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March 9, 2006

TO: EQB Members

FROM: Michael Sullivan
Telephone: 651-201-2462

RE: **ANNOTATED AGENDA FOR
March 16, 2006 Board Meeting**

General

This month's meeting will take place at the Minnesota Pollution Control Agency – Board Room, 520 Lafayette Road, St. Paul, MN 55155. The meeting will begin at 9:00 a.m. Staff will be available for briefing and questions at 8:00 a.m.

Attention: *Denotes an agenda item that may require Board action.

I. *Adoption of Consent Agenda

- Adoption of the Proposed Agenda for March 16, 2006 meeting
- Adoption of the Proposed Minutes for February 16, 2006 meeting

II. Executive Director's Report

III. Legal Counsel Report

IV. *Request by Dead Lake Association for the EQB to Assume Responsibility for the EIS Adequacy Decision for the Blue Heron Bay Project EIS

Presenter: Gregg Downing, EQB staff
(651-201-2476)

Materials enclosed:

1. Letter from Dead Lake Association requesting EQB action.
2. Timeline of events in review of Blue Heron Bay project (received from Dead Lake Association)
3. Map of Dead Lake, Otter Tail County (received from Dead Lake Association)

4. Excerpt from 1982 rulemaking Statement of Need and Reasonableness explaining the intent of the criteria under which EQB may assume EIS adequacy responsibility.
5. Rule excerpt, Minn. Rules, part 4410.2800 on EIS adequacy.
6. Letter from Otter Tail County Attorney regarding the County's position on the request for EQB to take over the EIS adequacy decision.
7. Letter dated March 9, 2006 from Peder Larson on behalf of the project proposer.
8. Letter dated March 9, 2006 from Bob Deutschman, President, Dead Lake Association, with the following attachments:
 - a. Unpublished opinion from the Court of Appeals reversing the County's decision not to be prepare an EIS on the Blue Heron Bay project;
 - b. Otter Tail County's Negative Declaration decision
 - c. Otter Tail County's Scoping Decision for the EIS
 - d. March 5, 2003 letter from the DNR Regional Director commenting on the EAW;
 - e. October 25, 2005 letter from the DNR Regional Director commenting on the scope of the EIS;
 - f. April 21, 2003 letter from the Minnesota Historical Society recommending additional fieldwork regarding archaeological sites;
 - g. October 12, 2005 letter from the State Archaeologist regarding archaeological impacts;
 - h. Minutes from December 27, 2005 Otter Tail County Board meeting regarding the EIS Scoping Decision and consultant selection.
9. Sample resolution (by which the Board could assume responsibility for the EIS adequacy decision).

Issue before the Board

The Dead Lake Association, a citizens group, has asked the Board to take responsibility for determining the adequacy of a court-ordered EIS for the Blue Heron Bay resort development in Otter Tail County. The Association is concerned about the county's ability to prepare an objective and thorough EIS. The EQB has the authority to take over an EIS adequacy decision under certain circumstances.

Background EQB role. Until the early 1980s, the EQB was responsible for determining the adequacy of every final EIS. When the Legislature amended Minnesota Statutes, section 116D.04 in 1980 to decentralize the Environmental Review process, it assigned the RGU that prepares an EIS the duty to also determine whether the final EIS is adequate. The Legislature also, however, provided EQB the authority to assume this responsibility under certain circumstances, giving the EQB sixty days from the date of the EIS preparation notice to exercise it.

In this case, the EIS Preparation Notice was published in the January 16, 2006 issue of the EQB Monitor. As a result, the sixty day time frame in the statute expires on March 17, 2006. Thus, if the Board intends to act on this request, it must do so at the March 16, 2006 meeting.

The Board has been asked to intervene in EIS adequacy decisions a number of times, since EQB adopted the rule governing the decentralized process in 1982. Most of these requests have occurred in conjunction with projects of the Metropolitan Airports Commission. The Flying Cloud Airport Expansion EIS, whose adequacy the Board determined last month, is an example. The opportunity to assume responsibility for determining the adequacy of an EIS remains an important Board authority.

Background: legal authority. The Environmental Policy Act, Minnesota Statutes, section 116D.04, subd. 2a (g), states:

The responsible governmental unit shall determine the adequacy of an EIS, unless within 60 days after notice is published that an EIS will be prepared, the Board chooses to determine the adequacy of an EIS.

The Environmental Review program rules, Minn. Rule 4410.2800, subp. 1, further provide:

The RGU shall determine the adequacy of the final EIS unless notified by the EQB, on its own initiative or at the request of the RGU, the proposer of the project, or other interested persons, that the EQB will determine the adequacy. The EQB shall notify the RGU no later than 60 days following publication of the preparation notice in the EQB Monitor.

The subpart goes on to specify the three conditions under which the EQB can intervene:

The EQB shall intervene only if the EQB determines that:

- A. the RGU is or will be unable to provide an objective appraisal of the potential impacts of the project;
- B. the project involves complex issues which the RGU lacks the technical ability to assess; or
- C. the project has multijurisdictional effects.

Board members should note that the rule *allows* the Board to act if it determines that at least one of the conditions is met, but *does not require* it to do so even if each of the conditions is met. In other words, the Board is not obligated to assume the responsibility, but may choose to do so if any of the three conditions applies.

Background: description of the project. The following description of the Blue Heron Bay project is based primarily on information from the county EAW. Some details of the project may have changed since the EAW was written in 2003.

