STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE

ENVIRONMENTAL QUALITY BOARD

Proposed Amendment to Rules Governing the Environmental Review Program, Minnesota Rules, chapter 4410

AFTERNOON/EVENING SESSIONS

The Rules Hearing in the above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, taken before Angela D. Sauro, RPR, a Notary Public in and for the County of Hennepin, State of Minnesota, taken on the 30th day of March, 2006, at Fort Snelling History Center Auditorium, Fort Snelling, Minnesota, commencing at approximately 2:05 p.m.

APPEARANCES

STEVE M. MIHALCHICK, ADMINISTRATIVE LAW JUDGE, OFFICE OF ADMINISTRATIVE HEARINGS, 100 Washington Square, Suite 1700, Minneapolis, Minnesota 55401-2138.

GREGG DOWNING, ENVIRONMENTAL REVIEW COORDINATOR, ENVIRONMENTAL QUALITY BOARD, office of Geographic and Demographic Analysis, 658 Cedar Street, Room 300, St. Paul, Minnesota 55155.

ALSO PRESENT:
Jon Larsen, EQB Staff
Robert Roche, Assistant Attroney General
Melissa Manderscheid, Law Student
Rebecca leis, Law Student

The Original is in the possession of Administrative Law Judge Steve M. Mihalchick.

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THE JUDGE: This is a Rule Hearing being conducted for the Environmental Quality Board. I am Steve Mihalchick, I am an Administrative Law Judge from the Office of Administrative Hearings. We review and approve or disapprove rules such as these. My job is conduct this hearing and then make a determination as to whether the Agency has demonstrated that the rules are necessary and reasonable.

There are several documents on the table up front. One of them is our Rule Hearing Procedures sheet. I am just going to hit a couple of the points there. There is two purposes of this hearing. One is to allow the Agency to explain a bit what is proposed and what the need for it is and the reasonableness of it, although they will rely preliminary on their written Statement of Need and Reasonableness.

The second purpose is to allow the public to comment, and so we will do that as well today.

So generally we will start and we will have the jurisdictional documents demonstrating that they followed the procedures introduced into the record. We will then have Mr. Downing give an overview of what is being proposed here, and then we will take questions and comments from the public.

We do have a court reporter here, so when you do

ask questions or comments I am going to ask you to come up front to the podium, tell us who you are, and state your name the first time you come up and who you represent, if anyone.

I am going to have the Panel introduce themselves.

MR. ROCHE: Robert Roche, R-O-C-H-E. Assistant Attorney General, Counsel to the EQB staff.

MR. DOWNING: I am Gregg Downing, that is Gregg with two Gs at the end.

THE JUDGE: I don't think that is on, Mr. Downing.

MR. DOWNING: Thank you. I am Gregg Downing, that is Gregg with two Gs at the end, Downing, D-O-W-N-I-N-G, with the Environmental Quality Board staff.

THE JUDGE: Mr. Larsen, are you going to speak?

MR. LARSEN: I may have nothing to present today, but I am Jon Larsen with the Environmental Quality Board staff, that is J-O-N, L-A-R-S-E-N.

THE JUDGE: Thank you. Part of the requirements are that the Agency file several documents and give several types of notice during the adoption of the rules, so Mr. Roche is going to list those exhibits that demonstrate their compliance with those requirements.

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MR. ROCHE: Exhibit 1 is a request for comments published in the State Register on Monday, February 14, 2005; Exhibit 1A is the Preliminary Draft of Possible Amendment dated February 2, 2005; Exhibit 2 is a copy of proposed rule amendments as approved by the revisor; Exhibit 3 is the Statement of Need and Reasonableness; Exhibit 4 is a Certificate of Mailing of the Statement of Need and reasonableness to the legislative Reverence Library.

Exhibit 5 is a copy of the Notice of Hearing as mailed; Exhibit 6 is a copy of Notice of Hearing which was published in the State Register on Monday, February 13, 2006; Exhibit 7 is a Certificate of Mailing of the Notice of Hearing to the EQB rulemaking mailing list and of the accuracy of the mailing list.

Exhibit 8A is a certificate of giving notice pursuant to the additional notice plan by use of the EQB Monitor; Exhibit 8B is a certificate of giving notice pursuant to the additional plan by use of news release; Exhibit 8C is a certificate of giving notice pursuant to the additional notice plan by posting the notice at the EQB's website.

Exhibit 9 is a certificate of sending the Notice of Hearing and the Statement of Need and Reasonableness to the legislators; Exhibit 10 is a certificate of consulting

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with the Commissioner of Finance in compliance with Minn. Stat., Section 14.131.

Exhibit 11 is a certificate of the Environmental Quality Board's authorizing resolution; Exhibit 12 consists of public comments and requests for a hearing that were received by the EQB by March 15, 2006; Exhibit 13 is a Certificate of Mailing of the Notice of Hearing to those who requested a hearing.

Your Honor, I would move those jurisdictional documents into the administrative record. Then if it's all right with you, I would like to go ahead and identify the other exhibits, the evidentiary exhibits that the EQB staff will be submitting.

THE JUDGE: All right. 1 through 13, including the subnumbers, are received.

MR. ROCHE: Exhibit 14A is a Fact Sheet on the background of air pollution source EAW category revision; Exhibit 14B is a Fact Sheet on the background of the revision to the EAW category wastewater systems; Exhibit 14C is a Fact Sheet on the background of the EAW category revision for historical places; Exhibit 15A is a time line diagram of the revised EIS scoping and cost agreement process that the rule making envisions; Exhibit 15B is a time line diagram of the proposed special AUAR process that is proposed in this rule making.

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Exhibit 16 is a script of comments that Gregg Downing will be making on behalf of staff; and Exhibit 17 is a printout of the Power Point slides that Mr. Downing will be using as part of his presentation.

And I go ahead and move those exhibits as well, Your Honor.

THE JUDGE: All right, those are all received. I want to note that on January 30th of 2006 I approved the dual notice and additional notice plan that had been submitted by the Board to me on January 23, 2006. I think we should make that an exhibit, so I will make that Exhibit 18.

A couple of other comments, the Agency has asked that I keep the comment period open for additional days, so that will be open for 20 days, which means that written comments can be submitted to me and I have to receive those by 4:30 on April 19, 2006. Those can be sent by mail or delivered or e-mail or fax. I think I have listed all of those numbers on the information sheet. Mr. Grooms.

MR. GROOMS: Are copies of the exhibits available?

THE JUDGE: Copies of the exhibits are available at my office. I don't know, are you uploading those to your website?

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MR. DOWNING: Your Honor, I believe that many, but not all, of the exhibits would be available at our website at the present time. We could try to arrange to have them all uploaded, or certainly if anybody wants to get a copy of any of the exhibit we can certainly make them available in whatever form.

THE JUDGE: Are you talking about the public comment exhibits or jurisdictional?

MR. GROOMS: The jurisdictional ones.

THE JUDGE: They are here, you can look at them today certainly, and they will be available in my office and available from Mr. Downing as well. Okay, Mr. Downing.

MR. DOWNING: Thank you, Your Honor. This proposed rulemaking would amend 39 subparts of the Environmental Review Program rules in Minnesota Rules Chapter 4410. Most of these amendments are minor housekeeping or technical amendments intended to clarify points of ambiguity or confusion in the existing rules or to correct some minor flaw or inefficiency in the environmental review procedures.

A few of the amendments would require additional review procedures in limited specific circumstances. This primarily would affect the Alternative Urban Areawide Review process at Minnesota Rule Part 4410.3610.

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This rulemaking also proposes to revise the mandatory Environmental Assessment Worksheet thresholds for three existing categories covering the following type of projects: Air pollution sources, wastewater systems, and historical places.

The Board's statutory authority to adopt the rule amendments is given in the Minnesota Environmental Policy Act, Minn. Stat 116D.04, Subdivisions 2a, 4a and 5a and in 116D.045, Subdivision 1. Under these provisions the Board has the necessary statutory authority to adopt the proposed rule amendments.

The proposed revisions of the mandatory EAW thresholds included in this rulemaking arose out of a study of mandatory EAW thresholds conducted by the Environmental Quality Board during 2004. The reports prepared in that study relating to the three mandatory categories revised in this rulemaking are EQB Exhibits 14A, 14B and 14C, the Fact Sheets that Mr. Roche introduced into the record previously.

The proposed revisions of the Environmental Review procedural provisions included in this rulemaking result from the experience of the EQB staff and the staffs of member agencies in the day-to-day application of the rules. Most of these provisions -- most of those are provisions that have proven to be ambiguous or confusing

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in application.

A few of the proposed procedural revisions, notably some of the revisions in the Alternative Urban Areawide Review process, are more substantiative. Not surprisingly, those amendments have turned out to be the most controversial based on the comments received during the comment period.

The EQB published and distributed a Request for Comments on February 14, 2005, which is EQB Exhibit 1. 48 possible rule amendments were identified in the request materials, as indicated in EQB Exhibit 1A. Copies of all comments received in response were distributed to our Board in association with the May 2005 meeting.

At the August 2005 meeting the Board was briefed by staff on recommendations for how to proceed on each of the potential rule amendments in response to the comments received. The Board agreed to delay or drop rulemaking for some of the 48 possible amendments, and also directed the staff to draft amendment language and the Statement of Need and Reasonableness for the rest of the items.

