

**MINNESOTA ENVIRONMENTAL QUALITY BOARD**  
**MEETING MINUTES**  
**Thursday, March 16, 2006**  
**Pollution Control Agency Board Room**

**EQB Members Present:** Robert A. Schroeder, Dana Badgerow, Jonathon Bloomberg, Brenda Elmer, Gene Hugoson, Matt Kramer, Gene Merriam, Glenn Wilson

**EQB Members Absent:** Sheryl Corrigan, Jerome Deal, Dianne Mandernach, Susan McCarville, Lt. Governor Carol Molnau and Paige Winebarger

**I. Adoption of the proposed Agenda for the March 16, 2006 meeting and Minutes from the February 16, 2006 Environmental Quality Board Meeting**

Commissioner Kramer made a motion that the minutes and proposed agenda be adopted and Commissioner Hugoson seconded. The motion was approved on a voice vote.

**II. Executive Director's Report:**

Michael Sullivan stated that Gregg Downing, EQB staff, would be talking about the status of the Phase I rulemaking. Mr. Sullivan stated that there have been a number of things that have happened.

Gregg Downing stated that the comment period on the Phase I rulemaking ended on March 15, 2006 at 4:30 p.m. Mr. Downing stated that each member's place was a packet of all the comments received. The EQB staff received five comment letters, which is not that many, but with one of the letters, the staff did receive more than 25 requests to hold the hearing. Mr. Downing had a brief conversation with the author of that letter, Lloyd Grooms on behalf of the Builder's Association of the Twin Cities, and Mr. Grooms indicated that his clients might be willing to withdraw their requests. However, it does not seem feasible that those requests could be withdrawn in time to cancel the hearing. The hearing would have to be canceled by March 24, 2006 and the EQB staff does not think that is enough time to handle all the comments and get each person to withdraw their request. So, the EQB staff will probably be going to hearing on March 30, 2006. Judge Mihalchick will preside and the staff expects the decision by the end of May from the judge.

Regarding the comments received, the EQB staff has only had the opportunity to skim some that came in yesterday. Most of them seem to be directed at the proposed amendments to the AUAR process, Minn. Rule 4410.3610. The most important aspect that comments were received on were 1) proposing to have addition scoping procedures in the process in the case that a single project, being reviewed in the AUAR area, either was over the EIS threshold or took up at 50% of the ground area of the AUAR area. Mr. Grooms' letter takes exception to the idea of the 50% threshold; he believes it's an arbitrary number and asks to withdraw that concept; and 2) the idea of when scoping the AUAR that the RGU might be required to look at scenarios outside the boundary of the AUAR as originally designated and perhaps outside the jurisdiction of the development doing the AUAR.

Also, there were comments received on the proposed re-definition of “sewered area” and the Township Association questioned the adding of the annexation agreement language in the mandatory EAW/EIS categories.

Mr. Downing indicated that Phase II consisted of a number of proposed revisions that were not ready for the Phase I rulemaking, including: revising the mandatory EAW categories for animal feedlots and for non-metallic mineral mining, primarily aggregate mining, new mandatory EAW/EIS categories for projects in shoreland areas and highly important natural resources, and the revision of the treatment of cumulative impacts. Mr. Downing stated he will briefly go over the status of each one.

Feedlots: At the Technical Representatives meeting on March 7, 2006, the Department of Agriculture staff explained that they and the Pollution Control Agency staff have agreed to pull back on making a recommendation on the feedlot EAW topic at this time. They indicated that they hope to have a recommendation by this fall.