The proposed project is a residential development on a 257 acre peninsula and two islands on Dead Lake in Otter Tail County, with 29,000 feet of shoreline. (A map of the lake is included in the enclosed materials.) Approximately 150 residential units are planned, with a mixture of single family homes, duplexes, cabins and lodges. The development would cluster units in specific areas rather than lay them out as a traditional lot-block development. Sewer and water systems would be installed. Dock space would be provided for each unit, but the docks would be

clustered in certain areas rather than spread out along the shoreline. A clubhouse would supply community services to residents, such as a swimming pool, fitness center, restaurant and miscellaneous recreational activities.

Background: Dead Lake. Dead Lake is the second largest lake in Otter Tail County, covering 7901 acres. It is unusual in that, although it is large in surface area, it is predominantly very shallow, a factor likely contributing to its classification as a “natural environment” lake in the state shoreland classification system. In fact, Dead Lake is the largest natural environment-classed lake in the state. The lake’s unusual features make it an important waterfowl hunting and wild rice lake.

Presently, there are about 300 homes on the lake, equally divided between permanent and summer residences, and also about 7 or 8 resorts. This development is spread unevenly around the lakeshore because of differences in lake depth, ownership patterns and other variable conditions around the lake. Much of the existing development is concentrated along the shore of the deeper basins of the lake. The proposed development would be located on a shallow part of the lake.

Background: environmental review history of the project. The Dead Lake Association submitted a timeline of events in its review of the Blue Heron Bay project, which is enclosed in the packet. We understand the chronology to be correct, although the developer or county may differ with the Association’s characterization of some of the legal points included. The timeline includes events related to several legal challenges not directly part of the Environmental Review process. The timeline establishes that there has been a lengthy history of contention over this project involving the county, lake association and developer.

To briefly summarize its history, Ottertail County completed an EAW for the project in January 2003, the county issued a negative declaration and the Dead Lake Association challenged that decision in April 2003. The Otter Tail County District Court upheld the county’s negative declaration and the association appealed. The Court of Appeals reversed the district court and required that an EIS be prepared.

The county has scoped the EIS and selected a consultant to assist them in preparing it. The hiring of the consultant was delayed due to the proposer’s reluctance to sign the EIS cost agreement. We have been told that the cost agreement has now been signed, although that was not confirmed at the time of this writing. We understand that controversy may emerge over the potential use by the county of information developed by consultants working directly for the developer.

Analysis

It should be made clear that EQB assumption of the EIS adequacy determination would not otherwise change the county’s status as project RGU. Otter Tail County would remain the RGU and would continue to be responsible for completion of the EIS. The EQB would not assume any responsibility for EIS preparation, but would simply review the EIS when finished by the county and rule on whether it meets the tests for EIS adequacy.

Board members should note that a decision on the adequacy of an EIS may be appealed (Minnesota Statutes, section 116D.04, subd. 10). In other words, if the EQB were to assume responsibility for making the adequacy decision, it would become exposed to a potential lawsuit over its decision on the adequacy.

While the rule allowing the EQB to assume EIS adequacy decisions has been in effect since 1982, the question has come before the Board less than 10 times. There are two basic reasons for the small number of cases. First, few EISs are done in Minnesota – less than ten per year on average. Second, the statute limits the opportunity for EQB to assume responsibility to a 60 day period fairly early in the process. People concerned about the quality of an EIS often do not consider making a request to EQB until after the 60 day window has closed. We commonly receive citizen inquiries about possible EQB involvement, but most occur too late for the EQB to act.

The Environmental Review rule specifies that only one of the three conditions it lays out must be met in order for the EQB to have the opportunity to assume responsibility for an EIS adequacy decision. For the reasons we describe in the following paragraph, we believe this case clearly meets the test of having “multijurisdictional effects.” If the Board agrees, it need not explore the other two conditions (i.e., whether the county’s technical expertise is sufficient or whether it can be objective in review – although we expect such testimony will be presented at the Board meeting).

Questions have arisen about the meaning of “multijurisdictional effects.” In response, the staff and legal counsel consulted the Statement of Need and Reasonableness document from the 1982 rulemaking. A copy of the relevant pages is included in your packet. This information constitutes the best available guidance about the EQB’s intent in adopting the rule. (Note: the SONAR uses the obsolete MCAR rule number system; “6 MCAR sec. 3.031 G” became part 4410.2800 in the new numbering system.) The first full paragraph on page 84, especially its final three sentences, concern “multijurisdictional effects.” That text and the rule’s inclusion of agencies as governmental units make clear that the Board defined a “jurisdiction” as an entity having approval authority over a project. Consequently, “multijurisdictional” means that more than one unit of government has approval authority over the project in question. The Board has adopted this interpretation in past cases as well.

In the Blue Heron Bay matter, several units of government must give approval to the project. A number of documents, including the EAW, indicate that permits and approvals will be required from the county, MPCA, DNR, Department of Health and U.S. Army Corps of Engineers. Therefore, this case involves multijurisdictional effects and satisfies the test for EQB intervention.

Staff Recommendation

It is customary for EQB staff to include a recommendation for Board action in this briefing. However, because the Board has an unusual degree of discretion in this instance, counsel

recommends that it make its decision based upon the criteria and the testimony surrounding the criteria.

In particular, the SONAR's interpretation of the multijurisdictional factor is worth repeating:

In addition, multi-jurisdictional cases are more likely to be subjected to EQB intervention. If several governmental units are involved, it is more likely that there will be legitimate differences of opinion on the relative impacts and merits of the activity.

Based upon the presentations made at the Technical Representatives meeting, we believe that the various arguments in favor of and opposed to the Board assuming the EIS adequacy responsibility will be fully presented in testimony at the Board meeting.