DRAFT – December 2, 2005

Environmental Review Program Rules

Minnesota Rules, Chapter 4410.

Proposed Amendments &

Statement of Need and Reasonableness

I. INTRODUCTION

This proposed rulemaking would amend 38 subparts of the Environmental Review rules in chapter 4410. Most of the amendments are considered minor "housekeeping" or technical amendments that are 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 or steps in limited specific circumstances; this primarily would affect the Alternative Urban Areawide Review process at part 4410.3610. This rulemaking also proposes to revise the mandatory Environmental Assessment Worksheet thresholds in such a way as to reduce the number of mandatory EAWs required for the following types of projects: air pollution sources; wastewater systems; and historic places.

This document explains the need for and reasonableness of proposed amendments to the EQB rules governing the Minnesota Environmental Review Program. It summarizes the evidence and arguments that the Board is relying upon to justify the proposed amendments. It has been prepared to satisfy the requirements of Minnesota Statutes, section 14.131 and Minnesota Rules, part 1400.2070.

The rule amendments are presented in part V of the document along with the SONAR information specific to each. Preliminary to part V are sections providing SONAR information about the rule amendments in general.

A. Environmental Review Program Rules

The Minnesota Environmental Review Program, established by the Minnesota Environmental Policy Act of 1973, has been in existence since 1974. The program operates under rules adopted by the Environmental Quality Board, which are binding upon all state agencies and political subdivisions of the state. The rules contain two basic parts: the procedures and standards for review under this program and listings of types of projects either for which review is mandatory or which are exempted entirely from review under this program. Mandatory review can either be in the form of an

Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS). The lists of types of projects subject to those requirements are generally referred to as the "mandatory categories." The lists of exempt projects are referred to as "exemptions categories" or sometimes just "exemptions." The list of mandatory EAWs is found at Minnesota Rules, part 4410.4300, mandatory EISs, at 4410.4400, and exemptions, at 4410.4600.

B. Development of proposed amendments; public comment

The EQB published and distributed a Request for Comments on February 14, 2005. Forty-eight possible rule amendments were identified in the Request materials. The notice asked that comments be submitted by April 18, 2005, although a number of comments were received and accepted after that date. Copies of all comments were distributed to the Board in association with the May 2005 meeting, and were posted at the EQB website. At the June 2005 meeting the Board was presented with a table itemizing the comments received for each potential rule amendment. At the August 2005 meeting the Board was briefed by staff on recommendations for how to proceed on each potential rule amendment in response to the comments received. The Board agreed to delay or drop rulemaking for some of the amendments and to have the staff draft amendment language and the Statement of Need and Reasonableness for the rest of the items. The Board reviewed draft proposed amendments and SONAR material at its September and October meetings, and authorized rulemaking at its December 2005 meeting.

C. Alternative Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact the EQB secretary, at Environmental Quality Board, 300 Centennial Building, 658 Cedar Street, St. Paul, MN 55155; telephone: 651/201-2464; fax: 651/296-3698. TTY users may call the Department of Administration at 800-627-3529.

II. STATUTORY AUTHORITY

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

III. THE NEED FOR THE RULES

The need for each proposed rule amendment is described in section V below. The proposed revisions of the mandatory EAW thresholds included in this rulemaking arose out of a study of mandatory EAW thresholds conducted by the EQB during 2004. The various reports prepared in that study are available at the EQB's website, and the summary reports are appended to this document. The proposed revisions of various Environmental Review procedural provisions result from the experience of the EQB staff and staff of member agencies in the day-to-day application of the rules, and generally

represent provisions that have proven to be ambiguous or confusing in application. A few of the proposed procedural revisions (notably some revisions in the Alternative Urban Areawide Review process and the Generic EIS process) are more substantive.

IV. COMPLIANCE WITH VARIOUS STATUTORY REQUIREMENTS

A. Regulatory analysis of factors required by Minnesota Statutes, section 14.131

Minnesota Statutes, section 14.131, sets out six factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (6) below quote these factors and then give the agency's response.

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

As with the existing rules, the proposed amendments will affect primarily persons who propose to develop projects that have, or may have, potential for significant environmental effects. The greatest impacts would occur to those proposers whose projects would require an EAW under the proposed rules but not under the current rules. Only two of the proposed amendments have the potential to require review that would not previously have been required:

- the amendment proposed at part 4410.1000, subp. 5 could require preparation of a revised EAW if the circumstances of the situation change, whereas previously only a change in the project itself could cause this change; this possibility applies equally to all types of projects and all proposers independent of who they may be.
- The amendments at parts 4410.4300, subp. 19 and 4410.4400, subp. 14 could require review of a residential project that would not previously required review if the project is located in an area which is identified for future residential development in an annexation agreement between the city and township but which is not identified yet in a comprehensive plan or zoning ordinance; this potential effect could fall upon proposers of residential projects who work in areas undergoing annexation.

Two other proposed amendments may make review under the rules more rigorous in some cases, which may have an effect upon some proposers in terms of time and cost:

- The amendment at part 4410.1700, subp. 2a would allow for officially longer periods of time for the gathering of additional information after the EAW comment period. This could result in information being gathered that would otherwise not be gathered. However, the effect in practice would not be as great as might theoretically be expected because it is now common for proposers and RGUs to informally agree to extend the time period even though the rules do not officially allow this. Also, in some cases the result of this amendment may be avoidance of the ordering of an EIS, which would result in considerable time and cost savings to affected proposers.
- The added procedures proposed at part 4410.3610, subp. 5a, would add additional scenarios to the analysis in some Alternative Urban Areawide Reviews, the costs

of which would accrue in most cases to the proposer of the project that necessitated the additional procedures of subpart 5a. These would be proposers of projects which either meet mandatory EIS criteria or are otherwise of substantial size.

The proposed amendments to the mandatory EAW categories at part 4410.4300, subps. 15, 18, and 31 will reduce the number of mandatory EAWs required to be prepared, resulting in time and cost savings to some proposers of projects of the types covered by those three categories (air pollution sources, wastewater systems, and historic places). The cost savings are estimated in section 6 under the topic of the cost of not adopting the amendments

Otherwise, the amendments proposed are expected either to have no affect or to make the rule processes more efficient by eliminating confusion and misinterpretation and disputes about interpretation. As with the current rules, the beneficiaries are expected to be project proposers, units of government and the general public.

