**Environmental Quality Boar**
300 Centennial Buildir
658 Cedar Stre
St. Paul, MN 551
Voice: 651.201.24
Fax: 651.296.36

March 25, 2009

The Honorable Steve Mihalchick
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, MN 55164-0620

VIA ELECTRONIC MAIL AND FAX

RE: Proposed amendments to rules governing the Environmental Review Program; EQB staff responses to comments.

Dear Judge Mihalchick:

The EQB staff offers the following responses to comments made at the public hearing and in writing as of March 20, 2009. The staff expects to submit additional responses by the end of the rebuttal period on April 1, 2009.

**I. EQB proposed modifications to rule amendments**. The EQB staff suggests the following modifications to the rules as proposed:

1. Part 4410.0200, subp. 11a. Cumulative potential effects. We propose a modification to line 2.13: delete "relevant; after "factors" add the phrase "determined to be relevant by the RGU." This modification was suggested by the AMC comments, and the EQB staff agrees that it would improve the wording and clearly denote that it is the RGU who determines whether a factor is relevant.

2. Part 4410.0200, subp. 55a. Ordinary high water level. We propose to modify line 2.16 by deleting the reference to part 6120 and substituting a reference to Minnesota Statutes, section 103G.055, subd. 14. The DNR staff has pointed out to us informally that by switching the reference to the statutes instead of the DNR's rules, we would avoid any confusion that may be caused if the shoreland management rules are renumbered as part of the impending amendments to chapter 6120. We believe that the statutory definition has the same substantive meaning as the rule definition, although the exact wording is slightly different.

3. Part 4410.0200, subp. 79a. Sensitive shoreland area. On line 2.21 substitute "or" for "and." The intent is that any of the conditions listed is sufficient to make a shoreland area sensitive. Thus, the conjunction should be "or" here.

4. Part 4410.0200, subp. 81a. Shore impact zone. During the hearing it was pointed out that the reference in this proposed definition to part 6120.3300, subp. 3 of the DNR's shoreland management rules is potentially confusing because subpart 3 is quite lengthy. We propose now to simplify the definition to:

Subp. 81a. Shore impact zone. "Shore impact zone" has the meaning given in part 6120.2500, or by a local ordinance if the ordinance specifies a greater size for the zone.

5. Part 4410.4300, subp. 19a. Residential development in shoreland. We propose to add at the end of item A:

"If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one."

In the hearing, a question was raised about how the mandatory category thresholds were applied if a project was partially in and partially out of a sensitive shoreland area. The EQB staff indicated that in similar cases we used a proportional threshold determination technique that is described in subpart 19, residential development, in the context of treating developments with mixtures of attached and unattached units. We propose to explicitly add directions for using that same technique to the shoreland residential category, to cover cases where a project is in both sensitive and nonsensitive shoreland areas and also partly in and partly out of shoreland.

6. Part 4410.4300, subp. 20a. Resorts, campgrounds, and RV parks in shorelands. We propose to add the following language as a new paragraph following item B:

"If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the

number of units in each type of area by the applicable threshold for each area, equals or exceeds one."

The reason for proposing this addition is the same as for the proposed change to item 19a immediately above, i.e., to clarify how to apply the category thresholds if a project is only partly in shoreland or sensitive shoreland.

7. Part 4410.4300, subp. 36a. Land conversions in shoreland. In item A, on line 14.6 insert "or more" after "800" and on line 14.7 insert "or more" after "1320."

8. Part 4410.4400, subp. 14a. Residential development in shoreland. We propose to add at the end of item A:

"If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one."

The reason for this modification is as described in response #6 above; this subpart is the EIS analogue and should be treated in the same manner.

9. Part 4410.4400, subp. 26. Resorts, campgrounds, and RV parks in shorelands. We propose to add the following language as a new paragraph at the end:

"If a project is located partially in a sensitive shoreland area and partially in nonsensitive shoreland areas, an EAW must be prepared if the sum of the quotient obtained by dividing the number of units in the sensitive shoreland area by the applicable sensitive shoreland area threshold, plus the quotient obtained by dividing the number of units in nonsensitive shoreland areas by the applicable nonsensitive shoreland area threshold, equals or exceeds one. If a project is located partially in shoreland and partially not in shoreland, an EAW must be prepared if the sum of the quotients obtained by dividing the number of units in each type of area by the applicable threshold for each area, equals or exceeds one."

The reason for modification is the same as for response # 7; this subpart is the EIS analogue.

**II. Responses to other comments; (no modifications are proposed).**

1. Part 4410.3610, subp. 2, item D. "AUAR small project drop-out provision." The Minnesota Center for Environmental Advocacy (MCEA) continues to object to the policy that a small project that otherwise would not require review can be dropped out of an ongoing AUAR analysis by the RGU. The MCEA objected to this concept during the earlier "phase 1" rulemaking in 2006; this objection was the primary reason the EQB withdrew this proposal during that rulemaking. The EQB continues to believe that removing a small project from the AUAR is legally permissible and not detrimental, except in unusual cases, to the purposes of AUAR review.

Because of MCEA's earlier objection, the EQB chose to add the first sentence to item D when it re-proposed the drop-out provision in this rulemaking. The proposed first sentence makes explicit that the ordering of the AUAR does not create an obligation to review any particular specific project that may arise within the AUAR boundary during the preparation of the AUAR that would not otherwise exist (absent the order for the AUAR).

The EQB does not believe that any provision exists in the law – nor was it the EQB's intent when creating the AUAR process – to imply that the designation of a geographic area for an AUAR review establishes a requirement for the review of all potential projects within the area. Use of the AUAR process is voluntary on the part of the RGU and the RGU has complete discretion in choosing the boundaries of the area to be included. Also, the existing rules give the RGU the option of reviewing specific projects within the AUAR boundary that do require an EAW or EIS through the EAW or EIS process rather than the AUAR process. These facts argue against the idea that the AUAR order creates an obligation for review of projects within the boundary. If no obligation for review is created by the AUAR order, why should it not be permissible to remove a small project from the review after it has been ordered?

If there is a sound technical reason why the project proposed for removal should not be dropped out, that reason can be revealed through the proposed notice and comment process. That, in fact, is the purpose of adding the notice and comment process to the rules: to provide a mechanism to screen whether the project should be retained in the AUAR analysis.

MCEA also objects to the length proposed for public comments on a proposed project removal. The proposed rules would provide for a 10 business day comment period (from the date of the *Monitor* notice). The EQB believes that 10 business days is sufficient for the purpose of these comments. The scope of comment is limited in these cases. It should not be necessary to have a comment period as long as for the review of EAWs or EISs, where the scope of comment covers many technical topics. It is always a goal of the EQB to expedite the procedural aspects of the program whenever possible. The program is frequently criticized for delaying projects unduly. Where a comment period need not be 30 days, the EQB believes that a shorter period is appropriate.

