EQB Rebuttal Response 7/23/2019
OAH Docket # 80-9008-35532
Revisor's Draft #4157

State of Minnesota
Environmental Quality Board
EQB Rebuttal Response to Public Comments
July 23, 2019.

This document supplements information in the Statement of Need and Reasonableness (SONAR; Hearing Exhibit D) in the matter of proposed revisions of Minnesota Rules, Minnesota Rules, chapters 4410.0200, 4410.0500, 4410.4300, 4410.4400, 4410.5200, 4410.7904, 4410.7906, 4410.7926, and 4410.4600, Relating to Rules Governing Environmental Review.

This document contains the Environmental Quality Board's (EQB) detailed responses to public comments submitted during the post-hearing comment period. The comments are numbered and organized for review in Exhibit R.1.

The EQB thoroughly reviewed public comments, from the post-hearing comment period, which are addressed in detail in this document. All comments received during all comment periods, and the public hearing transcripts are posted in their entirety on the EQB webpage for this rulemaking at: https://www.eqb.state.mn.us/content/eqb-mandatory-categories-rulemaking.

Comments

Comment Period	Comment #	Summary of comment (note: comments that are paraphrased are indicated with *)
Post-hearing comment period	Comment 443	*My qualifications for making these comments are exceptional and should be given appropriate weight;
Post-hearing comment period	Comment 444	*The public hearing process was necessary to hold the EQB accountable for compliance with applicable law through means of an objective third party
Post-hearing comment period	Comment 445	*Minnesota and the entire globe are in existential environmental climate, ecosystem and human health crises;
Post-hearing comment period	Comment 446	*The EQB's proposed rule changes are wholly oblivious too and entirely inadequate to adequately address these looming crises

Post-hearing comment period	Comment 447	*The proposed rule changes are not compliant with the Minnesota Environmental Policy Act (MEPA) and the Minnesota Administrative Procedures Act (MAPA);
Post-hearing comment period	Comment 448	*The EQB has not properly exercised its authority and legal obligation to utilize unbiased advisory panels to assess the effectiveness of environmental review and make recommendations for changes;
Post-hearing comment period	Comment 449	*The Administrative Law Judge has available basis in record and legal options for remanding the proposed set of rule changes to the EQB with instructions for revisions demonstrating compliance with certain requirements MEPA and MEPA and to empanelling unbiased advisory panels of qualified experts to make recommendations that would be both MEPA and MAPA compliant.
Post-hearing comment period	Comment 450	"It is the executive branch, which is the Environmental Quality Board (EQB) under the Governor and the Courts, that are responsible for holding the Legislature in check and assuring that execution of laws are not in conflict with legislation that has passed, including here, the longstanding requirements of the Minnesota Environmental Policy Act (MEPA). As I will detail in the following testimony, the proposed rule changes for mandatory review for Motorized Recreational Trails, Items A. and B. are, I believe, in direct conflict with the EQB's responsibility under MEPA 116D.01 "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings." The Legislature directs agencies, including the EQB, to follow all of MEPA when it states in MEPA 116D.03 subdivision 1: Requirement The legislature authorizes and directs that, to the fullest extent practicable the policies, rules and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01-116D.06."
Post-hearing comment period	Comment 451	"Items A. and B. are in direct conflict with the intent of Environmental Review to prevent environmental degradation by wise and informed decisions and with the stated purpose of the MEPA. 116D. 01 (b), which all state agencies, including the EQB are to follow. The rule changes proposed in items A. and B. are also in conflict with the EQB's responsibilities to carry out MEPA and act as a trustee of the environment for succeeding generations under 116 D.02 Subdivision 2, 1."
Post-hearing comment period	Comment 452	"I believe it is the EQB's responsibility, as dictated by the legislature, in MEPA 116D.03, to maintain the threshold at 10 miles as it is in the best interest of the environment to prevent degradation, as supported by the 1982 Sonar statement that the degree of environmental impact is a function of length, and it is in the best interest of succeeding generations for whom the EQB is the environmental trustee , as stated in 116D.02 under Subdivision 1. Policy and Subdivision 2. State Responsibilities."
Post-hearing comment period	Comment 453	"The language in this proposed rule change of Item B. remains impermissibly vague in my view and so indefinite one must guess at its meaning. It does not establish a reasonably clear policy or standard to control and guide administrative officers so that the rule is carried out by virtue of its own terms and not according to the whim or caprice of the officer.