Aggregate Mining: In the study of environmental review thresholds that Mr. Scherkanbach led in previous years, the idea had come up about lowering the threshold for non-metallic minerals mining from 40 acres to 20 acres. The idea had been strongly urged at a focus group meeting with representatives of the Aggregate Ready-Mix Association. After that, the Board received a number of comments from other gravel miners that were opposed of that idea. This was partly because of that controversy and partly because of the potential ramifications for the category coming from the pending case in the Supreme Court involving the gravel mining in Kandiyohi County. The Board decided to remove the non-metallic mineral category from Phase I and wait until Phase II. Even though there are no proposed changes to the aggregate category in Phase I, a comment was received from the Aggregate Ready-Mix Association. The Association is now supporting leaving the threshold at 40 acres. They have changed their position on this and since they were very instrumental on coming up with the idea in the first place, it would appear that there is little or no support on lowering the threshold from 40 to 20 any longer. This might be dropped out of Phase II rulemaking, unless EQB is required to do something with this category in response to the CARD vs. Kandiyohi matter which is still pending in the Supreme Court.

Shoreland Development: The DNR staff is close to bringing a technical recommendation for new EAW/EIS categories for various types of development in shorelands of lakes and rivers. This may be presented at the next Board meeting in April.

Also relating to this topic, a letter was sent to Commissioner Merriam from the Association of County Planning and Zoning Administrators dated March 8, 2006. In that letter, the Association raised some questions about some of the proposals likely to be contained in the DNR’s technical recommendations. The EQB staff has not had the opportunity to think about what the implications might be, but the County Planning and Zoning Administrators is a very important group in implementation of environmental review. The EQB staff intends to give serious attention to the concerns raised by that group.

Highly-Important Natural Resources: The DNR staff is continuing to review their category ideas internally and they are hoping that a technical recommendation might be ready for the Board by May.

Cumulative Impacts: There are two important rule influences on this topic 1) the pending Supreme Court case based on the Kandiyohi County aggregate mining EAW/EIS controversy. In that case, the criteria in the EQB in determining if an EIS is needed that directly relates to cumulative impacts is at the heart of that case. The result of that case may cause the EQB staff to do something about that piece of that rule, at least; and 2) many people believe that the rules do not contain enough guidance about how to treat cumulative impacts in an environmental review. The EQB staff has been working on that issue and will continue to work on that and it might be necessary to add better guidance regarding that as well as deal with the issues the Supreme Court case may raise.

Commissioner Merriam asked Mr. Downing what the issue is in the Kandiyohi County court case. Mr. Downing asked for Bob Roche to help explain the legal issues of the case. Mr. Roche stated that the case is the CARD matter. For the second part of the question, the issue is cumulative impacts. The Court of Appeals in that case when looking at these projects individually, none of the projects had significant environmental impacts, so cumulatively they could not have a potential or significant environmental impact. There was an appeal to the Supreme Court.

Mr. Schroeder wanted to note that the Board is one person short of a quorum, but the Board will proceed in hope that someone will be able to attend.

Commissioner Hugoson stated that there are two visitors in the audience. They are two gentlemen from the Schezwan Ministry of Agriculture spending some time at the Department of Agriculture. They spend three months at the University and now are spending three months at the Department of Agriculture. Mr. Jao is from the Schezwan Ministry of Agriculture and Mr. Lou is in charge of the machinery area of the Ministry. Schezwan Province is in the southwestern part of China and is the largest agricultural province in China with about 80 million people. Mr. Hugoson visited Schezwan a few years ago and met Mr. Jao then so they have an arrangement with the Ministry of Agriculture that they will spend some time here job shadowing the people at the Department of Agriculture and continue that relationship.

Mr. Sullivan stated that at each Board member's place is a yellow copy that is a small modification of the resolution that was sent in the packet on blue paper.

### **III. Legal Counsel Report:**

Robert Roche stated that he would talk about the Colby vs. EQB/PCA litigation. For the Board's recollection, what happened in that case is the EQB received a petition for preparation of an EAW on a feedlot in Polk County. Polk County ultimately determined that their feedlot was exempt from environmental review because it has a capacity of fewer than 1,000 animal units. Opponents of the project sued Polk County and also the EQB, the PCA and Ramsey County; in both cases they are asking for required preparation of an EAW. On behalf of the

EQB, Mr. Roche has filed a motion to dismiss the litigation in Ramsey County. The case has been briefed and Mr. Roche will argue a motion on March 23, 2006.

