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May 7, 2009

Gregg Downing
Environmental Quality Board
658 Cedar Street, Room 300
St. Paul, MN 55155

Re: ***In the Matter of Proposed Amendments to Rules Governing the Environmental Review Program: Minnesota Rules, Chapter 4410*; OAH Docket No. 12-2901-20137-1**

Dear Mr. Downing:

Enclosed herewith and served upon you by mail is the Report of the Administrative Law Judge (Corrected) in the above-entitled matter. This report corrects errors in Findings 24-27 of the Report dated May 1, 2009. A copy of the Rule Hearing Register and a copy of a letter are also enclosed. Please include these items with the official record.

Sincerely,

Steve M. Mihalchick mo.

STEVE M. MIHALCHICK
Administrative Law Judge

Telephone: 651-361-7844
steve.mihalchick@state.mn.us

SMM:mo
Encl.

cc: Julian Plamann, Governors Staff-Support
Revisor of the Statutes
Legislative Coordinating Commission
The Honorable Lori Swanson, Attorney General

OAH 12-2901-20137-1
Governor's Tracking No. AR 344

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE ENVIRONMENTAL QUALITY BOARD

In the Matter of Proposed Amendments to Rules Governing the Environmental Review Program: Minnesota Rules, Chapter 4410

REPORT OF THE ADMINISTRATIVE LAW JUDGE (CORRECTED)

Administrative Law Judge Steve M. Mihalchick conducted a series of hearings throughout Minnesota concerning these rules proposed by the Minnesota Environmental Quality Board (EQB or the Board). Hearings were conducted in Alexandria on February 25, Hermantown on March 2, Bemidji on March 4, Baxter on March 5, and St. Paul on March 16, 2009.[1] Approximately six members of the public attended the hearings in Alexandria, four in Hermantown, three in Bemidji, four in Baxter, and five in St. Paul. Each hearing continued until everyone present had an opportunity to ask their questions and state their views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[2] The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in their being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The members of the EQB's hearing panel were: Gregg Downing, Environmental Review Coordinator, EQB; Jon Larsen, Principal Planner, EQB; Peder Otterson, Shoreland Management Supervisor, Minnesota Department of Natural Resources (Alexandria and Hermantown hearings); Matthew Langan, Technical Representative, Minnesota Department of Natural Resources (Hermantown and St. Paul hearings); and Paul Radomski, Science Advisor, Minnesota Department of Natural Resources (Bemidji and Baxter hearings).

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[1] The St. Paul hearing was originally scheduled for February 26, 2009, but was rescheduled due to inclement weather.

[2] Minn. Stat. §§ 14.131 through 14.20 (2007).

The EQB and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. At the hearing, the initial deadline for filing written comment was set for March 25, 2009, twenty calendar days after the last originally scheduled hearing, to allow interested persons and the EQB an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days, April 1, 2009, to allow interested persons and the EQB the opportunity to file a written response to the comments received during the initial period. The last timely response was received and the hearing record closed on April 1, 2009.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background and Nature of the Proposed Rules

1. The Board is proposing to amend Minn. R. ch. 4410 governing the Environmental Review Program. These proposed rules relate to the preparation of Environmental Assessment Worksheets (EAWs), Environmental Impact Statements (EISs), and other environmental review documents. This rulemaking is referred to by the Board as the Phase 2 amendments, to distinguish it from the previous Phase 1 amendments which were adopted by the Board in 2006.

2. The major proposed additions and revisions the Board is proposing in this rulemaking are as follows:

a. New mandatory EAW and EIS categories specific to developments in shoreland areas.

b. Amendments to the Alternative Urban Areawide Review (AUAR) process.

c. Amendments clarifying how "cumulative potential effects" are to be accounted for in determining if a discretionary EIS is required.

d. Clarifications to the citizens' petition process.

e. Guidance on the assessment of cumulative effects in EAWs, EISs, and AUAR documents.

f. Clarifications on a governmental unit's ability to prepare and give public notice of draft permits or other approval documents prior to completion of the environmental review process.

g. The preparation of an EIS for a proposed release and a permit for a release of genetically engineered wild rice.

Statutory Authority

3. The Board's statutory authority to adopt these proposed rules is located in the Environmental Policy Act, Minnesota Statutes, chapter 116D. Specifically, Minn. Stat. § 116D.04, subd. 2a (a), directs the Board to establish, by rule, "categories of actions for which environmental impact statements and for which environmental assessment worksheets shall be prepared as well as categories of actions for which no environmental review is required."

4. Further, subdivision 4a of Minn. Stat. § 116D.04 directs the Board to promulgate rules which "identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement." Subdivision 5 of the same section requires the Board to promulgate rules in conformity with the Environmental Policy Act, specifically establishing:

> (1) the governmental unit which shall be responsible for environmental review of a proposed action;
>
> (2) the form and content of environmental assessment worksheets;
>
> (3) a scoping process in conformance with subdivision 2a, clause (e);
>
> (4) a procedure for identifying during the scoping process the permits necessary for a proposed action and a process for coordinating review of appropriate permits with the preparation of the environmental impact statement;
>
> (5) a standard format for environmental impact statements;
>
> (6) standards for determining the alternatives to be discussed in an environmental impact statement;
>
> (7) alternative forms of environmental review which are acceptable pursuant to subdivision 4a;
>
> (8) a model ordinance which may be adopted and implemented by local governmental units in lieu of the environmental impact statement process required by this section, providing for an alternative form of environmental review where an action does not require a state agency permit and is consistent with an applicable comprehensive plan. The model ordinance shall provide for adequate consideration of appropriate alternatives,

and shall ensure that decisions are made in accordance with the policies and purposes of Laws 1980, chapter 447;

(9) procedures to reduce paperwork and delay through intergovernmental cooperation and the elimination of unnecessary duplication of environmental reviews;

(10) procedures for expediting the selection of consultants by the governmental unit responsible for the preparation of an environmental impact statement; and

(11) any additional rules which are reasonably necessary to carry out the requirements of this section.

5. Additional authority for adopting standards is established under Minn. Stat. § 116D.045. Subdivision 1 authorizes the Board to "adopt procedures to assess the proposer of a specific action for reasonable costs of preparing and distributing an environmental impact statement on that action required pursuant to section 116D.04. Such costs shall be determined by the responsible governmental unit pursuant to the rules promulgated by the board."

6. Finally, Minn. Stat. § 116C.94, subd. 1, was amended in 2007 as follows:

(b) The board shall adopt rules that require an environmental impact statement and otherwise comply with chapter 116D and rules adopted under it for a proposed release and a permit for a release of genetically engineered wild rice. The board may place conditions on the permit and may deny, modify, suspend, or revoke the permit.[3]

7. Under these statutory provisions, the Board has the necessary authority to adopt the proposed rules.

Compliance with Procedural Rulemaking Requirements

8. On August 14, 2006, the EQB published in the State Register a Request for Comments on the EQB's possible amendments to the existing rules governing the Environmental Review Program. The Request explained that these are the rules governing the preparation of EAWs, EISs, and other environmental review documents. The notice indicated that the EQB had not yet prepared a draft of the possible rules and invited comments.[4]

9. Subsequently, the EQB published three more Requests for Comments in the State Register, which supplemented the Request for Comments published on August 14, 2006. On December 11, 2006, the EQB sought comments on possible

[3] *See* Laws of Minnesota 2007, chapter 57, article 1, section 141.

[4] 31 SR 215 (August 14, 2006); *see also*, Ex. 1.

amendments addressing the analysis of cumulative effects, incorrect references, and public notice of draft permits. The June 18, 2007 Request for Comments notified the public that the EQB was also proposing to address release and a permit for release of genetically engineered wild rice, as required by the Minnesota Legislature during the 2007 session. On May 27, 2008, the EQB published a final Request for Comments announcing its intention to correct errors in four rule parts of the proposed rules.[5]

10. On December 15, 2008, the Board filed copies of the proposed Notice of Hearing, proposed rules, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the Board also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of December 18, 2008, the Administrative Law Judge approved the additional notice plan.

