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March 15, 2006

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Mr. Gregg Downing
Environmental Quality Board
300 Centennial Square Building
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*RE: Proposed Amendments to Rules Governing the Environmental Review Program, Minnesota Rules, Chapter 4410*

Dear Mr. Downing:

This letter is submitted on behalf of the Builders Association of the Twin Cities ("BATC"), a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises throughout the Minneapolis-St. Paul metropolitan region. The BATC recommends that several of the provisions proposed regarding Minnesota Rule, Chapter 4410.3610 Alternative Urban Areawide Review ("AUAR") process be amended or deleted. The current proposed language is inconsistent with and contradicts existing rules, is vague and/or has no rational basis. We propose the changes set forth on Attachment A to correct these deficiencies. In our opinion, the proposed revisions are not "substantially" different (within the meaning of Minn. Stat. § 14.05, subd.2 (b)), but instead merely clarify the proposed rules which maintain consistency to the existing rules. For convenience sake, we present our comments and proposed changes in the same order of the proposed rule.

## Minnesota Rule 4410.0200 – DEFINITIONS AND ABBREVIATIONS

### Subp. 81 – Sewered Area

The sewered area is amended to include homeowner owned facilities but this change does not go far enough.

The proposed rule should be expanded to read "... publicly owned, homeowner owned, or other privately owned ..." to include the new facilities that are owned independently from any homeowner association but may serve an association development. These type of developments are similar to those proposed in rural areas of Wright County.

**Minnesota Rule 4410.3610 - ALTERNATIVE URBAN AREAWIDE REVIEW PROCESS**

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

"*Determine*"

The proposed rules provide: "[i]f adverse comments are received, the RGU must consider and *determine* whether to keep the project in the review or move it from the review ...."

The current provision fails to provide a deadline for the RGU to make its determination even though the other provisions of this subpart provide a fixed period for actions; i.e., "[a]gencies and interested persons have *15 days* from the date of receipt of the notice to file comments ..." and "[i]f no adverse comments are received within *20 working days* of giving notice, the project may be removed ...."

The EQB also recommends a fixed timeline for action elsewhere in the proposed rules. For example, "[t]he RGU shall ~~promptly~~ determine whether the proposer's submittal is complete *within 30 days or such other time period as agreed upon by the RGU and proposer*." (See proposed Minn. R. 4410.1400.)

BATC recommends that the proposed rule be revised to state that "... the RGU must consider the comments and determine *within 30 days from the end of the comment period* whether to keep the project in the review or remove it from the review ...." The 30-day time period is consistent with Minnesota Rule 4410.1400 where the RGU determines whether a proposal or submittal is complete and comparable to the "20 working days" which is the time period for removing the project if no adverse comments are received.

"*50 Percent of the Area*"

This proposed subpart also provides:

> "[I]f a specific project will be reviewed under the procedures of this part rather than under the EAW or EIS procedures and the project itself would otherwise require preparation of an EIS under parts 4410.4400 '*or will comprise at least 50 percent of the area covered by the alternative urban areawide review*', the RGU must follow the additional procedures ...."

The stated purpose of this rule is to allow the use of an AUAR procedure to review single, specific projects that would otherwise be subject to an EAW or EIS. As such, the proposed rule should be consistent with those procedures. Existing mandatory EAW and EIS categories have no such size limitations. In fact, whether a certain size industrial, commercial or institutional facility mandates an EAW is dependent on the type of local government unit that governs the development; i.e., unincorporated area, or first, second, third or fourth class city. (See Minn. R. 4410.4300, Mandatory EAW Categories, subp.

14.) Similarly, whether certain residential developments require a mandatory EAW is based on a multiple criteria; not simply size or density. (See Minn. R. 4410.4000, subp. 19.) The same distinctions are found in the mandatory EIS categories. (See Minn. R. 4410.4400, subps. 11 and 14.) Given that the Statement of Need and Reasonableness ("SONAR") offers no rationale for this size requirement, the size delineation is on its face arbitrary and capricious. Therefore, it must be stricken from the proposed rule.