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues. The only costs that the EQB will incur in the implementation of the rules will be for the costs of time and materials for updating guidance materials to incorporate the rule amendments. These costs will be minimal. The EQB may experience reduced costs due to the amendment at part 4410.5600, subp. 2 allowing for electronic-only distribution of the EQB Monitor. The Pollution Control Agency is expected to experience cost savings due to the raising or elimination of the mandatory EAW thresholds at parts 4410.4300, subp. 15 & 18. Estimates of these savings are provided in section 6 regarding the costs of not adopting the amendments.

Responsible Governmental Units, especially local units, will likely experience higher costs for review due to some of the proposed amendments, but in almost all cases they are expected to pass those added costs on to the proposers of the projects undergoing review. The amendments most likely to result in these costs are those proposed at parts 4410.1700, subp. 2a, and 4410.3610, subp. 5a.

The only rule amendment that might have an effect on state revenues is that proposed at part 4410.6200, subp. 1. In rare cases, this might reduce state revenues that otherwise would be collected during EIS preparation, if an RGU chose to waive cost-recovery for staff expenses; this is much less likely than it would have been several years ago as tight budgets have reduced the number of General Fund staff available to perform environmental review tasks..

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule, and
(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

Because of the overlap between these two factors as they relate to this rulemaking, factors #3 & #4 are discussed jointly in this section. Most of the proposed amendments are considered by the EQB to be clarifications of the rules as they now stand. As such, these amendments impose no additional costs or intrusions, and hence there are no less costly or intrusive alternatives possible. A number of other amendments address procedural problems with sections of the existing rules; these amendments would lessen the costs and intrusions of implementing the rules by removing obstacles and streamlining the procedures. For the amendments which would change the mandatory EAW thresholds, all of those proposed raise or eliminate an existing threshold in some way and thus are lessening the cost and intrusion of the rules. A few of the changes proposed that go beyond mere clarifications would allow for additional time to be taken in the review process, such as the proposed amendments at parts 4410.1400 and 4410.1700, subp. 1a. In both cases, the additional time must be agreed to by the project proposer, which allows the proposer to control the extent of the additional time and cost intrusions.

For the rule amendments that impose additional requirements, the EQB did consider alternative approaches. Regarding two revisions in the AUAR process, at part 4410.3610, subparts 2 & 5a, the original amendment concepts as explained in the Request for Comments were to prohibit removing a project from an AUAR once started and to prohibit the use of the AUAR process to review a specific development project at all. In view of the public comments received in opposition to these proposed prohibitions, the EQB instead developed and opted for the additional procedural requirements expressed in these two subparts. The amendments now being pursued avoid the original outright prohibitions and instead seek to resolve the perceived problems in the existing rules through some additional opportunities for public input into the review. The steps that are proposed to be added are no more than the minimum needed to accomplish the purpose.

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

Overall, these proposed rule amendments are expected to reduce the overall cost of environmental review because fewer mandatory EAWs will be prepared due to the revisions to the mandatory thresholds for some categories. The beneficiaries of these reductions would be the proposers of projects within those categories, the Pollution Control Agency (which is the RGU for most of the categories with threshold revisions), and local units of government that will be relieved of the need to prepare EAWs for destruction of historic properties due to the revisions to that mandatory EAW category. The dollar value of those reductions are estimated below in section 6 on the probable cost of not adopting the amendments.

A few of the individual rule amendments will cause cost increases in limited circumstances:

- The expansion of the reasons for requiring a new EAW be prepared at part 4410.1000, subp. 5 may be expected to result in perhaps two additional EAWs per year (about 150 EAWs are prepared in a typical year), at a total cost of $10,000 to

$20,000. The additional costs would be expected to be borne by the proposers of the projects in question.

- The amendment at part 4410.1700, subp. 2a would allow for officially longer periods of time for the gathering of additional information after the EAW comment period, which could result in information being gathered that would otherwise not be gathered. The cost of such information would vary, but seldom would be expected to exceed $5,000 to $10,000. Moreover, in practice it is now common for proposers and RGUs to informally agree to extend the time period to gather more information even though the rules do not officially allow this; in those cases there would be no cost increases due to the amendment. Also, in some cases the result of this amendment may be avoidance of the ordering of an EIS, which would result in considerable time and cost savings to affected proposers.
- The added procedures proposed at part 4410.3610, subp. 5a, would add additional scenarios to the analysis in some Alternative Urban Areawide Reviews, the costs of which would accrue in most cases to the proposer of the project that necessitated the additional procedures of subpart 5a. The cost of this additional analysis is estimated to range from $10,000 to $20,000. These costs would be no greater than would have been experienced if the projects had been reviewed through the EIS procedures .
- The amendments at parts 4410.4300, subp. 19 and 4410.4400, subp. 14 could require review of a residential project that would not previously required review if the project is located in an area which is identified for future residential development in an annexation agreement between the city and township but which is not identified yet in a comprehensive plan or zoning ordinance. EQB would expect that this might occur once or twice per year, at a cost of $5,000 to $10,000 per occurrence. This cost would fall upon the proposers of the residential projects in question.

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals

If the proposed rule amendments are not adopted, the costs and consequences can be grouped into three categories: those due to preparing EAWs that would not be mandatory if the amendments are adopted; those due to ineffective features of the current rules that would be corrected by the amendments; and those due to inefficiencies caused by confusion or misinterpretation of provisions that would be clarified if the amendments were adopted.

The Pollution Control Agency staff has made estimates of the effect of adopting the proposed category threshold revisions to subparts 15 and 18 of part 4410.4300, the mandatory EAW categories list. Based on the characteristics of the projects reviewed over the period 2000-2003, only 6 of 14 projects (43%) reviewed due to the air pollution category would have required review if the proposed new thresholds had been in effect. Therefore, a conservative estimate would be that not adopting the amendments to the air pollution category would result in 1-2 “extra” EAWs being prepared per year. Using

$5,000 - $10,000 as a cost range for a typical EAW of this type, the total cost of not amending the air category would be $5,000 to $20,000.

Similarly, for the wastewater systems category revisions, based on the characteristics of the projects reviewed over the period 2000-2003, only 25 of 53 projects (47%) reviewed due to the wastewater systems category would have required review if the proposed new thresholds had been in effect. Therefore, a conservative estimate would be that not adopting the amendments to the wastewater systems category would result in 7 "extra" EAWs being prepared per year. Again using $5,000 - $10,000 as a cost range for a typical EAW of this type, the total cost of not amending the wastewater systems category would be $35,000 to $70,000.