The Board reviewed the draft proposed amendments and SONAR material at its September and October meetings, and authorized this rulemaking at its December 15, 2005 meeting.

The Statement of Need and Reasonableness in

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Section IV beginning on Page 3 describes the costs of implementing the rule amendments, including estimates of who would bear those costs. I am not intending to discuss that detailed information here unless there are questions about it, except to say that we expect the overall effect of these amendments in total to be a net reduction in the cost of doing environmental review.

The Statement of Need and Reasonableness, Section IV.B.3 presents the EQB staff's analysis under Minnesota Statutes, Section 14.127 from which the EQB concludes that the rule amendments proposed will not result in an increased cost of more than $25,000 for any small business or small city in the first year after enactment.

The EQB has also consulted with the Commissioner of Finance in compliance with Minn. Stat., Section 14.131 regarding the costs of the rules, and this is documented in EQB Exhibit 10.

As for establishing the need for and reasonableness of the specific amendments proposed, the EQB staff is relying primarily upon the Statement of Need and Reasonableness. In addition, we offer EQB Exhibits 14A, B and C, which are Fact Sheet summarizing the process by which the amendments to the three mandatory EAW category thresholds were developed.

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Exhibits 14A and 14B were developed by the staff at the MPCA, since the MPCA is responsible for review under the air pollution and wastewater systems EAW categories. The MPCA staff are present at the hearing to provide additional information about the revision of those categories if needed.

The EQB staff prepared Exhibit 14 C based on input from the Minnesota Historical Society staff.

Because the substantive comments received so far focused on the Alternative Urban Areawide Review process changes being proposed, we would like to at this point go through a Power Point presentation to more fully explain the background and history and rationale for those amendments, and then after that Power Point presentation the staff would like to briefly discuss the comments received so far during the comment period and our initial responses to these.

THE JUDGE: Let's interrupt you here for a second. Mr. Roche has noticed that the copy of the SONAR that is on the table just has the odd pages. So if anybody is inconvienced by that, just let us know.

MR. ROCHE: Do we have a copy that we could use to maybe ask the folks outside to make more copies.

THE JUDGE: I have a full set. These

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were available.
MR. DOWNING: We do, I will look.
THE JUDGE: Does anybody need a complete SONAR that doesn't have it.
MS. BRIMMER: I have already got one.
THE JUDGE: I guess everybody here has them.
MR. ROCHE: Maybe when we take a recess.
THE JUDGE: Go ahead, Mr. Downing.
MR. DOWNING: Thank you, Your Honor. Again, this Power Point presentation is a summary of the background of the Alternative Urban Areawide Review process amendments. I am always going to refer to this as the AUAR process for short.
The AUAR rules were adopted by the EQB in 1988 as a new type of substitute review as authorized for the Board to do under the Environmental Policy Act.
This process was recommended by a stakeholder work group that the Board operated at that time as a better approach to urban and suburban development.
The basic idea of the AUAR process is to review the impacts of anticipated residential and commercial type development in a particular geographic area, and that when the review is done no specific project plans necessarily need be available at that time.

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The AUAR process review substitutes for any EAWs or EISs that would otherwise be required for specific projects in the AUAR area, and that is if two conditions are met. The projects must be consistent with the assumptions used in the AUAR review, and the mitigation plan developed in the AUAR must be implemented with respect to those projects. But if those conditions are met, then individual projects in the area do not need to do their individual EAWs or EISs that would otherwise be required.
The development anticipated in the area studied in the AUAR is derived from the Comprehensive Plan and other specific project plans if available. Also I should note in some cases the community may also use proposed amendments to the Comprehensive Plan as a basis for analysis as well.
The rule explicitly acknowledged that specific projects could be covered in the AUAR review and specifies how to handle the review of projects in the area if they want to go forward in the timeframe that the AUAR is taking place.
When the Board was developing the present set of rule amendments the EQB staff intended to make two amendments to the AUAR process. The first would be to revise Subpart 1 about what kinds of projects can be

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covered in the AUAR due to confusion over whether sewers and wastewater systems could be reviewed through the AUAR process.
Secondly, the staff intended to amend the rules to require that a draft of the mitigation plan accompany review of the draft analysis document. At the present time the mitigation plan only needs to be distributed along with the final document. Neither of those two amendments has received any comments.
As the Board was preparing to issue the request for comments the Department of Natural Resource asked that a number of additional amendments be included for the AUAR process, and the next couple of slides cover what those were.
The First amendment the DNR asked for was to prohibit the use of the AUAR process for the review of a single project that would otherwise require a mandatory EIS.
The second DNR request was to allow the removal of a specific project from an ongoing AUAR area only if that project received its own EAW or EIS.
The third request from the DNR was that to require that all development scenarios studied in an AUAR be inconsistent with the existing adopted Comprehensive Plan. The rule now only requires that one of the

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development scenarios be consistent with the Comp Plan.
And then finally, the DNR asked that guidance be added regarding the treatment of cumulative impacts in the AUAR analysis.
The EQB included those four suggestions in the table that accompanied the request for comments. After the request for comments period, after looking at the comments the EQB dropped two of the DNR proposals, the one regarding all the scenarios being consistent with the Comprehensive Plan and the one regarding additional guidance on cumulative impacts.
In the case of cumulative impact guidance, the Board basically set that aside for the moment pending several court cases that might impact what we do regarding cumulative impacts in the AUAR.
Due to adverse reactions in the comments, the other two DNR proposes were modified. The EQB staff developed some modifications. The DNR indicated that they could live with those, and the Board put those into the rulemaking rather than the original DNR proposal.
The changes are indicated on this slide of modifications to the DNR proposals. First, instead of requiring an EAW or an EIS if a specific project were to be dropped out of the AUAR area, and instead we would provide an opportunity for comments about whether the

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dropping out would be okay or not, and based on those comments the Responsible Governmental Unit could make a decision as to whether it would be appropriate to let that project out or keep it in the review, or review it through its own EAW or EIS if necessary.

Secondly, instead of prohibiting the review of a single big project through the AUAR, we proposed instead to provide for a comment process to assure that adequate alternative scenarios would be analyzed. This would apply only when a single project in the AUAR area either was over the EIS threshold for that kind of project, or if it comprised at least 50 percent of the geographic area of the AUAR, and this process would be akin to the EIS scoping process that would be done if the project had been reviewed through an EIS.

This slide explains the basic rationale for this 50 percent of area criterion that the EQB is proposing as one of the two triggers for having to go through the additional review process for the AUAR that we have suggested in the process at new Subpart 5a. The rationale basically consists of these points here.

The DNR's objection to the use of an AUAR for the review of single projects was partly based on the idea that it was a distortion of the intent of the AUAR process to use it for a review for specific projects. It is true

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that the original thrust of the AUAR was to be able to review anticipated development in an area without regard to any specific project plans, but the rules also don't prohibit the use of the AUAR to review specific projects.

The 50 percent of the area criterion that the EQB staff has proposed is based on the idea that as the project gets larger compared to the overall AUAR area, the amount of distortion in the process also gets larger; and it was the EQB's staff belief that once you reach 50 percent of the area, the review would become more about the single project than the review of the entire area. The EQB staff agrees that when a single big project dominates the AUAR review, there may be a need to take a closer look at alternatives, and hence the proposed additional scoping process.

So, Your Honor, that is some additional background and explanation of how we got to the place we are at in terms of those proposed rule amendments affecting the AUAR process.

THE JUDGE: Okay.

MR. DOWNING: Unless there are questions about that, I would like to go on and discuss the comments received so far and the initial EQB staff responses to those.

THE JUDGE: All right. Are there are

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questions about what he said in his brief presentation?

MR. GROOMS: I will let him respond to our comments, and I may have questions.

THE JUDGE: We will give you plenty of opportunity to ask questions. Go ahead, Mr. Downing.

MR. DOWNING: Thank you, Your Honor. I am going to cover the comments in the order that the part commented on appears in the rules, except all comments regarding the AUAR process will be dealt with at the end.

The first section of the rule upon which we have comments is Part 4410.0200, the definition section, specifically Subpart 81, the definition of sewered area. In this amendment the EQB staff was proposing to add in the phrase or homeowner owned along with or publicly owned as one of the ways in which the wastewater treatment area could qualify to be a sewered area.

We have received a comment from Mr. Grooms on behalf of the Builders Association of the Twin Cities that suggests that we also add in the phrase or other privately owned along with or homeowner owned. The EQB staff's response to that at this point is that we believe that making that additional addition would be contrary to the intent of the amendment. We believe that the amendment as we proposed was simply trying to make explicit the EQB's 1982 intention to cover homeowner owned systems under this

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definition. We do have an excerpt from 1982 SONAR which we could introduce as an exhibit if you would like which clearly specifies that it was the Board's intent in that rulemaking to include homeowner owned systems as part of the sewered area definition.

The problem has been that many people looking at the words or publicly owned don't see that that includes homeowner owned systems, and we have had considerable confusion about the interpretation of this definition as a result. It was the staff's intent to add in the phrase or homeowner owned simply to make explicit what we believe the Board thought it had said was the definition back in 1982.

The excerpt from the SONAR specifically indicates that they did not intend to cover systems that were privately managed at that time.

Although certainly such a phrase could be added to this definition, that would certainly go beyond the intent of the Board in this rulemaking, and at this point we think it would raise issues that the Board has not discussed, nor has been discussed by any of the people who had possibly commented on these rules to date.