**Subp. 5 - Procedures for review.**

**B.** The proposed rules add a clause "*the need to analyze additional development scenarios.*"

Elsewhere in the proposed rules this change is qualified by the additional language "*as required by this part.*" (See subp. 5D.) For consistency, the same qualifier should be added in subpart B.

**H.** The proposed rule allows for an AUAR to be deemed inadequate if "the review has not analyzed '*sufficient*' development scenarios as required by this part." The word "*sufficient*" should be replaced with the word "*qualified.*"

Under subp. 3, "[t]he RGU may specify more than one scenario of anticipated development provided that at least one scenario is consistent with the adopted comprehensive plan [and] [a]t least one scenario must be consistent with any known development plans of property owners in the area." Further, the suggested language in subpart C states that the specific criteria found in Minnesota Rule 4410.2300(G), must be used to determine if a suggested alternative should be included or excluded.

Accordingly, whether a review is inadequate turns not on whether a "sufficient" number of scenarios have been analyzed but whether the "qualified" scenarios have been analyzed. We recommend that "sufficient" be replaced by "qualified."

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

The "50 Percent of the Area" limitation discussed above under subpart 2 is also found in subpart 5a. For the reasons previously stated, it should be removed here as well.

**A.** The proposed rule calls for the RGU to institute a public comment process for specific projects. Under the proposed language, the public comment process is "to assist it in *identifying* appropriate development scenarios...." (Emphasis added.)

The use of the word *identifying* is misleading and inconsistent with the other rules proposed to govern the process. As written, the proposed rule could have unintended consequences. Under the proposed language, RGUs may feel compelled to request that

comments include alternative development scenarios even where they may not be necessary or appropriate.

Under subp. 5(B), the language reads that "comments may address...the need to analyze additional development scenarios." (Emphasis added.) The language is clearly permissive. Thus, for purposes of consistency, the reference to the comment process should also be permissive. To that end, the word "identifying" should be deleted and replaced with "*considering whether* appropriate development scenarios and relevant issues *need* to be analyzed...."

**B.** Under the proposed subpart 5a(B):

> "[c]omments may suggest additional development scenarios, including development at sites outside the proposed alternative urban areawide review boundary, if the additional scenarios would likely minimize or avoid potentially significant environmental impacts that may result from development of the scenarios based on or incorporating the plans for the specific project or projects that require use of the procedures of this subpart."

The proposed language should be removed as it contradicts other provisions, creates unresolveable jurisdictional conflicts, and offers no criteria by which to evaluate the comments. First, under Minnesota Rule 4410.3610, subpart 1, "[a] local unit of government may use the procedures of this part [ALTERNATIVE URBAN AREAWIDE REVIEW PROCESS]...to review anticipated residential, commercial, warehousing, and light industrial development and associated infrastructure in a particular geographic area '*within its jurisdiction*'...." Subsequent language in 4410.3610, subp. 1(c) references "[a]n implementation program describing public programs, fiscal devices, and other actions to be undertaken to implement the comprehensive plan." Each of these land use tools are jurisdiction specific. These devices do not reach beyond the boundaries of the specific jurisdiction, nor can they. Thus, the AUAR is meant to be confined to a specific geographic area no longer than the local unit of government.

Furthermore, a case addressing the question of the appropriate geographic scope of a review is currently pending before the Minnesota Court of Appeals, *MCEA v. City of St. Paul Park*, CX-04-4470 (Washington County, April 20, 2005). While the final decision due in early April would not be determinative, nor necessarily binding on the EQB relative to its proposed rule amendments, the decision could provide direction on the appropriate scope of review. In EQB deliberations leading up to the proposed rules, the EQB staff recommended not to proceed with a proposed rule because the subject of the rule was being litigated, stating that "it would not be prudent to move forward to draft a rule...[and it] should be delayed until the staff can see what the decisions are...." Minutes of August 18, 2005 EQB Board Meeting, p. 5. Given the fact that the SONAR provides no justification for defining the expansive area, that it does not set forth any

criteria to determine the area that may include alternatives, and that the EQB prior action regarding pending litigation, the provision should be struck. Indeed, it is too vague, lacks any rational basis, and is inconsistent with existing policy.