In terms of cost savings to the state government, the reduction of EAWs for the air pollution category is 1.25 less EAWs completed per year. This is approximately equivalent to 15% of one fulltime equivalent (FTE) position, or $11,700. This 15% of an FTE is not one person's position, rather a combination of time from the environmental review staff, permit engineers, hydrologists, risk assessors, support staff, and others as needed. The reduction of EAWs for the wastewater systems category is 7 less EAWs completed per year. This is approximately equivalent to 85% of one FTE position, or $63,300. Again, this 85% of an FTE is not one person's position, rather a combination of time from the environmental review staff, permit engineers, hydrologists, risk assessors, support staff, and others as needed. Putting both the reductions in EAWs for the air pollution and wastewater systems category together, the result is 8.25 fewer EAWs completed per year. In terms of cost savings to the Pollution Control Agency, this is approximately equivalent to one fulltime equivalent (FTE) position, or $78,000.

Regarding the costs or consequences of foregoing improved effectiveness of the program due to not adopting these amendments, the area of the rules where the greatest improvements in effectiveness lie is the changes to the AUAR process at part 4410.3610, subparts 2 and 5a. Without the additional procedures proposed, the potential will continue to exist for certain projects to avoid review of their environmental consequences according to accepted state standards. This has the potential for projects to be approved without a complete understanding of their environmental consequences. It also has the potential to contribute to lawsuits over incomplete review of certain projects with the accompanying time delays and associated costs. There has already been one lawsuit over an AUAR where one of the basic issues was whether sufficient alternatives to a specific project were analyzed in the AUAR, the issue that the proposed new subpart 5a procedures are intended to address.

It is not possible for the EQB to make a meaningful estimate of the costs that would result if the various ambiguities and unclear rule provisions are not corrected through these amendments. Obviously, however, confusion over the meanings of rules and misinterpretations of rules do lead to a waste of resources and associated costs.

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

It is possible for a given project to require review of its environmental impacts under requirements of the National Environmental Policy Act as well as the Minnesota Environmental Policy Act. The federal process prescribes environmental documents similar to state EAWs and EISs and uses processes similar in general outline although different in details to the Minnesota process under chapter 4410. Almost always, it is public projects such as highways, water resources projects, or wastewater collection and treatment that require such dual review. In the few cases where dual review is needed, specific provisions in the Environmental Review rules provide for joint state-federal review with one set of environmental documents to avoid duplication of effort. These provisions are: part 4410.1300, which provides that a federal Environmental Assessment document can be directly substituted for a state EAW document and part 4410.3900, which provides for joint state and federal review in general. Neither or these provisions will be affected by the proposed amendments.

B. Other SONAR Content Required by Statute

1. Performance-based rules

Minnesota Statutes, sections 14.002 and 14.131, require that the SONAR describe how the agency, in developing the rules, considered and implemented performance-based standards that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

Except for a very few of the proposed amendments, the present rulemaking does not substantially affect the procedures of Environmental Review, but rather either makes minor adjustments in the procedures or alters the thresholds at which review is required. And for those few amendments that do alter the procedures in a substantial way (amendments to the AUAR process at part 4410.3610) the additional procedures involve only a basic public notice, review and comment process. Consequently, this rulemaking does not offer the opportunity for adopting performance-based rules or providing procedural flexibility. Furthermore, Environmental Review is not a regulatory program, and hence the EQB has no "regulatory objectives" in this rulemaking.

2. Additional Notice

Minnesota Statutes, sections 14.131 and 14.23, require that the SONAR contain a description of the agency's efforts to provide additional notice to persons who may be affected by the proposed rules or explain why these efforts were not made. The EQB is using the following elements to provide additional notice in this rulemaking:

- Posting on the EQB Website. The rulemaking notices, the proposed rule amendments, and the SONAR will be posted at the EQB website.

- Publication of the rulemaking information in the *EQB Monitor*. The Monitor is a bi-weekly electronic publication of the EQB concerning events in the environmental review program and is routinely examined by many persons and organizations with a potential interest in environmental review activities.
- Press Release to Major Circulation Newspapers. We will send a press release about the rulemaking to newspapers throughout the state.

Our Notice Plan also includes giving notice required by statute. We will mail the rules and rulemaking notice to everyone who has registered to be on the EQB's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. We will also give notice to the Legislature per Minnesota Statutes, section 14.116.

3. Section 14.127 analysis

Section 14.127 (enacted in 2005) of the Administrative Procedures Act requires an agency to determine if the cost of complying with proposed rules in the first year after the rules take effect will exceed $25,000.00 for any "small business" (less than 50 full-time employees) or "small city" (less than 10 full-time employees). Although this analysis is not required to be included in the SONAR, the EQB has chosen to put it here, as it is related to the information provided under sections A.5 and A.6 above.

The EQB has determined 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 enacted. As described in section A.5 above, overall the amendments will result in decreased costs and only a few of the individual revisions would result in an increase in costs. Most of the proposed amendments are considered by the EQB to be clarifications of the rules as they now stand. As such, these amendments impose no additional costs. A number of other amendments address procedural problems with sections of the existing rules; these amendments would lessen the costs of implementing the rules by removing obstacles and streamlining the procedures. For the amendments which would change the mandatory EAW thresholds, all of those proposed raise or eliminate an existing threshold in some way and thus lessen the cost of the rules.

A few of the changes proposed that go beyond mere clarifications would allow for additional time to taken in the review process, such as the proposed amendments at parts 4410.1400 and 4410.1700, subp. 1a. In both cases, the additional time might result in additional analysis being performed at the expense of the proposer (which might be a small business) but in no case would the cost be expected to reach $25,000.

For the rule amendments that impose additional requirements, notably at part 4410.3610, subparts 2 & 5a, in the AUAR process, the amendments might result in increased costs to the Responsible Governmental Unit (which might be a small city although very few AUARs are done by a city so small as to have less than 10 FT employees), but which would likely be passed on to the project proposer (which might be a small business). The increased costs potentially due to the amendment at subpart 2 would result from keeping a small project in the AUAR; since AUAR costs are normally pro-rated to property owners based on acreage, a small project's share would not exceed $25,000.

The increased costs potentially due to subpart 5a would result from the analysis of additional alternatives in the AUAR. The cost of analyzing additional scenarios in an AUAR should not exceed $25,000, except in unusual circumstances. The EQB does not expect that such circumstances will occur in the first year of the rules effect where the RGU is a small city or the affected proposer a small business.