2. Part 4410.3610, subp. 5, item A. Geographic boundary of AUAR review. With the amendments at this provision, the EQB attempts to correct the misinterpretation given by the Court of Appeals in the *MCEA vs. City of St. Paul Park* case. This amendment is supported by the MCEA but opposed by the Association of Minnesota Counties (AMC). AMC advocates that the rules should instead require an RGU to consider the scope of the needed technical analyses prior to setting the AUAR boundary. We believe that would be a problem for several reasons and are convinced that it would create a serious disincentive for RGUs to use the AUAR process, perhaps crippling it.

Connecting the boundary to impacts would force an entirely different outlook on the AUAR boundary from what it is now. Now, RGUs define the boundary based on planning and development factors. If the geographic range of potential impacts were to be taken into account in setting the AUAR boundary, it would necessarily force the expansion of most AUAR areas; this would inherently make the review more complex and more expensive.

AMC complains about the uncertainty of the boundaries of a cumulative potential effects analysis; those uncertainties would be at least as troublesome when the RGU is trying to define the AUAR boundaries as when trying to do the AUAR technical analysis. We do not see how requiring the RGU to face those issues sooner would make them easier to deal with. It would likely force RGUs to hire consultants to help them with the planning of the AUAR boundary, whereas now consultants are generally needed only to perform technical analyses; again this change would increase the costs of the AUAR process.

Finally, the proposed modification does not make sense. The AUAR boundary is the analogue of the property boundary for a single project. That boundary is fixed and does not expand or contract depending on the geographic range of the impacts of the project. Similarly, the AUAR boundary should be independent of the geography of the impacts.

3. Part 4410.3610, subp. 5a. New "scoping" procedures for AUAR. The Builders' Association of the Twin Cities opposes one of the two proposed situations to which new procedures of item 5a would apply, namely, the situation where any single project would cover at least 50% of the geographic area of the AUAR.

The idea of applying a scoping process to AUARs involving large specific projects was developed as a response to criticism about allowing AUARs to review specific projects at all. Originally, the EQB proposed to ban the use of AUARs in cases where specific projects had been proposed. That idea was countered by commenters at the Request for Comments stage in the "phase 1" amendments. Taking those comments into account, the EQB decided to take a different approach. The following statement appeared in the 2006 SONAR:
"The EQB was persuaded by the comments that trying to prohibit the review of specific projects through the AUAR process was not likely to be effective, could lead to distortions of the process, and could inhibit good planning in some cases. On the other hand, the EQB recognizes that there is some merit to the proposition that an EIS may provide a more rigorous review of a specific project than the AUAR process. In

particular, the EIS content requirements are stronger in regard to the nature of alternatives that must be addressed in the review. Consequently, the option proposed in this rulemaking is to continue to allow the use of the AUAR procedure to review single specific projects, but to require some additional procedures to improve the analysis of alternatives in some cases. The cases in which the additional procedures would be required are either when a specific project exceeds a mandatory EIS threshold (and would therefore require preparation of an EIS if not reviewed through the AUAR procedures) or when any specific project comprises at least one-half of the AUAR area." (SONAR, January 7, 2006, page 29.)

The EQB continues to believe that the "50% of the area" threshold makes sense in the context of why the amendment was proposed in the first place. The amendment seeks to improve the analysis of alternatives where the AUAR involves large specific projects. A threshold of size is needed for this purpose that relates to the extent to which the AUAR is "about the specific project" rather than based on generalized development in the AUAR area. Where the specific project's size is above 50% of the area, the review will tend to be more about the specific project than about the rest of the area's development. Opponents have not proposed an alternative threshold, but only oppose the concept in principle. The EQB believes that the principle behind the threshold is sound, as stated in the quoted material from the 2006 SONAR.

4. Part 4410.4300, subp. 19a and part 4410.4400, subp. 14a. New mandatory EAW & EIS categories for residential projects in shoreland. Mr. Geer, Zoning Administrator for Kandiyohi County, questions the disparity in the mandatory threshold that would apply to clustered developments compared to traditional lot-and-block developments. The residential shoreland categories proposed at these subparts are not written using the terminology "clustered" or "lot-and-block," however, it is acknowledged that the lower thresholds of the "B" items would generally apply to traditional lot-and-block" type developments whereas the higher thresholds of the "C" items would generally apply to conservation subdivisions and planned unit developments.

As the SONAR notes (pages 46 & 47), both of the latter types of subdivisions use clustering and compact lots to provide larger amounts of common open space. Lot-and-block subdivisions typically divide the whole project area among lots owned by individuals, resulting in little common open space. Because the percentage of common open space is a determinant of which thresholds will apply, there is a definite distinction between the thresholds for these different styles of subdivision. The thresholds would be in the ratios of 15:25 or 25:50 for the EAW categories and 50:100 or 100:200 for the EIS categories, or overall about 1:2. It must be noted, however, that the common open space issue is not the only determinant of which threshold level applies. If a clustered-type development includes a high number of units compared to the "reference density" listed in the rules, the lower thresholds will apply to them regardless if they have much common open space.

The EQB staff continues to believe that the SONAR presentation for subpart 19a and the more detailed discussion in SONAR Attachment 4, beginning on page 13, adequately

justify the idea of establishing lower review thresholds for projects that do not preserve natural features and habitat through the use of common open space or that crowd too many units onto the site. As noted above, the ratio of the lower and higher thresholds as proposed is about 1:2. Mr. Geer describes this as a "dramatic disparity." However, a 1:2 ratio between thresholds is common throughout the EQB's rules wherever a tiered system of thresholds is established. Compare, for example, the industrial/commercial thresholds at part 4410.4300, subp. 14, the residential thresholds at part 4410.4300, subp. 19, the corresponding EIS categories at parts 4410.4400, subps. 11 and 14, or the exemptions at parts 4410.4600, subps. 10 and 12. The EQB believes that the proposed shoreland residential threshold ratios are in line with those of the rest of the rules.

Mr. Geer suggests that the use in the SONAR discussion of the descriptor "dense" for lot-and-block type developments was intended to be pejorative and to subtly influence the reader to have a negative view of that type of development. The EQB staff, on the other hand, believes that it used the term "dense" with respect to residential developments only as a convenient label to distinguish between the styles of development to which the criteria of the "B" items applied and those to which they do not apply (and which would then fit the thresholds of item C). It was not our intent to imply that the styles of development to which the adjective "dense" was applied are "bad" compared to the non-dense styles of development. However, we do believe, for the reasons stated in the SONAR, that the "dense" developments do pose a higher potential for significant impacts and therefore justify lower thresholds.