Mr. Schroeder stated that before the next item on the agenda, Mr. Roche will set up the issue on the Dead Lake Association. Mr. Roche stated that before he got into the details, that he has been in the litigation involving the Dead Lake resort. The Dead Lake Association sought a contested case hearing before the Pollution Control Agency on the adequacy of the county's environmental review. Mr. Roche represented the PCA in that litigation. The PCA took the position that it could not hold the contested case, so that would have to be done by the courts. That litigation is over and Mr. Roche has addressed this with the Chair of the EQB, the Commissioner of the PCA, the attorney representing the developer and the attorney representing the Dead Lake Association.

Mr. Roche reminded everyone that the question before the Board today is not whether this EIS is adequate. The question that is before the Board is whether the Board has to make the decision if the EIS is adequate. The Board will not decide today if the environmental review is over for this project. The Board is just needs to decide with the rule criteria set forth whether it can and should make that decision of adequacy. This is a discretionary decision for the Board. If the Board finds that the criteria for taking on the adequacy decision, it does not mean that the Board must make the decision. It means that the Board can make the decision if it chooses to. So, if the Board finds that the criteria are met, it means you can take on the decision.

Voting on the resolution would be an exercise of each member to take on the decision. If the Board chooses not to adopt the resolution, then the matter is simply stays with Otter Tail County. The Board does not have to affirmatively have to vote not to take on this decision. Failing to adopt a resolution would leave it with the county.

There are couple of different ways to go about this; 1) if there is no quorum, the Board can not act and it will stay with Otter Tail County, 2) if the Board chooses not to vote on the resolution, then the Board is not making a decision and it will stay with Otter Tail County, 3) if the Board votes on the resolution, and it does not pass then the Board has not decided to take on this and it stays with Otter Tail County and 4) if the Board votes on the resolution, and it passes, only then does the Board take on the decision.

Commissioner Merriam asked about the history of the discretion of the Board of assuming determination of adequacy. Mr. Merriam wanted to know how many times the Board has been asked. Mr. Sullivan stated that Gregg Downing would go over that in his presentation.

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

Gregg Downing, EQB staff, stated that until the early 1980's the Board was responsible was determining the adequacy of every EIS in the state. When the law was de-centralized, almost all the authorities of the EQB were de-centralized to local units of government and other state agencies. The law retained certain authorities for the EQB under certain circumstances; one of those was the authority or option of taking over the determination of adequacy of any EIS, but

the way the law was written, the Board has a limited opportunity to do that. The Board must notify the normal RGU within 60 days of the publication of the EIS Preparation Notice in the EQB Monitor. If the Board fails to act within that 60 day period, the Board's authority to take over the adequacy will then expire.

In its present case, the Blue Heron Bay project on Dead Lake in Otter Tail County, the preparation notice of the EIS was published on January 16, 2006 in the EQB Monitor; 60 days from that date is March 17, 2006. Therefore, the Board at this meeting is within the period of time during which it has authority to act if it so chooses to take over the adequacy of the EIS.

Mr. Schroeder stated that if there are members of the audience that would like to address the Board on this issue, there are purple cards to fill out with their information.

Mr. Downing stated that to answer Commissioner Merriam's question, when this issue did arise, the staff checked the records to see how many times this has come before the Board in the past. It appears that there are 5 or 6 times that the issue has come before the Board. The Metropolitan Airports Commission has had 3 EIS's before the Board for an adequacy decision; the most recent one being the Flying Cloud Expansion that was before the Board at the last meeting. Prior to that was the Dual Track Railroad Siting Process EIS and prior to that back in the 1980's was the Anoka County Airport Expansion. In all those cases, the situation was that the Responsible Government Unit asked the Board to take over the adequacy decision. In some cases, they may have asked the Board because of the controversy it may have posed. The RGU was in active support of the Board taking on the decision. There is one other case where the issue was brought before the Board by a third party. In the early 1980's, the City of Bloomington asked the EQB to take over the adequacy decision for a development project EIS for the City of Minneapolis. That did come before the Board, but the Board declined to take over the adequacy. Those are the only times the staff can recall of the issue coming before the Board and this rule has been in effect since 1982.