V. RULE-BY-RULE ANALYSIS OF NEED AND REASONABLENESS

4410.0200 DEFINITIONS AND ABBREVIATIONS.

Subp. 1a. ~~**Agency.** "Agency" means the State Planning Agency.~~

The definition of "agency," meaning the State Planning Agency, is being deleted from the rule because the term is no longer used in the rules. The State Planning Agency was abolished in 1991, but the definition of this term was not eliminated in subsequent rulemakings until now.

Subp. 9b. **Connected actions.** Two projects are "connected actions" if a responsible governmental unit determines they are related in any of the following ways:

A. one project would directly induce the other;

B. one project is a prerequisite for the other and the prerequisite project is not justified by itself; or

C. neither project is justified by itself.

The definition of "connected actions" needs clarification with respect to the second of the three relationships that can constitute connected actions. Where one project is a prerequisite for another, the relationship is only a connected action if the prerequisite project is not justified by itself. If the prerequisite project is justified on its own, then it should be considered on its own (rather than as an inseparable portion of any project(s) dependent upon it). This principle is not reflected in the language now in the rule.

EQB staff has for some time recognized this problem with the existing wording. A typical example that illustrates the difference is the relationship between infrastructure projects, such as sewers and roads, and the development they are intended to serve. For example, if a sewer were to be built to serve only a specific planned residential project, the sewer and residential projects would rightly be considered connected actions because the sewer would not be built if not for that development. Here, the prerequisite sewer project is not justified by itself. On the other hand, if a sewer were planned to serve a large area in which many residential developments were expected, the sewer would not be properly considered as a connected action with any of those developments; the sewer is justified by itself as a necessary piece of infrastructure to service development in general.

Without the distinction being made about whether a prerequisite project is justified by itself, the logical result would be that every infrastructural project would be a connected action with every development it would ultimately serve, which would create an unworkable and absurd result. The rule has not been interpreted in this way and it is time to reflect this interpretation in the rule language.

Subp. 69. Public ~~**Protected**~~ **waters.** "Public ~~Protected~~ waters" has the meaning given ~~public waters~~ in Minnesota Statutes, section 103G.005.

The Legislature amended State water laws to replace the term “protected waters” with "public waters." This amendment would update these rules to use the correct term.

Subp. 70. Public waters ~~**Protected**~~ **wetland.** "Public waters ~~Protected~~ wetland" has the meaning given ~~public waters wetland~~ in Minnesota Statutes, section 103G.005, subdivision 15a.

The Legislature amended State water laws to replace the term “protected wetland” with "public waters wetland." This amendment would update these rules to use the correct term.

Subp. 81. **Sewered area.** "Sewered area" means an area:

A. that is serviced by a wastewater treatment facility or a publicly owned or homeowner owned, operated, or supervised centralized septic system servicing the entire development; or

B. that is located within the boundaries of the metropolitan urban service area, as defined pursuant to the development framework of the Metropolitan Council.

The SONAR from the 1982 rulemaking when this term was introduced indicates that a centralized septic tank system serving the entirety of a project and owned by the homeowners collectively was intended to be included in this definition. However, the present wording is ambiguous about this which has led to confusion and differences in the interpretation of the term from one case to another. Some people have interpreted “publicly owned” to mean only owned by a unit of government while others have interpreted it to include ownership by the homeowners. The insertion of the words “homeowner owned” would clarify the intent to the reader.

Subp. 92. **Wastewater treatment facility.** "Wastewater treatment facility" means a facility for the treatment of municipal or industrial waste water. ~~It includes on-site treatment facilities.~~

The 1982 SONAR indicates that as used here, the term “on-site treatment facilities” meant wastewater treatment facilities, other than municipal facilities, built by the

proposer “on site” to serve a particular development. The sentence containing the term was included to ensure that such facilities were included under the definition. However, today in common usage, the term “on-site treatment” means septic tank/drainfield systems or other small-scale treatment systems serving an individual residential lot. Such facilities are generally considered as an alternative to a “wastewater treatment facility,” not an example of one. By deleting the final sentence of the definition this potential confusion can be eliminated without otherwise affecting the interpretation.

4410.1000 PROJECTS REQUIRING AN EAW.

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

This subpart presents the criterion for determining if a new EAW should be prepared if there is a change after the EAW review but before the project is approved or is built. The present rule only provides for a new EAW if there is a substantial change in the project and imposes no time restriction on how long the EAW would be good for if the implementation of the project is delayed significantly. A few projects have been delayed for many years after an EAW was prepared, and because the project itself had not changed the EAW remained valid without needing any updating.

It has been pointed out to the EQB staff that if a project is not built for a long time and there is no time limit on the “shelf-life” of the EAW, there could be substantial changes in the circumstances in which the project would be built that could greatly affect the potential for environmental impacts of the project that were not addressed in the EAW. For example, the surrounding development could be different from what was expected when the EAW was prepared which could substantially change the nature and severity of certain impacts. The EQB believes that this is a valid concern and that the rule ought to be amended to address this issue.

The EQB considered addressing the issue by adding a time limit on the “shelf-life” of an EAW. However, there was considerable disagreement among the member agencies about what an appropriate time limit would be. This indicated that a single time limit is probably not appropriate for all types of projects. Rather than try to define different limits for different types of projects, the EQB agencies agreed that the proposed criterion (a substantial change in circumstances resulting in significant adverse impacts that were not addressed) would be a preferable solution.

4410.1100 PETITION PROCESS.

> Subp. 6. **EAW decision.** The RGU shall order the

preparation of an EAW if the evidence presented by the petitioners, proposers, and other persons or otherwise known to the RGU demonstrates that, because of the nature or location of the proposed project, the project may have the potential for significant environmental effects. The RGU shall deny the petition if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects. In considering the evidence, the RGU must take into account the factors listed at part 4410.1700, subpart 7, items A to D. The RGU shall maintain, either as a separate document or contained within the records of the RGU, a record, including specific findings of fact, of its decision on the need for an EAW.

The standard in this rule does not address whether or not the RGU should consider mitigation and regulation applicable to the project when deciding if the project may have the potential for significant environmental effects. Because the rule does not indicate whether or how such factors should be considered, different RGUs treat petitions differently with respect to mitigation and regulation. This should be rectified so that there is a "level playing field" for all petitions and for all projects for which petitions are filed.

