEIS.<br>Cumulative potential effects elsewhere. | Cumulative impacts for GEIS.<br>Cumulative potential effects elsewhere.                                                                                                                                           | Cumulative impacts                                                                        |
| Amendment at 4410.0200, Definitions                           | None                                                                    | Add defn. for cumulative potential effects based on existing defn. of “cumulative impacts” with Supreme Court interpretations on geographic and temporal limits added.<br>(Keep defn. of cumulative impact also.) | Amend defn. of cumulative impacts as per defn of cumulative potential effects in Option B |
| Enhance definition <sup>A</sup>                               | No                                                                      | Optional                                                                                                                                                                                                          | Optional                                                                                  |
| Amendment at 4410.1700, subpart 7, item B, EIS need criterion | None                                                                    | Delete words after “cumulative potential effects.”                                                                                                                                                                | Delete all and add “cumulative impacts.”                                                  |
| Add factors to consider in 4410.1700, s 7, I B <sup>B</sup>   | No                                                                      | Optional                                                                                                                                                                                                          | Optional                                                                                  |

|                                                                                                                                                                      |     |     |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|-----|-----|
| Add directions to consider cumulative impacts/potential effects in EAWs, EIS, & AUARs (at 4410.1200, 4410.2300 H, 4410.3610, subp. 4)                                | Yes | Yes | Yes |
| State that only current aggregate effects of past projects must be considered (at 4410.2300 H)                                                                       | Yes | Yes | Yes |
| Delete 4410.2100, subp. 6, item F                                                                                                                                    | Yes | Yes | Yes |
| Add language at 4410.3610, subp. 3 stating that designated AUAR boundary does not limit geographic scope of technical analyses in AUAR (“undo” Appeals Ct. opinion.) | Yes | Yes | Yes |

<sup>A</sup>Enhancements could include:

“Surrounding area” = (?)

Change “natural resources” to “environmental resources”

“Actually planned” = permit applied for

“Basis of expectation laid” includes identified in adopted comprehensive plan

<sup>B</sup>Factors could include:

- the size of the contribution from the project compared to the size of the total aggregate impact;
- the degree to which the project complies with any mitigation measures specifically designed to address the cumulative impact;
- the efforts of the proposer to minimize contributions from the project;
- the size of the contributions from the project compared to those of the likely contributions from reasonable alternatives to the project; &
- the extent to which an EIS on the specific project would be able to address the aggregate impact.