11. As required by Minn. Stat. § 14.131, the Board asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government in a letter dated October 5, 2007. The Department of Finance provided comments in a memorandum dated January 9, 2008, and stated that the Board had adequately analyzed the potential costs to local units of government.[6] The Department of Finance concluded:

> It is likely that as a result of these rule changes there will be some fiscal impact on local units of government. The magnitude of the impact depends on the extent to which local governments pass the costs of increased requirements and services to project proposers. Local units of government that commonly produce EAWs and EISs will likely have cost recapture processes already in place. Those local governments that have not had to complete many EAWs and EISs previously would likely be the ones that may incur costs as the result of the rule change.[7]

12. On January 8, 2009, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. The Notice contained the elements required by Minn. R. 1400.2080, subp. 2. The Notice identified the dates and locations of the hearings in this matter. The Notice also announced that the hearing would continue until all interested persons had been heard, or additional hearing dates added, if needed.[8]

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[5] 31 SR 751 (December 11, 2006), *see also*, Ex. 2; 31 SR 1807 (June 18, 2007), *see also*, Ex. 3; 32 SR 2094 (May 27, 2008), *see also*, Ex. 4.

[6] Ex. 6 (SONAR), Supplement #2.

[7] *Id.*

[8] Ex. 12.

13. On January 20, 2009, a copy of the proposed rules and the Notice of Hearing were published in the State Register.[9]

14. At the hearing in Alexandria, Minnesota, on February 25, 2009, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

A. The Department's Request for Comments as published in the State Register on August 14, 2006.[10]

B. The Department's Request for Comments as published in the State Register on December 11, 2006.[11]

C. The Department's Request for Comments (to propose mandatory EIS category for genetically-engineered wild rice), as published in the State Register on June 18, 2007.[12]

D. The Department's Request for Comments as published in the State Register on May 27, 2008.[13]

E. A copy of the proposed rule amendments, as approved by the Revisor of Statutes.[14]

F. The Statement of Need and Reasonableness (SONAR).[15]

i. SONAR, Attachment 1: Public Notice: EQB seeks input on proposals for amending rules regarding "cumulative impacts or effects," May 2, 2007.[16]

ii. SONAR, Attachment 2: Shoreland projects survey, May 2007.[17]

iii. SONAR, Attachment 3: Graph 1.[18]

iv. SONAR, Attachment 4: Background information in support of SONAR, DNR staff, April 2007.[19]

v. SONAR, Attachment 5: Fact sheet re lakeshore development categories, November 2004.[20]

G. A memorandum from James Connaughton, the Chairman of the Council on Environmental Quality, Executive Office of the President,

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[9] 33 SR 1243 (January 20, 2009), *see also* Ex. 11.
[10] Ex. 1, 31 S.R. 215.
[11] Ex. 2, 31 S.R. 751.
[12] Ex. 3, 31 S.R. 1807.
[13] Ex. 4, 32 S.R. 2094.
[14] Ex. 5.
[15] Ex. 6.
[16] Ex. 6A.
[17] Ex. 6B.
[18] Ex. 6C.
[19] Ex. 6D.
[20] Ex. 6E.

titled, "Guidance on the Consideration of Past Actions in Cumulative Effects Analysis."[21]

H. Minnesota Supreme Court case, *Citizens Advocating Responsible Development, et al vs. Kandiyohi County Board of Commissioners and Duininck Brothers, Inc.*[22]

I. The certificate of mailing for sending the Statement of Need and Reasonableness to the Legislative Reference Library.[23]

J. Notice of Hearing, as mailed.[24]

K. The Department's Notice of Hearing as published in the State Register on January 20, 2009.[25]

L. Certificate of mailing the notice of hearing to EQB rulemaking mailing list.[26]

M. Certificate of the accuracy of the mailing list.[27]

N. Certificate of giving notice pursuant to the additional notice plan by use of the EQB Monitor.[28]

O. Certificate of giving notice pursuant to the additional notice plan by posting notice at the EQB's website. [29]

P. Certificates of Giving Notice

   i. Certificate of giving notice pursuant to the additional notice plan by mailing or emailing to known persons – Minnesota Association of Counties (Gregg Downing).[30]

   ii. Certificate of giving notice pursuant to the additional notice plan by mailing or emailing to known persons – individuals interested in genetically-engineered wild rice (Jon Larsen).[31]

   iii. Certificate of giving notice pursuant to the additional notice plan by mailing or emailing to known persons – Shoreland Rules Update Project (Susan Hall).[32]

Q. Certificate of giving notice pursuant to the additional notice plan by use of a news release (Jim Schwartz).[33]

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[21] Ex. 7, June 24, 2005.
[22] Ex. 8, 713 N.W. 2d 817 (Minn. 2006).
[23] Ex. 9.
[24] Ex. 10.
[25] Ex. 11, 33 S.R. 1243.
[26] Ex. 12.
[27] Ex. 13.
[28] Ex. 14.
[29] Ex. 15.
[30] Ex. 16A.
[31] Ex. 16B.
[32] Ex. 16C.
[33] Ex. 17.

R. Certificate of sending the Notice of Hearing and Statement of Need and Reasonableness to Legislators.[34]

S. Certificate of Board's authorizing resolution.[35]

T. Letter, dated December 3, 2008, informing Commissioner of Agriculture that proposed rules may affect farming operations.[36]

U. Documents and Comments

i. Documents from, and comments received in response to, August 2006 Request for Comments.[37]

ii. Documents from, and comments received in response to, December 2006 Request for Comments.[38]

iii. Documents from, and comments received in response to, June 2007 Request for Comments.[39]

iv. Documents from, and comments received in response to, June 2007 informal request for comments regarding treatment of cumulative impacts or effects.[40]

v. Documents from, and comments received in response to, June 2007 informal request for comments regarding mandatory categories for land projects.[41]

15. The Board has met all of the procedural requirements applicable to the proposed rules. All exhibits were available at the cost of reproduction from the Board.

Additional Notice Requirements

16. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made.

17. The EQB has made a genuine and committed effort to involve interested parties and other members of the public in this rulemaking. Significant changes to the proposed rule were made in response to comments and feedback from interested parties. The proposed rule has benefited substantially from this public input. By the time of the public hearings, the EQB had heard and considered the great majority of the evidence and argument that would be presented by interested parties and the public at the hearing, and had made several modifications to its proposed rules to incorporate

[34] Ex. 18.
[35] Ex. 19.
[36] Ex. 20.
[37] Ex. 21A.
[38] Ex. 21B.
[39] Ex. 21C.
[40] Ex. 21D.
[41] Ex. 21E.

meritorious suggestions that had been presented. It made additional modifications based upon comments made at and during the hearings.

18. The EQB created a Web page devoted to the proposed amendments.[42] It contained links to the proposed rules, SONAR, Notice of Hearing, and pre-hearing comments submitted to the Board regarding the proposed rules. Subsequently the Web page was periodically updated to inform interested parties and the public about changes to the proposed rules.