The Geer letter also asserts that the SONAR presents contradictory arguments regarding groupings of units, arguing on page 44 that grouping does not matter with respect to impacts and then on pages 45 to 47 that grouping does matter with respect to impacts. However, what the SONAR states on page 44 is that "*some* of the important potential issues from shoreland residential projects depend only on the number of units, not upon how they are grouped. These issues are those relating to water surface use and the impacts on the lake ecosystem from boat use." On pages 45 to 47, the discussion is about other impacts, such as preservation of ecological and natural resources on the shoreland. Thus, the statements on page 44 are not in contradiction to those on pages 45 to 47. Also, it should be noted that the SONAR discussion on page 44 is about why the shoreland residential category does not use the terms "attached" and "unattached units," as are used for the existing residential category at subpart 19. The EQB has not disposed of this terminology because it believes that the grouping (or clustering) of units in shoreland does not make any difference to the overall impacts, but rather because for shoreland development "grouping" can be better described in terms of common open space and unit density.

5. Part 4410.4600, subp. 26. Exemption of certain governmental activities. MCEA and other commenters have objected to the amendment of the governmental activities subpart. The EQB stands by the discussion provided in the SONAR which explains and justifies the distinction between conducting environmental review for "projects" and not conducting review for "plans." We believe that the proposed amendment merely

completes the otherwise incomplete list of types of governmental activities that are in the realm of "plans."

Thank you for consideration of our responses.

Sincerely,

Gregg Downing
Environmental review Coordinator

**Environmental Quality Boar**
300 Centennial Buildir
658 Cedar Stre
St. Paul, MN 5515
Voice: 651.201.249
Fax: 651.296.369

April 1, 2009

The Honorable Steve Mihalchick
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, MN 55164-0620

VIA ELECTRONIC MAIL AND FAX

RE: Proposed amendments to rules governing the Environmental Review Program; EQB staff rebuttal period responses to comments.

Dear Judge Mihalchick:

The EQB staff offers the following responses to comments, in addition to those contained in our letter of March 25, 2009.

**I. EQB proposed modifications to rule amendments.** The EQB staff suggests the following modifications to the rules as proposed. (These are in addition to those proposed in our response letter dated March 25, 2009.)

1. Part 4410.4300, subp. 19a. Residential development in shoreland. We propose to modify the caption to read: "Residential development in shoreland outside the seven-county Twin Cities metropolitan area" and to modify the first sentence of item A as follows:

A. The local governmental unit is the RGU for construction of a permanent or potentially permanent residential development located wholly or partially in shoreland outside the seven-county Twin Cities metropolitan area of a type listed in items B to E.

The comment letters from the cities of Lino Lakes, St. Paul and Minneapolis raise issues about whether the common open space and unit density criteria used in this category are appropriate to projects located in urbanized areas. St. Paul and Minneapolis suggest excluding projects in first-class cities from these requirements.

The EQB staff has consulted with the DNR staff working on the revision of the state shoreland management rules about how they are dealing with the question of rural versus urban development. We have learned that the DNR is aware of the need to take a different approach to requirements in urban areas and likely will propose different approaches in their draft shoreland rule amendments. The DNR points out that in the metropolitan area there are a host of planning functions with environmental components. These planning functions include:

- Comprehensive Planning (required of all metro area communities)
- Metropolitan Council review of Comprehensive Plans and amendments
- Metropolitan Council regional planning efforts
- Watershed Management Organization and Watershed Management District plans (which blanket the metro area)
- Metro Greenways Initiative

These planning functions serve to reduce the likelihood that shoreland residential projects will pose the potential for significant environmental effects in the metropolitan area, and justify higher thresholds for EAWs and EISs. DNR has also noted a growing number of conservation subdivisions proposed in the 7-county metropolitan area.

We have also learned from the DNR staff that, although few metro area cities participated in the hearing or commented, it is likely that many more cities share the same general view as expressed in the Lino Lakes letter and could exert pressure on the Board or the Governor's office to force a change in the proposed amendments.

In view of these facts, the EQB staff believes that the proposed shoreland residential category requirements need to be revised as they apply to the metropolitan area. Since the DNR's ideas for dealing with urbanized areas are still evolving through their rule development process, it is not possible to simply adopt distinguishing criteria borrowed from the DNR's work. Excluding only first-class cities would not go far enough because there are only four cities of the first class statewide (Minneapolis, St. Paul, Duluth, and Rochester) and, as the Lino Lakes letter demonstrates, the issues apply to many other urban area cities as well.

After consideration, we believe that the best solution for this rulemaking is simply to exclude all projects in the Twin Cities seven-county metropolitan area. After the DNR shoreland rule amendments are implemented, the EQB may wish to revisit this issue and perhaps fine-tune the distinction between rural and urban thresholds based on factors built into the DNR's rules. Until such time, we think that the use of the Twin Cities metropolitan area boundary is the best solution to the need to differentiate rural and urban shoreland category standards. Under this modification, there would be no shoreland-specific EAW or EIS thresholds for shoreland projects within the seven-county Twin Cities metropolitan area. The existing residential thresholds would continue to be applicable. 2. Part 4410.4400, subp. 14a. Residential development in shoreland. We propose to modify the caption to read: "Residential development in shoreland outside the seven-county Twin Cities metropolitan area" and to modify item A as follows:

A. The local governmental unit is the RGU for construction of a permanent or potentially permanent residential development located wholly or partially in shoreland outside the seven-county Twin Cities metropolitan area of a type listed in items B to E.

The reasons for these modifications are the same as discussed for item 1 above.

**II. Responses to other comments; (no modifications are proposed).**

1. Part 4410.0200, subp. 11a. Cumulative potential effects.

Responses of a general nature. The EQB staff wishes to address certain points made in the March 25, 2009 letter from Ms. Marrow of the Minnesota Center for Environmental Advocacy (MCEA). These comments relate to the overall approach the EQB is proposing for the cumulative potential effects concept. Later, we respond to specific comments from MCEA and other commenters about various rule provisions.

MCEA states (page 5) that by defining cumulative potential effects separately from cumulative impacts "EQB creates a distinction" between the uses of the terms. From the EQB staff's point of view, we are not "creating" the distinction but merely acknowledging and building on a distinction recognized by the Minnesota Supreme Court in the *CARD* case. Furthermore, we disagree with the argument that by adopting a separate definition for the term "cumulative potential effects" the EQB "abandons almost 40 years of interpreting the rules synonymously" (meaning interpreting cumulative potential effects to be equivalent to "cumulative impacts.") The MCEA implies that there now exists a substantial record of interpretation which EQB would be abandoning.

