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April 12, 2007

TO: EQB Members

FROM: John Wells
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RE: **ANNOTATED AGENDA FOR
April 19, 2007 Board Meeting**

General

This month's meeting will take place at the Pollution Control Agency, 520 Lafayette Road. 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 **April 19, 2007** meeting
 - Adoption of the Proposed Minutes for **March 15, 2007** meeting
- II. Chair's Report**
- III. Executive Director's Report**
- IV. Legal Counsel Report**
- V. Report of the Subcommittee on Future EQB Directions**
- VI. *Adoption of *Protecting Minnesota's Waters* Priorities for the 2007-2009 Biennium**

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

Materials Enclosed

Draft report: ***Protecting Minnesota's Waters: Priorities for the 2007-2009 Biennium***

Issue Before the Board:

Minnesota Statutes, section 103A.43 requires the Environmental Quality Board to issue a water policy and priorities report to the Governor and Legislature each biennium. The Board will be asked to consider approval of the draft *Protecting Minnesota's Waters* report for this purpose.

Background:

The draft report focuses on three priority areas: implementing the Clean Water Legacy Act, safeguarding water supplies and protecting wetlands. The recommendations were drawn from reports approved by the Governor's Office, EQB and member agencies over the last several months, as well as from discussions of the cabinet in February. They include:

1. Implement the Clean Water Legacy Act

- Increase the amount of water quality data collected by state, local and federal agencies, as well as citizens
- Direct significant new resources to the development of TMDLs in order to accommodate economic growth and provide the blueprints for effective, focused cleanup of polluted waters
- Provide additional landowner assistance for implementation of specific practices targeted at protection and restoration of waters
- Conduct additional applied research on best management practices effectiveness
- Continue providing technical assistance to small unsewered communities

2. Safeguard water supplies

- Develop a water supply interconnect between the cities of Minneapolis and Saint Paul
- Continue efforts to ensure metropolitan water supply reliability and proper water supply safety and security
- Support statewide research to, among other projects, better define the location and characteristics of ground water resources, giving priority to areas subject to ethanol or population demands
- Evaluate how public water suppliers integrate sustainability into the second generation of water emergency and conservation plans
- Use the biennial water availability assessment as a benchmark for what we know or need to know about the allocation of Minnesota's water resources and the policies and priorities that guide allocation decisions, supporting EQB and DNR efforts to enhance the analysis and apply the findings of future editions

3. Protect Minnesota's wetlands

- Support changes to the Wetland Conservation Act and rule, and fund their implementation to reduce wetland losses, improve administrative efficiency and improve data
- Implement the Comprehensive Wetland Assessment, Monitoring and Mapping Strategy

Discussion

The draft report was assembled with the assistance of staff from the Pollution Control Agency (the Legacy section lead), the Board of Water and Soil Resources (wetlands lead), and the Metropolitan Council, EQB and Department of Natural Resources (shared leads for water supply). The report has been assembled at this time with the thought that an Administration water priorities package could be of help to agencies addressing issues in legislative conference committees this session.

A final round of technical reviews is being conducted concurrently with distribution of the report in the mailing to members, and it is possible that staff will bring suggestions for changes to the Board meeting. If these become complicated – which we do not expect – the Board of course also has the option of deferring approval until a later date.

Staff Recommendation:

The EQB staff recommends approval of the draft report and submission to the Governor and Legislature after incorporation of any needed changes and publication.

VII. Phase 2 Amendments to the Environmental Review Program Rules; New Mandatory Categories for Projects in Shorelands

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

Materials Enclosed

1. Table of revised proposed shoreland project mandatory EAW & EIS categories and definitions of terms used.
2. Table of original shoreland projects categories proposed.

Issue Before the Board:

The staff will present a revised proposal for new mandatory EAW & EIS categories for various types of projects occurring in shorelands of lakes and rivers. This revised version has been developed with the DNR staff in response to negative comments received on the original version sent out for comments last August. DNR staff will be present to help answer any questions about the revised proposal.