Furthermore, another section of the proposed subpart B providing that "[g]overnment units and interested persons shall participate in the public comment process ...", but has added a requirement that "comments *shall address* suggested additional development scenarios and relevant issues to be analyzed." By use of the word *shall*, the EQB is requiring that government units' and interested parties' comments address development scenarios and relevant issues. Again, comments are meant to be permissive, not mandatory.

In fact, the subpart is internally inconsistent because one sentence states "*comments shall address...,*" but than states that *"comments may suggest.*" Further, if the intent is to require the RGU to respond to comments, that issue is addressed in subpart C where the rule says "[t]he RGU must consider all timely and substantive comments..." and "must document its reasons for excluding the scenario...." For all of the above reasons, subpart B should be struck in its entirety.

**Minnesota Rule 4410.3610 - ALTERNATIVE URBAN AREAWIDE REVIEW PROCESS**

Subp. 19 – Residential Developments

The proposed rule amends the threshold of requisite total number of units to include "land ... identified for residential development by an ... annexation agreement." We believe this term must be clarified to include only an annexation agreement specific to the subject development. Many annexation agreements cover entire townships or large portions. The proposed rule clearly does not intend for each development to include all potential development that may occur in the future but only that which is going to be included as part of the proposed development.

This same language is included in the comparable mandatory EIS category. Minn. R. 4410.4400, subp. 14. Both proposed rules should be amended to read "annexation agreement specific to the residential development."

To facilitate review of our comments, we have attached a blacklined document incorporating our suggested changes. If you have any questions regarding these suggestions or comments, please do not hesitate to contact me.

Finally, the BATC hereby requests a contested case hearing. I also attach the signatures of persons each of whom also requests a contested case hearing.

Very truly yours,

WINTHROP & WEINSTINE, P.A.

Lloyd W. Grooms

Cc: David M. Aafedt, Esq.
Remi Stone, Esq.

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Fredrikson
& BYRON, P.A.

February 27, 2006

Mr. Greg Downing
Environmental Quality Board
Room 300, Centennial Office Building
658 Cedar Street
St. Paul, MN 55155

Re: Proposed Amendments to Rules Governing the Environmental Review Program, Minnesota Rules, Chapter 4410

Dear Mr. Downing:

I comment on the subject amendments solely for me and not for anyone else, clients or otherwise.

I comment on the proposed new subpart 5a. in Section 4410.3610. Section B of proposed subpart 5a. provides that ". . . Comments may suggest additional development scenarios, including development at sites outside of the proposed alternative urban area wide review boundary, . . ." First, the scope of these suggestions must necessarily be within the governmental jurisdiction of the RGU which is proposing to undertake the AUAR. Otherwise, the analysis, but more importantly the mitigation plan, is an hypothetical exercise. Second, I suggest that the other development sites should at least be consistent with the RGU's comprehensive plan, land use and policy plans for the anticipated uses. Absent such consistency, commenters through environmental review might be enabled to direct re-examination of a city's broad-based comprehensive plan solely because of one factor – environmental concerns. In the Twin Cities region subject to the Metropolitan Land Planning Act, with Metropolitan Council – monitored and mandated local comprehensive planning reflecting regional policies, such a narrow re-examination is counterproductive.

Thank you for the opportunity to comment.

Sincerely yours,

David C. Sellergren
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AGGREGATE & READY MIX
ASSOCIATION OF MINNESOTA

March 8, 2006

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

Dear Mr. Downing:

RE: Proposed Permanent Rules Relating to Environmental Review program

The Aggregate & Ready Mix Association of Minnesota (ARM) supports the proposed Permanent Rules Relating to Environmental Review Program as published in the State of Minnesota State Register, Volume 30, Number 33, February 13, 2006.