In actuality, there is almost no history of interpretation of the meaning of either term in Minnesota. The confusing language (and missing language) throughout the rules has long been recognized, although for various reasons no concerted effort was ever made to try to clarify matters. To help cope with the confusion, the EQB staff chose to maintain that the two terms must mean the same thing – to do otherwise under the circumstances would have been even more confusing. Until the *CARD* case, the EQB staff did not see any way forward to address the confusing aspects of the rules without needing to solve other even more perplexing aspects of the cumulative impacts/potential effects puzzle.

This approach worked for decades until the *CARD* case. Until *CARD*, there was very little light shed on the issues and confusion by the Minnesota courts. In sum, there is little for the EQB to abandon by changing the definition of cumulative potential effects.

The EQB staff agrees with MCEA about its point that the EQB is not required to follow the lead of the Minnesota Supreme Court as explicated in the *CARD* case. The EQB did consider other options before deciding to propose the amendments in this rulemaking. The history of this is explained in SONAR attachment 1. The EQB chose this option because it offered the best overall approach in its view. The EQB staff disagrees with the MCEA's assertion (page 9) that it "has not provided any clear benefit" to be derived from

defining cumulative potential effects separately from cumulative impacts. The SONAR states the clear benefit beginning on page 19:

"The EQB has determined that it is very important to preserve the distinction made by the Minnesota Supreme Court between a broader scope of cumulative analysis appropriate to a GEIS and a narrower scope appropriate to review of specific projects. If that is not preserved in this rulemaking, some might infer that the EQB intended to remove or diminish the distinction found by the Court about the relative breadth of reviews of cumulative-type effects in a GEIS and project-specific review documents. The EQB believes that it is important not to establish any such presumption or implication because it maintains that the distinction found by the Court is reasonable and it does not wish to take any action that may be construed to weaken or diminish that distinction." As we will explain below, we believe this is a critical benefit to preserve.

In its response to the MCEA's comments on part 4410.1700, subp. 7, item B, the EQB staff discusses how the distinction between broadly and narrowly scoped cumulative potential effects analysis relates to the obligation of project-specific reviews to deal with cumulative potential effects and why the distinction is more important in the Minnesota process than in the federal NEPA process. Please refer to that section of this letter in regard to that matter.

The expansion of the scope of cumulative potential effects analysis is a concern of several of the other comment letters (BATC, AMC & MN Chamber). The concern is that the amendments will make cumulative potential effects analysis more expansive and hard to deal with, and that this in turn will complicate and delay review, and drive up its costs. Cumulative potential effects is a difficult concept; it is hard to know where to draw boundaries and to determine "how much review is enough," even if all parties are acting in good faith. Because of these difficulties, it is particularly important to strike an appropriate balance in defining boundaries and requirements. This will aid RGU's in implementing review requirements and insulate them from unwarranted litigation.

The MCEA accuses the EQB of proposing "an extremely complicated definition for cumulative potential effects." (Page 9, second paragraph.) While the definition is long and contains several different concepts, we believe it is straightforward and neither complex nor hard to understand. Perhaps if the construction of rules were different, the content of the definition could be more easily presented. If the rules are adopted, the EQB will prepare guidance materials that can explain the meaning of cumulative potential effects in a way unhindered by the Revisor's rules of construction. The contents that have no counterparts in the NEPA definition have been added in an attempt to clarify or provide more guidance in use. For example, much of the length is due to providing guidance on how to determine if a "basis of expectation" has been laid for a project. This seems to EQB staff to be a helpful addition, and an improvement compared to the NEPA definition's silence about the issue. Also, one of the added concepts is guidance taken from the NEPA program itself; likely this guidance will be added to the NEPA regulations at some future time.

MCEA states that "[t]he EQB's decision to 'pick and choose' language from the Minnesota Supreme Court's CARD decision, CEQ guidance, and NEPA, in addition to the introduction of new terminology and concepts creates multiple opportunities for confusion and inconsistency in the analysis of cumulative potential effects in Minnesota environmental review." The first part of this sentence does provide an excellent summary of how the EQB derived its proposed approach to cumulative potential effects. However, we take issue with the sentence from the word "creates" onward. We did 'pick and choose' from what we considered to be the best ideas from the variety of sources MCEA has listed. We did that to assemble a composite definition that is superior to any of those offered by the sources in its breadth of coverage of different aspects of the cumulative potential effects concept. NEPA lacks the "basis of expectation" concept that the Minnesota Supreme Court enunciated. Since the Minnesota Supreme Court did not offer guidance about how one determines if there is a basis of expectation, the EQB has introduced several appropriate factors to use a guide. None of the existing definitions addresses how to treat the contributions from past projects, but the appropriate concept exists in CEQ guidance; therefore, the EQB decided to incorporate it into its new definition. The Minnesota Supreme Court stated useful concepts about geographic and temporal limits on where to look for other projects to take into account which do not appear in the existing definitions; the EQB added those concepts to its composite definition, making some modifications that it believes clarify the concepts in application. Building upon these elements did create a long definition compared to those that previously existed, but we do not see how this makes it confusing or inconsistent in its use in Minnesota. We think the composite definition answers more questions and gives more guidance about how to treat cumulative potential effects than any of the alternatives.

The MCEA urges the EQB to abandon its approach and adopt cumulative impact language from the federal NEPA process. One of the key arguments for this is that we would then be able to benefit from past NEPA case law. The EQB did consider this option earlier in the rule development process but rejected it, because "[b]ased upon its understanding of the federal case law, EQB staff is skeptical that adopting the NEPA approach would create more clarity in the rules than adopting the Minnesota Supreme Court's approach." (SONAR attachment 1, page 5.)

Another reason given by MCEA for adopting the federal NEPA approach is the existence of a CEQ guidance document *Considering Cumulative Effects under NEPA*, which MCEA states the "EQB has cited and followed for years" (page 8). This implies (again) that the EQB is deviating from long-standing practice by proposing an independent definition. However, MCEA fails to note the context in which the EQB has consistently recommended the use of the CEQ guidance to RGUs. The EQB guidance refers RGUs to the CEQ guidance only in the situation where the RGU is working on preparing an EIS. (*2008 Guide to the Minnesota Environmental Review Rules*, Page 29.) The EQB does believe that in trying to figure out how to do a cumulative-type analysis for EIS purposes the CEQ document is the best available source of information. However, the EQB does not recommend the document as guidance when trying to decide if significant cumulative effects may result from a project, which is the issue when preparing and using an EAW.

We do not believe that the CEQ document is helpful in that context (which is the context in which over 90% of Minnesota Environmental Review is done).