19. As found in Finding No. 10, the EQB submitted an additional notice plan to the Office of Administrative Hearings, which was reviewed and approved by the Administrative Law Judge by letter dated December 18, 2008. During the rulemaking proceeding, the EQB certified that it provided notice to those on the rulemaking mailing list maintained by the EQB and in accordance with its additional notice plan.[43]

20. Pursuant to its approved additional notice plan, the Board also provided notice of the proposed rules by:

- Posting the Notice of Hearing, proposed rules, and SONAR on the EQB's website;
- Publishing rulemaking information in the *EQB Monitor*;
- Sending a press release to major circulation newspapers;
- Emailing the Notice of Hearing, proposed rules, and SONAR to the Minnesota Association of Counties and requesting that the information be forwarded to each county, specifically the zoning administrators;
- Emailing the Notice of Hearing to individuals who had expressed interest in the requirements for an EIS for the release of genetically engineered wild rice; and
- Emailing links to the Notice of Hearing, proposed rules, and SONAR to people interested in the parts of the proposed rules relating to shoreland development.[44]

21. The EQB went to great lengths to inform and involve interested parties and the affected public in this rulemaking. The active participation of those persons and the accommodation by the EQB of many of their concerns demonstrates that the EQB more than adequately satisfied the notice requirements.

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[42] http://www.eqb.state.mn.us/resource.html?Id=19877.

[43] *See*, Exs. 14-18.

[44] *Id.*

Compliance with Other Statutory Requirements

Cost and Alternative Assessments

22. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

> a. a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> b. the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> c. a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> d. a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> e. the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
>
> f. the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
>
> g. an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

In the SONAR, the Board included and thoroughly addressed all these factors. Some of the statements in the SONAR are restated in the following findings.

Classes of Persons Affected

23. In the SONAR, the EQB stated that the proposed rules would directly affect persons who propose to develop projects that have, or may have, potential for significant environmental effects. The greatest impact would be to proposers of projects located in shoreland areas affected by the proposed mandatory EAW categories. The types of shoreland area projects involved would be nonmetallic mining, residential developments, resorts, RV parks, campgrounds, and other projects disturbing certain

amounts of shoreland. The persons who are expected to benefit from the proposed changes are project proposers, units of government and the general public.[45]

Estimate of the Probable Costs to the Agency and Other Agencies

24. As the Responsible Governmental Unit (RGU) for EISs on releases of genetically engineered wild rice, the EQB would incur significant costs during EIS scoping and preparation, but would be authorized to charge those costs to the project proposer. The only other costs that EQB would incur in implementing the new rules would be for the costs of time and materials for updating guidance materials to incorporate the rule amendments, which it found would be minimal. Counties and cities with developable shoreland will likely experience higher costs for review due to some rule amendments, but in almost all cases the costs would be added to the costs paid by the proposed users of the projects undergoing review. The additional procedures for the AUAR will accrue in most cases to the proposer of the project that necessitated the additional procedures.[46]

Determination of Whether there are Less Costly or Less Intrusive Methods

25. The EQB stated that most of the proposed amendments are clarifications of the existing rules and do not impose additional costs or intrusions.[47] For those amendments that do impose additional requirements, the EQB considered several different options, as discussed below and throughout the SONAR.

Description of Alternatives Seriously Considered

26. The EQB did consider alternative approaches to the proposed rule amendments in the AUAR process. The original amendment concept would have prohibited removal of a project from an AUAR once started, and would have prohibited use of the AUAR process to review specific development projects. In response to public comments opposing these prohibitions, the EQB modified the proposed amendment to create additional opportunities for public input in the review process. The EQB also considered different ways to amend the rule provisions regarding the treatment of cumulative-type impacts as well as the mandatory EAW and EIS categories for shoreland projects.[48] These options are discussed in depth in the SONAR.

Estimate of the Probable Costs of Complying

27. According to the EQB, the primary cost increases caused by the proposed amendments are those attributable to the new mandatory EAW and EIS categories for shoreland projects. Proposers of projects would bear the additional costs associated with these new categories. The EQB estimated that the cost of an EAW for a shoreland

[45] SONAR at 3-4.
[46] SONAR at 4-5.
[47] SONAR at 5-6.
[48] SONAR at 5-6.

project is between $5,000 and $10,000, while most other EAWs cost between $1,000 and $15,000.[49]

28. To estimate the new costs to be imposed by the creation of the new EAW and EIS mandatory categories, the EQB surveyed counties and 57 cities with extensive shoreland areas to obtain data on the characteristics of projects in shorelands over the past decade. The SONAR contains a lengthy discussion of the results of this survey.[50]

Estimate of the Probable Costs of Not Adopting the Proposed Rule Amendments

29. According to the Board, if the proposed rule amendments were not adopted, the costs and consequences would affect four categories; 1) continuing inefficiencies caused by confusion or misinterpretation that would be corrected by the proposed amendments; 2) those affected by ineffective features in the current rules that would be corrected by the amendments; 3) those due to the need to process citizen petitions for some projects that would either be exempt or automatically require review; and 4) those due to not correcting the error made by the Court of Appeals regarding AUAR boundaries and the scope of technical analysis.[51]

Differences between the Proposed Rule and Existing Federal Regulations

30. In the SONAR, the Board stated that the federal process prescribes environmental documents similar to the Minnesota EAW and EIS but different in detail. In the instances where dual state-federal review is needed, specific provisions in the Environmental Review rules provide for joint review with one set of environmental documents. These provisions are not affected by the proposed amendments. One specific area of the proposed amendments that would perpetuate a difference between state and federal review is in the terminology used for cumulative-type impacts. The state's proposed definition would modify federal wording to reflect a Minnesota Supreme Court ruling that made a distinction between a broader scope of analysis appropriate to an EIS and a narrower scope appropriate to review of specific projects.[52]

31. The EQB has fulfilled its obligation under Minn. Stat. § 14.131 to discuss cost and alternative assessments in the SONAR.

Impact on Farming Operations

32. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming

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[49] SONAR at 6.

[50] SONAR at 6-12. *See also*, Exs. 6B, 6C, 6D, and 6E.

[51] SONAR at 12-14.

[52] SONAR at 14-15.

operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

33. By letter dated December 3, 2008, the EQB provided the proposed rules and the SONAR to the Commissioner of Agriculture. The EQB directed attention to the proposed rule (Minn. R. 4410.4400, subp. 28) adding a mandatory EIS requirement for the release of genetically engineered wild rice.

34. The Administrative Law Judge concludes that EQB has provided notice and conducted a hearing in accordance with Minn. Stat. § 14.111.

Performance-Based Regulation

35. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

36. According to the EQB, there were no opportunities here for new performance-based rules or to provide procedural flexibility because most of the proposed amendments do not substantially affect the procedures of environmental review, and few of the amendments related to the AUAR process add public notice, review and comment process.[53]

37. The Administrative Law Judge finds that the EQB has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Cost to Small Businesses and Cities under Minn. Stat. § 14.127

38. Effective July 1, 2005, under Minn. Stat. § 14.127, an agency must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[54] The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[55]

39. The EQB has determined that the rule amendments proposed will not result in an increased cost of more than $25,000 for any small city in the first year after

[53] SONAR at 15.

[54] Minn. Stat. § 14.127, subd. 1.

[55] Minn. Stat. § 14.127, subd. 2.

adoption, but it may result in costs exceeding $25,000 for one or more small businesses. Those businesses would most likely be shoreland real estate developers who would be confronted with requirements for additional mandatory EAWs and EISs, which can cost in excess of $100,000.[56]

40. The Administrative Law Judge finds that the EQB has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Consultation with the Commissioner of Finance

41. Under Minn. Stat. § 14.131, the agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

42. As stated in Finding No. 11, the Board asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government in a letter dated October 5, 2007. The Department of Finance provided comments in a memorandum dated January 9, 2008, and stated that the Board had adequately analyzed the potential costs to local units of government.[57]

43. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules on units of local government.

Rulemaking Legal Standards

44. Under Minnesota law,[58] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[59] Here, the EQB prepared a detailed and complete SONAR, supported by several exhibits, in support of its proposed rules. The EQB supplemented the SONAR with comments made by EQB staff at the public hearing and with the Board's written post-hearing Response and Rebuttal.

45. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[60] Arbitrary or unreasonable agency action is action without

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[56] SONAR at 16.

[57] SONAR, Supplement #2.

[58] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

[59] *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[60] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

consideration and in disregard of the facts and circumstances of the case.[61] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[62] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[63]

46. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[64]

47. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Board complied with the rule adoption procedure, whether the rule grants undue discretion, whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[65]

48. Because the Board suggested changes to proposed rules after the hearing and in response to comments by the public, it is necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

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[61] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

[62] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[63] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

[64] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

[65] Minn. R. 1400.2100.

Analysis of the Proposed Rules

49. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

50. The Administrative Law Judge finds that the EQB has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all provisions of its rule changes as originally proposed and the modifications it proposed in its post hearing Response. The Administrative Law Judge also finds that all provisions are authorized by statute and that there are no other problems that would prevent the adoption of the proposed rules.

51. There is some disagreement with the Board's rules expressed by interested persons and other members of the public. Again, however, the Board has fully addressed those concerns, incorporated some of them in its modifications, or added further clarification of its reasons for its own proposals. Many lake associations submitted comments in support of the proposed rules generally. The Board is not required to adopt a rule or policy because someone considers it "better," or more favorable to that person. Some of the comments were directed at rule provisions that were not proposed to be changed and some requested new rules beyond those proposed in this proceeding. Those are not within the scope of the Notice of Hearing and cannot be addressed. None of the public comments demonstrate that any of the proposed rule changes are unreasonable or not in compliance with applicable law.

Rule Analysis by Part

Part 4410.0200 – Definitions and Abbreviations

Subpart 11a – Cumulative potential effects

52. The EQB proposes a new definition of "cumulative potential effects" to clarify and correct problems related to impacts of a cumulative nature that are due to multiple projects over time. Various terms are used to describe this type of result, including "cumulative impact," "cumulative effect," and "cumulative potential effect." Although the terms have been interpreted to have a similar meaning in the past, the EQB chose to adopt the distinction recognized by the Minnesota Supreme Court in *Citizens Advocating Responsible Development v. Kandiyohi County Board of Commissioners* (the *CARD* decision).[66] The Court distinguished between a broader scope of review associated with "cumulative impacts" and a narrower, project-specific

[66] 713 N.W.2d 817 (Minn. 2006).

focus associated with "cumulative potential effects." The amended definition is derived from a composite of the *CARD* ruling, Council on Environmental Quality (CEQ) guidance and the National Environmental Policy Act (NEPA) so as to incorporate desired concepts and appropriate factors for making determinations about those concepts.[67]

53. Comments received in response to the Request for Comments expressed concern that the new definition would create confusion and deprive RGUs of guidance from past NEPA case law on the subject.[68] The EQB considered using the NEPA cumulative impact language, but rejected it based on its belief that such an approach would not provide more clarity, particularly when trying to decide if significant cumulative potential effects may result from a project, as when preparing and using an EAW.[69]

54. The expansion of the scope of cumulative potential effects analysis is of concern to many commentators, who worry that the proposed amendments will make the cumulative potential effects analysis more expansive, complicated, and expensive.[70] The EQB acknowledges that this analysis is a difficult concept, but argues that its proposed definition strikes an appropriate balance in defining boundaries and requirements. According to the EQB, the proposed definition will aid RGUs in implementing review requirements and insulate them from unwarranted litigation.[71]

55. The amended rule also substitutes the term "environmentally relevant area" for "surrounding area" to better denote the phrase's intended and proper meaning. "Surrounding area" implies a single, fixed area, which may either be too big or too small relevant to consideration of the cumulative potential effects. Thus, the new term is designed to overcome that problem. Some commentators disagreed with that policy choice, but the EQB's position is reasonable.[72]

56. The EQB received a comment suggesting the addition of the phrase "but collectively significant" between the words "minor" and "projects" on line 2.1 of the Proposed Permanent Rules.[73] The EQB considered the proposal in the SONAR,[74] but found that the point was whether individual projects could result in cumulative potential effects; not whether those effects were collectively significant. According to the EQB,

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[67] EQB Staff Rebuttal Period Responses to Comments, April 1, 2009 (EQB Rebuttal), at 5.

[68] Exs. 21B, 21D.

[69] EQB Rebuttal, at 5.

[70] Public Comment 5 (Builders Association of the Twin Cities); Public Comment 1 (Association of Minnesota Counties); Mike Robertson, Minnesota Chamber of Commerce, letter dated March 25, 2009.

[71] EQB Rebuttal at 4.

[72] Mike Robertson, Minnesota Chamber of Commerce, letter dated March 25, 2009; Public Comment 1 (Builders Association of the Twin Cities); and Public Comment 5 (Association of Minnesota Counties).

[73] Mike Robertson, Minnesota Chamber of Commerce, letter dated March 25, 2009.

[74] SONAR at 21.

the original phrase, taken from the NEPA definition of cumulative impacts, implies all cumulative potential effects are significant by definition, which is not true.[75]

57. The EQB received a comment suggesting the deletion of the phrase beginning with "unless" on line 2.4 of the proposed permanent rules.[76] The EQB notes that it borrowed the concept from recent NEPA guidance and considered making the change.[77] The EQB ultimately rejected omitting the phrase based on a concern that, without it, a situation might arise where such itemization of past impacts was necessary, but only optional.[78] As it stands, the proposed rule does not require itemization of past actions unless necessary.

58. The EQB also received comments with regard to the basis of expectation factors for determining whether a project is reasonably likely to occur.[79] The SONAR states that each of the factors listed in the proposed rule "may" lay a basis of expectation, but that the RGU must consider them among other factors.[80] The Association of Minnesota Counties (AMC) comment suggested a modification to line 2.13 of the Proposed Permanent Rules by deleting "relevant" and adding "determined to be relevant by the RGU" after "factors." The EQB wishes to make this change and believes it would improve the wording and clearly denote that it is the RGU who determines whether a factor is relevant.[81] This editorial change to Subpart 11a is necessary and reasonable. The modifications do not create a substantial difference from the proposed subpart 11a. The EQB has demonstrated that the proposed rule is reasonable and necessary and provides needed standards to aid in the preparation of an EAW.

Subpart 55a – Ordinary high water level

59. The EQB proposed to add a definition of "Ordinary high water level" giving it the meaning in Minn. R. 6120.2500, subpart 11, which is a term defined in the Department of Natural Resources (DNR) rules regarding shoreline management. The EQB wants to make its environmental review rules and the DNR's shoreland management rules consistent as to the definition of "ordinary high water level" because both rules address the same topic.[82]

60. Subsequent to publication of the proposed rules in the State Register, DNR staff approached the EQB and suggested that the reference to Minn. R. 6120.2500 be deleted and substituted instead with a reference to Minn. Stat. §

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[75] EQB Rebuttal at 6-7.

[76] Mike Robertson, Minnesota Chamber of Commerce, letter dated March 25, 2009.

[77] SONAR at 21.

[78] EQB Rebuttal at 7.

[79] Public Comment 5 (Builders Association of the Twin Cities); Public Comment 1 (Association of Minnesota Counties).

[80] SONAR at 22-23; *see also,* EQB Rebuttal at 7.

[81] EQB Staff Responses to Comments, March 25, 2009 (EQB Response), at 1.

[82] SONAR at 24.

103G.055, subd. 14. While the definition of "ordinary high water level" in the statute is slightly different than it is in the DNR's rules, the EQB wishes to change proposed part 4410.0200, subp. 55a, as follows: "'Ordinary high water level' has the meaning given in ~~part 6120.2500, subpart 11~~ Minnesota Statutes, section 103G.055, subdivision 14."[83]

61. The Administrative Law Judge finds that proposed definition at subpart 55a is needed and reasonable, and changing it as stated above does not make it substantially different from the text as originally published in the State Register.

