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June 11, 2009

Meeting Location: Pollution Control Agency Lower Level Board Room

TO: EQB Members

RE: **ANNOTATED AGENDA FOR
June 18, 2009 Board Meeting**

General

This month's meeting will take place in the **Pollution Control Agency Lower Level Board Room**. The meeting will begin at 9:00 a.m. Staff will be available for briefing and questions at 8:30 a.m.

I. * Adoption of Consent Agenda

- Adoption of the Proposed Agenda for **June 18, 2009** meeting
- Adoption of the Proposed Minutes for **March 19, 2009** meeting

II. Chair's Report

III. EQB Staff Report

IV. **Adoption of Amendments to Rules Governing the Environmental Review Program

Presenters: Jon Larsen and John Wells
(651-201-2477; 201-2475)

Material enclosed:

1. Report of the Administrative Law Judge
2. Rules as proposed for adoption
3. Sample Resolution
4. Order Adopting Rules
5. EQB staff letters to ALJ in response to comments: "comment period letter," dated March 25, 2009; and "rebuttal period letter," dated April 1, 2009

** Items requiring discussion may be removed from the Consent Agenda.*

*** Denotes action may be taken*

Note: Public written comments on the proposed rule and transcripts of the public hearing are not included in your packet. These comments are summarized in the report of the ALJ and in the enclosed EQB staff response to comments letters. The written comments are posted at the EQB website (www.eqb.state.mn.us) under “Notices.” Any board member interested in seeing the transcripts should contact the EQB staff.

Issue Before the Board

The board is asked to approve and adopt final amendments to the Environmental Review program rules, as recommended by the Administrative Law Judge. The EQB has followed the standard rulemaking process, including public hearings before an Administrative Law Judge, and is now at the point of actually adopting amendments to the rules. These amendments have often been referred to as the “phase 2” amendments to distinguish them from early “phase 1” amendment adopted in 2006.

Background

This rulemaking has been in process for several years. In February 2005, the EQB published a Request for Comments covering about 50 possible revisions to the Environmental Review program rules. In August 2005, the board decided which of the topics in that original group were ready for rulemaking, and proceeded with the formal rulemaking process on these “phase 1” amendments. The phase 1 amendments went into effect in October 2006.

It was understood that topics not ready for phase 1 would be considered for inclusion in a second round of rulemaking, termed “phase 2.” As time has passed several additional amendments were been identified and added to the phase 2 group. In addition, several of the topics included in the phase 1 rulemaking were withdrawn during the hearing process for further work and were re-proposed in phase 2.

The board authorized rulemaking for the phase 2 amendments in July 2007, but a lengthy delay occurred due to Governor’s Office review. The Governor’s Office approved proceeding with the amendments in late 2008 without comment on their substance. The hearing process took place during January to March 2009. Administrative Law Judge Steve Mihalchick presided at the hearing. Judge Mihalchick’s report was received in early May 2009.

Discussion

There are five general topics covered by the proposed rule amendments:

- New EAW, EIS & Exemption categories specific to projects within shorelands;
- Changes to treatment of “cumulative potential effects” throughout the rules;
- Several changes to Alternative Urban Areawide Review process;
- New mandatory EIS category for release of Genetically-Engineered Wild Rice; and
- Other miscellaneous clarifications and corrections.

Based upon public comments received in the hearing, staff is recommending several modifications to the rule provisions about shoreland project categories. Those modifications have been approved by the ALJ in his report. The proposed modifications are shown by strikeout-and-underlining on the enclosed Revisor’s rule draft. Only one minor wording

clarification is proposed to any of the other amendments, although some of them received adverse comments during the hearing. The comments did not persuade staff that modifications were needed for those provisions, and the ALJ's report agrees with the staff position.

Three of the new definitions used in the shoreland mandatory and exemption categories (ordinary high water level, sensitive shoreland area, and shore impact zone) are proposed to be modified to improve the wording; none of them make any substantial changes to the meanings. A "technical-type" addition is proposed to the residential and resort-campground-RV park EAW and EIS categories. This modification adds language specifying how to decide if review is mandatory if a project lies partially in a shoreland or partially in sensitive shorelands; the language is analogous to language used in other existing mandatory categories (such as mixed residential and commercial projects), and specifies a set of arithmetic calculations that are used to decide if review is mandatory. This additional language should have been included in the amendments from the start, but escaped our attention until questions were asked during the hearing about how to handle projects straddling shoreland boundaries.