MCEA also asserts that having a separate definition for cumulative potential effects and for cumulative impacts will cause confusion and an added burden for units of government involved in joint state-federal review. The SONAR acknowledges on page 20 that joint review would need to account for the differences. However, as noted in the SONAR, the EQB staff believes that the units and government, and their consultants (who almost always prepare any joint documents), are among the most experienced and sophisticated practitioners of environmental review, and while the somewhat different definitions will need to be taken into account, this will not be beyond the skill of those involved in joint reviews.

Responses to specific comments on the definition.

"Environmentally relevant area." A number of comments addressed the proposed substitution of this phrase for "surrounding area" as used by the Minnesota Supreme Court. Most of these either suggest using the language of the Minnesota Supreme Court or suggest using even more restricting language than did the Court. On the other hand, MCEA advocates a greater expansion than implied by "environmentally relevant area" but does not suggest specific language to do this.

The EQB staff believes that the term "environmentally relevant area" is a well-designed phrase, because it clearly denotes its intended and proper meaning: the (geographic) area relevant to consideration of cumulative potential effects. As the SONAR notes, the environmentally relevant area will vary between different types of impacts, and is not a single fixed area. The term accommodates this necessary variability in interpretation in a way that "surrounding area" can not. "Surrounding area" simply connotes a fixed geographic region around the project unrelated to a project's environmental reach. It does not suggest that the distance may be different for different projects. We think that "environmentally relevant area" overcomes that problem.

"Significant cumulative potential effects can result from individually minor projects taking place over a period of time." The Minnesota Chamber of Commerce (Chamber) suggests adding the phrase "but collectively significant" between the words "minor" and "projects" in this sentence. The Chamber indicates that adding this phrase (taken from the NEPA definition of "cumulative impacts" and which also is used in the existing EQB definition of "cumulative impacts," which is not being changed) would help prevent the new definition of cumulative potential effects from being "more expansive than the current definition of 'cumulative impacts.'" The EQB staff finds this suggestion problematic on two levels. The first is that the Minnesota Supreme Court in the *CARD* case has already determined that "cumulative impacts" and "cumulative potential effects" are not the same thing, and that cumulative impacts has a broader scope – thus is "more expansive" – than cumulative potential effects. The EQB staff is not sure that adding the phrase in question adds anything to the distinction already made by the Minnesota Supreme Court.

The second problem is that adding the phrase back in would seem to undo the objective of the proposed amendment to the sentence. As stated in the SONAR (page 21, first paragraph): "[t]he EQB believes the emphasis in the original sentence was misplaced: the point here is whether the individual projects could result in cumulative potential effects, not whether these effects are 'collectively significant.' The original sentence implies that all cumulative potential effects are significant by definition which is not true." From this quote it is clear that the EQB proposed to delete "collectively significant" for a reason unrelated to the issue of whether cumulative potential effects or cumulative impacts is the more expansive term. In summary, the EQB staff is not necessarily opposed to this addition, but we are skeptical that it improves the rule in any way.

"In analyzing the contributions of past projects to cumulative potential effects, it is sufficient to consider the current aggregate effects of past actions. It is not required to list or analyze the impacts of individual past actions, unless such information is necessary to describe the cumulative potential effects." The Chamber suggests deleting the phrase beginning with the word "unless." As explained in the SONAR (page 21), the EQB borrowed this concept from recent federal NEPA guidance. The federal guidance includes the proviso that the Chamber is questioning. Unfortunately, the federal document did not provide any examples of situations where the itemization of past impacts would be appropriate and the EQB staff has not been able to envision such situations ourselves. Therefore, the EQB staff takes on faith the potential existence of such situations, although they are likely to be rare. Assuming that such a situation were to arise, the issue is whether if the proviso is deleted from the rule, would the lack of that wording prevent an RGU from itemizing past impacts if that appeared appropriate in the particular circumstances?

Basis of expectation factors.

The Builders Association of the Twin Cities (BATC) and the Association of Minnesota Counties (AMC) commented on two of the factors the EQB has proposed as as part of an RGU's determination of whether a basis of expectation has been laid for a project. BATC opposes two of the factors (whether future development is indicated by adopted comprehensive plans or zoning or other ordinances; whether future development is indicated by historic or forecasted trends) and AMC opposes one of the factors (the comprehensive plan/zoning factor). The commenters argue that these factors are not reliable indicators of future development and are far too broad. BATC summarizes the arguments by stating that an RGU should only consider a basis of expectation to be laid where "affirmative steps are being taken to commence and complete development."

The EQB staff would point out that the factors in question are not proposed as definitive indicators that a basis of expectation has been laid. The proposed rule does not state that either factor is a presumption of a basis of expectation. The rule merely states that an RGU must consider these among other factors. The SONAR states on page 22 that each of these factors "may" lay a basis of expectation under the right circumstances, and provides some discussion of when these circumstances would occur. In many, or most,

cases these factors would not establish a basis of expectation, but in the circumstances where they would, they need to be taken into account.

2. Part 4410.0200, subp. 79b. Sensitive shoreland area (definition). The letter from Henry VanOffelen of the Minnesota Center for Environmental Advocacy (MCEA) advocates adding another group of waters to the list of sensitive shoreland areas, namely, waters determined to be "impaired waters" according to the MPCA "303 D" process (except for those impaired solely due to mercury). The idea of including impaired waters as indicators of shoreland sensitivity was previously considered, but rejected, by the EQB in the earlier stages of developing the shoreland threshold concepts. Also, we are informed by the DNR shoreland management rules staff that the MPCA advised them to not use impaired waters status as an indicator in the proposed shoreland rules amendment. The EQB's proposed criteria all relate to the official acknowledgement by some unit of government of special natural resource or ecological values. We believe that the designation of a water as impaired due to pollution is not the same sort of recognition.

3. Part 4410.1100, subp. 2. Citizen petition content requirements. The following are responses to MCEA's comments about this proposed amendment.

The rationale for this amendment is to ensure that the actual material evidence required to be submitted under the rule is available and included in a substantive form, such that the reader of the petition actually has in hand the information that is alluded to in the narrative of the petition. While the Internet provides a great abundance of potentially available materials that might support a petition as material evidence, the petitioner is required to supply it; in other words, identify specifically the data that are relevant and claim it as material evidence. MCEA comments infer that there is an undue burden to provide materials, particularly if copyright protected.