Specifically ARM supports extending the current rules relating to the threshold for the preparation of an EAW being a minimum of 40 acres. ARM members have found the EAW process to be very helpful as a process to communicate environmental issues on proposed aggregate mining projects to the RGU and will continue to utilize the EAW process for these projects.

Thank you for your attention to these comments. Please let us know if you have any questions or comments on this correspondence.

Sincerely,

Fred J. Corrigan
Executive Director

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March 13, 2006

Mr. Gregg Downing
EQB
300 Centennial Building
658 Cedar Street
St. Paul, MN 55155

Re: Review of Proposed Environmental Review Program Rule Changes

Dear Mr. Downing:

We have reviewed the proposed rule changes as part of the Environmental Review Program Rule Revisions. WSB & Associates, Inc. works with many municipal RGUs in the development and implementation of EAWs, AUARs, and EIS's. We appreciate the opportunity to comment on these rule revisions again. We offer the following comments with regard to the rules.

1. We support the changes that would allow cities to complete an AUAR for a specific project, provided that the additional provisions are adhered to. This seems like a reasonable approach to address some of the agency concerns while still allowing cities the option to develop an AUAR.

2. Regarding the mandatory category for wastewater systems (MR 4410.4300, Subpart 18), we would suggest for trunk line and lift station improvements that the municipalities should be the RGU rather than the PCA. The cities are the entities that are designing, analyzing, and implementing these types of projects and, thus, know the most about the projects and the possible impacts. The current process is cumbersome and time consuming, and lends itself to duplication of efforts, with the cities providing all the EAW information to the PCA and the PCA then reviewing and publishing the EAW. We agree that the PCA should remain the RGU on the wastewater treatment plant construction and expansion.

We appreciate this opportunity to comment on the proposed rule changes. If you have any questions, please feel free to call me at (763)287-7196.

Sincerely,

***WSB & Associates, Inc.***

Andi Moffatt

Andrea Moffatt

**MINNESOTA ASSOCIATION OF TOWNSHIPS**
*'Grassroots Government of Minnesota'*

*Executive Director:*
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March 15, 2006

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Environmental Quality Board
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**BY US MAIL AND FACSIMILE (651/296-3698)**

Dear Mr. Downing:

I am providing these comments on behalf of the Minnesota Association of Townships with respect to the proposed changes to the environmental review process as outlined in the February 13, 2006 Minnesota State Register. In particular, I have concerns about potential unintended consequences arising from the need to conduct environmental review of residential developments simply because they are located in an area subject to an annexation agreement. *See proposed Minn. R. 4410.4300, subp. 19, 4410.4400, subp. 14.*

We recognize that there will likely be relatively few instances in which these rules would come into play. In fact, they would apparently apply only when an orderly annexation agreement exists in either of two situations: first, those in which neither the town nor the county in which it is located has adopted a comprehensive plan or zoning; and second, those in which the property is guided or zoned as something other than residential by the town or county. Nevertheless, in either case, the result is that the existence of an annexation agreement will trigger environmental review where none was previously mandated.

The Association, as well as the League of Minnesota Cities and many members of the Legislature, has invested significant energy and resources in attempting to convince both townships and cities of the wisdom of entering into orderly annexation agreements when doing so makes good planning sense. Properly negotiated and written annexation agreements encourage smart growth, reduce environmental risks, and help eliminate the political and personal disputes that may otherwise accompany annexation proceedings. By imposing additional review and costs on property being developed within these areas, the proposed rules will create a disincentive to cities and towns to reach mutually

acceptable annexation agreements. In doing so, the threat of environmental problems is magnified, rather than reduced.

For these reasons, we request that the proposed rule changes be eliminated or changed to better address the EQB's concerns. In fact, a contrary approach may be the best solution to these concerns, namely modifying the rules to require an EAW or EIS in those situations where an orderly annexation agreement is *not* in place under Minnesota Statutes, Section 414.0325.

Thank you for your consideration in this matter. Please let me know if you have any questions.

Very truly yours,

Daniel J. Greensweig