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April 26, 2006

The Honorable Steve Mihalchick
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, MN 55401-2138

VIA ELECTRONIC MAIL AND FAX

Re: Proposed amendments to rules governing the Environmental Review program;
EQB staff rebuttal period responses to comments

Dear Judge Mihalchick:

The EQB staff offers the following responses to comments during the five-day rebuttal period following the end of the public comment period. This letter supplements the responses in my letter of April 19, 2006.

Request to withdraw certain proposed amendments. In view of the comments received and other developments, the EQB wishes to withdraw the following three proposed amendments:

1. 4410.0200, subpart 81, definition of "sewered area."

Discussion by EQB member agencies of the comments received from the Builder's Association about this definition revealed confusion about the amendment and how it relates to similar definitions in the rules of other agencies. The EQB wishes to withdraw this amendment from this rulemaking to reconsider it in view of these facts.

2. 4410.3610, subpart 2, relationship of an AUAR to specific projects; and
3. 4410.3610, subpart 5a, additional procedures required when certain specific projects are reviewed.

Just after the public hearing on these amendments was held, the Minnesota Court of Appeals released its decision in the case *Minnesota Center for Environmental Advocacy vs. City of St. Paul Park and R. Gordon Nesvig, et al* (case number A05-1029). The Court's decision raises important issues about the meaning of the boundaries of an AUAR which the EQB had not expected. In view of this development, the EQB believes it would be prudent to withdraw the proposed amendments at subparts 2 and 5a, which directly or indirectly relate to the setting of AUAR boundaries and the implications thereof, from this rulemaking. The EQB intends to reconsider these amendments in the broader context of the cited case and related issues, and anticipates including revised amendments in another rulemaking later this year. At its regular

monthly meeting of April 20, 2006, the Board passed a motion in favor of withdrawing the amendments at subparts 2 and 5a.

Proposed modifications to amendments. In my response letter of April 19, 2006, I indicated that the EQB staff was willing to consider suggestions from the Township Association for alternative language for the proposed amendments at parts 4410.4300, subpart 19 and 4410.4400, subpart 14 adding the words "annexation agreement." During the past several days we have been discussing with Mr. Greensweig of the Township Association his concern as expressed in his comment letter of March 15 and how we might resolve the issue. Mr. Greensweig indicated that his concern could be resolved if we added reference to the "annexation by ordinance" process under Minn. Stat., sec. 414.033, as an alternative indication that land would be residential in the future. As a result of our discussions, the EQB staff is recommending that both of these amendments be modified as follows:

> Subp. [19/14]. **Residential development.** An [EAW/EIS] is required for residential development if the total number of units that may ultimately be developed on all contiguous land owned or under an option to purchase by the proposer, ~~and that is zoned for residential development or is identified for residential development~~ except land identified by an applicable comprehensive plan, ordinance, resolution or ~~annexation~~ agreement of a local governmental unit for a future use other than residential development, equals or exceeds a threshold of this subpart. [Remainder of subparts as proposed before…]

As you will note, the rule previously counted land as future residential if it was so identified by government plans, ordinances, or, as we proposed in this rulemaking, an annexation agreement. The modified rule would presume land will be for residential use in the future unless it is identified for some other type of land use by any of the types of governmental documents listed in the proposed rule. This modification proved to be the clearest way to incorporate the "annexation by ordinance" process under Minn. Stat., sec. 414.033, which the Township Association asked to be included as an alternative to "annexation by agreement." We at first tried to directly add land eligible for annexation under that statute to the list of government "identifiers" in the rule, but then realized that we needed to exclude land eligible for annexation that was not intended for residential development. After unsuccessfully trying several direct ways to work that exclusion into the existing rule, we realized that the revision we are now recommending best got at what we wanted with the clearest wording.

EQB staff responses to other comments. The following are responses to other comments received. No modifications to the proposed rules are suggested in these responses.

Comment: The Minnesota Center for Environmental Advocacy opposes the revision of the threshold for the mandatory EAW category for Air Pollution, at part 4410.4300, subpart 15, item A. The Center is particularly concerned with respect to ethanol projects that propose to burn coal and mining operation in northern Minnesota.
EQB staff response: The EQB staff would point out that both ethanol plants and mineral mining have their own mandatory EAW categories. Ethanol plants are under the "fuel conversion facilities" category at part 4410.4300, subpart 5, item B. The threshold for

environmental review is 5 million or more gallons per year of ethanol for construction or expansion of an ethanol plant. The average capacity of a new or expanded ethanol plant in Minnesota is well over 5 million gallons per year. According to information from the MPCA, of eight recent ethanol projects, the average size was 70.6 million gallons per year and the smallest was 15 million gallons per year. As a result, the threshold change in the air pollution category does not affect environmental review for ethanol plants.

The metallic mineral mining industry also has its own environmental review mandatory category at part 4410.4300, subpart 11. Currently, there are three mining projects requesting construction. Two of these projects are completing a mandatory EIS and one was exempted from environmental review by the Legislature. For two other recent mining projects, one completed an EIS on account of water issues and another completed an EAW under the air pollution category. Mining projects will remain largely unaffected by the air pollution category threshold change. In addition, all metallic and mineral mining facilities in Minnesota are considered major sources under the federal Prevention of Significant Deterioration (PSD) program. This rigorous public permitting program requires air dispersion modeling and usually an air emission risk analysis. Other pollutant concerns expressed in the comment would be covered in the air emissions permit through state and federal PSD regulations.

Additionally, in the event that an ethanol or mining project does not require mandatory review, the public can file a petition for environmental review. Consequently, the commenter's concern that the majority of these facilities will not complete environmental review is unfounded.

Comment: The comment letter from WSB & Associates suggested that the RGU for certain sewer system projects be changed from the PCA to the city.
EQB Staff response: The EQB staff continues to believe that the PCA is the appropriate RGU for the whole wastewater systems category. There are three basic reasons for this. First, oftentimes sewer extensions are included in a proposed new or expanded wastewater treatment plant project. In those cases it could create confusion to have two separate RGUs for parts of the same project. Second, the environmental review rules state that the governmental unit with the greatest authority over the project is the RGU. PCA has the greatest authority because they continue to issue permits for sewer extensions, track compliance, and take enforcement action when necessary. Third, sewer extension approval is often based on the capacity of the wastewater treatment plant to which it is routed. PCA must check permitting and compliance records to make sure the capacity is available. Since sewer systems and wastewater treatment plants are inherently connected, it makes sense to keep the same RGU for both types of projects.

Thank you for your consideration of our responses.

Sincerely,

Michael Sullivan
Executive Director