THE JUDGE: Okay.

MR. DOWNING: Then the next -- actually, we jump back to the mandatory EAW categories now, jumping

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over the AUAR process for a minute, we will come back to that, the next section of the rules then on which we have received comments so far is in the Section 4410.4300, Subpart 18, the mandatory EAW category for wastewater systems. In this in Item A of Subpart 18 the Board's proposed amendment modified the mandatory EAW category threshold, raised it up, but did not change any of the other aspects of this category, including who was responsible for carrying out the review. The proposed amendment from the EQB would have left the Pollution Control Agency in charge of this category as it has been for over 20 years.

The comment we received on this is from WSB & Associates Consultants, and they suggested that the RGU should be changed from the MPCA to the municipality in question with respect to sewer trunk lines and lift station improvements.

The EQB staff's response at this point would be that we really need to consult with the MPCA staff about this comment, and we will respond in writing during the comment period regarding this. However, we can note that the question of changing the RGU designation is something that was never discussed or contemplated we believe by the EQB in proposing the amendment originally.

The next section of the rules upon which we

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received a comment is also in 4410.4300, Subpart 19, the EAW category for residential development. Here the Board was not amending the threshold, but adding an additional phrase to a sentence which indicates that -- it's hard to explain. In determining the size of the residential project that may undergo review, the rule now requires that all contiguous land owned by the property owner be considered even if the property owner is not intending to develop the land for residential at that time.

However, there is a caveat, and that is that the additional land the property owner owns must be in some official way identified as potential for residential development in the future. The rule now recognizes that Zoning Ordinances and Comprehensive Plans as identifiers of the area as future residential.

We have come across a number of cases in our experience where neither the zoning nor the Comprehensive Plan identified an area for residential, but an annexation agreement that covered the area that had been adopted by the appropriate city and township did indicate that the area was going to be residential in the future.

The EQB's intent for this amendment was to also recognize such annexation agreements as indicators that the property was going to become residential, and therefore the number of units buildable on that would have

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to be counted against the threshold in deciding if the project required review even though that whole area might not be developed in the near future.

The comment we received on this was again from the Builders Association of the Twin Cities, and they suggested that this amendment be restricted to annexation agreements specific to the residential development and not to include broader or general annexation agreements that just happen to cover the area but were actually drawn up for sort of the remainer of the township or something broad such as that.

Let me respond to that one first. The EQB staff feels that restricting annexation agreements in that way would largely defeat the purpose of this amendment. The purpose that we are trying to achieve here is simply to acknowledge the annexation agreements are an additional indicator of the intent for an area to develop as residential use in the future, and we don't see that it should make any difference whether that annexation agreement that so indicates be specific to that particular project or generally for the whole area. It's an indicator that residential development is the future use of that land.

We also received a second comment on this from the Minnesota Township Association, and the Township

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Association was concerned that this amendment may create a disincentive to townships and cities to develop annexation agreements, and that doing that would be counterproductive to good planning and could magnify rather than reduce potential environmental effects.

In response to that the staff would say at this point that we also do believe that conducting comprehensive review of residential development is also important to good planning, and adding the annexation agreement language in would promote more comprehensive use of that.

The Township Association has told us that before the end of the comment period they will try to develop some alternative language that they would feel would be more acceptable, and we would certainly intend to take a look at that and address this issue more fully after we can review their proposed language.

Those would be the sections of the rule we have had comments on now other than the AUAR process. But I might note that, Your Honor, there is an additional comment letter in the batch that we received during the comment period that actually isn't on any of the rules that we proposed to amend at this point. It's actually somewhat jumping the gun. The Board expected some time later this year to look at possibly amending the EAW

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category that is regarding non-metallic mineral mining. So there is a letter from the Aggregate & Ready Mix Association in the packet that actually does address the threshold for non-metallic mineral mining, but that subpart is not open for amendment in this rulemaking.

Turning then to the comments we have received about the AUAR process. This is at 4410.3610. No comments were received on our proposed changes to Subpart 1.

The first subpart where we received any comments were changes to Subpart 2. The section of Subpart 2 that we have received comments on has to do with this idea that after the AUAR review has begun if the proposer of a project within the boundaries of the AUAR should want to have his project proceed on a faster track and if his project is not over an EAW threshold itself, what process can be used to in effect drop that project out of the AUAR process.

The Board had proposed, as we mentioned in the Power Point presentation, that rather than prohibit this being done, that there be a notice and comment process provided so that reviewers and the public could find out that this is being proposed, submit comments about whether or not there was any reason not to do that, and then the RGU would consider those comments, if there were adverse

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comments, and decide whether or not the project could go off on its own or would have to remain within the AUAR review.

The comment we received about that again from the Builders Association of the Twin Cities notes that we did not set a timeframe within which the Responsible Governmental Unit would have to make a decision about whether or not the project could be let out of AUAR or not, and they proposed adding the phrase that the decision be made within 30 days or such other time period as agreed upon by the RGU and the proposer.

Our response to that would be that we would agree with that suggestion. I think they are correct that we should put a timeframe in there. The timeframe they suggest is sort of the standard timeframe that we use in a number of other places in the rules, and we think that would be a good suggestion to add.

The Builders Association also had a comment about another paragraph in Subpart 2, the one indicating that if a single project was over the 50 percent of the area criterion it would need to follow the procedures in Subpart 5a. Since that same provision is basically repeated in Subpart 5a, I won't respond to that now, but rather jump to 5a or cover it when we get to 5a.

Existing Subpart 5, which is the procedures for

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review, the Builders Association asked for some clarifying wording in Items B and H, and we believe these revisions would not alter the substance of the text, and that we would agree to work on rewording those provisions. We are not sure at this point, Your Honor, whether or not we would agreed to the exact words suggested by the Builders Association, but we do acknowledge that those provisions could be better worded, and we will work on that and provide a response during the comment period.

Now we are at Subpart 5a, which is the section of additional procedures that the Board is proposing that would be required when specific projects are either over the EIS threshold or over 50 percent of the ground area of the AUAR were covered in the review. We have basically proposed a series of procedures that would be very similar to the EIS scoping procedures that are at the initial stage of an EIS process.

We received several comments about these procedures, most of them from the Builders Association of the Twin Cities, but also from at least one other party as well.

The first comment from the Builders Association of the Twin Cities basically was objecting to the use of the 50 percent of the ground area criterion, and they provided a variety of reasons why they don't believe that

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that is an appropriate criterion to use for triggering this additional level of process.

The EQB staff continues to believe that the 50 percent criterion is a valid criterion. It basically gets back to the reason that we explained in the Power Point presentation, that we do believe that as the projects covered in the AUAR review get larger, there is somewhat of a distortion of the process, and at some point the review becomes more about the project than the whole area, and we think that when that happens there should be these additional procedures which make the process somewhat more like the scoping of an EIS, and we believe that 50 percent is the appropriate place to draw that line.

Now, the Builders Association also had a comment regarding the wording of the part of the process having to do with the nature of the comments that people could make in the scoping process. We are willing to consider rewording that sentence. We are not sure we agree with the suggested language of the Builders Association, but we will address that question in our response during the comment period.

Probably the most substantive comment we have received about this part was received from the Builders Association, and a similar comment from David Sellergren,

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an attorney who submitted a comment letter, this would be objecting to language in Item B allowing commenters to suggest alternative development scenarios which would be physically located outside of the boundaries of the specified AUAR area. This idea is challenged for several reasons by Mr. Sellergren and also in the letter from Mr. Grooms.

The EQB staff recognizes that those comments raise some important issues that deserve careful consideration. We don't have a response at this time. We will address those issues in our response letter during the comment period.

Finally, the Builders Association letter had a concern about our use of the word shall in Item B talking about the nature of comments that people should submit. They indicated that we were being directive towards commenters rather than permissive.

Our response to that is that we were not attempting to be directive there. We modeled that provision on existing Rule Part 4410.1600, which is the section governing public comments on an EAW, and the word shall appears there, and we just carried that same language over here. Our intent was not to mandate how the public can comment, but we were trying to focus the comments on the issues at hand to make sure that they are

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useful.

We may need to -- I guess we will consider rewording that section to avoid the appearance of being prescriptive, but we would like to keep the comments focused on the relevant issues.

Your Honor, that would be the summary of the comments we have received to date and our responses at this time.

MR. ROCHE: Your Honor, just to clarify, I think Mr. Downing may have misspoken, and perhaps I misheard him, when he said that the word shall was not intended to be directive. I think what he was really trying to say was that it was intended to be directive, in other words, telling the public that this is what the comments should be focused on, but it is not mandatory, in other words, there is no adverse consequence if the comments are not in accordance with that. So I just wanted to clarify that point.

THE JUDGE: I think I understood him. Maybe it does need some better wording. I had one person say they wanted to testify, and that was Janette Brimmer. So if you have any questions or comments, if you could come up here and state and spell your name, tell us who you represent, and then ask your questions and make your comments.

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MS. BRIMMER: Thank you, Your Honor. My name -- can you hear that? Is it on? I can't tell for sure.

THE JUDGE: We can hear.

MS. BRIMMER: My name is Janette Brimmer, J-A-N-E-T-T-E, Brimmer is B-R-I-M-M-E-R, I am the Legal Director with the Minnesota Center for Environmental Advocacy. Your Honor, we are interested in commenting today, although we will probably take advantage of the invitation to submit more detailed written comments by the deadline.