The EQB staff believes that it remains incumbent on the petitioner to provide, with the petition, the material evidence that the rule requires to support the contention of a possibility of significant environmental effects if a project were to go forward. As the use of the Internet to gather information has increased, petitioners have made more wide-spread use of Internet sources for material evidence. Occasionally this leads the petitioner to merely provide an Internet address to some document or web page, while never actually annotating or identifying specific passages. It is to the petitioner's advantage *and necessary to the petition* to provide a physical copy of this material. The RGU responsible for responding to a petition and evaluating it cannot appreciate the petitioner's argument if it cannot discern the material evidence. We do, however, agree with MCEA that material evidence can take many forms. It is acceptable to submit maps, images, text, etc. either on paper, a fixed electronic attachment such as a PDF document, or as electronically readable media such as computer disk; but it must be physically available with the petition.

Due to the dynamic and ephemeral nature of the Internet, merely providing a URL or other link to a resource on the Internet is insufficient. The structure and availability of

individual sites changes too rapidly to assure that the same information is available at any subsequent time for viewing by a reader of the petition. Neither does it allow the petitioner to annotate the information to make clear what it is that the petitioner wishes to emphasize. Further, an Internet link to an encyclopedic source makes it an unmanageable task for the reader to ferret out what is meant to be concluded from a potentially overwhelming amount of data. It is the petitioner's responsibility to extract whatever information is relevant and explain why it is important.

MCEA claims a potentially irreconcilable conflict with copyright protection. The EQB staff does not agree that this need be a significant problem. A huge body of publicly available information exists that is generated by local, state, and federal government and is typically copyright-free. Brief citation of copyright protected material is generally held to be a permitted use. Entire articles of a scientific, academic, or professional/trade nature can be obtained as reprint copies at modest cost; or permission for the use in a petition may be sought from the author or copyright holder. We know of no instance where a petitioner has been frustrated by copyright protection or held accountable for copyright infringement.

4. Part 4410.1700, subp. 7, item B. EIS need criterion relating to cumulative potential effects. The MCEA letter urges the deletion of the final three of four factors proposed to be used by an RGU as indications of whether the project under review (in an EAW) has potential for significant environmental effects (and therefore requires preparation of an EIS) due to its contribution to cumulative potential effects. The MCEA agrees that the first factor proposed, the significance of the cumulative effect, is a legitimate factor for the RGU to consider. However, MCEA claims that the other proposed factors misconstrue or miss the point of cumulative potential effects analysis. This claim illustrates clearly a fundamental difference of opinion between MCEA and the EQB staff with respect to the relationship of a specific project under review through the EQB's rules and cumulative potential effects analysis.

The broad view of MCEA regarding cumulative potential effects analysis seems connected to a fundamental difference between federal and Minnesota environmental review in terms of what is the typical subject of review. Most federal NEPA reviews are of government actions which do not involve specific private projects. The reviews typically are of actions proposed by federal agencies, often in collaboration with a state or local government (such as improvements to a municipal airport in collaboration with the FAA); some of the reviews are of a "programmatic" nature, reviewing the likely impacts if a federal agency adopts a new policy or plan.

In contrast, (as we argue with respect to MCEA's comments about part 4410.4600, subp. 26) Minnesota's program is targeted to "projects," most of which are development projects of private parties. We believe that this fundamental difference in what gets reviewed affects the scope of what is required in the review. Just because a project was "next in the queue," should the proposer of a relatively small project with a modest contribution to a cumulative potential effect (even if the cumulative effect is of

significance) be required to prepare an EIS whose primary purpose is to study the overall cumulative potential effect and not the impacts from the project? We believe that a private developer cannot be expected to pay for, or wait for, analysis that is rightfully the obligation of the government. We believe that MCEA's view of cumulative potential effects analysis could require private developers to do exactly that: provide through the review of their specific project a cumulative analysis that ought to be the responsibility of the government.

It appears to us that this would be the necessary result of deleting the three EIS need criteria opposed by MCEA. Without those criteria there is no defense against an RGU ordering an EIS due to the existence of a significant cumulative potential effect, however small the contributions from the specific project under review and despite the efforts of the proposer to minimize the project's contribution. Not only would this situation be unfair, but we fear that it would eventually lead to a backlash from the development community that might not only roll-back cumulative potential effects requirements, but also restrict other aspects of the process, perhaps even eliminating it.

The EQB staff believes that the three criteria in question are essential to preserving a distinction between a narrow scope for cumulative potential effects analysis for specific projects and the broader scope to be used in a GEIS discussed by the Minnesota Supreme Court. Although seldom used, the GEIS process is the review tool provided for in the rules to deal with issues broader than those from a specific project; as the rule puts it: "[a] generic EIS may be ordered by the EQB to study types of projects that are not adequately reviewed on a case-by-case basis." (Part 4410.3800, subp. 1.) The rule later states that one of the criteria for ordering a GEIS is: "G. the potential for significant environmental effects as a result of the cumulative impacts of such projects." (Part 4410.3800, subp. 5.) While the EQB staff acknowledges that the GEIS has only occasionally been used in this way, the government's failure to use the GEIS process (or other alternative methods of studying cumulative-type impacts) does not justify shifting the burden of analysis to specific-project reviews (and the costs and time delays onto individual project proposers).

The EQB staff contends that before a project-specific EIS can be ordered on the basis of cumulative potential effects, the RGU must find a relationship between the contribution from the project and the aggregate effect that justifies requiring an EIS for that particular project. That is the intended purpose of the criteria proposed to be added. The EQB is certainly willing to consider other possible criteria and rewording of those it has proposed, but it can not agree to withdraw the criteria as urged by MCEA.

The Minnesota Chamber of Commerce also submitted a comment about subpart 7, items B and C, which we believe raises a good point. The issue relates to the interaction of items B and C in the RGU's decision-making process. Within the context of item B, the mitigation plan factor is intended to mean only a comprehensive mitigation plan designed to address a certain cumulative potential effect and to allocate allowable contributions among all contributing sources. As noted in the SONAR, we think the only likely common examples of such plans in the near future in Minnesota are the MPCA's TMDL plans for various watersheds. Within the context of item B itself, the EQB staff believes

that only these comprehensive mitigation plans should count. However, the EQB staff has assumed that other types of mitigation applied to the project would be considered by the RGU under item C. We agree that this may not be entirely clear from the way the rule is written, but we do not have a proposal for how to clarify this point in the rule language. We can discuss this matter in our written guidance that will be developed after a rule is adopted, however.