There was some controversy reflected in the comments received in response to the Request for Comments about adding a provision about taking mitigation and regulation into account in the EAW need decision, especially about the possibility that such a provision would give an RGU too much leeway to dismiss a petition without needing to investigate the potential effects of the project – in other words, that these added factors would create even more grounds to deny petitions. (It is a fact that at least 4 out of 5 petitions are dismissed under the present criteria.) While the EQB understands the concern that adding a provision about mitigation and regulation could be used by an RGU as yet another reason to deny a petition, it also believes that it is important for an RGU to take into account mitigation measures that will in fact be implemented.

The approach chosen to add consideration of regulation and mitigation into petition decisions is to direct the RGU to take into account the same four factors as required to be considered in making an EIS need decision, at part 4410.1700, subpart 7, items A to D. Among these items, item C explicitly deals with mitigation and regulation, being "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority." Directing the RGU to also consider items A, B and D would have the added benefit of strengthening the correspondence between what an RGU should consider in ordering an EAW and in ordering an EIS. At present, many RGUs look to the same factors when reviewing a petition, but the rules do not explicitly direct the RGU to consider those same factors. If this amendment is made, then it will be clear to RGUs that the difference between the two types of decision is in the standard ("may have the potential for significant environmental effects" versus "has the potential for significant environmental effects").

4410.1200 EAW CONTENT.

The EAW shall address at least the following major categories in the form provided on the worksheet:

A. identification including project name, project proposer, and project location;

B. procedural details including identification of the RGU, EAW contact person, and instructions for interested persons wishing to submit comments;

C. description of the project, the purpose of the project, methods of construction, quantification of physical characteristics and impacts, project site description, and land use and physical features of the surrounding area;

D. resource protection measures that have been incorporated into the project design;

E. major issues sections identifying potential environmental impacts and issues that may require further investigation before the project is commenced;

F. known governmental approvals, reviews, or financing required, applied for, or anticipated and the status of any applications made, including permit conditions that may have been ordered or are being considered; ~~and~~

G. if the project will be carried out by a governmental unit, a brief explanation of the need for the project and an identification of those who will benefit from the project; and

H. an assessment of the compatibility of the project with approved plans of local units of government.

Part 4410.1200 lists information that must be addressed in an EAW. The EAW content requirements do not now specifically address compatibility of the project with approved local plans, and this has been pointed out to the EQB by representatives of the Sierra Club on several occasions. It is proposed to add a new item H that would require this to be covered in an EAW. It should be noted that the actual EAW form that has been prepared by the EQB does already include a question (#27) that addresses whether or not the project is consistent with local approved plans. Therefore, although in theory this amendment creates an additional information need for the project proposer, in practice this information has routinely been supplied in EAWs for many years.

4410.1400 PREPARATION OF AN EAW.

The EAW shall be prepared as early as practicable in the

development of the proposed project. The EAW shall be prepared by the RGU or its agents.

When an EAW is to be prepared, the proposer shall submit the completed data portions of the EAW to the RGU. The RGU shall ~~promptly~~ determine whether the proposer's submittal is complete within 30 days or such other time period as agreed upon by the RGU and proposer. If the RGU determines that the submittal is incomplete, the RGU shall return the submittal to the proposer for completion of the missing data. If the RGU determines that the submittal is complete, the RGU shall notify the proposer of the acceptance of the submittal within five days. The RGU shall have 30 days from notification to add supplementary material to the EAW, if necessary, and to approve the EAW for distribution. The RGU shall be responsible for the completeness and accuracy of all information.

The rule now states (second paragraph) that after the proposer submits the completed data portions of the EAW to the RGU, the "RGU shall *promptly* determine whether the proposer's submittal is complete," however, "promptly" is not defined and is subject to disputes between RGUs and proposers. It is proposed to correct this situation by amending the rule by deleting the word "promptly" and adding the phrase "within 30 days or such other time period as the RGU and the proposer agree upon" at the end of the sentence. Thirty days is a reasonable standard for review of this type. It is the length of review for completed EAWs, draft AUARs, and the scoping of EISs. If for a given project the RGU determines that 30 days will not be a sufficient period of time, it can approach the proposer to arrange for a lengthier period of time. This would only be likelier for major, complex projects.

4410.1500 PUBLICATION AND DISTRIBUTION OF AN EAW.

A. The RGU shall provide one copy of the EAW to the EQB staff within five days after the RGU approves the EAW. This copy shall serve as notification to the EQB staff to publish the notice of availability of the EAW in the EQB Monitor. At the time of submission of the EAW to the EQB staff, the RGU shall also submit one copy of the EAW to:

(1) each member of the EQB;

(2) the proposer of the project;

(3) the U.S. Corps of Engineers;

(4) the U.S. Environmental Protection Agency;

(5) the U.S. Fish and Wildlife Service;

(6) the State Historical Society;

(7) ~~the Environmental Conservation Library~~ the State Archeologist and the Indian Affairs Council;

(8) ~~the Legislative Reference Library~~ the Environmental Conservation Library;

(9) the regional development commission and regional development library for the region of the project site;

(10) any local governmental unit within which the project will take place;

(11) the representative of any petitioners pursuant to part 4410.1100; and

(12) any other person upon written request.

Item A presents a list of institutions to which EAWs must be routinely distributed. This list is out-of-date and needs some updating. Specifically, the Legislative Reference Library has asked to be removed from the list as its resources no longer allow for routine cataloging and storing of environmental review documents and there is a need to achieve wider distribution of EAWs for review with respect to archaeological and Native American cultural features.

4410.1700 DECISION ON NEED FOR EIS.

Subp. 2a. **Insufficient information.** If the RGU determines that information necessary to a reasoned decision about the potential for, or significance of, one or more possible environmental impacts is lacking, but could be reasonably obtained, the RGU shall either:

A. make a positive declaration and include within the scope of the EIS appropriate studies to obtain the lacking information; or

B. postpone the decision on the need for an EIS, for not more than 30 days or such other period of time as agreed upon by the RGU and proposer, in order to obtain the lacking information. If the RGU postpones the decision, it shall provide written notice of its action, including a brief description of the lacking information, within five days to the project proposer, the EQB staff, and any person who submitted substantive comments on the EAW.

The current rules allow for an extension of no more than 30 days to get missing information. However, in practice longer extensions are frequently taken when the project proposer agrees. This amendment would bring the rule language into agreement with this common practice.