Subpart 79a – Sensitive shoreland area

62. The Board proposed a definition of "Sensitive shoreland area" at subpart 79a. The Board stated that this definition is needed because the phrase is used in the proposed rules regarding new mandatory categories for projects in shorelands at parts 4410.4300 and 4410.4400.[84]

63. Henry VanOffelen of the Minnesota Center for Environmental Advocacy (MCEA) suggested that the EQB add another group of waters to the list of sensitive shoreland areas, namely waters determined to be "impaired waters" according to the Minnesota Pollution Control Agency's (MPCA) process for identifying waters impaired solely due to mercury.[85] The Board noted that it had previously considered including this category of waters, but rejected the idea because the Board's proposed criteria all relate to the official acknowledgement by a unit of government of special natural resource or ecological values. The Board believes that the designation of a water as impaired due to pollution is not the same type of recognition.[86]

64. Subsequent to the hearings, the Board noticed an error in the proposed definition and wishes to fix it as follows: "'Sensitive shoreland area' means shoreland designated as a special protection district pursuant to part 6120.3200 ~~and~~ or shoreland riparian to any of the following types of public waters . . . ."[87]

65. The Administrative Law Judge finds that proposed definition at subpart 79a is needed and reasonable, and changing it as stated above does not make it substantially different from the text as originally published in the State Register.

Subpart 81a – Shore impact zone

66. The EQB originally proposed to define "Shore impact zone" as follows: "'Shore impact zone' means land located between the ordinary high water level of a public water and a line parallel to it at 50 percent of the structure setback distance as established by part 6120.3300, subpart 3, or by local ordinance, whichever distance is greater."

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[83] *See*, EQB Response at 1.
[84] SONAR at 24-25.
[85] Henry VanOffelen letter dated March 25, 2009.
[86] EQB Rebuttal at 8.
[87] *See*, EQB Response at 2.

67. The term is used as a threshold factor in the proposed new EAW category at part 4410.4300, subpart 36a, item B, dealing with land conversions in shorelands. The initial definition of the new term was taken from existing DNR shoreland management rules at part 6120.3300 subpart 3.[88]

68. Comments received raised concerns that the definition from DNR rules was very lengthy and potentially confusing.[89] In response, the EQB proposed a completely new, simplified definition as follows: "'Shore impact zone' has the meaning given in part 6120.2500, or by a local ordinance if the ordinance specifies a greater size for the zone."[90]

69. The Administrative Law Judge finds that this clarification is reasonably within the scope of the originally proposed rule and preserves the goals of the original change. The new proposed term and the changes are reasonable and necessary and do not make subpart 81a substantially different.

Part 4410.1100, subpart 2 – Petition Process; Content

70. Part 4410.1100 allows for any person to request the preparation of an EAW on a project by filing a petition signed by at least 25 individuals. Subpart 2 lists the required contents of such a petition. The Board proposed to amend item E as follows:

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

71. The Board seeks this amendment due to the increased use of the internet to obtain material evidence to file with a petition. Some individuals have provided only URL citations to material evidence on the internet without including the information with the petition. The statute, Minn. Stat. § 116D.04, subd. 2a, governing petitions for an EIS is similar and related to this rule and refers to "material evidence accompanying a petition." The Board wishes to carry the idea over into this rule.[91]

72. MCEA expressed concern that this new requirement will impose a significant burden on the public, particularly if the material to which the petition refers is protected by a copyright and cannot be legally copied. MCEA suggested that the Board add language to the rule allowing for alternative arrangements to be made if the

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[88] SONAR at 26.

[89] Alexandria Hearing Transcript at 19-23. *See also,* City of Lino Lakes letter dated March 20, 2009, at 5.

[90] EQB Response at 2.

[91] SONAR at 26-27.

material is under copyright protection to ensure that the RGU is able to review the materials without requiring citizens to make illegal copies.[92]

73. The Board responded that it is to the petitioner's advantage and necessary to the petition to provide a physical copy of the material evidence so that the RGU can adequately review, evaluate, and respond to the petition. The structure and availability of individual websites changes too rapidly to assure that the same information is available at any subsequent time for viewing. Furthermore, the Board stated that it knows of no instance where a petitioner has been frustrated by copyright protection or held accountable for copyright infringement as it relates to the petition process. Accordingly, the Board stands by its addition to item E and declines to change the proposed rule based on MCEA's comments.[93]

74. The Administrative Law Judge finds that the EQB has demonstrated a rational basis for the amendment to subpart 2, item E. While the MCEA raised some good arguments, nothing in those comments defeats the need for and reasonableness of the proposed change.

Part 4410.1700, subpart 7 – Decision on Need for EIS; Criteria

75. The EQB proposed the following amendments to subpart 7:

> In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered: . . .
>
> B. cumulative potential effects ~~of related or anticipated future projects~~. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;
>
> C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project . . .
>
> .

76. These proposed amendments to subpart 7 are the EQB's attempt to deal with problems relating to effects of a cumulative nature. The definition of "cumulative potential effects" proposed at part 4410.0200, subp. 11a, is implemented in this subpart. The EQB seeks to add this list of factors that an RGU must consider when determining if the project under review has the potential for significant environmental effects due to

[92] MCEA letter dated March 25, 2009, at 19-20.

[93] EQB Rebuttal at 8-9.

the cumulative potential effects to which it contributes. The Minnesota Supreme Court's *CARD* decision does not provide this type of guidance, and the EQB believes that these factors will aid the regulated parties in understanding the process.[94]

77. MCEA urges deletion of the last three of the four proposed factors. Their objection lies in the ultimate purpose of cumulative potential effects analysis, which they contend is to focus on environmental impacts rather than on project developers. MCEA contends that the final three factors are contrary to federal and state environmental review law and in conflict with the ultimate role a cumulative potential effects analysis should play in determining that a project has the potential for significant environmental effects.[95]

78. The EQB staff responded to concerns raised by the MCEA by pointing out that the Minnesota program targets effects relative to a project rather than broader scale analysis, which tends to be the purview of federal NEPA reviews. The EQB staff questions the wisdom of requiring a small-scale project to conduct a full-scale cumulative potential effects analysis "simply because it is next in the queue" after a larger project. It finds that it would be unfair to require the small-scale private developer to bear the costs of that broad analysis in addition to those directly related to its project. The three disputed factors provide developers with incentives to mitigate the impacts of their projects by giving them a defense against an EIS mandated by a RGU if they do so. The EQB worries that to do otherwise could spur a backlash by developers who could put pressure on legislators to roll back the requirements, along with other parts of the process. The broader-scope analysis sought by the MCEA is not abandoned under this rule, but rather is the responsibility of the government. If the RGU wishes to order a project-specific EIS on the basis of cumulative potential effects, it must find a relationship between the contribution by the project and the aggregate effect that justifies the EIS. This change has clearly been given substantial consideration and appears reasonable and necessary.[96]

79. MCEA supports the proposed changes to item C, but recommended that the EQB be clear that this standard does not depart from mitigation standards set forth in state and federal case law.[97]

80. The EQB also responded to comments received from the Minnesota Chamber of Commerce regarding the changes made to items B and C and how these changes will interact in the RGU's decision-making process.[98] With respect to Item B, according to the EQB, "the mitigation plan factor is intended to mean only a comprehensive mitigation plan designed to address a certain cumulative potential effect and to allocate allowable contributions among all contributing sources."[99] There are a

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[94] SONAR at 28-29.

[95] MCEA letter dated March 25, 2009, at 15-16. *See also,* Fort Snelling Hearing Transcript at 81-85.

[96] EQB Rebuttal at 9-10.