The staff requests that the Board concur that this revised proposal should be sent out to stakeholder groups for informal review. Staff expects that after receiving comments on this revised version it would be in a position to draft a proposed rule amendment.

Background:

One important element of the “Phase 2” Environmental Review rule amendment process is consideration of new mandatory categories for EAWs and EISs for projects in shoreland areas. (Shoreland extends back 1,000 feet from a lakeshore or 300 feet from the bank of a river.) Several years ago the EQB was asked to develop such categories by

the Minnesota Lakes Association (now part of the Minnesota Waters organization) and several legislators due to the increasing development pressure on the remaining undeveloped lakeshore in the state. Under the existing rules there are no special categories that apply to projects in lakeshore – the regular residential and commercial-industrial categories apply as they would anywhere else.

In February 2005, the EQB asked the DNR to take the lead in developing a proposal for such categories. The DNR established a stakeholder advisory committee from persons who expressed interest in serving on such a committee. Based on input from the advisory group, the DNR developed a proposal. The EQB accepted the proposal in April 2006 and included it in the package of proposed rule amendments for which public comments were sought in August 2006. The proposal for new mandatory categories for projects in shoreland areas received the most comments of any of the proposed rule amendments.

The main point of the shoreland category comments was that the proposal was too complicated for successful implementation by the local units that would be largely responsible for applying the new categories. Three groups suggested alternative approaches for such categories: the Minnesota Association of County Planning & Zoning Administrators (MACPZA); Minnesota Waters, an advocacy group for conservation of lakes and rivers; and the Minnesota Center for Environmental Advocacy. All three differed markedly from the proposal that the DNR and EQB put forth, and the most obvious difference was that they were less complicated. The MACPZA group sent a representative to the August 2006 Board meeting to testify about the concern over the complicated nature of the EQB/DNR proposal.

In view of the negative comments about the complexity of the original proposal and the alternative proposals submitted by commenters, the DNR staff, in consultation with the EQB staff, has developed a much simpler proposal for the new EAW and EIS categories.

Discussion:

The revised DNR/EQB staff proposal includes 12 separate EAW thresholds and 7 separate EIS thresholds, whereas the original proposal contained 48 EAW and 26 EIS thresholds. These numbers may be the best indicators of how much simplifying has been done to the proposed categories. In addition, the categories are based on fewer factors so less information is needed to apply them. For example, distinctions are no longer made among types of residential subdivisions or upon whether the local unit has adopted DNR-approved shoreland ordinances. The standards proposed in the DNR's "alternative 6120" guidance are no longer factors used in the revised categories.

The revised proposal does carry over the most important principles identified by the advisory group. The concept of shoreland sensitivity is retained and for all the categories types but one, the thresholds would be lower in sensitive shoreland areas. "Sensitive" shoreland areas are the same as proposed in the original version and are listed in the definitions section. Another principle carried over is that "credit is given for doing the right thing" -- the thresholds are higher where good shoreland development standards and

practiced are followed. The categories attempt to target projects that disturb the shoreland itself and/or put pressure on a lake's resources.

For residential projects, the factors upon which the thresholds are based, other than the shoreland sensitivity, are the percentages of common open space; the overall unit density compared to the maximum allowable density according to the DNR shoreland rules if the lots were developed as unsewered single lots; the creation of any "access lots" (lots that give access to nonriparian lots); and the unit density resulting if a resort or commercial PUD is converted to a planned unit or residential development. For commercial, industrial, or institutional developments the factors used, other than shoreland sensitivity, are the length and area of shoreland zones disturbed and the current land cover.

In addition to the various simplifications made, the proposed EIS thresholds have been raised significantly.