We are interested in commenting today because we get involved, our organization does quite a bit in environmental matters. We are a Minnesota-based, nonprofit environmental organization. We work in a lot of different areas, water quality, land use, and transportation, forest issues, to name a few, and so as a result we are very active participants in the environmental review process in all respects, both petitioning for environmental review, commenting on it.

We have been active in the State for 30 years, and I think I can even put in a plug for the fact that one of our current board members, Charles Dayton, was instrumental in the passage of the Minnesota Environmental Policy Act, so we have a long-standing interest.

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Our primary area of concern regarding these rules are the provisions with respect to the Alternative Urban Areawide Rule, the AUAR portion. In particular we are concerned about the removal of parcels or projects from AUAR, both the substance of that and the process. Our general position that we will address today is that the proposed rule regarding withdrawal of projects or parcels from an AUAR is contrary to the statutory requirements regarding environmental review and in effect presents a question of law for consideration.

Really our objections to those provisions are grounded in the requirements for environmental review generally as found in the statute Chapter 116D. We do environmental review or we are directed to do enviromental review by the Legislature in order that we have good government decision making, in other words, that we know and understand potential for impact to the environment before we take the action. We do it and are directed to do by the statute when there is a potential for environmental effects. The statute directs that government entities use it in their decision-making processes, whether it is approval of a particular development, a project or in their permitting process, and that environmental review is done early so that it is of real use in those decisions.

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The statutes further provide that there is a stay of the action or the project while review is pending, and that is in order to foster all those other things that it's about, in other words, foster its purpose, foster its use, make sure that it is used adequately and informs the decision.

We are talking here about an AUAR. The statutes directed the Environmental Quality Board to set forth an alternative form of environmental review addressing and utilizing similar procedures as an Environment Impact Statement, but that could be used in lieu of an Environmental Impact Statement.

Generally MCEA supports of the use of an AUAR. It can be a very good planning document. It really when used correctly fosters all those purposes for good environmental review. It encourages early planning, it encourages an early and a broad look at what the impact of development decisions might be, and so when they were done well they are very helpful.

When done well they can also I think, as Mr. Downing pointed out, streamline environmental review for individual projects. That is when an individual project conforms to the overall planning, the overall environmental review that was done in an AUAR, that individual project can in the grossest or simplist terms

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skip other environmental review. It doesn't have to go through the EAW or EIS that might otherwise be necessary.

MCEA is concerned about changes because we think that they are contrary to some of these principles, and we note from our involvement in some cases, I think Mr. Downing mentioned at least one pending case with respect to the use of an AUAR, that there might be some abuses, that they might not be used always for sort of the higher public good of planning, and we are concerned that some of the changes being proposed by EQB today would simply foster that.

So to become more specific I would like to turn your attention, Your Honor, to 4410.3610, Subpart 2 and the proposed changes there, which are basically the proposed changes allowing for removal of a parcel or a project from an AUAR consideration, sort of excusing them from inclusion in the AUAR. Now, that really just goes to the whole point and the whole purpose of an AUAR, it starts to clip away at it right from the start.

The whole point of the AUAR, again, is the comprehensive review of a broader geographic area which may very well, we understand, be a single project, but that tends to be a larger project. In early analysis and planning, really taking a look at let's say it's a corn field in, I don't know, Farmington, and Farmington has

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plans for what that is going to look like some day in the not too distant future, if you start sort of checker boarding that process, removing parcels from that AUAR, you start to loose the effectiveness of that AUAR document pretty quickly. It really punches holes in its usefulness and its relationship to the planning.

When environmental review is done it's done for the entire identified project or government action. You don't do an EIS on a mining project but exempt the pellet manufacturing plant or the parking lot from the EIS. You don't do an EAW for a new ethenyl plant but you excuse the groundwater well from which they will draw their water from the environmental analysis.

Nor should a parcel or two or four in the middle of, like I said, the Farmington plan or Woodbury plan in the AUAR be excused from planning environmental review, the AUAR, simply because they don't want to be included, they don't want to wait for the process, whatever the reason might be. It makes no sense, it's not supported by the underlying principles and requirement of the environmental review statutes.

Further, we believe it's contrary to the law because environmental review is done if there is potential for significant environmental effects. Presumably if a decision has been made to do an AUAR it's because there is

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an anticipation that there is the potential for significant environmental effects because the land use is changing in some significant way, and to remove a parcel from that is then to suggest that somehow that parcel in the middle didn't have potential significant environmental effect, the changes somehow won't affect that parcel. Again, that is simply internal conflicting, doesn't make sense, and really doesn't follow the basics of environmental review law.

Now, I would like to make what might be an advanced argument, we did have a meeting with EQB to discuss some of these things so we know a little bit about various issues. I don't want this to be confused with mandatory categories. I know that there is some concern or there had been some discussion that, well, if that parcel didn't have to do an EIS in the first place, we almost have to let them out. Again, that doesn't really make sense. Don't confuse that with the mandatory categories.

The mandatory categories are shorthand. That is just an easy way for EQB to say these things are so big or have such an impact that we automatically send them to an EIS. That doesn't mean that all the things that don't meet the rule for a mandatory category don't need environmental review. Many things that don't trip the

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trigger for mandatory review go through environmental review because why? Because the basic component is do they have the potential for significant environmental effects. That is the test. If an AUAR has been ordered, then that decision is made and we shouldn't be peeling pieces off.

MCEA's suggestion here is to urge the removal of this provision, that if an AUAR is ordered that is it, everybody is in, it's a short moratorium on those projects or parcels, that is a common tool that is used in planning, it makes sense, it will make sense to local governments, and it's not unduly onerous.

Alternatively we support the original DNR position, that if there is going to be a parcel or a project removed from an AUAR, that it be removed only if it has its own EAW or EIS because, again, a decision has already been made that there is the potential for significant environmental effects.

That is the substance. I would like to turn briefly to the notice and process components also with respect to those changes concerning removing a parcel from an AUAR. The rule that is proposed today by EQB says that local government is supposed to provide notice of intent to excuse a parcel and the reason for it, but it is not required to publish that notice in the EQB Monitor. That

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is extraordinarily problematic, and it really runs contrary to how EQB does notice and comments in just about everything else.

Some of it is just practicality, to whom would they give notice. How would EQB define that parties are interested in the removal of a project or parcel from environmental review? We are all going along assuming an AUAR is being done, we would have no reason to give any indication that we need to receive notice. So from the outset it seems strange that they would even know who should receive notice.

It's also contrary to most of the other procedures. People's expectation right now in terms of the way that the EQB operates is that when it's going to take some action or when local governments approve an EAW or do something of that nature, it gets published in the EQB Monitor. It just seems to make sense that these decisions, should this particular provision of rule go forward and be in the final rule, at a minimum those government decisions to remove something from an AUAR should be published in the EQB Monitor consistent with other standard procedures with the EQB.

Similar comment on the fact that citizens and other interested parties then have only 15 days to comment as opposed to the usual 30 days for all other

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environmental review related public participations. Again, there is no good reason given why that has to be different other than this whole thing is kind of a hurry-up, but there is no really rational reason, and you are going to set off confusion, is it my 30 days, is it my 15 days, when do I get to participate, how. We would urge the standard 30-day comment period that applies in most other instances.

This rule change says that only if adverse comments are received on this decision that is noticed somehow to people that we may or may not know about in the shortened comment period, only if adverse comments are received must the government make findings and state reasons for removing a parcel or a project from an AUAR. This is contrary to standard government decision making and requirements.

Somehow suggesting to local governments that they are excused from the usual government or agency decision making of having to find facts, support their decision, have that decision in writing, there is really no reasons for EQB to be excusing governments from that. If the government had already ordered an AUAR, they would have already probably had a resolution and findings to that effect. Decisions affecting that AUAR really should also. That just appears to be an unnecessary component that EQB

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is directing the local government on how to make their decision.

It also puts an undue burden on the public. We have already talked about how it might be hard for the public to find out about this, but at this point then it's up to the public to make sure that the government decision making is done, that it's in writing, that it's transparent regardless of whether the citizens have the time and know-how to do that. Again, that is not how government decision making normally works. That is not how we support it. Again, I don't see any good reason in these rules for EQB to be excusing local government from those standard procedures.

I would like to then turn my attention to one thing that I think that Mr. Downing raised, I think this was in response to comments. This is about what the comments should be about when we are talking about -- let me actually back up so I am clear. I am talking about Subpart 5a where the single project compromises more than 50 percent of the area of the AUAR, so we have moved on to that specific provision. Sorry, I should have given that direction.

Again we would take issue, actually this is probably the only thing on which I agree with Mr. Grooms, but we would take issue on the shall comment and what

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shall be included in those comments. Again, normally we don't dictate to the public the subject of their comments. If the EQB wants to suggest that the public may want to include these things and it will make their comments more effective, that is welcome and that is appropriate; but I don't think that we should be directing to the public exactly what they need to comment on.

I also have some concerns that you are then suggesting to the public that they come up with alternative development plans and other specifics. That, again, seems to be a burden on public participation.

That would conclude my comments on the AUAR provisions. Very, very briefly we have some concerns about the mandatory review category increasing the amount of air pollutants that can be released without being automatically required to do environmental review. We have some concerns because there are some very large mining projects on the horizon that may affect.