		What is the definition of " an existing corridor in current legal use by motor vehicles?" This description is not specific enough. It could include public roads and highways, to the detriment of the general public's physical safety and well being and jeopardize the physical integrity of needed public transportation infrastructure. It could also include pipeline corridors and power line corridors that ATVS can legally ride along in some areas. It could also include seldom used, primitive logging roads that are not closed and can pose significant environmental impact issues of sedimentation and invasive species spread, if designated for motorized recreational use. The language is unclear to the user and to the enforcer regarding the specific parameters for a route to be designated for a new motorized recreational use. Could, for example, a mudder truck go down a pipeline or powerline corridor which is legally used by ATVS in some areas? How does the enforcer know? How does the user know?"

EQB response:

Thank you to everyone that took the time to review the proposed rule changes and submit comments. All comments received that are not related to proposed changes identified in the current rulemaking have been compiled, considered and are included in the formal rulemaking record.

According to Minnesota Statute § 14.05. subd. 2. Authority to modify proposed rule. (a) An agency may modify a proposed rule in accordance with the procedures of the Minnesota Administrative Procedure Act (MAPA). However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules or notice of hearing.

EQB's rulemaking process has adhered to the requirements under MAPA. MAPA provides a transparent process for adopting, amending, modifying or repealing rules.

Response to comment 443:

All substantive comments submitted for consideration under this rulemaking are considered equally. In addition to the formal rulemaking comment period, EQB completed an additional notice plan as well as many other public input opportunities on the rules and rulemaking prior to language being released. See EQB rulemaking website for a list of these meetings and outreach activities: https://www.eqb.state.mn.us/content/eqb-mandatory-categories-rulemaking

Response to comment 444:

The Minnesota Administrative Procedures Act ensures that a public hearing will be held when 25 or more requests are received. These requirements apply to all state rulemaking processes.

Response to comment 445:

These are important issues that all federal, state and local government agencies are considering. An effective and efficient State Environmental Review Program (SERP) is an important tool used by these government agencies before making approval decisions.

Response to comment 446:

The goals of this rulemaking are to ensure an effective and efficient SERP, and are proposed for the following considerations:

- 2013, the Legislature directed EQB to conduct rulemaking for silica sand projects (Laws of Minnesota 2013, Chapter 114, Article 4, Section 105).
- 2015 Legislature directed EQB to update Environmental Review rules to allow certain trails to be built or designated without requiring Environmental Review (Part 4410.4300, subpart 37. Recreational trails).
- In 2015, the legislature directed EQB to streamline environmental review efficiency (2015 Special Session Law, Chapter 4, Article 3, Section 2.)
- Recommendations identified in the 2013 Mandatory Environmental Review Categories Report (Report) to the Legislature

Response to comment 447:

The Environmental Quality Board ("EQB") was created because the legislature found that the "problems related to the environment often encompass the responsibilities of several state agencies and that solutions to these environmental problems require the interaction of these agencies." Minn. Stat. § 116C.01. The creation of EQB was to convene these state agencies and to address environmental problems, review environmental programs and ensure that there is compliance with state environmental policy. *See* Minn. Stat. § 116C.04, subdivision 2. It is EQB's assertion that updating its mandatory category rules for the Environmental Review program is one manner it carries out its responsibilities, duties and obligations outlined in MEPA.