Staff Recommendation:

The EQB staff believes that the EQB ought to pursue the revised shoreland category proposal rather than the original proposal. The staff recommends that the next step be to send the revised proposal to the stakeholder groups that have followed and participated in the shoreland category development process so far for their informal comments before we try to actually draft proposed rules. At the same time, the staff intends to survey local units get data from which to estimate how many additional EAWs and EISs the new categories would likely generate, which units would likely be responsible for the increased review, and how much the increased review would likely cost or save. That information must be included in the Statement of Need and Reasonableness that must be prepared for the formal rulemaking process.

VIII. Phase 2 Amendments to the Environmental Review Program Rules; Cumulative Impacts/Cumulative Effects – Possible Options for Amendments

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

Materials Enclosed

1. Briefing memorandum on issues and optional approaches to rule revisions
2. June 2, 2006 memorandum from Robert Roche to EQB members
3. January 17, 2007 memorandum from Robert Roche to EQB members

Issue before the Board

The staff will present several options for amending the Environmental Review rules to deal with issues relating to "cumulative impacts" (or "cumulative potential effects") analysis. The intent of the presentation is two-fold: (1) to begin to orient the Board to the possible rule amendments relating to this difficult topic; and (2) to obtain the Board's concurrence to ask for informal comments on the options identified so far from the stakeholders interested in this topic.

Background

One important element of the “Phase 2” Environmental Review rule amendment process is consideration of amendments to clarify how impacts of a “cumulative” nature should be handled when preparing review documents and when deciding if an EIS must be prepared for a project. The EQB has toyed with the idea of making such amendments for years, but has never succeeded, primarily due to the difficulties involved. However, the issue recently took on added significance because of two court decisions interpreting the existing rules on this topic. In one case (*CARD vs. Kandiyohi County*), the Minnesota Supreme Court set out a different interpretation of some of the existing rules than the EQB had subscribed to and offered interpretations of some rule provisions that EQB had never provided guidance about. In the other case (*MN Center for Environmental Advocacy vs. City of South St. Paul*), the Court of Appeals made what the EQB staff and many others believe to be a mistake about how the cumulative analysis in the Alternative Urban Areawide Review process is affected by the boundary set for the process; this mistake can be corrected by amendments to the EQB’s rules.

In addition to responding to the court decisions, the EQB could also amend the rules to include explicit directions to consider cumulative-type impacts when preparing EAWs, EIS, and AUARs. Although it is hard to believe, the rules (adopted in 1982) do not actually ever state that such analysis is necessary, although it normally is done after a fashion anyway.

Discussion

The enclosed memorandum presents possible rule amendments for the three issues relating to cumulative-type analysis: (1) response to the CARD decision; (2) adding explicit instructions to address cumulative-type impacts; and (3) correcting the error made by the Court of Appeals. The possible amendments for the second and third issues are quite straight-forward. However, that is not true for the first issue. The staff, working with Mr. Roche, has identified three optional ways to approach issue I, and several additions that could also be added to some of them.

Significant Issues

Some organizations that have followed the possible amendments to the cumulative analysis rule provisions may be disappointed that none of the options presented for issue I departs very far from the Supreme Court’s interpretation. In earlier comments, some organizations stated that this was an opportunity for a “clean break” from the confused wording of the past and an opportunity to make cumulative impact analysis more protective of the environment as well as clearer. The Center for Environmental Advocacy advanced the idea that we should revamp our rules to follow federal NEPA requirements for cumulative impacts analysis. The staff has not included such an option in this memorandum, primarily because Mr. Roche’s analysis of NEPA case law (January 2007 memorandum from Mr. Roche enclosed in packet) demonstrates that federal law interpretations are less clear in their meaning than the opinion of our Supreme Court. Consequently, we do not see how following the federal program as a model will produce clarity on this topic.

Perhaps in comments on these options, the Center or other organizations can suggest specific alternative wording that would be clear but make cumulative analysis more protective than any of our alternatives presented here. If so, the Board can definitely consider those ideas before actual rule amendments are drafted.