We also are aware of ground swell is not exactly the right word, but a movement to have coal burning ethenyl plants. There is already one that has been proposed. We know that there are more on the horizon. I think that excusing them from mandatory environmental review is just not good policy.

Our last comment concerns electronic publication

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of the EQB Monitor, and we address this as an environmental justice issue. We have this concern across the board with a number of proposals by government to go to electronic noticing only. This is Subpart 2 of 4410.5600.

Obviously not everyone has ready access to computers. If you do have a computer, you may not have ready access to the internet. This is a serious hindrance to public participation, and it's a hindrance to public participation to folks that are probably already somewhat disenfranchised. It's just not acceptable for a government entity to be doing this for what basically simply appears to be cost and ease for the staff.

We noted I think it was in the SONAR that EQB said, well, we have been doing it this way for a while and nobody has objected. Well, the very people that you are most affecting that can't get the notice because they don't have access to the electronic notice are probably not going to be clamouring because they don't know that this is going on. It's sort of a house of cards.

We do object. We think that the current system works fine. We think that that really fosters full public debate and review, and we would support maintaining an actual mailing for people that request to be mailed the EQB Monitor.

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That concludes MCEA's comments, Your Honor Thank you.

THE JUDGE: Thank you. Do you have that in a written statement there that we can make an exhibit?

MS. BRIMMER: I don't at this time. What I would like to do is submit, and I can submit, Your Honor, by next Tuesday something in writing, if that is acceptable.

THE JUDGE: Well, that is fine. I just thought maybe if you had what you said in a statement there we could give it to the court reporter now.

MS. BRIMMER: You could have my outline.

THE JUDGE: Actually, she is excellent, probably doesn't need it. So you can submit those any time by the 19th. I forgot to mention too there is, as most of you know, there is a reply period or a response period, so after April 19th there is a five-working-day, one-week response period where people can reply, people in the Agency can reply to the comments made prior to that point. So that would be April 26th those reply comments would be due. Thank you.

MS. BRIMMER: Thank you.

THE JUDGE: Mr. Grooms, you had maybe, do you want to make any statements or ask any questions?

MR. GROOMS: I have a number of

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questions.

THE JUDGE: Why don't you come up here. Let's take about a ten-minute short break, and then we will have Mr. Grooms' comments and questions.

(At this time a recess was taken from 3:07 p.m. to 3:21 p.m.)

THE JUDGE: We are back on the record. Mr. Grooms.

MR. GROOMS: Thank you. Actually, I just have probably a fairly short list of questions, points of clarifications based on Mr. Downing's review. I guess the first is on terms of the sewered areas, the definition of the sewered areas.

THE JUDGE: Would you just state your name and who you represent.

MR. GROOMS: I am sorry. Lloyd Grooms, with the law firm of Winthrop & Weinstine, representing the Builders Associations of the Twin Cities.

THE JUDGE: Thank you.

MR. GROOMS: First of all, the first questions have to do with the sewered area comment. For clarification, did the Board actually reexamine and reaffirm the 1982 SONAR as part of this rulemaking?

MR. DOWNING: Well, I am not sure if this exactly answers your question, Mr. Grooms, but the

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Board -- I mean the rationale for making this change that the staff explained to the Board was that the 1982 SONAR indicated that the Board had intended to include homeowner owned centralized sewer systems under the definition of sewered areas, but that in practice it wasn't clear to a lot of people that was the intent, and we were having continual confusion over it. We had suggested to them that we add those words to make the explicit definition consistent with what the Board -- we told them the Board had said back in '82, and the Board did not object to that. So I guess they at least passively reaffirmed the Board position from '82.

MR. GROOMS: So then it's the EQB's position that nothing has changed in the sewer systems since 1982?

MR. DOWNING: Well, I am not sure I would go so far as to totally agree with that, but at least --

MR. GROOMS: How about if I give you a moment to think about that while I ask you two other perhaps more specific questions. When you say homeowner, does that include a homeowner association?

MR. DOWNING: Yes, it would be intended to include homeowner associations, and almost all cases that we are familiar with it intent would be homeowners

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associations that would be involved here because we are talking about a relatively large system, certainly one that would be larger than any individual at least normal property owner would have for a single dwelling.

MR. GROOMS: So a system that would serve 50 units?

MR. DOWNING: I am sure there have been some that are at least as big as 50 units, yes.

MR. GROOMS: What is the critical -- what was the critical distinction between a homeowner association facility that serves 50 homes and a privately owned system that serves 50 homes?

MR. DOWNING: I am not sure that I recall if the '82 SONAR specifically addressed that issue or not, so I guess I can't really respond to that.

MR. GROOMS: Okay. On the annexation question, again point of clarification, and maybe I will just do this as a hypothetical, if there is a joint annexation agreement that covers the entire township and there is a development that only includes a portion of the township, does the new threshold provide that the development that is expected in the township triggers the mandatory review, or is it just that portion of the development that is covered by the -- I am sorry, that portion of the township that is covered by the

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development?

MR. DOWNING: Well, I will give an answer and see if the answer indicates that I understood the question. I mean our -- what we are trying -- the geographic area within which it would need to be determined what the number of residential units would be would be up to either the ownership boundary of the ownership of the person, the proposer of the project, or other contiguous parcels that they might have an option to purchase. That is the -- that is the area you're looking at.

The annexation agreement issue comes in as helping define whether or not that area is intended for residential development and at what density in the future or not. So in the EQB's staff view it's immaterial whether the annexation agreement would only be about that ownership area or other areas including up to the whole township. That simply is an indicator that within that boundary that the person owns that property is going to be or is not going to be developed in the future as residential and what the density, the maximum density could be so that you have got a number of -- you can figure out how many units could be there so that you have got that to compare to the threshold.

So the fact -- so the annexation agreement

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boundary doesn't really have anything to do with the question. It's the ownership boundary that is the boundary we look at.

MR. GROOMS: And just as a follow-up, is it the boundary and geographic area that we are talking about for the threshold or the number of units that are being proposed by the development over the geographic area?

MR. DOWNING: What the existing rule indicates that you take -- if a developer is proposing to develop only a portion of his or her holdings and the other part of the holdings are indicated for future residential development either by the zoning, a Comp Plan or if these amendments go through an annexation agreement, then in addition to the units in the part they are developing now, you would have to calculate the number of units buildable on the additional holdings based on the number of units per acre or whatever the indicator would be, and then add those on. If that total exceeds the threshold, then review is needed even if the project being proposed at this time is not over the threshold in and of itself.

MR. GROOMS: And then is the controlling document we will call it the municipality's Comprehensive plan or the township's plan, assuming one exists, or the

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calculation in the annexation agreement as to what is permissible?

MR. DOWNING: If we had a case where there were multiple indicators overlapping on the property, for instance, if the township had a plan and the city had a plan, it's always our practice to use the one that is likely to be in effect when the property gets developed. So if it's in the case of annexation, the City plan would be a better indicator of what is going to happen in the future than the township plan since the property is going to be annexed to the city when the development takes place. So we would say that you use the city plan.

In most cases what we have run into is we don't have overlaps. It's just one or the other, and in a lot of cases it's nothing but the county zoning because there aren't any comprehensive plans developed yet; or as we indicate, as it would indicate the need for this amendment, we have a fair number of cases where the county's zoning doesn't indicate it, there is not a comp plan yet adopted that covers the area, but the annexation agreement does indicate that this area is going to go residential, and that is why we want to add that language to the rules so we can use that annexation agreement as the indicator that it's going to go residential and

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therefore you have to count the extra -- the units that may be built in the future.

MR. GROOMS: So the only time the annexation agreement comes into play is when the other zoning devices don't exist?

MR. DOWNING: That would be correct. If there are already -- if the zoning or an applicable comp plan already indicates that it's going to be developed as residential, the annexation agreement would essentially be redundant. It's the cases where we don't have either of those, but the annexation agreement does indicate that it's going residential, we are basically trying to fill that gap is what we are trying to do here.

MR. GROOMS: So the use of the word or in the proposed rule is only when we don't otherwise have the other zoning devices to use?

MR. DOWNING: If we already had either the zoning or the comp plan condition met, it wouldn't make any difference whether there was an annexation agreement or not.

MR. GROOMS: Okay. Just a couple questions on the 50 percent area criteria that you discussed in the AUAR. In the handout that you presented today I was trying to check, I didn't see that same explanation in the SONAR, so I am just going to work off

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the handout. You reference DNR's objections and go on to say the amount of distortion gets larger once you reach 50 percent. What is the distortion that you are referring to?

MR. DOWNING: What we are referring to is the distortion of the nature of the review going from what you might call the pure AUAR where there are the development scenarios studied depend strictly on the comprehensive plan or other planning documents and aren't influenced at all by plans of any property owners for any other parcels in there, that is one end of the spectrum, and in going to a case where the AUAR is reviewing nothing but one single project, and we have had cases stretched all across that spectrum.

As the idea of distortion is as you go from the "pure" AUAR toward the single project governing the whole area, some of the aspects of the AUAR apply as it was originally developed apply less well, and therefore there is in effect a distortion of the process, and the distortion increases as the relative size of the project to the AUAR area increases.