Subp. 3. **Form and basis for decision.** The RGU's decision shall be either a negative declaration or a positive declaration. ~~If a positive declaration, the decision shall include the RGU's proposed scope for the EIS.~~ The RGU shall base its decision regarding the need for an EIS ~~and the proposed scope~~ on the information gathered during the EAW process and the comments received on the EAW.

In cases where the RGU issues a "positive declaration," (i.e., orders an EIS be prepared) the existing rule requires that the RGU also develop a draft EIS scope at the same time. In practice, this has proven to be very difficult for governmental units to do. Almost all the positive declaration notices that the EQB has ever received have lacked any information about the proposed scope of the EIS. It seems clear that in practice RGUs need a period of time after ordering an EIS to develop a proposed EIS scope. The proposed changes at this subpart are coordinated with those at part 4410.2100, subpart 4 (see below) and together would establish a more workable process for the scoping of an EIS ordered after completion of an EAW.

4410.2100 EIS SCOPING PROCESS.

Subp. 4. **Scoping period for some discretionary EIS's.** If the EIS is being prepared pursuant to part 4410.2000, subpart 3, item A, the following schedule applies:

A. At least ten days but not more than 20 days after notice ~~of a positive declaration~~ is published in the EQB Monitor, a public meeting shall be held to review the scope of the EIS. Notice of the time, date, and place of the scoping meeting shall be published in the EQB Monitor within 15 days of receipt of the proposer's scoping cost payment pursuant to part 4410.6500, subp. 1, item A, and a press release shall be provided to a newspaper of general circulation in the area where the project is proposed. All meetings shall be open to the public.

B. Within 15 days of the public scoping meeting, ~~30 days after the positive declaration is published in the EQB Monitor,~~ the RGU shall issue its final decision regarding the scope of the EIS. If the decision of the RGU must be made by a board, council, or other similar body which meets only on a periodic basis, the decision may be made at the next regularly scheduled meeting of the body following the scoping meeting but not more than 45 days after the positive declaration is published in the EQB Monitor.

This rule guides the scoping of an EIS that has been ordered after the preparation of an EAW and the issuance of a "positive declaration." The changes here will work in coordination with those of part 4410.1700, subpart 3 (see above) to improve the transition from the decision to prepare an EIS into the scoping of the EIS. As described above, the procedures in the current rule have proven unworkable in practice, and furthermore, the

scoping procedures in this rule are inconsistent with provisions of part 4410.6500, subp. 1, item A, regarding the proposer's payment to the RGU for scoping costs.

The proposed changes would start the timeframe for scoping when the proposer pays the RGU for the estimated scoping costs, rather than from the date of the positive declaration. In some cases where an EIS is ordered, the project proposer is not prepared to proceed into scoping immediately, for several possible reasons including the possibility that the project will be abandoned. Using the payment of the scoping costs as a starting point makes sense as it indicates the intent on the part of the proposer to proceed with the EIS. Within 15 working days of that event, notice of a public scoping meeting would be required in the EQB Monitor. The meeting schedule would not be changed, only the point where the deadline is measured from. The RGU's scoping decision would be required within 15 working days of the scoping meeting, which is the same timeframe as provided for a scoping decision for a mandatory or voluntary EIS, measured from the end of the comment period.

> Subp. 8. **Amendments to scoping decision.** After the scoping decision is made, the RGU shall not amend the decision without the agreement of the proposer unless substantial changes are made in the proposed project that affect the potential significant environmental effects of the project or substantial new information arises relating to the proposed project that significantly affects the potential environmental effects of the proposed project or the availability of prudent and feasible alternatives to the project. If the scoping decision is amended after publication of the EIS preparation notice, notice and a summary of the amendment shall be published in the EQB Monitor within 30 days of the amendment. The notice may be incorporated into the notice of the availability of the draft or final EIS.

The current rule states that a notice must be given in the EQB Monitor whenever the scope of an EIS is revised by the RGU. However, if the draft or final EIS document is near release it would be more efficient to announce the scope revision as part of the notice of those documents rather than as a separate notice. This proposed amendment would allow for that.

> Subp. 9. **EIS preparation notice.** An EIS preparation notice shall be published within 45 days after the ~~scoping decision is issued~~ RGU receives the proposer's cash payment pursuant to part 4410.6500, subp. 1, item B, or part 4410.6410, subp. 3. The notice shall be published in the EQB Monitor, and a press release shall be provided to at least one newspaper of general circulation in each county where the project will occur. The notice shall contain a summary of the scoping decision.

The amendment proposed here would work in combination with that proposed at part 4410.6100, subp. 1, to correct a problem with the initiation of the 280 day timeframe for completion of an EIS. The statutes state, at Minn. Stat., sec. 116D.04, subd. 2a(g), that

an EIS must be completed within 280 days of the publication of the EIS preparation notice. However, at Minn. Stat., 116D.045, subd. 4 the statutes state that preparation of an EIS may not begin until the proposer pays the RGU at least one-half the estimated cost of the EIS. As the rules are currently written, the sequence of scoping, cost agreement and payment, and EIS preparation events is:

Scoping decision (4410.2100, subps. 3-6)
*EIS Preparation Notice published – within 45 days (4410.2100, subp. 9)
EIS cost agreement signed – within 30 days (4410.6100, subp. 1)
Proposed pays at least ½ cost assessment – within 10 days (4410.6500, subp. 1B)
EIS preparation begins – immediately upon payment (4410.6500, subp.1 B)
*Point at which 280 day EIS "clock" begins

Under the present system, although the EIS 280 day preparation period begins when the EIS Preparation Notice is published, payment of the cost may not occur until up to 6 weeks later. The proposed amendments here and at part 4410.6100, subp. 1 would shuffle the events so that the 280 period does not begin until work is ready to proceed. The proposed sequence of events would be:

Scoping Decision
Draft cost agreement given proposer by RGU –within 30 days
RGU and proposer sign cost agreement – within 30 days
Proposer pays at least ½ assessed cost – within 10 days
EIS preparation begins – immediately upon receipt of cost payment
*EIS Preparation Notice published – within 45 days of receipt of cost payment
*Point at which 280 day EIS "clock" begins

A diagram showing the sequence of steps now and under the proposed amendments is contained in the appendices.