5. Part 4410.1700, subp. 7, item C. EIS need criterion relating to reliance on mitigation. The Minnesota Center for Environmental Advocacy (MCEA) makes extensive comment on the proposed amendment of part 4410.1700, Subp. 7, item C, which the EQB is amending by adding the statement: "[t]he RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project;"

MCEA seems to offer general support for this amendment through recitation of case law and exposition of what it feels is necessary for compliance. MCEA makes special note that the Minnesota Supreme Court in its opinion in *CARD v. Kandiyohi* used the word "certain" where the proposed amended language does not. MCEA indicates that this comment is relative to amended language at 4410.1700, Subp. (B), but we are unable to discern the connection, and speculate that MCEA means to cite 4410.1700, Subp. (C). The actual statement in that opinion reads:

> "When an RGU considers mitigation measures as offsetting the potential for significant environmental effects under Minn. R. 4410.1700, it may reasonably do so only if those measures are specific, targeted, and are certain to be able to mitigate the environmental effects. The RGU must have some concrete idea of what problems may arise and how they may specifically be addressed by ongoing regulatory authority. There is a definite difference between an RGU review that approves a project with vague promises of future mitigation and an *RGU review that has properly examined a project and determined that specific measures can be reasonably expected to deal with the identifiable problems the project may cause".* (Emphasis added.)

The EQB staff believes that the proposed amendment language a reasonable synthesis and restatement of the above italicized passage, and makes an effective rule provision. MCEA does not offer alternative language nor suggests specifically that a change be made. The EQB believes that the proposed draft language is adequate. The call for mitigation measures to be "specific" and "be reasonably expected to effectively mitigate the identified environmental impacts of the project" satisfies the conditions and issues the MCEA names as being required.

6. Part 4410.3100. subp. 2a. Concurrent review of draft permits not prohibited. The Minnesota Center for Environmental Advocacy (MCEA) makes extensive comment on this proposed amendment to the rules. The general thrust of these comments is that the amendment is (a) problematic for government decision-makers to make fully informed final decisions, and (b) an impediment to public participation, unless environmental

review including public review and comment is completed before any notice of a permit is issued (and receipt of comments) which would lead to a final decision. Most of MCEA's characterization focuses on the final decision itself; and infers that that decision cannot be other than flawed, and the process other than defective if all steps of environmental review are not complete before notice of a draft permit is issued.

The EQB staff disagrees. The amendment to 4410.3100 by the addition of proposed rule language at Subpart 2a is a modest proposition to make explicit in rule that a governmental unit is not specifically prohibited from *issuing notice of and receiving public comments on a draft permit* before completion of environmental review.

This proposed rule language affects only the timing of public notice of a (any) draft permit and reception of public comments. It does not dictate that any governmental unit engages in concurrent availability for review if it chooses to defer such notice. Further, the current rule or this amendment does not require the RGU to closely coordinate with all other governmental units with permits to give, relative to the individual timing of their notices or relation to the progress of environmental review. The amendment also anticipates that the public will indeed participate in any of these permit reviews to the extent of their interest. The initiation of environmental review in the case of some projects (and not others) may lead to additional information and opportunities for the public to comment; but it is not otherwise a stumbling block to their participation in the various permit processes that may be going on at any given time.

The general prohibition on final decisions or the starting of a project, which is inherent in the provisions of 4410.3100, remains intact and foremost in its intent in this part of the rules. All governmental units remain bound to follow the prohibitions of 4410.3100. The proposed amendment does nothing to change this. It has long been a tenet of application of these rules that internal work processes, including definition or revision of the project itself or consideration of designs, (including generation of the information or parameters for defining the project in applying for permits, approvals or other governmental participation) is not prohibited by 4410.3100; as long as no final decision is made until the criteria of 4410.3100 are met. The amendment only proposes to directly state that a particular circumstance, of having a draft permit available to the public for review, is not specifically prohibited.

MCEA argues that the similarity of a draft permit to the final form of the permit as it is finally issued is evidence that a governmental unit generally disregards any information developed as a result of the environmental review process (or, perhaps, the permit review process itself) if that process has been going on concurrently with notice of the draft permit. MCEA further asserts, in its given example, that any argument offered by an agency to argue the contrary is "disingenuous." We would suggest the better explanation of draft permits routinely being similar to their final permits, by any agency, is likely due to wide experience and professional expertise in defining the draft permit in the first place. Agency staff typically exercise professional judgment in initially advising applicants as to what is likely to be acceptable in a permit. To conclude that environmental review when present, or the routine public process in permit review must

necessarily have been ignored if there is not substantial change in the permit, is not warranted.

MCEA's argument also ignores the fact RGUs must consider the mitigative measures associated with a project before deciding whether to order an EIS for a project. As noted above, those mitigative measures must be reasonably well-defined in order for an RGU to consider them. In many cases, the mitigative measures are identified and defined in a project's draft permit. By having a draft permit as well as an EAW, an RGU can evaluate the extent to which the potential effects of a proposed project are properly addressed and mitigated in a proposed permit. EQB staff believe that this results in better permitting and better environmental review decisions.

7. Part 4410.3610, subp. 2, item D. "AUAR small project drop-out provision." The EQB staff has already responded to the oral version of the MCEA's comments regarding this proposed amendment in its letter dated March 25, 2009. After considering the written comments, we wish to add the following response regarding an example MCEA includes in its letter.

MCEA offers a specific example of an AUAR situation that it contends illustrates the need to prevent small projects from being dropped from an AUAR review. The example involved groundwater withdrawals in the City of Woodbury. We believe that the technical analysis of groundwater withdrawals in a certain area would not depend on whether specific projects were officially in or not in the AUAR review (nor on exactly where the AUAR boundary was drawn). To obtain an accurate estimate of total groundwater use, a consultant would need to account for all groundwater use in the area, whether that use was a "subject" of the AUAR study or not. Dropping a specific project out of the AUAR does not alter the fact that the project would contribute to groundwater use, and an accurate estimate would necessarily need to account for its usage. The small project in question would be treated just like an existing water user that happened to be in the vicinity of the AUAR area. In doing a technical analysis of cumulative-type effects, all relevant sources need to be considered whether or not they are officially part of the "subject" of the environmental review. In view of this, we do not believe that this example illustrates MCEA's point at all.

8. Part 4410.3610, subp. 5a. Additional AUAR procedures needed in cases involving large specific projects. The Minnesota Center for Environmental Advocacy (MCEA) objects to the directions for the appropriate focus of public comments given in this new proposed section. MCEA suggests that these directions are restrictive and burdensome to the public. The EQB staff's response is that the directions are included for the purpose of guiding the public to offer useful comments. As explained in the SONAR, the point of adding this "scoping"-like procedure at the start of the AUAR is to assure that appropriate alternative development scenarios that reflect logical alternatives to the large specific project being included in the review are brought to light. The directions for commenting proposed by EQB are merely intended to focus the public on that purpose. As a practical matter, the public will comment upon whatever it chooses to; the EQB cannot prevent the public from expressing whatever it wishes to by writing a

rule about commenting. Further, the rule proposes to require that "the comments must provide reasons why a suggested development scenario or alternative to a specific project is potentially environmentally superior to those identified in the RGU's draft order" in order to give comments about alternatives some force. This is not meant to be burdensome, but merely to direct the commenter to back up their belief that the alternative needs to be considered with some relevant facts.

