

Supplement

To Statement of Need and Reasonableness, signed September 27, 2007, For Revisions to the Environmental Review Program Rules, Chapter 4410

This document explains the need for and reasonableness of four additional amendments to the Environmental Review program rules that the Environmental Quality Board has decided to add to the group of proposed amendments authorized in July 2007. These amendments would revise the following parts of the rules:

- 4410.0400, subpart 4, Appeal of final decisions,
- 4410.1000, subpart 5, Change in proposed project; new EAW,
- 4410.1700, subpart 5, Distribution of decision [on the need for an EIS] &
- 4410.4600, subpart 7, [Exemption for] Storage facilities.

The Board approved the addition of these amendments to this rulemaking on May 15, 2008 and directed the Chair to add a Supplement addressing these amendments to the existing SONAR, signed on September 27, 2007. Because rulemaking hearings on the amendments authorized in July 2007 were still pending, the EQB decided to include these four amendments as part of that rulemaking rather than adopt them through an independent rulemaking procedure.

Specifically, this document supplements section IV of the SONAR with respect to the four additional amendments. Sections I to III & V of the SONAR are not affected by the addition of the four proposed rule amendments.

IV. Rule-by-Rule Analysis of Need and Reasonableness

4410.0400, subpart 4. **Appeal of final decisions.** Decisions by an RGU on the need for an EAW, the need for an EIS, ~~and the adequacy of an EIS~~ and the adequacy of an Alternative Urban Areawide Review document are final decisions and may be reviewed by a declaratory judgment action initiated within 30 days of the RGU's decision in the district court of the county where the proposed project, or any part thereof, would be undertaken.

Explanation: This amendment would make explicit in the rules that an RGU's decision on the adequacy of a final AUAR analysis document (which includes the mitigation plan) is a final decision that is appealable in district court, in the same manner as for decisions about the adequacy of EISs. This is implicit due to the fact that the AUAR document is a substitute for EISs (as well as for EAWs) that would otherwise be required, but the rules would be clearer if an explicit statement of this were made. There have been legal challenges to AUAR adequacy decisions in the past.

4410.1000, subpart 5. **Change in proposed project; new EAW.** If, after a negative declaration has been issued but before the proposed project has received all approvals or been implemented, the RGU determines that a substantial change has been made in the proposed project or has occurred in the ~~RGU's~~ project's circumstances, which change

may affect the potential for significant adverse environmental effects that were not addressed in the existing EAW, a new EAW is required.

Explanation: As part of the Phase 1 amendments adopted in 2006, the phrase “or has occurred in the RGU’s circumstances” was added to this subpart. The original intent was to refer to the circumstances surrounding the *project*, not the circumstances of the *RGU*. However, in its draft of the rules given to the Revisor’s office, the EQB staff used the pronoun “its” rather than the word “project.” The Revisor’s office attempted to improve the wording by replacing this indefinite pronoun with a specific noun, but mistakenly chose “RGU’s” rather than “project’s” as the word to substitute. Unfortunately, throughout the rulemaking process no one noted that the wrong word had been used in the amendment. The current amendment would merely correct this error and return the meaning to that originally intended by the EQB.

4410.1700, subpart 5. **Distribution of decision** [on the need for an EIS]. The RGU’s decision shall be provided, within 5 days, to all persons on the EAW distribution list pursuant to part 4410.1500, to all persons that commented in writing during the 30-day review period, and to any person upon written request. All persons who submitted timely and substantive comments on the EAW shall be sent a copy of the RGU’s response to those comments prepared under subpart 4. Upon notification, the EQB staff shall publish the RGU’s decision in the EQB Monitor. ~~If the decision is a positive declaration, the RGU shall also indicate in the decision the date, time, and place of the scoping review meeting.~~

Explanation: In the Phase 1 amendment adopted in 2006, the EQB made a change to the rules at part 4410.2100, subpart 4, item A, that affected the timing of the notice for a scoping review meeting following a “positive declaration” on the need for an EIS. That amendment, which required the proposer of the project to make payment to the RGU for the expected cost of scoping prior to notice of the scoping meeting, created a conflict with the requirements of this subpart. This subpart requires notice of the meeting to be issued within 5 days of the EIS need decision, while the amendment at part 4410.2100, subpart 5 requires the notice to be published within 15 days after receipt of the proposer’s cost payment. In most cases, these two timeframes are not compatible.

The preferred way to resolve this conflict is to delete the requirement in this subpart that the notice of the positive declaration include notice of the scoping review meeting. Notice of the scoping meeting will occur later as a separate notice, after receipt of the scoping cost payment. While this change would require the RGU to issue an extra public notice, it would have the benefit of providing more time for the RGU staff to prepare information about the intended scope of the EIS to include in the notice of the scoping review meeting. Having better information prior to the meeting should facilitate better comments from the public on the scope of the EIS.

4410.4600, subpart 7. [Exemption for] **Storage Facilities**. Construction of a facility designed for or capable of storing less than 750 tons of coal ~~or more~~, with an annual

throughput of less than 12,500 tons of coal, or the expansion of an existing facility by these respective amounts, is exempt.

Explanation: The EQB staff recently noticed while proof-reading a document that cited this rule, that the extraneous words “or more” occur in this infrequently-used exemption category. Staff speculates that this phrase was inadvertently carried over into this exemption in 1982 because it is frequently used in the mandatory EAW and EIS categories for similar types of projects. While the phrase does not affect the interpretation of the exemption, it ought to be removed.

VI. CONCLUSION

Based on the foregoing, the proposed rule amendments are both needed and reasonable.

Dated: _____

Gene Hugoson, Chair