The staff thinks there are good reasons why it does not come before the Board more often; 1) there are not very many EIS's; 2) some EIS's are done under some fairly complex processes, the public would not even think of the idea of getting the EQB involved. An example of that is the MnDOT EIS's. A great number of EIS's done over the years have been MnDOT highway projects that join state and federal EIS's. There are many public hearings; the decision is made by MnDOT and also the Federal Highway Administration; 3) most of the time by the time people want to bring it to the Board, it's too late. The 60 days has probably passed. The staff has talked with citizens who would have like the EQB to take over the adequacy, but it's been too late. The Dead Lake Association is the first group that has approached the Board while the timeframe is still open in a very long time.

The rules provide that the Board can take over the adequacy decision if at least one of three conditions are met; 1) the RGU (here Otter Tail County) is or will be unable to provide an objective appraisal of potential impacts of a project; 2) the project involves complex issues which the RGU lacks the technical ability to assess; and 3) the project has multi-jurisdictional effects. The rule allows the Board to take over the adequacy decision if at least one of those conditions are met, but the Board is not obligated to even if all the conditions are met.

Questions have arisen about the meaning of the multi-jurisdictional effects criterion. Mr. Roche and the staff looked back at the Statement of Need and Reasonableness on the 1982 rulemaking. The staff believes it is clear that what the Board meant in 1982 was that multi-jurisdictional effects meant where more than one unit of government has authority to approve the project. The issue has been raised that this criterion could apply to most if not all projects. The staff's position is that it does apply to many cases. The issue then becomes, could that really be the meaning of the criterion? The statute uses the term "chooses" to take over the adequacy decision. The statute gave the Board great latitude and the staff thinks the rules were written in such a way that they can almost always apply if the Board wanted to get involved. But since the Board is not obligated to, they can still decline to get involved. It gives the Board discretion and the opportunity to choose what it feels is the appropriate thing to do.

In terms of the description of the project and the history of the review, the staff would prefer to leave it to the witnesses who will be testifying both for and against this action. The parties did make a presentation at the Technical Representatives meeting.

If the Board chooses to take this action, the Board does not become the Responsible Governmental Unit and the Board assumes no responsibility for the EIS than it would otherwise have. The County will continue to be the RGU to direct the preparation of the EIS, review the comments, and direct a revision to the final. When the County feels the final is ready, they will send it to the EQB staff and then at that point they would bring the matter before the Board. The only thing the Board would do is to make the final double-check decision on whether or not the EIS is adequate. Up until that time, the Board would not be assuming any additional role in the process.

Although it is customary for the staff to make a recommendation to the Board, the staff believes that in this case because of the unusual discretion given by the legislature to the Board, that it not appropriate for the staff to make a recommendation, except that the staff thinks the condition regarding the multi-jurisdictional effects is met. A number of governmental units are expected to have to give approval for this project, including the County, the PCA, DNR, Department of Health and maybe the U.S. Army Corp of Engineers. That clearly makes this multi-jurisdictional under the meaning of the word as the Board intended back in 1982. The Board, if it chooses, is entitled to intervene and take on the adequacy decision. Beyond that the staff believes that they should not substitute their judgment for that of the Board; the Board should listen to the testimony given and make up their own minds.

Commissioner Merriam asked if Mr. Downing had any contact with Otter Tail County Board other than the letter that is in the Board packet. Mr. Merriam stated that typically when the County Board takes an action, it is by resolution. The Board received a letter from the county attorney telling the Board that the County Board does not agree with the citizens' assertions, but that it does not object to the EQB taking over the determination. Mr. Merriam indicated he is confused by the absence of a resolution and about the proviso of there being no cost to the County. Mr. Downing stated that the EQB staff has had several conversations with County staff. Mr. Downing talked with Mr. Hauser, the County Attorney, regarding a letter that was sent. Mr. Downing specifically talked with him about what the County Board meant by the

additional cost issue. Mr. Downing stated what they were concerned about was that if the Board took over the adequacy decision, they might be billed for the EQB's time as well as the Administrative Law Judge. Mr. Downing assured him that there would be no additional costs. Regarding the question of the resolution, Mr. Downing does not know specifically if they passed a resolution.