[97] MCEA letter dated March 25, 2009, at 17-18.

[98] Mike Robertson, Minnesota Chamber of Commerce, letter dated March 25, 2009.

[99] EQB Rebuttal at 10.

limited number of such plans for the near future in Minnesota, but the EQB states that only comprehensive plans such as the MPCA's TMDL plans for various watersheds should count. The EQB indicates that there is still room for other types of mitigation plans under item C, however, and would be willing do provide guidance to better clarify the point.

81. The proposed amendment to subpart 7 acts as a guide to regulated parties in determining whether an EIS is necessary. The EQB has shown that the proposed amendments to items B and C are needed and reasonable.

Part 4410.3100, subpart 2a – Prohibition on Final Governmental Decisions; Concurrent review of draft permits not prohibited

82. The Board proposed subpart 2a for clarification purposes, as follows: "Subpart 1 does not prohibit a governmental unit from issuing notice of and receiving public comments on a draft permit prior to completion of environmental review." According to the Board, this practice is common among RGUs, but has recently been questioned as contrary to the prohibitions in subpart 1.[100]

83. MCEA strongly objected to this proposed language and argued that allowing for noticing of draft permits prior to the completion of environmental review is outside the authority of the EQB under the applicable statute. MCEA cites Minn. Stat. § 116D.04, subd. 2b, which states that a governmental action "shall be preceded" by a detailed environmental impact statement. Furthermore, subdivision 2a of the same statute prohibits a governmental entity from taking action, directly or indirectly, to further or assist a project prior to completion of environmental review. MCEA asserts that the purpose of environmental review, through the preparation of EAWs or EISs, is to allow governmental agencies to engage in reasoned and fully informed decision making regarding the environmental impacts of a particular government action. MCEA also expressed concern that concurrent environmental review and public comment would actually impede effective public participation because the findings of the environmental review would not yet be completed and available.[101]

84. According to the EQB, the proposed rule language affects only the timing of public notice of a draft permit and reception of public comments. The EQB asserts that the proposed rule does not dictate that any governmental unit engages in concurrent review if it chooses to defer such notice. The other prohibitions on final governmental decisions under part 4410.3100 remain intact, and effective public participation is not diminished.[102]

85. The Administrative Law Judge finds that the Board has demonstrated a rational basis in the record for this proposed addition to part 4410.3100. Subpart 2a is a

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[100] SONAR at 31-32.

[101] MCEA letter dated March 25, 2009, at 2-4. *See also,* Fort Snelling Hearing Transcript at 80-81.

[102] EQB Rebuttal at 11-13.

clarification to the rules for the benefit of the regulated parties, and the Administrative Law Judge finds that it is needed and reasonable.

Part 4410.3610 – Alternative Urban Areawide Review Process

Subpart 2, item D – Relationship to specific development projects

86. The Alternative Urban Areawide Review (AUAR) process is a simplified process by which a local unit of government can do a broad-based environmental review without needing to make a case-by-case determination of whether environmental review is otherwise required for all projects within the area. The AUAR process is not intended to create a presumption that every possible project that is proposed within the study area requires review.[103]

87. The EQB proposed item D to: (1) add an explicit statement that the ordering of an AUAR does not constitute a finding by the RGU that all potential development within the AUAR area has or may have the potential for significant environmental effects; and (2) add a public notice and comment opportunity prior to any removals of projects from the AUAR review. The EQB wished to address situations in which an AUAR is begun and then a proposer of a project of less than mandatory review size wishes to remove the proposer's project area from the AUAR. The EQB presumes that this will generally happen when a proposer wants to proceed through the local review process on a faster track than the AUAR is scheduled to progress.[104]

88. MCEA objected to a project being removed from a particular AUAR process as contrary to Minnesota Statutes, chapter 116D, which requires review of any government action, direct or indirect, that has the potential for significant environmental effects, regardless of whether or not an individual project itself fits within the mandatory EAW or EIS categories. According to MCEA, when a local government unit decides to order preparation of an AUAR, the decision has already been made that there is the potential for significant environmental effects from the actions that will be examined within the AUAR, and that all parcels and projects within that area must necessarily be included in the review. Failure to include all projects is arbitrary and capricious and contrary to the statute, and MCEA urges the EQB to remove item D from the proposed rules. At a minimum, MCEA supports the position of the DNR that parcels or projects be removed from an AUAR only if the parcel or project does its own EAW or EIS.[105] As to the public notice and comment portion of proposed item D, MCEA requested that the proposed 10-day comment period be extended to a 30-day period, as it is with other types of environmental review.

89. In response, the EQB noted that MCEA objected to this same concept during the "phase 1" rulemaking in 2006, and the EQB sought to clarify the rules in this rulemaking by adding the first sentence of item D, which makes explicit that the ordering

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[103] SONAR at 34.

[104] SONAR at 33.

[105] MCEA letter dated March 25, 2009, at 10-12. *See also,* Fort Snelling Hearing Transcript at 85-89.

of an AUAR does not create an obligation that would not otherwise exist to review any particular specific project that may arise within the AUAR boundary during the preparation of the AUAR. The EQB argues that the AUAR process is voluntary for the RGU and that the RGU should have the ability to remove a project from the review once it has been ordered. Furthermore, the EQB notes that the notice and comment period should bring to light any sound reasons why the project proposed for removal should not be removed from the AUAR process. As to MCEA's proposal to lengthen the comment period, the EQB reiterated that the 10-day period is long enough given the limited scope of comment, which is not nearly as comprehensive as that of an EAW or EIS.[106]

90. The Administrative Law Judge finds that the Board has demonstrated a rational basis in the record for proposed subpart 2, item D. While MCEA's comments were thoughtful and comprehensive, the Board is not required to adopt those suggestions. Subpart 2, item D is needed and reasonable.

Subpart 5, item A – Procedures for review

91. Subpart 5 lists the procedures for review under the AUAR process. The Board seeks to amend item A as follows:

> The RGU shall prepare a draft environmental analysis document addressing each of the development scenarios selected under subpart 3 using the standard content and format provided by the EQB under subpart 4. A draft version of the mitigation plan as described under item C must be included. <u>The geographic extent of the analyses of direct, indirect, and cumulative potential effects conducted in preparing the document is not to be limited by the boundaries set in the order for review under subpart 3.</u> The draft document must be distributed and noticed in accordance with part 4410.1500.

92. The Board proposed this amendment in response to *Minnesota Center for Environmental Advocacy v. City of St. Paul Park*.[107] In that case, MCEA challenged the adequacy of an AUAR, partly on the grounds that the AUAR did not adequately consider cumulative-type impacts on resources outside of the AUAR boundary. The Court of Appeals decided that the RGU did not need to consider impacts or sources outside of the AUAR boundary on the basis that an RGU would have already factored in the complete scope of the analysis prior to setting the AUAR boundary. The Board argues that this is not how the AUAR process generally works and it wishes to correct what it believes is a fundamental error by the Court by amending subpart 5, item A. The Board asserts that it is reasonable for the cumulative impacts analysis to look beyond the AUAR boundary because environmental impacts can migrate across boundaries.[108]

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[106] EQB Response at 4.

[107] 711 N.W.2d 526 (Minn. Ct. App. 2006).

[108] SONAR at 36-37.

93. The Association of Minnesota Counties objected to this proposed amendment arguing that the rules should require an RGU to consider the scope of the needed technical analysis prior to setting the AUAR boundary in an effort to reduce uncertainty in the process.[109]

94. The Board responded that connecting the AUAR boundary to impacts would change the current process, making it more complex and expensive. Currently, RGUs define the boundary based on planning and development factors, not on geographic impact. According to the Board, the AUAR boundary is the analogue of the property boundary for a single project so it does not make sense to include the geographic range of the impacts in the initial setting of the boundary.[110]

95. The Administrative Law Judge finds that the proposed amendment to subpart 5, item A is needed and reasonable. The Board has demonstrated a rational basis in the record.