Recommendation

The staff would like to distribute the options it has identified to the stakeholders who have expressed interest in the subject of revising the rules relative to cumulative-type analysis. Feedback would be very helpful in moving forward towards an actual draft of proposed rule amendments. Perhaps the stakeholders can identify other viable options or help “flesh out” the details of some that the staff has identified but not been able to completely describe. Unless the Board directs otherwise, the staff would proceed to distribute the options memorandum following the Board meeting.

IX. Technical Representatives’ Report to the EQB on Environmental Review

Presenters: Bob Patton, Department of Agriculture Technical Representative; Susan Heffron, PCA Technical Representative; Gregg Downing, EQB staff

Materials Enclosed

1. Report (with 2 appendices)

Issue Before the Board:

The Technical Representatives Committee and the EQB staff have prepared a report as directed by the Board on the EQB’s role as it pertains to the Environmental Review Program. The report will be presented to the Board, which is requested to accept it and its recommendations.

Background:

At the January retreat the Board directed the Technical Representatives Committee and the EQB staff to review the EQB’s role as it pertains to the Environmental Review program and to prepare a report with recommendations. The Technical Representatives Committee has carried out that charge. The procedures followed and information sources considered are explained in the report.

Discussion:

The report is quite succinct and speaks for itself, so no attempt to summarize it any further will be made here.

Recommendation:

The Board is requested to accept the report and the recommendations it contains. The Board may wish to consider asking a subcommittee of members to consider the recommendations in more detail.

X. Annual report on Federal Programs for the Management of High Level Radioactive Waste

Presenter: Jon Larsen, EQB Staff (651-201-2477)

Materials Enclosed:

Annual Report, Federal Programs for the Management of High Level Radioactive Waste, 2006

Issue Before the Board:

This item is a presentation for the Board's information only. The report has been prepared by EQB staff for Commissioner Badgerow in fulfillment of the requirement to submit an annual report to the Legislature on federal programs for the management of high level radioactive waste.

Background:

Minnesota Statutes, section 116C.712 requires that the Director of the Office of Strategic and Long Range Planning submit a report to various committees of the Legislature advising the Governor and the Legislature on policy issues relating to the federal high-level radioactive waste disposal program. EQB staff has taken responsibility for preparing and reviewing the annual report on behalf of the Director since 1987. The current report summarizes recent developments occurring since April 2004. Much of the report focuses on activities relative to the selection of Yucca Mountain, Nevada as a national repository for nuclear waste, and the issues associated with storage of Spent Nuclear Fuel (SNF) in the interim; and ultimately transportation of SNF for permanent disposition. Nuclear power currently provides about 20% of all electricity generated in Minnesota.

Highlights of this report include:

- The Department of Energy plans to apply by July of 2008 to the Nuclear Regulatory Agency (NRC) for licensure of Yucca Mountain.
- The earliest that Yucca Mountain could receive SNF is 2017.
- Litigation by the State of Nevada has largely been dismissed, save for the question of a 10,000 year safety standard being inadequate.
- The EPA is responding to this by amending safety standards to address some safety elements out to one million years.
- Private Fuel Storage, LLC (PFS) was given a license by the NRC for monitored retrievable storage for interim storage of SNF at Skull Valley, Utah.
- The Bureau of Land Management and Bureau of Indian Affairs each took action to reject this action by PFS. PFS has filed its legal intent to respond.
- The financial outlook for continued use of nuclear power appears stable.
- Monticello nuclear power plant had a minor incident in January of 2007; received a "green" rating by NRC.
- Monticello was re-licensed by the NRC to operate until September 8, 2030.
- Minnesota joined the NRC "Agreement State Program".

In summary, although timelines continue to slip and its opening appears to be at least a decade away, Yucca Mountain continues to move forward towards addressing the issue of ultimate disposal of SNF for Minnesota's nuclear power plants.

**Denotes action may be taken.*

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