Mr. Schroeder asked about a point in the letter dated February 22, 2006 from Rob Deutschman from the Dead Lake Association. In that letter, there is a statement that says Jon Larsen from the Environmental Quality Board made a special offer to Otter Tail County to assist them through the EIS, but that the offer was turned down by the County.

Jon Larsen, EQB staff, stated that he had many conversations with representatives from the Dead Lake Association and during one of those conversations with Doug Martin. Mr. Martin asked Mr. Larsen what the possibility was of the EQB staff providing advanced technical assistance to the County. Mr. Larsen assured Mr. Martin that was possible and the EQB staff could, in person, visit the County staff on important matters. The explanation was made to the Dead Lake Association that the EQB staff was routinely available for technical assistance. There was a direct offer made to Otter Tail County. Mr. Larsen assured Mr. Martin that if he communicated that to Otter Tail and they chose to take them up on it, the EQB would respond.

Mr. Roche wanted to confirm with Mr. Downing that he contacted Otter Tail County directly and let them know that this matter was before the Board today. Mr. Downing stated that he talked several times with Mr. Kalar and as of March 15, 2006 Mr. Kalar was intending to make it to the meeting today. Mr. Kalar indicated to Mr. Downing that he did discuss with the County Board on whether or not they wanted Mr. Kalar to attend the EQB meeting and the County directed Mr. Kalar to attend.

Commissioner Kramer stated that Mr. Downing noted the EQB to assume responsibility for the EIS adequacy. Mr. Kramer stated that he would like the other Board members to know that on page 5 of the annotated agenda, staff has noted that 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.

**Testimony:**

Doug Martin, Board of Directors for the Dead Lake Association, stated that the Association is asking the EQB to approve the resolution to determine the adequacy of the Final EIS for the proposed Blue Heron Bay. Mr. Martin had a powerpoint presentation set up for the Board members to look at the set up of the lake in Otter Tail County.

Dead Lake is the second largest lake in Otter Tail County; it's the largest shallow water lake in the state of Minnesota. About 83% of the lake is less than 15 feet deep. There has been a lot of controversy over the shallow water development and this particular development is located in the center of the lake. Mr. Martin wanted to go through the unique characteristics of the lake.

It is unusual in the way it's configured. Mr. Martin went through different parts of the lake and explained their characteristics. The section of the lake where the development would be is very shallow; has wild rice and waterfowl. One of the challenges in looking at the development is they do not know what each "box" is. One member of the Dead Lake Association asked if they were going to be homes or timeshares and they were told there were no timeshares. The DLA did not ask the question about fractional ownership. Fractional ownership is like a watered down version of a timeshare. Mr. Martin stated that this would obviously have an impact on the lake.

Mr. Martin stated that Jon and Gregg stated earlier that this is a discretionary decision; Mr. Martin would like to share some reasons why the EQB should make that decision to determine the adequacy of the EIS proposed.

Otter Tail County Board of Commissioners unanimously agreed twice not to object to the request that the EQB make an adequacy determination of the Final EIS for the proposed Blue Heron Bay project.

One of the other factors is that the project has multi-jurisdictional effects; the Dead Lake Township, Otter Tail County, DNR. The EQB should determine the adequacy of the Final EIS because through no fault of their own, Otter Tail County lacks the technical expertise. Mr. Martin indicated that Otter Tail County voted to hire Wenck and Associates as their consultant for this project, so they are recognizing that they need some additional help. Mr. Martin stated that the County has asked for help, but Wenck is not on Board. There was a letter that the Board members received that says Wenck and Associates is a premiere Minnesota engineering consulting firm fully capable of assisting Otter Tail County in assessing the project and preparing the EIS. Then it says, as ordered, Otter Tail County has hired Wenck and Associates to prepare the EIS. Mr. Martin asked at the County Board meeting if Wenck is on board and are they in a position under contract to work on this project and the answer was no. Mr. Martin stated that the developer may have signed the contract, the County may have signed the contract, but Wenck is not on Board.