Subpart 5a – Additional procedures required when certain large specific projects reviewed

96. Proposed subpart 5a puts forth additional procedures that must be followed "if a specific project will be reviewed according to this part and the project would otherwise require preparation of an EIS . . . or will comprise at least 50 percent of the geographic area to be reviewed." The additional procedures consist of notice and comment by the public, guidance on the purpose of the comments, criteria for review, and a deadline for the RGU's final decision.[111]

97. The Builders' Association of the Twin Cities (BATC) opposed the inclusion in this subpart of situations where any single project would cover at least 50 percent of the geographic area of the AUAR. BATC argues that the current rules already determine which projects of a certain scale warrant further environmental review, and that the proposed subpart 5a subjects all projects to an EIS-type review for no reason other than the area the project covers.[112] In response, the Board reiterated the arguments in the SONAR and argued that the new language seeks to improve the analysis of alternatives where the AUAR involves large specific projects.[113]

98. MCEA largely supported proposed subpart 5a, but objected that the Board was attempting to limit the types of comments made by the public, thereby restricting and burdening public participation.[114] The Board responded that it was not attempting to limit public comment, but to guide the public in making useful comments for the RGU. Under the proposed subpart, members of the public are still free to comment as they

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[109] Public Comment 5 (attached letter dated June 20, 2007).
[110] EQB Response at 5.
[111] SONAR at 38-39.
[112] Public Comment 1.
[113] EQB Response at 5-6.
[114] MCEA letter dated March 25, 2009, at 14-15. *See also,* Fort Snelling Hearing Transcript at 90-92.

wish without restriction, and the plain language of the proposed rules requires the RGU to consider all timely and substantive comments.[115]

99. Proposed subpart 5a describes a thorough public process to analyze these types of AUAR situations while providing guidance to the public on how to most effectively participate. Accordingly, the Board has shown that subpart 5a is needed and reasonable.

Part 4410.4300 – Mandatory EAW Categories

Subpart 19a – Residential development in shoreland

100. The proposed amendments to part 4410.4300 add mandatory EAW categories to the rules that explicitly address different types of projects in shoreland areas that may have the potential for significant environmental effects. Subpart 19a specifically addresses residential development in shoreland areas and describes the types of residential development, "located wholly or partially in shoreland," that require an EAW. The local governmental unit continues to be the RGU for these types of projects.[116]

101. This proposed subpart, specifically item B, received criticism from the Kandiyohi County Zoning Administrator as it relates to traditional lot-and-block developments. The County argues that the effect of the proposed rule is to cut in half the threshold for mandatory EAW for these types of developments, thereby providing a disincentive to build them. The County also objected to the use of the terms "dense" and "high density" in the SONAR in relation to developments.[117]

102. Lino Lakes questioned whether the definition of "tier" as proposed in this subpart, and whether item D, regarding controlled access lots, may be in conflict with the "Marinas" exemption at part 4410.4600, subpart 16.[118] The EQB consulted with DNR staff regarding these two questions and concluded that a conflict likely did not exist. If a conflict did arise, the EQB notes that subpart 1 of part 4410.4600 states that a mandatory category prevails over an exemption category.[119]

103. During the public hearings, one of the issues discussed by the EQB and some commentators was how the mandatory category thresholds would be applied if a project was partially in and partially out of a sensitive shoreland area. In response to these comments, the EQB wishes to add directions to the proposed rules for how to address these situations; such directions parallel the procedure in place under subpart 19 (Residential development) of the current rules. The EQB proposes to add the following language at the end of proposed item A:

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[115] EQB Rebuttal at 13-14.
[116] SONAR at 39, 43-44.
[117] Public Comment 4.
[118] City of Lino Lakes letter dated March 20, 2009, at 6.
[119] EQB Rebuttal at 15.

If the project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.[120]

104. Henry VanOffelen, a natural resource scientist with MCEA responded to the Board's additional proposed language by suggesting that it be simplified in the following manner:

> If a project is located partially in a sensitive shoreland area and partially in a nonsensitive area, an EAW must be prepared based on the thresholds established for sensitive shoreland areas. If a project is located partially in a shoreland area and partially not in a shoreland area, an EAW must be prepared based on the thresholds established for shoreland areas.[121]

105. Other commentators questioned whether the common open space and unit density criteria used in this category are appropriate to projects located in urbanized areas.[122] The Board consulted with the DNR on this question because the DNR is in the process of developing shoreland rule amendments and the Board wishes to be consistent with the DNR on this topic. The DNR, however, has not yet completed its rule development. Accordingly, and in response to the concerns of the commentators, the Board wishes to amend the rule caption of subpart 19a to read: "Residential development in shoreland outside of the seven-county Twin Cities metropolitan area." Likewise, the Board seeks to add the same phrase to item A as follows: "A local governmental unit is the RGU for construction of a permanent or potentially permanent residential development located wholly or partially in shoreland outside the seven-county Twin Cities metropolitan area of a type listed in items B to E."[123]

106. The Administrative Law Judge finds that all of the proposed clarifications to subpart 19a are reasonably within the scope of the originally proposed rule and preserve the goals of the original change. The changes are reasonable and necessary and do not make subpart 19a substantially different than originally published in the State Register.

Subpart 20a – Resorts, campgrounds, and RV parks in shorelands

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[120] EQB Response at 2.

[121] Henry VanOffelen letter dated April 1, 2009.

[122] City of Lino Lakes letter dated March 20, 2009, at 6-8; City of St. Paul letter dated March 25, 2009.

[123] EQB Rebuttal at 1-2.

107. Subpart 20a is another of the new mandatory EAW categories that explicitly address different types of projects in shoreland areas that may have the potential for significant environmental effects. This subpart addresses "construction or expansion of a resort or other seasonal or permanent recreational development located wholly or partially in shoreland, accessible by vehicle."[124]

108. As noted in the subpart 19a discussion above, a question was raised at the hearing about how the mandatory category thresholds would be applied if a project was partially in and partially out of a sensitive shoreland area. In response to these comments, the EQB wishes to make a similar addition to the proposed subpart 20a for how to address these situations. The EQB proposes to add the following language at the end of subpart 20a:

> If the project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.[125]

109. The Administrative Law Judge finds that this clarification is reasonably within the scope of the originally proposed rule and preserves the goals of the original change. The new proposed category and the changes are reasonable and necessary and do not make subpart 20a substantially different.

Subpart 36a – Land conversions in shorelands

110. The Board wishes to make the following clarification to item A of its new mandatory EAW category regarding land conversions in shorelands: "For a project that alters 800 feet or more of the shoreline in a sensitive shoreland area or 1,320 feet or more of shoreline in a nonsensitive shoreland area, the local government unit is the RGU."[126]

111. The Administrative Law Judge finds that this additional clarification is needed and reasonable, and it does not make subpart 36a substantially different than originally published in the State Register.

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[124] SONAR at 49-50.

[125] EQB Response at 2-3.

[126] EQB Response at 3.