Recognizing that and wanting to add in the additional in effect scoping procedure at some point as the project got bigger, the EQB staff believed that 50 percent was the logical cutoff because once you're

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beyond that then the single project is, you know, the majority of the AUAR area.

MR. GROOMS: And what was the criteria for that logic?

MR. DOWNING: Specifically why 50 percent as opposed to some other percentage, or I am not --

MR. GROOMS: Sure.

MR. DOWNING: Well, simply on the basis that once you get to 50 percent then if the project was larger than that then the review was more about a single project than about the rest of the area simply on the basis of the relative sizes of the two, and we felt that there was no -- we don't see that there is any good reason to draw the threshold at any other point other than 50 percent being, you know, the dividing line between it being in the minority and majority.

We do feel that the idea of invoking this extra procedure at some point as the projects get larger in relation to the area, once you reach that conclusion it seems that 50 percent is the best place to draw that line then.

MR. GROOMS: Maybe I will rephrase a couple other questions to try to get to the same point. When we talk about the distortion that you think is

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happening in the process, how do I measure the distortion?
MR. DOWNING: Well, I'm not sure that we have really a way of measuring the distortion in any quantifiable terms. I mean to some extent I think the idea of distortion is kind of a metaphorical phrase, not necessarily some kind of measurable quantitative indicator.
MR. GROOMS: Are there any other documents that you reviewed to come up with the 50 percent benchmark, did you review all AUARs that have been prepared?
MR. DOWNING: No, we certainly did not review all AUARs that have been prepared. The EQB staff has a general familiarity with the nature of the projects undergoing review through the AUAR process, and I don't know that -- I mean it wasn't any sort of statistical sort of analysis or anything that caused us to come up with the 50 percent principle. It was pretty much based on simply the principle that as the size of the project increases relative to the size of the AUAR area, at some point we believe that we should invoke this extra procedure, and it seemed to us that once the majority reached -- the majority of the area was the single project, that was the point to do it.
MR. GROOMS: Isn't it possible to have a

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project that covers 50 percent of the area that wouldn't even be subject to environmental review?
MR. DOWNING: Meaning that the project would be sort of a low density type development but would take up a lot of acres?
MR. GROOMS: Well, I will rephrase it. It could be 50 percent of the area and not be subject to a mandatory EIS?
MR. DOWNING: Yes, that would be the case because if that weren't the case then we wouldn't need the 50 percent criterion because the mandatory EIS threshold criterion would always apply then.
MR. GROOMS: Aren't you effectively subjecting this 50 percent area then to an EIS?
MR. DOWNING: No, because we are not -- to do that we would simply have to say they couldn't use the AUAR at all, and then they would have to go through some other process, including an EIS. Whether the project -- whether the RGU has to go through the additional procedures proposed in Subpart 5a because the project is over the EIS threshold or exceeds the 50 percent area criterion, either way all we are doing is adding a relatively small process at the beginning of the AUAR to assist the RGU in getting the proper scope in terms of the alternatives for the AUAR. I think that is

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far less than requiring a project to go through the EIS process on its own.
MR. GROOMS: But if I have a project that covers 50 percent of the area and I am trying to remove myself from the AUAR, right now, if I understand the rule, I have to go through the extra procedure?
MR. DOWNING: I am not sure I understood your question, Mr. Grooms. Did you say if you were trying to remove the project from the AUAR?
MR. GROOMS: Uh-huh.
MR. DOWNING: So we're talking about the process proposed under Subpart 2 then rather than Subpart 5a?
MR. GROOMS: Subpart 2, yes.
MR. DOWNING: I am sorry, now I have forgotten how your question started. Could you please repeat, I was thinking of the wrong subpart here.
MR. GROOMS: Sure. We talked about looking at the rule that says if a specific project will be reviewed through the procedures of this part rather than through an EAW or EIS, and that project itself would otherwise require preparation pursuant to or will comprise 50 percent of the area, the RGU must follow the additional procedures.
MR. DOWNING: Right, those procedures

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are the procedures in Subpart 5aA, the scoping procedures for the AUAR, not the dropping out procedures in Subpart 2.
MR. GROOMS: Let me ask you just one more question, I think it probably gets to -- maybe it will just help us wrap this up. In terms of if a project, I am again reading this, a project that covers 50 percent, the 50 percent area you have not equated that in any way to the environmental impacts of that particular project?
MR. DOWNING: That would be correct. We are not necessarily assuming that the project would meet the test of requiring an EIS with respect to the 50 percent area criterion because it's an alternative to -- there are two criteria by which the extra procedures would be needed. One has to do with the project, the specific project exceeding the EIS threshold on its own.
But independent of that we have the idea here that if the project is large enough with respect to the AUAR area that we should still use the extra procedures with this additional scoping process without making any claim as to whether or not that specific project on its own would require an EIS. I mean it's really based on a different principle.
MR. GROOMS: And that principle again?
MR. DOWNING: The distortion of the

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process as we compare to the situation where the development being studied is based on planning projections as opposed to the plans of a specific project, and as that specific project is large with respect to the area at the 50 percent dividing point then we believe that the extra procedures are warranted the same as if the project was over the EIS threshold.

MR. GROOMS: Even though I think you agreed that you could be over the 50 percent threshold and not have necessarily have any adverse environmental effect?

MR. DOWNING: Well, it's possible, but one doesn't know that until one has done the analysis.

MR. GROOMS: So is the alternative actually to have that project undergo another analysis?

MR. DOWNING: I don't think I understand the question.

MR. GROOMS: Well, you say it's a question of you don't know that until you have actually completed the analysis, but yet under the proposed rule as soon as a project exceeds 50 percent of a land area regardless of any other determination it's going through a new process.

MR. DOWNING: It's going through additional steps in the process. It's not really a new

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process. It's the addition of really one phase at the beginning, which would be similar to the scoping of an EIS, to assure that the proper development scenarios are looked at to avoid a situation where when you get to the end and discover that there were alternative development scenarios to the project that weren't looked at that probably should have been, which could from the standpoint of the project proposer could certainly be worse than if they had looked at from the first.

MR. GROOMS: I think we'll leave it at that. Thank you.

THE JUDGE: Any additional responses or comments on that? Does anybody else have any questions or comments?

I have just a couple of brief ones. When you were talking about the written comments you had received, you referred to the Builders Association of the Twin Cities' comment about the -- well, you spoke with Mr. Grooms about the 1982 intention, and what you are doing here is basically clarifying what you think is the original intent. My question is would you be considering what the Builders are suggesting adding the private association at some future point?

MR. DOWNING: Your Honor, do you mean future point in a separate rulemaking?

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THE JUDGE: Yes, well either now or in the future, but ever is my question I guess?

MR. DOWNING: Your Honor, I don't recall that until Mr. Grooms has brought this up that anybody has suggested that we make that change. I think some of the member agencies of the Board would likely have some concerns about making that change. So I guess I don't know.

MR. ROCHE: If you don't know, say you don't know.

MR. DOWNING: I guess we have no plans at the present time to look at that in the other phrase of the rulemaking.

THE JUDGE: And another provision regarding the change from that somebody suggested about changing the review from being by the PCA to the RGU, you said you needed to talk to the PCA about that. Is that something that you are going to do?

MR. DOWNING: Your Honor, can I clarify, are we talking to PCA about possibly making that change, or simply asking their reaction to that comment?

THE JUDGE: I don't know, you said you need to talk to PCA, and my question is are you going to talk to PCA?

MR. DOWNING: Yes. Your Honor, we do

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intend to talk to PCA about that, and we would anticipate that they would be opposed to that change, but we haven't had an opportunity to talk to them about that yet.

THE JUDGE: I have a question for Mr. Grooms, and it's about that privately owned systems. Can you come up and tell me how common that is, what it is you're talking about here, is that typical in a housing development now, is that what we are talking about?

MR. GROOMS: To make sure that I accurately describe it, I will in our written comments provide more of an explanation, description and explanation. Generally you're finding in certain suburban exurban, rural areas where you can have the same type of development, a small residential development that actually is serviced by a privately-owned, privately-operated facility, sewer/water facility, much as you would otherwise see with a homeowner association, it really becomes a question of who actually has ownership, who has responsibility for that particular system.

I would think it would -- I would not go so far as to say it's common. I would say it's something that you're starting to see with more frequency now, but we will in our written comments provided you a greater detail on that.

THE JUDGE: Okay. Thank you. Does

anybody else have any questions or comments? We are going to recess then until 7:00 and take any additional comments at that point. Again, you are certainly encouraged and invited to submit written comments to me by April 19th. If you want to see the comments that come in, you can review those at my office. I would guess is the EQB going to put their comments on their website?

MR. DOWNING: Yes. Your Honor, I would anticipate that we would do that.

THE JUDGE: We don't -- well, we can do that, but not as well as the EQB at this point, so I suggest you look there. Any responses to additional comments can be filed in the reply period, and that is until April 26th.

Does anybody have anything else? We will be recessed then.

(Whereupon, at 3:50 p.m., Thursday, March 30, 2005 the Afternoon Session was concluded.)

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(This is the Evening Session of the Environmental Quality Board Rules Hearing, which commenced at approximately 7:05 p.m.)

THE JUDGE: The hearing will be reconvened. This is a Rule Hearing that is being conducted for the Environmental Quality Board involving some changes they are proposing to the Environmental Review Program Rules.