On November 15, 2005 Otter Tail County approved an EIS scoping decision. The Dead Lake Association was asked if they supported the scoping decision. Overall, the DLA does support the decision and they also support Wenck. The DLA think, in the scoping decision, that the timeframe is unrealistic. November 15, 2005 Otter Tail County approves the EIS scope, in January/February a draft EIS, in March a Final EIS, April the adequacy determination. On December 7, 2005, the developer distributed his preliminary draft EIS to the bidding consultants, so within a couple of weeks, the developer has already taken the plan, and put together the whole EIS. On December 27, 2005, Otter Tail County selected Wenck and Associates to take on this task of doing the EIS. Mr. Martin stated that the developer refused to sign a reimbursement agreement. The developer's continuous efforts to control the EIS process prevent the thorough, professional, and independent review of the project. The Dead Lake Associations concern is that not only if Wenck comes on board, but after they are hired that Wenck may need to do research and may not have the time or the finances available to them to



do this. Mr. Martin stated that it would be a benefit to the County to get the EQB to check this stuff over for them and make sure they have covered all there bases. Otter Tail County may take over control in the completion of the EIS.

Mr. Martin stated that, given the history of the project, the EQB is in the best position to make an unbiased technically sound decision on the adequacy of the EIS. In summary, the EQB should approve the resolution to determine the adequacy of the Final EIS for the proposed Blue Heron Bay development on Dead Lake in Otter Tail County for the following reasons; 1) the project is multi-jurisdictional, 2) this EIS has some unique characteristics, and 3) Otter Tail County Commissioners unanimously agree not to object to the request that the EQB determine the adequacy of the Final EIS for the Blue Heron Bay project.

Commissioner Merriam asked if it was Mr. Martin's position that whether Otter Tail County Board or the Environmental Quality Board making the determination of adequacy affects the work product of Wenck and Associates. Mr. Martin stated yes; that this project has been going on for 3-4 years and the developer has a relationship with the County, as does DLA.

Mr. Roche stated that if the Board does decide to take on the adequacy decision, it does not mean that the Board becomes the RGU in terms of preparing the EIS. Otter Tail County would still have the responsibility for doing the EIS. Mr. Schroeder stated Wenck and Associates would be working with Otter Tail County in the preparation of the EIS.

Member Bloomberg asked if Mr. Martin could provide some more background on the Dead Lake Association and if Mr. Martin, in particular, is a seasonal owner. Mr. Martin stated that that there are just under 200 members of the Dead Lake Association. About half of the people live there full time and the other half are seasonal.

Member Bloomberg wanted to confirm that Mr. Martin was speaking on behalf of all the Dead Lake Association members. Mr. Martin agreed and stated that when the announcement came out, there were 117 people that wrote letters regarding the project. Two letters were in support of the project and 115 were concerned about the project.

Commissioner Hugoson asked Mr. Martin to explain more about Wenck "not being on board". Mr. Hugoson asked if Mr. Martin means that the reason why Wenck is not here today is because they are not in agreement with what is taking place, they have been hired or not been hired, there is a contract signed or not signed, there is not a process agreed to for their payment, etc. Mr. Martin stated that Wenck put together a proposal and that proposal was accepted by Otter Tail County. Then it stopped because they were waiting for expense reimbursement to come from the developer. Wenck is not in contract with the County as of today; they are not hired under Mr. Martin's understanding. They submitted it, but the agreement needed to be signed by the developer and by the County. Half of the money was supposed to be paid up front.

Mr. Hugoson asked if the timetable that was laid out in the powerpoint presentation has proceeded at all in terms of proceeding with the EIS. Mr. Martin stated that was the developer's timetable and was a concern of Dead Lake Association.