4410.3100 PROHIBITION ON FINAL GOVERNMENTAL DECISIONS.

Subpart 1. **Prohibitions.** If an EAW or EIS is required for a governmental action under parts 4410.0200 to 4410.6500, or if a petition for an EAW is filed under part 4410.1100 that complies with the requirements of subparts 1 and 2 of that part, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:

A. a petition for an EAW is dismissed;

B. a negative declaration on the need for an EIS is issued;

C. an EIS is determined adequate; or

D. a variance is granted under subparts 3 to 7 or the action is an emergency under subpart 8.

To start or begin a project includes taking any action within the meaning of "construction," as defined at part 4410.0200, subp. 10.

Two clarifications are proposed to this subpart. The first proposed amendment would clarify that when a citizens' petition is filed the prohibitions on beginning a project and on governmental decisions to approve or begin a project go into effect only upon the determination by EQB that the petition complies with the content requirements of the rules (that is, that the petition is "complete"). The current rules are unclear about whether the prohibition begins when a petition is filed (arrives at the EQB offices) or when the EQB staff verifies its completeness. The EQB staff has always interpreted the rule to mean the latter for two reasons. Firstly, a significant percentage (in excess 30%) of petitions do not comply with all the content requirements as specified in part 4410.110, subparts 1 & 2 when they are originally filed with EQB. The EQB staff has always taken the position that a petition must be complete before it can invoke the prohibition on project approvals; otherwise, project opponents would be able to stall projects without actually having a case for potential environmental effects.

Secondly, the interpretation that the prohibition begins before the EQB staff reviews the petition would cause practical problems. The EQB has five working days to review a petition for completeness and to assign an RGU (part 4410.1100, subp. 5). If in the meantime, a governmental unit issues a permit before the EQB is able to notify it of the existence of the complete petition, is the permit invalid – or is the project now exempt (pursuant to part 4410.4600, subp. 2, item B)? Since the law and rules do not address this ambiguous situation, the EQB has always taken the position that such a situation is meant to be avoided, meaning that the prohibition on approvals does not begin until the EQB has reviewed the petition and found it to comply with the content requirements. As a matter of practice, the EQB staff routinely contacts the RGU by telephone as soon as a petition is determined to be complete in order to minimize the possibility that a permit will be issued after the petition is deemed valid.

The second amendment would clarify what it means to "start" or "begin" a project, these words being the terms used in the prohibition language referring to action on the project itself as opposed to the approval of the project. The EQB has always taken the position that starting or beginning a project was equivalent to taking any action covered by the term "construction," as defined at part 4410.0200, subp. 10. This amendment would make that interpretation explicit in the rule.

4410.3610 ALTERNATIVE URBAN AREAWIDE REVIEW PROCESS.

Subpart 1. **Applicability.** A local unit of government may use the procedures of this part instead of the procedures of parts 4410.1100 to 4410.1700 and 4410.2100 to 4410.3000 to review anticipated residential, commercial, warehousing, and light industrial development and associated infrastructure in a particular geographic area within its jurisdiction, if the local unit has adopted a comprehensive plan that includes at least the elements in items A to C.

~~For purposes of this part, "light industrial development, facility, or project" includes a development, facility, or~~

~~project engaged in the assembly of products from components that are not produced at the site, but does not include any development, facility, or project, including an assembly development, facility, or~~ [T]he procedures of this part may not be used to review any project meeting the requirements for a mandatory EAW in part 4410.4300, subparts 2 to 13, 15 to 17, 18, items B or C, or 24, or a mandatory EIS in part 4410.4400, subparts 2 to 10, 12, 13, or 25.

The first proposed amendment at this part is intended to clarify the types of "industrial" projects that cannot be reviewed through the AUAR process. In 1997 the EQB amended this subpart in an attempt to accomplish the same objective, however, the approach chosen at that time has not worked out well in practice. The approach used in 1997 was to define "light industrial," and then provide a list of industrial projects that were not "light industrial" based on references to various mandatory EAW and EIS categories. In practice this has caused confusion among RGUs and consultants, in part because the definition of "light industrial" used in the rule differs from the understanding of the term as used in other contexts. In hindsight, the EQB now sees that a more direct and less confusing approach would be the one proposed here: delete the definition of "light industrial" and simply provide the list of industrial projects types (based on EAW and EIS categories) that cannot be reviewed under the AUAR process.

The second amendment at this subpart is to eliminate one of the three subdivisions of subpart 18, concerning wastewater systems, from the list of excluded projects. Subpart 18 contains three items: item A deals with sewage collections systems; item B with sewage treatment systems; and item C with industrial wastewater treatment systems. The present rule excludes all three items from review through the AUAR process. However, EQB staff believes that including item A, sewage collections systems, was an inadvertent error. There is no good reason not to allow the review of a sewer system in an AUAR and good reasons to include such review. The AUAR process explicitly provides for the review of "associated infrastructure" along with residential, commercial, warehousing and light industrial development within a particular geographic area. Sewers are as much infrastructure as roads, watermains, energy distribution, and communications. In order to provide comprehensive review of anticipated development, the impacts of the planned sewage collection system ought to be included in the AUAR review. The amendment proposed would correct the error made in 1997 and allow for the review of sewer systems in an AUAR.

Subp. 2. **Relationship to specific development projects.** The prohibitions of part 4410.3100, subparts 1 to 3, apply to all projects for which review under this part substitutes for review under parts 4410.1100 to 4410.1700 or 4410.2100 to 4410.3000. These prohibitions terminate upon the adoption by the RGU of the environmental analysis document and plan for mitigation under subpart 5.

Upon completion of review under this part, residential, commercial, warehousing, and light industrial development

projects and associated infrastructure within the boundaries established under subpart 3 that are consistent with development assumptions established under subpart 3 are exempt from review under parts 4410.1100 to 4410.1700 and 4410.2100 to 4410.3000 as long as the approval and construction of the project complies with the conditions of the plan for mitigation developed under subpart 5.
If a specific residential, commercial, warehousing, light industrial, or associated infrastructure project, that is subject to an EAW or EIS, is proposed within the boundaries of an area for which an alternative review under this part is planned but has not yet been completed, the RGU may, at its discretion, review the specific project either through the alternative areawide review procedures or through the EAW or EIS procedures. If the project is reviewed through the alternative areawide review procedures, at least one set of development assumptions used in the process must be consistent with the proposed project, and the project must incorporate the applicable mitigation measures developed through the process.