I am Steve Mihalchick, an Administrative Law Judge from the Office of Administrative Hearings. We review and approve rules proposed by other agencies, and here tonight from the EQB is Gregg Downing, who is one of the staff members there, and he will tell you what his function is; and also Mr. Jon Larsen from the Agency as well.

So Mr. Downing will make a brief presentation on what the Board is proposing in these rule changes, and then we will take some questions, if you have any. We did have a few people earlier today who had some questions and comments.

There is also an opportunity for written comments to be submitted. Those have to be submitted within 20 days, so if you do want to submit any written comments on these rules you can send them to me at the address on that

guideline sheet by April 19th.

Okay, Mr. Downing, do you want to describe these rules, what the Agency is proposing here.

MR. DOWNING: Thank you, Your Honor. I will give an abbreviated version of the presentation that we gave earlier today. This proposed rulemaking would amend 39 subparts of the Environmental Review Program Rules in Minnesota Rules, Chapter 4410. Most of these amendments are minor housekeeping or technical amendments intended to clarify points of ambiguity or confusion in the existing rules or to correct minor flaws or inefficiencies in the procedures.

A few of the amendments would require additional review procedures in limited specific circumstances. This would preliminarily involve the Alternative Urban Areawide Review process or the AUAR process at Part 4410.3610.

This rulemaking also proposes to revise the mandatory Environmental Assessment Worksheet thresholds for three existing categories for air pollution sources, wastewater systems, and historical places.

The Board's statutory authority to adopt the rules is given in the Environmental Policy Act at Minnesota Statute 116D.04 and 116D.045. Under these provisions the Board has the necessary authority to adopt the proposed rule amendments.

The proposed revisions of the mandatory Environmental Assessment Worksheet thresholds included in this rulemaking arose out of a study of the mandatory category conducted by the EQB during the year 2004, and the reports prepared in that study for the three categories that we are revising in this rulemaking are included as EQB Exhibits 14A, 14B and 14C.

The proposed revisions of the various Environmental Review procedural provisions result from the experience of the EQB staff and the staffs of the member agencies in the day-to-day application of the rules. Most of these are provisions that have proven to be ambiguous or confusing in application. A few of the proposed procedural revisions, notably in the Alternative Urban Areawide Review process, are more substantive. Not surprisingly, it's those amendments that have turned out to be controversial based on the comments we have heard so far.

The Environmental Quality Board published a request for comments in February of 2005. At that time the Board identified 48 possible rule amendments that it was thinking about making. Copies of all the comments were given to the Board in its May 2005 meeting, and in its August 2005 meeting the Board was briefed by staff on recommendations for how to proceed on each of the

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potential rule amendments.

The Board decided at that time to delay or drop rulemaking for some of the 48 possible amendments, but also directed the staff to proceed on the others and to draft rule amendment language and the Statement of Need and Reasonableness.

The Board reviewed those documents in its September and October meeting last fall and authorized this rulemaking at its December 15, 2005 meeting.

In the Statement of Need and Reasonableness in Section IV, beginning on Page 3 is the EQB staff's analysis of the costs of implementing these rules, including estimates of who would bear those costs. I am not going to go over that information in detail, but would answer questions about it.

In general, however, the staff believes that these amendments would be a net reduction in the cost of doing environmental review in Minnesota.

As for establishing the need for and reasonableness of each specific amendment proposed, the staff is relying primarily on the Statement of Need and Reasonableness; and, in addition, as indicated, Exhibits 14A, B and C are Fact Sheets that summarize the process by which the amendments to the three mandatory EAW category thresholds were developed.

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Because the substantive comments received so far focused on the Alternative Urban Areawide Review process changes, I would like to now quickly go through a Power Point presentation that explains the background and rationale for those amendments.

THE JUDGE: Would you also explain who the EQB is.

MR. DOWNING: Sure. The Environmental Quality Board is an independent State Agency. It actually is a board that currently consists of 15 members. 10 of the members are Agency Commissioners, actually heads of the agencies, and those are the agencies related to the environmental matters, Pollution Control, Natural Resources, Health, Agriculture, Transportation. Who else, Jon?

MR. LARSEN: The Board of Soil and Water Resources, Commerce.

MR. DOWNING: There must be a couple more. Oh, administration, our own Commissioner, can't forget about her. There are also five citizens appointed by the Governor. The Board has been around since 1973, and it's performed various roles over that time sort of depending upon what the interests of the administration at the time were.

One of the constants the Board has always been

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responsible for is the supervision of the Environmental Review program. In fact, at one time back in the 1970s the Board made all the decisions about Environmental Review, ordered all the reviews, reviewed all the reviews, reviewed all the impact statements and whatever. Nowadays the Board's role is very limited mostly to doing the rules, amending the rules and providing technical assistance.

Background of the Alternative Urban Areawide Review process amendments. The Alternative Urban Areawide Review process rules were adopted back in 1988 as a new type of substitute review. The Environmental Policy Act tells the Board that among the things it needs to do in rulemaking is establish types of different ways of doing the same things as the EAWs and EISs but in a more efficient fashion for certain types of projects, and under that authority the Board adopted the AUAR process in 1988.

The process was developed and recommended to the Board by a stakeholder work group as a better approach of review of development in urban and suburban areas, and that is why the name is Alternative Urban Areawide Review.

Actually there had been a couple done in fairly rural areas, but for the most part it's done in municipalities, and primarily in the metro area, but not exclusively.

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The idea is that it reviews the impacts of the anticipated residential and commercial development in a particular geographic area, and you don't need to have the specific development plans for any of the property owners in hand to do this. You basically figure out what is going to happen through by looking at the Comprehensive Plan and then reviewing what you think will happen.

Next slide, Jon. Actually, that is the second bullet point here is the development is anticipated in the area derived from the Comprehensive Plan and any specific project plans, if there are any.

Backing up to the first point, this process substitutes for EAWs and EISs that would otherwise be required for specific projects. So, in other words, after this review has been successfully completed, any property owner within that area doesn't have to worry about doing an EAW or EIS for their project provided that what they propose is actually consistent with what was reviewed in the AUAR, and, secondly, that the mitigation plan developed in the AUAR is carried out for that project.

The rules explicitly acknowledge that specific projects can be covered through the AUAR review.

In the development of these present rule amendments the EQB staff intended to do two things to the AUAR process. One, to fix some confusion as to what kind

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of projects can be reviewed through it, especially about sewers and wastewater systems; and, secondly, we wanted to require a draft of the mitigation plan get reviewed at the draft analysis stage rather than just at the end.

We got no comments on either of these proposed amendments. They were pretty non-controversial.

However, as the Board was getting ready to request comments on this, the Department of Natural Resources asked for four fairly significant changes to this process. The first of these would be to prohibit the use of the AUAR process for review of single projects that would otherwise require a mandatory EIS.

The second thing they wanted us to do was allow removal of a project from an ongoing AUAR only if it receives its own EAW or EIS. In other words, if an area of land is being reviewed and a developer that owns a parcel within that and his own project doesn't require an EAW or EIS, currently you think the developer can ask to be sort of dropped out of the AUAR and go on their own track, and the DNR asked that that not be allowed unless they had to go through the EAW or EIS process.

The third thing that the DNR asked us to do was require that all of the development scenarios studied in the AUAR be consistent with the existing Comprehensive Plan. The rules now only require just one of the

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scenarios to be consistent with the Comprehensive Plan.

And, finally, they asked for additional guidance regarding cumulative impacts in the analysis.

After we got our comments back from the requested comments, the EQB dropped two of the DNR proposals, the one about all scenarios being consistent with the Comp Plan and the one about cumulative impacts guidance. Actually the cumulative impacts guidance didn't get so much dropped as we delayed it because there are a couple of court cases that are still pending that could very well influence what we want to do with that, and we want to wait for those results.

The other two DNR suggestions were modified by the EQB due to adverse reactions. The next slide shows -- this is what we are now proposing in the current rulemaking here. Instead of requiring an EAW or EIS before a specific project can be dropped out of an AUAR, instead we are proposing that there be an opportunity for public comment about whether or not it's okay to drop that project out and make the Responsible Governmental Unit consider those comments before it decides whether or not the project can be left out or not.

And instead of prohibiting review of single big projects, instead provide for a public comment process to ensure that the adequate development scenarios are

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analyzed. This is sort of like a scoping process for an EIS, but this would only apply if any single project in the area either on its own was over an EIS threshold or was at least 50 percent of the geographic area of the AUAR.

And -- well, I guess it's up here, we will go over it. We actually developed this slide in anticipation of discussion earlier today about this criterion because one of the comments that we did receive questioned whether this was a legitimate thing to do. The EQB staff believes that DNR's objection to the use of the AUAR process in reviewing single projects was partly based on the idea that it's a distortion of the intent of the process to review specific projects through this process. Because the process was originally developed to look at areas where you didn't even have plans for any projects.

So this 50 percent area criterion is based on the idea that as an individual project gets larger compared to the AUAR area, the amount of distortion in the process increases, and we felt that once you got to 50 percent of the area the review became more about the single project than about reviewing the area, and at that point we believed that you should have to go through the scoping process to make sure that the alternatives being considered are the appropriate ones, the same that you

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would have to do if it was an EIS review.

So that would complete the staff's presentation, Your Honor. I guess at this point tonight we won't go over the comments we have received, unless you would like us to again.