Member Elmer stated that one of the slides of the Mr. Martins presentation showed the proposed development. Ms. Elmer asked Mr. Martin what is in that spot currently. Mr. Martin stated that there is a farm and few other structures.

**Testimony:**

Terry Sullivan, Secretary of the Dead Lake Association, stated that she wanted to respond to Mr. Bloomberg's question of the Dead Lake Association and their members and how they are represented. Ms. Sullivan stated that Doug Martin is a Board member and as far as the individuals on the lake, her husband bought their property in 1976 and they retired up there five years ago. They have been full-time volunteers for the last three years. This is a natural classification lake and they have been concerned about happens to the lake; the fish, waterfowl, etc. Their place is just across from the proposed development and this is very important to her.

Robert Deutschman, President of the Dead Lake Association, has been a member of the Board for six years and president for almost five years. Mr. Deutschman receives all of the mail that comes into the DLA and just recently there has been a membership drive and of the number of members that have sent in their dues. Mr. Deutschman stated that they are not against development; just that large of a development, on that critical point of land.

Jim Erickson, owner of the property, stated that he has been going at this since 2001. Mr. Erickson stated that if he was the EQB he would be concerned about taking responsibility under these circumstances. Mr. Erickson stated that if the DLA would say to the EQB if the County Board makes the decision, which Mr. Erickson thinks they are capable of doing, we will not bring a lawsuit, Mr. Erickson would be tempted to say the EQB can take over the decision.

Mr. Erickson stated that he believes the Otter Tail County Board capable of making an unbiased decision. The second criteria about them not having the technical expertise; to suggest that the draft EIS by his consultants, North American Wetland Engineering alone is inadequate, is improper. Mr. Erickson has done two EAW's and a draft EIS. Based on that, they requested three consultants to make a bid about they would do to review this and to do a final EIS. The EIS has been handed over to the County and the County wants to hire a consultant to do a review of it and he supports that. Mr. Erickson has signed a contract to do that and has agreed to pay for a second look at this document. Mr. Erickson stated that the County has his authority to hire Wenck and Associates. Mr. Erickson has pledged throughout this process to do this correctly and appropriately. Any delay is because of Mr. Erickson from the originated timetable and he is admitting to that.

Commissioner Merriam stated that he wanted to hear about why Mr. Erickson prefers the County Board to take on the decision. Mr. Erickson stated that the County Board is capable of making an unbiased decision and have the technical expertise.

Member Elmer asked if there is a timeline for the specific part of the EIS process and how much time would be added on. Mr. Downing stated regarding the EIS timeframe, the law indicates that the EIS should be completed within 280 after the same EIS preparation notice that starts the 60 day process from January 16, 2006. If the Board were to take the adequacy responsibility it would add between 3-6 weeks to the administrative process. It would depend upon at what point the county got done relative to the Board's schedule.

**Testimony:**

Peder Larson, attorney representing Blue Heron Bay Land Company, stated that in spirit they are not opposing the EQB making the adequacy decision. EQB staff pointed out that it is the Legislature's intent that the EQB no longer make these decisions; that RGU's should be responsible. The reason for that is that the government most responsible for approval wants to make sure the scope of the EIS covers the issues that they think are most important in their approvals. It is clear in the SONAR, that the Legislature back in 1980 purposefully gave this responsibility to the responsible governmental units. Clearly, the criteria allow the EQB to make this decision. The County Board has been a leader in shoreland managing decisions. They are capable of understanding and are objective. The County made a good scoping decision and has a very good scoping process. They took all the recommendation that were put forward and included nearly everything in the scoping decision. They hired consultants that the DLA recommended. On the multi-jurisdictional aspects, Mr. Larson suggested to the Board that they put a filter on that and look to see if there needs to be some referee activity.