The final modifications proposed for the shoreland categories involve excluding the seven-county Twin Cities metropolitan area from the application of the proposed new mandatory EAW and EIS thresholds for residential projects. This is the one major substantive change proposed as a result of the hearing comments. These modifications are proposed in response to comments from municipalities in the metro area. The underlying point of those comments is that the proposed residential thresholds reflect a "very rural perspective" on development densities which is not appropriate to urbanized development, and may in fact be counterproductive to good urban planning. When the EQB staff discussed this issue with the DNR staff working on revising the shoreland management rules, we learned that the same issue had been raised in their rule development process and that the DNR staff was intending to address it in their rules. However, their rule development had not yet progressed to the point that they could advise us of how they would be addressing it. Absent specific ideas to address this issue in our rulemaking, the EQB staff decided that the best course of action was to modify the proposed residential shoreland categories so that they will not apply in the metro area (and thus in the metro area the regular residential category thresholds will apply in shoreland). The ALJ's report agreed that this change was reasonable.

Significant comment letters were received during the hearing process from the Minnesota Center for Environmental Advocacy, the Chamber of Commerce, the Builders' Association of the Twin Cities, and the Association of Counties. These commenters focused on the amendments relating to cumulative potential effects and the Alternative Urban Areawide Review process, although MCEA also commented extensively on the amendment at part 4410.3100, subpart 2a (clarifying that public comments can be sought on a draft permit while environmental review is still underway). For the most part, these comments were similar to viewpoints expressed by the same groups earlier in the rule development process, such as in letters received in response to the several Requests for Comments that the board had earlier issued. Thus, issues raised have already been considered by the board before the amendments were proposed.

The specific reasons why the staff rejected modifying the amendments as suggested by these comments are explained in detail in the two enclosed EQB staff response letters and are

summarized in the ALJ's report. The staff will be glad to answer any questions that the board may have about these issues at the board meeting, if more detail is desired.

Although the staff has not received any communications since the hearing indicating that anyone intends to oppose the adoption of the rules as recommended by the ALJ, it is possible that some interested parties may attend the board meeting and speak against adoption of certain rule provisions, or ask for changes before the rules are adopted.

If the board so chooses, it may make changes in the rules other than as approved in the ALJ's report. However, before any modifications that are not covered in the ALJ's report can be adopted they must be reviewed and approved by the Chief ALJ. This would mean that at the June meeting the board would identify and approve the additional modifications it wants to make, after the meeting the staff would send the revised proposed rules to the Chief ALJ with certain supporting information, the Chief ALJ would review and approve or disapprove the revisions, and the board would act to adopt the rules at its next meeting (assuming the changes are approved by the Chief ALJ). It is possible that the Chief ALJ could disapprove any additional changes, which would mean that either those changes would have to be deleted, or further public input would need to be taken before they could be adopted.

After the board approves rule amendments, several additional steps must take place before the rules can go into effect. This includes a final review by the Governor's Office (and possible veto of the rules), final review by the Revisor's Office regarding the wording and form of the rules, filing with the Secretary of State, and publication in the *State Register*. The rules become effective five days after publication. If the board adopts the rule amendments at this meeting, we expect the amendments to become effective sometime in August or September.

EQB Staff Recommendation

The staff recommends that the board adopt the rules as proposed, with the modifications indicated, as recommended by the ALJ. A sample resolution that would implement this recommendation is in the packet. The resolution would authorize the Chair to sign the Order Adopting Rules and take the actions necessary to complete the rulemaking process.

V. Discussion of Possible FY 2010-2011 Work Elements

Presenter: John Wells, EQB staff (651-201-2475)

Issue Before the Board

Mr. Wells will present a brief overview of possible work elements for the board to consider in the coming biennium. The intent is not to have a detailed discussion at the June meeting, but to let members and interested parties know what might be on the board's "table" in the coming year. EQB staff will bring the list to the board for further consideration at an upcoming meeting. The possible work elements include:

1. Complete the board's decadal state water plan in consultation with the University of Minnesota and others to set the agenda for water management in Minnesota

2. Work with and through the Department of Natural Resources and the University of Minnesota to further develop a framework for the sustainable allocation of water supplies in a manner that meets the long-term needs of Minnesotans
3. Develop an energy and environment strategy report that helps the public understand state efforts and that addresses land use aspects of climate change
4. Provide citizens and local governments the assistance they need to participate in meaningful environmental review
5. Participate with the PCA in identifying options to streamline the Environmental Review process as required by the 2009 Session
6. Serve as the nonfederal cosponsor of the Minnesota River Integrated Watershed Management Project (the U.S. Army Corps of Engineers is the primary federal agency for the project)
7. Host an environmental congress to consider the great amount of environmental activity in which the state is now involved

VI. Adjourn