Part 4410.4400 – Mandatory EIS Categories

Subpart 14a – Residential development in shoreland

112. The proposed amendments to part 4410.4400 add mandatory EIS categories to the rules that explicitly address different types of projects in shoreland areas that may have the potential for significant environmental effects. These proposed categories reflect the proposed mandatory EAW categories in part 4410.4300. Subpart 14a specifically addresses residential development in shoreland areas and describes the types of residential development, "located wholly or partially in shoreland," that require an EIS. The local governmental unit continues to be the RGU for these types of projects.[127]

113. As was discussed at part 4410.4300, subpart 19a above, the issue was discussed at the public hearings about how the mandatory category thresholds would be applied if a project was partially in and partially out of a sensitive shoreland area. Because subpart 14a is the EIS equivalent of part 4410.4300, subpart 19a, regarding EAWs, the EQB wishes to make the same additions to subpart 14a as proposed above for subpart 19a. The EQB proposes to add the following language at the end of proposed item A:

> If the project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EIS must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EIS must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.[128]

114. Similarly, the Board wishes to amend the rule caption of subpart 14a to read: "Residential development in shoreland outside of the seven-county Twin Cities metropolitan area." Likewise, the Board seeks to add the same phrase to item A as follows: "A local governmental unit is the RGU for construction of a permanent or potentially permanent residential development located wholly or partially in shoreland outside the seven-county Twin Cities metropolitan area of a type listed in items B to E."

115. The Administrative Law Judge finds that these clarifications are reasonably within the scope of the originally proposed rule and preserve the goals of the original change. The changes are reasonable and necessary and do not make subpart 14a substantially different than originally published in the State Register.

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[127] SONAR at 51-55.

[128] EQB Response at 3.

Subpart 26 – Resorts, campgrounds, and RV parks in shorelands

116. Proposed subpart 26 is another of the new mandatory EIS categories that explicitly address different types of projects in shoreland areas that may have the potential for significant environmental effects. This subpart addresses "construction or expansion of a resort or other seasonal or permanent recreational development, accessible by vehicle."[129] Proposed subpart 26 is the EIS equivalent of proposed part 4410.4300, subpart 20a, thus, the Board wishes to make the same changes to subpart 26 as addressed above in the discussion of part 4410.4300, subpart 20a.[130] The Board proposes to add the following language at the end of subpart 26:

> If the project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EIS must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EIS must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one.[131]

117. The Administrative Law Judge suggests a technical correction to subpart 26 so that it is consistent with the proposed language of parts 4410.4300, subparts 19a and 20a, and 4410.4400, subpart 14a, as follows:

> For construction or expansion of a resort or other seasonal or permanent recreational development located wholly or partially in shoreland, accessible by vehicle, adding 100 or more units or sites in a sensitive shoreland area or 200 or more units or sites in a nonsensitive shoreland area, the local governmental unit is the RGU.

118. The Administrative Law Judge finds that this clarification is reasonably within the scope of the originally proposed rule and preserves the goals of the original change. The new proposed category and the changes are reasonable and necessary and do not make subpart 26 substantially different from the rules as originally published in the State Register.

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[129] SONAR at 55.

[130] EQB Response at 3.

[131] EQB Response at 3.

Part 4410.4300, subpart 12 – Nonmetallic mineral mining
Part 4410.4400, subpart 9 – Nonmetallic mineral mining

119. Henry VanOffelen of the MCEA encouraged the EQB to apply stronger standards to this type of mining.[132] But the EQB is not proposing such a change now. It is merely providing a convenient restatement of proposed parts 4410.4300, subpart 36a, item C, and 4410.4400, subpart 27, both of which are based on existing rule language.[133]

120. The MCEA's suggestions, including those of Mr. VanOffelen, for the entire group of proposed rules would make the environmental review rules more protective of the environment and more onerous for project developers. The EQB has balanced the various interests and adopted more moderate positions that are not unreasonable.

Part 4410.4600, subpart 26 – Exemptions; Governmental activities

121. The EQB proposed the following amendment to subpart 26:

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

122. The EQB argues that it has a long-standing interpretation that quasi-legislative actions are not subject to the environmental review program. This distinction draws a line between "projects" and "plans," the former being subject to the program and the latter not being subject to the program. By adding this proposed language to subpart 26, the EQB is attempting to remedy a discrepancy regarding the definition of "project" at part 4410.0200, subpart 65, and the governmental activities currently listed at subpart 26. The discrepancy involves, in part, whether the results of the project would cause physical manipulation of the environment, directly or indirectly. According to the EQB, this distinction is supported by the Court of Appeals' decision in *Minnesotans for Responsible Recreation v. Department of Natural Resources & All-Terrain Vehicle Association of Minnesota*.[134]

123. MCEA, as well as other commentators, strongly objected to the proposed amendment to subpart 26. "The exclusion from environmental review of governmental actions is unprecedented and MCEA strongly objects to this portion of the proposed rule

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[132] Henry VanOffelen letter dated March 25, 2009, at 3.

[133] *See*, SONAR at 42-43, 50-51, 52, and 55.

[134] 651 N.W.2d 533 (Minn. Ct. App. 2002); *see also,* SONAR at 58-59.

as contrary to MEPA, both in letter and in purpose."[135] MCEA also suggests that the proposed amendment is inconsistent with the AUAR process in these rules, which is intended to apply environmental review to those types of planning and zoning decisions that are proposed to be excluded from review in subpart 26. All governmental action that has the potential to affect the environment, directly or indirectly, must undergo environmental review.[136]

124. In response, the EQB referred to the discussion in the SONAR and reiterated that the proposed amendment to subpart 26 is consistent with 35 years of Board precedent. The EQB acknowledges that its environmental review program is different than NEPA and "mini-NEPA" review programs of some other states, but asserts that Minnesota is within its rights to limit the scope of its program to "projects" and to exclude review of "plans," consistent with the *Minnesotans for Responsible Recreation* decision of the Court of Appeals.[137]

125. The Administrative Law Judge finds that the proposed amendment to subpart 26 is needed and reasonable. The Board has demonstrated a rational basis for the change in the record.

126. The EQB has, through the SONAR, exhibits, oral testimony, Response, and Rebuttal demonstrated that the proposed amendments, including the proposed changes to rule language presented in its Response and Rebuttal, are needed and reasonable.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board gave proper notice in this matter. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

3. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii).

4. The additions and amendments to the proposed rules suggested by the Board after publication of the proposed rules in the State Register are not substantially

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[135] MCEA letter dated March 25, 2009, at 18-19. *See also,* Fort Snelling Hearing Transcript at 92-94.

[136] MCEA letter dated March 25, 2009, at 18-19.

[137] EQB Rebuttal at 16; *see also,* EQB Response at 7-8.

different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon further examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules, as modified by the Board, be adopted.

Dated: May 7, 2009

For

STEVE M. MIHALCHICK
Administrative Law Judge

Recorded: Transcript Prepared (6 volumes)
Kirby A. Kennedy & Associates

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must send the order adopting rules to the Administrative Law Judge. Provided that the Board has taken all of the required steps to adopt the rule, the Office of Administrative Hearings will request certified copies of the rule from the Revisor of Statutes and file them with the Secretary of State.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
P. O. BOX 64620
ST. PAUL, MINNESOTA 55164-0620

CERTIFICATE OF SERVICE

Case Title: ***In the Matter of Proposed Amendments to Rules Governing the Environmental Review Program: Minnesota Rules, Chapter 4410***	**OAH Docket No. 12-2901-20137-1**

Mary Osborn certifies that on Monday, May 07, 2009, she served a true and correct copy of the attached **Report of the Administrative Law Judge (Corrected)**; by placing it in the United States mail with postage prepaid, addressed to the following individuals:

Gregg Downing Environmental Quality Board 658 Cedar Street, Room 300 St. Paul, MN 55155	Julian Plamann, Governors Staff-Support Office of the Governor 130 State Capitol 75 Rev. Dr. Martin Luther King Jr. Blvd. St. Paul, MN 55155-1099
The Honorable Lori Swanson Minnesota Attorney General 102 Capitol Building 75 Rev. Dr. Martin Luther King Jr. Blvd. St. Paul, MN 55155	Revisor of the Statutes 700 State Office Building 100 Rev. Dr. Martin Luther King Jr. Blvd. St. Paul, MN 55155
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