Mr. Larson stated Mr. Erickson hired North American Wetland Engineering to work with Otter Tail to produce the EAW that Otter Tail County published. We also prepared an EAW for Otter Tail to publish on the subdivision that was never officially done. Mr. Erickson paid NAWA to work hand-in-glove with Otter Tail County to do an environmental review of this project. He asked NAWA to take those two EAW's and put them together and get an EIS formed, hired Blue Water Science to review this and they have. This is what was delivered to Otter Tail County. Wenck is independent of that process and will review this again on behalf of Otter Tail County.

Member Elmer asked to hear from Commissioner Merriam on the classification of a "natural environment lake". Commissioner Merriam stated the classification of a "natural environment lake" is in this instance because it is a large, shallow waterbody.

Jim Erickson wanted to add to Commissioner Merriam's response. According to the rules, most natural environment lakes are defined as small, shallow lakes. Dead Lake is 8,000 acres and is the largest natural environment lake in the state of Minnesota. The protections that are required for natural environment lakes are more extensive than other lakes; larger lots, more set-back. Mr. Erickson stated that being a natural environment lake is an advantage with

respect to market to an individual who wants to live on a natural environment lake. It is an incentive to build a project that is sensitive to that and appeals to that person.

Peder Larson stated that the preferred alternative up until now is a cluster development. Under the rules, there is some benefits to the proposer; they are allowed more units. The reason is there are a lot of extra restrictions on this project. They need to protect half of the 200-foot setback in its natural state. They are protecting 95% of the first 100 feet in it's current state. They are required to have 50% of the project in an open space and they have about 75% in open space. They are also required to have a centralized sewer system.

Mr. Schroeder stated that in all fairness, he would like to give Mr. Martin, Ms. Witzig, Ms. Sullivan and Mr. Deutschman another five minutes to summarize their position in this since Commissioner arrived after their presentation.

A summary of the earlier testimony was provided.

Mr. Roche stated that if the Board chooses to adopt the resolution, the County Board, not the EQB staff will be negotiating with consultants and responsible for preparing the environmental review documents. The County will have to negotiate with the consultants to prepare the documentation. The Board has three options; 1) not move the resolution; 2) move the resolution and vote against it and leave the decision of adequacy with Otter Tail County; or 3) move the resolution and vote to adopt the resolution in which case the Board would become responsible for determining the adequacy.

Chair Schroeder stated that there is a resolution before the Board as amended. Member Elmer moved the resolution given the large nature of the project and the sensitive environmental area and Commissioner Merriam seconded.

Chair Schroeder asked for discussion and Mr. Merriam stated that prior to 1982, the EQB determined the adequacy of all EIS's. The Legislature changed that framework to establish the primary responsibility with the responsible governmental unit. Mr. Merriam stated that it will not affect the outcome of the EIS and given the fact the local county board raises no objection. A couple more weeks into the process is not that long when this project has been going on for 5 years or so. There is minimal work for the EQB staff and other agency staff.

Member Bloomberg stated that he is voting against the resolution. Mr. Bloomberg stated that the overall goal is to ensure an accurate environmental review and regardless who makes the adequacy decision; that process is going to proceed with some of the best consultants. The EQB making the adequacy decision will not alter anything.

Commissioner Hugoson stated that he opposed the resolution. Any project out there is going to have multi-jurisdictional involvement. If the EQB takes on this case, it creates an open invitation that virtually everyone from this point on would suddenly be looking at the EQB to take on the adequacy decision. The agencies that are going to be most involved with any decision, DNR, PCA, and Health will still be involved in this project.

Commissioner Kramer stated that he opposed the resolution. Mr. Kramer stated the EQB's decision to take on the adequacy would be taking away the County and the citizen's right and responsibility to take on this decision.

Commissioner Bagderow stated even though she did not hear the full story from the Dead Lake Association, she did read the entire record.

Chair Schroeder called for a roll call vote on the resolution to have the EQB assume the adequacy decision which failed 2-6.

Chair Schroeder asked for additional discussion and seeing none, asked for a motion to adjourn. Commissioner Merriam made the motion to adjourn and Commissioner Kramer seconded the motion. The motion was approved on a voice vote.