EQB's rulemaking process has adhered to the requirements under MAPA. MAPA provides a transparent process for adopting, amending, modifying or repealing rules. The commentator notes specific concern with EQB's compliance with Minnesota Statues section 14.002 which emphasizes concerns regarding regulatory rules and programs that are "overly prescriptive and inflexible, thereby increasing costs to the state, local governments, and the regulated community and decreasing the effectiveness of the regulatory program." The legislator notes in response to these concerns that state agencies must develop "rules and regulatory programs must emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulator party and the agency in meeting those goals." Minn. Stat. § 14.002. EQB meets these goals by updating the rules to ensure better clarity and understanding for when the rules apply. This will ensure that the right types of projects are subject to environmental review.

Response to comment 448:

The EQB initiated and established the silica sand advisory panel and that group's input contributed to the rulemaking.

EQB's powers and duties are provided in Minn. Stat. § 116C.04. The Environmental Quality Board has jurisdiction to do the following:

> (a) The board shall determine which environmental problems of interdepartmental concern to state government shall be considered by the board. The board shall initiate interdepartmental investigations into those matters that it determines are in need of study. Topics for investigation may include but need not be limited to air and water resources and quality, solid waste management, transportation and utility corridors, energy policy and need, and planning.
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> (b) The board shall review programs of state agencies that significantly affect the environment and coordinate those it determines are interdepartmental in nature, and ensure agency compliance with state environmental policy.
>
> (c) The board may review environmental rules and criteria for granting and denying permits by state agencies and may resolve conflicts involving state agencies with regard to programs, rules, permits and procedures significantly affecting the environment, provided that such resolution of conflicts is consistent with state environmental policy.
>
> Minn. Stat. 116C.04, subd. 2

Additionally, the EQB has the authority "to establish interdepartmental or citizen task forces or subcommittees to study particular problems," Minn. Stat. § 116C.04, subd. 4. (Provided information pertaining to any task forces/subcommittees EQB regularly convenes) As this comment relates to powers and duties of the EQB generally, it is outside the scope of this rulemaking.

Response to comment 449:

Noted. This comment is not about the content of the rules but refers to rulemaking procedures, specifically the Administrative Law Judge's report and potential outcomes. Minnesota Rule 1400.2240 provides detailed information on the process for approving or disapproving the rules and the next steps under either circumstance.

Response to comment 450, 451, 452:

The commentators state that the proposed rule amendments to Minn. R. 4410.4300, subp. 37 conflict with the requirements of MEPA.

The legislature has authority to amend previously-enacted statutes. Kimberly-Clark Corp. & Subsidiaries v. Comm'r of Revenue, 880 N.W.2d 844, 850 (Minn. 2016) ("[T]he mere act of

enacting legislation did not bar the Legislature from later amending the enacted statute."); see also State ex rel. Bergin v. Washburn, 28 N.W.2d 652, 654 (Minn. 1947) ("What the legislature has authority to enact it obviously has like authority to amend or even to repeal."). Through the 2015 Special Session legislation, the legislature amended MEPA by clearly stating that recreational trails less than 25 miles long are excluded from mandatory MEPA review and directing EQB to amend its rules to implement the statutory exclusion. The current rulemaking changes are aligned with the intent of the 2015 legislation.

Response to comment 453:

The proposed language is meant to align with the Recreational Trails category which utilizes the phrase: "For purposes of this subpart, "existing trail" means an established corridor in current legal use." (Minn. Rule 4410.4300, subp. 37).

Motor vehicle is defined in statute, Minn. Stat. § 169.011, subd. 42:

> "Motor vehicle. "Motor vehicle" means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires. Motor vehicle does not include an electric personal assistive mobility device or a vehicle moved solely by human power."

The term corridor is the same as what is commonly understood in usage and is defined by Merriam Webster as "an area or stretch of land identified by a specific common characteristic or purpose", (https://www.merriam-webster.com/dictionary/corridor).