THE JUDGE: Does anybody have any questions on what Mr. Downing was talking about here particularly? I don't know, maybe we ought to just point out a couple of the issues that came up and then we'll go home.

MR. DOWNING: Can I be selective as to which ones?

THE JUDGE: Right, just maybe tell us what the MCEA representative said and maybe one of Mr. Grooms's. Janette she had a couple points. She objected to the taking out a portion at all.

MR. DOWNING: This afternoon we had comments from the Minnesota Center for Environmental Advocacy about a number of things, including some of the AUAR revisions. One of the points they brought up is that in their view the idea of dropping a project out of an AUAR is probably contrary to at least the spirit of the Environmental Policy Act, and they don't think it should be allowed at all. That is one thing the EQB staff and our attorney from the Attorney General's Office will

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consider.
We are pretty sure that the law does not prohibit projects being dropped out, and, in fact, over the years it indeed has happened, and right now there is no procedure at all for doing it, they just do it. So we felt that by having this comment process at least people and agencies would have the opportunity to provide reasons why it would not be acceptable to drop a given project out, and we felt that would be certainly better than just having it happen without anyone knowing.
THE JUDGE: What happens when they are dropped, then that development, that project is not subject to any review?
MR. DOWNING: Well, Your Honor, the only --
THE JUDGE: Or only if it is required under its own terms?
MR. DOWNING: We believe that you can only drop out a project if the project isn't subject to environmental review on its own, and the only projects that we have ever heard about being dropped out were relatively small projects. Well, I guess there was one that wasn't that small, but it still was not over the mandatory EAW threshold.
THE JUDGE: Are we talking mostly about

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housing developments or building construction?
MR. DOWNING: Housing, commercial stuff, office, retail sorts of things. The appropriate subject for AUARs to begin with is residential, that sort of commercial stuff, warehousing, light industrial, but nothing of an industrial character at all; and then also the infrastructure that goes with it, the roads and the sewer systems can also be reviewed through that process.
So for the most part the projects that have been dropped out are relatively small commercial or residential projects, and it doesn't happen -- well, we don't know about it happening a lot I suppose. It could have happened and people have not contacted us, but we have been contacted, oh, any number of times over the years where people wanted to know is it legitimate to do this and how do you go about it. We have always told them it isn't prohibited and we don't have any process for it, so do whatever you think would be appropriate.
Let's see --
THE JUDGE: How about the Builders Association.
MR. DOWNING: Do you have any suggestion as to their comments?
THE JUDGE: Well, let's just talk about the privately owned sewer system.

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MR. DOWNING: Okay. One of what we thought was a pretty straightforward revision we wanted to make was in the definition there is a definition in our rules of sewered area, and it basically now says that it includes an area where there is a pipe, you know, that takes what you think of as a sewer that takes the sewage to a municipal treatment plant, but it also said that it included a centralized septic tank system such as would be used in rural areas or especially in lakeshore areas, if that system was owned by either a unit of government, but the words that the rule uses is publicly owned. Well, this rule was adopted back in 1982, and if you look at the Statement of Need and Reasonableness from that rulemaking the Board specifically said that they meant by publicly owned not only governmentally owned, but also systems owned by the homeowners collectively.
But we in practice most people don't think that publicly owned means that. They would think it should say homeowner owned if that is what the Board meant. So we are proposing to add the phrase or homeowner owned to the rule to clarify the meaning, and we don't think we are changing the meaning because it's clear that is what the Board thought they were doing back in 1982.
The Builders Association gave us a comment that they would like us to add also or privately owned on to

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that as well, and they questioned whether or not we could distinguish on any scientific basis the homeowner or the ones from the privately owned ones. At this point we are not quite sure what to make of that. We had no intention of expanding the meaning of this when we set out to make this rule change, so this sort of somewhat throws a monkey wrench at us, and we have to figure out what to do about it. It's an interesting point.
THE JUDGE: What impact does that have, what other rule do you have that uses that definition of sewered area?
MR. DOWNING: Well, one place that comes into play is in the mandatory EAW and EIS thresholds for residential projects. That is projects outside of municipalities the threshold is higher if it's a sewered area than if it's an unsewered area, and especially in situations like lakeshore situations where you have got these centralized systems fairly commonly, you know, whether you can count that as sewered or not makes a big difference in the threshold. Does it double the threshold?
MR. LARSEN: Yes, it does, it is doubled.
MR. DOWNING: So you had a 75-unit project, it would be the difference between having to do

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an EAW and not having to do an EAW whether you're considered sewered or not. That is how we discovered that is what the Board had meant and what they said was rather different probably, I don't know, seven or eight years ago in a lakeshore type project, apparently somebody had actually looked at the SONAR and seen that it didn't seem to be consistent with our guidance at the time, and we checked it out and indeed the Board clearly intended to cover homeowner owned systems despite the fact that the language they chose wouldn't seem to necessarily imply that.

But we certainly did not -- the Board explicitly said they don't want to cover privately owned systems. That language is clear in the '82 SONAR also. So we think although there possibly could be merit to the Builders Association suggestion, we have never considered it, nor has the Board discussed it, and we don't know what the technical merits really are of that idea. We will certainly have to look into it before we could suggest that that would be something the Board would want to do.

THE JUDGE: And under the rulemaking procedures you can't force an Agency to adopt a rule that they don't want to adopt. So I think what they are saying now is, well, we're not going to adopt it now, we might think about it later. That will pretty much end it.

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Any questions? Do you want to talk about rulemaking?

MS. MANDERSCHEID: This handout pretty much does describe the process. Once after this hearing is over, then --

THE JUDGE: What happens?

MS. MANDERSCHEID: -- then what happens?

THE JUDGE: Well, after this hearing there is a 20-day written comment period, and then I will write a report within about a month after that giving my findings and conclusions as to whether the Board has demonstrated the need for and reasonableness of the rules it has proposed.

Meanwhile some of the comments will propose some additional changes, the Board may come back and say, okay, we have thought about some of those things that have been suggested, and we will propose to change it so-and-so. So whatever their final proposal is I have to decide whether it's legal, whether they have demonstrated it's necessary, and whether they have demonstrated what they have chosen to do is within the realm of reasonableness. If I say yes, then the rule will be approved and they can proceed to adopt it, which is mainly a publishing question.

MS. LEIS: Can you sort of decide, hey, I like this provision, or is it all or nothing, or is it

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just --

THE JUDGE: Normally what we do if we think there is a better way to do something, we would find that what they proposed can be adopted, assuming that we think it's legal and reasonable and necessary, but suggest that they might consider this other proposal or something like that. If I find that it is not legal or reasonable or necessary, then I have to disapprove it and suggest a correction that would fix it, and in that case my report has to be reviewed by the Chief Administrative Law Judge to determine whether he agrees with me. If he does, then the Agency can't adopt the rule unless they change it the way we suggest.

MS. MANDERSCHEID: What role do the public's comments play in the drafting of the ALJ's report?

THE JUDGE: In rulemaking the public comments play a big role. First off even before they get here to the hearing the Agency has solicited the comments, as you saw Mr. Downing talk about, and so this Agency, like most, considers those comments and solicits those comments in drafting their rules. In some ways by the time it get to a hearing it's almost a done deal. If somebody wants a recommendation on rulemaking, say get it in early and make your comments early and deal with the

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Agency.

But all the time there is comments made that will improve a rule, or sometimes agencies do things that are not legal or that are not reasonable and the public can point that out. The public comments are important and are considered, may or may not agree with them and adopt some of those.

I don't know, what do you think about rulemaking? It's a hard process. Minnesota has the hardest process in the United States for agencies for adopting rules. In the Federal Government you are not required to go through a hearing. It's all noticed and comment, and most states are that way too. Minnesota is unique, it's probably through the lobbying efforts of the various trade groups that make rulemaking harder, but we think it results in a better product, but it also results in a lot of work for the agencies.

MR. DOWNING: Your Honor, if I could follow up on that, this fairly thick notebook is the handbook for rulemaking that is assembled by an interagency ad hoc ongoing work group, and without this I am sure it would be impossible to legally adopt any complicated rule without this manual that tells you step by step what you need to do. There are so many requirements, many of which you could not possibly imagine

if somebody didn't tell you about them, and the order in which you have to do things sometimes doesn't make any sense at all. So it's really, really difficult. It's a whole bunch of hurtles you have got to get over, many of which you don't understand why you are doing, just have to do them.

Part of the process is very rational and logical, but there is also all these arbitrary things that you have got to make sure that you do. If you don't, it may have screwed up the process enough that you have to go back and start over again.

MR. LARSEN: Time lines must be met too.

THE JUDGE: If you think about trying to write a law or trying to write a rule, it's difficult, and you have to capture everything that might happen and address it, and it's very hard. Then having to write a document that explains why what you have written is necessary and reasonable is probably even harder, but that is what our Legislature requires. Thank you for coming.

We can be adjourned.

(Whereupon, at 7:35 p.m., Thursday, March 30, 2006 the Rules Hearing was adjourned.)

STATE OF MINNESOTA)

COUNTY OF HENNEPIN)

REPORTER'S CERTIFICATE

I, Angela D. Sauro, do hereby certify that the above and foregoing transcript, consisting of the preceding 81 pages is a correct transcript of my stenograph notes, and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated April 6, 2006

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Angela D. Sauro, RPR

Court Reporter