9. Part 4410.4300, subp. 12 and part 4410.4400, subp. 9. EAW & EIS categories for nonmetallic mineral mining in shoreland areas. The letter from Mr. VanOffelen of the Minnesota Center for Environmental Advocacy (MCEA) advocates lowering the thresholds for EAWs and EISs for nonmetallic mining in shorelands (to require EAWs for all mining in shorelands and EISs at 20 acres or 40 acres in sensitive and nonsensitive shorelands, respectively). The appropriate thresholds for nonmetallic mining in shorelands was debated by the advisory group formed by DNR and EQB in 2005; in those discussions, some advocated thresholds at the low levels now being advocated by MCEA. However, the EQB believes that those levels are too low and continues to favor the levels as proposed. Also, we believe that any proposed lowering of these thresholds would be vigorously opposed by many mining companies and others dependent on a supply of aggregate. During the "phase 1" process the EQB had requested comments on similar low mining thresholds and received many adverse comments. We believe that in order to set lower thresholds for mining in shorelands the EQB would need to begin a new rulemaking with broad stakeholder participation.

In addition to the above arguments, we have consulted with the DNR staff which has provided the following response to this comment:

"One of the primary purposes of the EAW is to determine whether an EIS is needed for a proposed project. Requiring an EAW for non-metallic mineral mining projects of more than 20 acres in sensitive shoreland areas and more than 40 acres in nonsensitive areas will allow this determination based on the environmental effects of the specific project. Mandatory preparation of an EAW on all such projects in shoreland areas regardless of size is an onerous requirement. For projects smaller than the proposed thresholds, the RGU can determine the need for a discretionary EAW based on the potential for a project to have significant environmental effects.

The MCEA comment overlooks the fact that mining is a temporary land use (unlike their comparison to conversion to residential housing). Reclamation of the land, as required through local regulations, can provide for a variety of post-mining land uses including habitat restoration or wetland creation.

Requiring mandatory EAWs for all projects and mandatory EISs for projects meeting the thresholds of 20 and 40 acres, in sensitive and nonsensitive shoreland areas respectively, would impose a substantial cost to society. In 2004 DNR did a GIS analysis that showed that 30.2% of all the land in northern Itasca County identified by the Minnesota Geological Survey as having potential for aggregate occurred within the shoreland protection district, defined by law (M.S. 103F.205) to include the area within 1,000 feet

of a lake and or 300 feet of a river. It should be noted that this percentage may be conservative due to edge effects of the buffer. It may be impractical or uneconomical to extract, in some situations, the portion of aggregate deposits that occur outside the shoreland district when a portion is also within the shoreland district. This could lead to a scarcity of aggregate and increases in costs, traffic and road deterioration as aggregate is transported greater and greater distances. The origin of a significant number of sand and gravel aggregate deposits is associated with the melting of ancient glaciers. Valleys that carried glacial meltwater, which now typically contains streams, and lands adjacent to many lakes, were highly conducive to the deposition of sand and gravel aggregate deposits ass the glaciers melted. This is borne out in the Itasca County study.

The environmental quality of shoreland areas is also protected during extraction projects by various state permits which may be required, including DNR water appropriation permit, DNR work in the bed of protected waters permit, BWSR wetland permit, MPCA water quality permit and MPCA air emission permit. In addition Minnesota counties and organized townships use planning and zoning to create mining ordinances, further protecting the environmental qualities of shoreland areas.

It is reasonable for the thresholds for nonmetallic mineral mining to be comparable to the thresholds established for land conversions in shorelands (Subp.36a) of 20 and 40 acres, in sensitive and nonsensitive shoreland areas respectively. As noted in the SONAR, the depth qualifier is not contained in the proposed revision 'because the types of impacts of concern do not depend on the depth of the excavation; the critical factor is that the surface vegetation is destroyed or disrupted.'

Minimum thresholds for environmental review (20 acres/40 acres) are reasonable. Projects not triggering such review are still reviewed through multiple permitting processes, affording reasonable levels of protection for the shoreland values."

10. Part 4410.4300, subp. 19a. Residential development in (metro area) shoreland. The Lino Lakes letter questions the definition of "tier" as proposed in this subpart and also whether item D regarding controlled access lots may be in conflict with an existing exemption at part 4410.4600, subp. 16, marinas.

The EQB staff has consulted the DNR shoreland staff about these two issues. Based on those discussions, we do not believe that any changes need to be made in the proposed rules. The DNR shoreland management staff does not believe that the proposed definition of tier is in conflict with typical local ordinances. Regarding the possible conflict between the proposed controlled access lot EAW threshold and the existing marina exemption, if there is indeed a conflict (and the EQB and DNR staffs are not sure that there is one), it would be resolved by the provision at subpart 1 of part 4410.4600 that states that if there is a conflict between an exemption category and a mandatory category, the mandatory category prevails.

11. Part 4410.4600, subp. 26. Exemption of certain governmental activities. The EQB staff has already responded to the MCEA's oral comments about this amendment in its March 25, 2009 letter. We would also like to add the following responses about certain points in the March 25, 2009 MCEA letter.

The MCEA letter states that the EQB's "long-standing" interpretation is "entirely inconsistent with the EQB rules" with respect to whether the term "projects" covers government actions such as planning and zoning. MCEA makes this statement without countering the fact that the interpretation of the rules given by the Court of Appeals in the case *Minnesotans for Responsible Recreation vs. DNR & All-terrain Vehicle Assn. of Minnesota* (explained on page 59 of the SONAR) is similar to that of the EQB staff.

The EQB staff would agree with the MCEA that the Minnesota Environmental Review program *could have been implemented* to cover governmental actions that are not "projects" and are of a planning or programmatic nature. The federal NEPA program and the "mini-NEPA" review programs of some other states (such as California, Washington and New York) do require review of "plans." However, Minnesota has chosen to limit the scope of its program to "projects" and to exclude "plans" from review. This is not just the interpretation of the EQB staff – or even of the Court of Appeals – but rather a factual statement about how the program has been carried out for nearly 35 years. As the SONAR notes, to the knowledge of EQB staff, the program has *never* reviewed a "plan"-type action. The MCEA's comments apparently seek to overturn 35 years of precedent by opposing the proposed amendment to this rule subpart. Our view is that if a change of this magnitude were to be contemplated it would need to come through legislative action after extensive public discussion.

Thank you for consideration of our responses.

Sincerely,

Gregg Downing
Environmental Review Coordinator