After an order for review has been adopted under subpart 3, the RGU may not remove a project from the alternative urban areawide review process without providing opportunity for public comment about the proposed removal. The RGU must provide notice of the intended removal and the reasons for the removal in the same manner as for distribution of an EAW pursuant to part 4410.1500, except that notice is not required to be published in the EQB Monitor. Agencies and interested persons shall have 15 days from date of receipt of the notice to file comments about the proposed removal of the project from the review. If adverse comments are received, the RGU must consider the comments and determine whether to keep the project in the review or remove it from the review based on whether the project may have the potential for significant environmental effects, taking into account the interaction of the project with other anticipated development in the alternative urban areawide review area. If no adverse comments are received within 20 working days of giving notice, the project may be removed from the review without further action by the RGU.

If a specific project will be reviewed through the procedures of this part rather than through the EAW or EIS procedures and the project itself would otherwise require preparation of an EIS pursuant to part 4410.4400 or will comprise at least 50% of the area covered by the alternative urban areawide review, the RGU must follow the additional procedures of subpart 5a in the review.

~~The prohibitions of part 4410.3100, subparts 1 to 3, apply to all projects for which review under this part substitutes for review under parts 4410.1100 to 4410.1700 or 4410.2100 to 4410.3000. These prohibitions terminate upon the adoption by the RGU of the environmental analysis document and plan for mitigation under subpart 5.~~

The first change in this subpart is to move the existing final paragraph so that it will appear first in the subpart. This is because with the addition of new paragraphs, if it is left at the end, it may tend to be disregarded. There is no change in the text of this paragraph, only its location in the document.

The second change in this subpart is to add a paragraph establishing a procedure to be followed in the event that it is proposed to remove a project from the AUAR after the AUAR is ordered. Per the paragraph in the rules immediately above this added paragraph, if a specific project requiring review is known when the AUAR is ordered, the RGU may at its discretion roll the review into the AUAR or review the specific project through the EAW/EIS process. However, the rules do not address what happens if after the AUAR is begun, a proposer of a project of less than mandatory review size wishes to have his or her project area removed from the AUAR, presumably to proceed through the local review process on a faster track than if included in the AUAR. This situation has arisen on a number of occasions, and in such cases it has been the opinion of the EQB staff that nothing in the rules prevents the RGU from removing the project. However, such removal of projects from an AUAR has caused concern and opposition in some cases, resulting in a request from the DNR that the EQB address this issue in this rulemaking.

Originally, the option considered, as included with the Request for Comments, was to prevent the removal of a project from an AUAR once the process had begun. However, comments from a local unit of government official pointed out that adopting that policy would in effect create an absolute moratorium on any development within an AUAR area during the AUAR preparation period, and that it would be a strong disincentive for many units of government to use the AUAR process. Additionally, EQB staff were concerned that this policy seemed to create a presumption that every possible project within an AUAR area met the criteria for requiring an EAW without any factual record to support it. As a result of these issues, the EQB determined to proceed with a different rule amendment, based on the suggestion of the local official who commented on this amendment.

The amendment option proposed would require the RGU to provide notice to interested agencies and persons of the intended removal of the project from the AUAR. Notice would be given in the same manner as for the availability of an EAW, except no EQB Monitor notice would be needed. Leaving out the Monitor notice allows the entire process to be more expeditious since the week's lead time for the Monitor notice is avoided. The agencies and persons receiving notice could file adverse comments for a period of 15 working days from the date they received the notice. It is expected that adverse comments would be in the nature of reasons why either the project on its own would be worthy of review or why the cumulative impact of the project together with the impacts of surrounding development would be worthy of review. If no adverse comments were received within 20 working days of the distribution of the notice, the RGU could remove the project from the AUAR without needing to prepare any findings about the environmental implications of doing so. However, if adverse comments were

received, then the RGU would need to make and document its determination according to the same standard as used for ordering an EAW ("may have the potential for significant environmental effects") taking cumulative impacts with surrounding development into account.

This proposed amendment would establish a straightforward and relatively simple procedure to be followed if the RGU is requested to remove a project from the AUAR after the AUAR is begun. The procedure would require approximately 5 to 6 weeks to complete, depending upon whether adverse comments were received and the nature of those comments.

The third change in this subpart is to add a paragraph stating that when a specific project is included in the AUAR area and that project either would require a mandatory EIS on its own or it covers at least half of the AUAR's geographic area, special procedures, which are specified in the new subpart 5a, must be followed. This paragraph would merely call attention to the need for the special procedures, not specify any of them. It is appropriate to place such a paragraph in this subpart because the topic of the subpart is how the AUAR relates to specific development projects that may be within the area. The discussion of new subpart 5a explains the background and rationale of this amendment.

Subp. 5. **Procedures for review.** The procedures in items A to H must be used for review under this part.

A. The RGU shall prepare a draft environmental analysis document addressing each of the development scenarios selected under subpart 3~~2~~ using the standard content and format provided by the EQB under subpart 4. A draft version of the mitigation plan as described under item C must be included. The draft document must be distributed and noticed in accordance with part 4410.1500

The current rules do not require the plan for mitigation to be included until the final AUAR analysis document is prepared. Over the years, numerous reviewers have suggested that having a draft of the mitigation plan to review at the time of the draft analysis document would improve their review and help avoid misunderstandings about needed mitigation in the final document. The rule amendment here would provide that a draft version of the mitigation plan must be part of or accompany the draft analysis document when it is distributed for review. It is recognized that the draft mitigation plan may have elements that are incomplete or possibly even missing compared to what will be covered in the final mitigation plan.

B. Reviewers shall have 30 days from the date of notice of availability of the draft environmental analysis in the EQB Monitor to submit written comments to the RGU. Reviewers that are governmental units shall be granted a 15-day extension by the RGU upon a written request for good cause. A copy of the request must be sent to the EQB.

> Comments may ~~must~~ address the accuracy and completeness of the information provided in the draft analysis and draft mitigation plan, potential impacts that warrant further analysis, further information that may be required in order to secure permits for specific projects in the future, ~~and~~ mitigation measures or procedures necessary to prevent significant environmental impacts within the area when actual development occurs, and the need to analyze additional development scenarios.

Several wording revisions are proposed to the second paragraph of this item dealing with comments on a draft AUAR analysis document. The first is to replace the word "must" with the word "may" regarding what comments should address. "Must" is inappropriate considering the addition of the phrase at the end of the paragraph "and the need to analyze additional development scenarios." Only in some cases, where the requirements of subpart 5a apply, will it be relevant to comment on this topic. In addition, it is illogical to *require* an interested party to comment on all relevant topics; they should be free to comment on one or all topics as they see fit and have relevant comments.

The second revision is to add the phrase "and draft mitigation plan," since the revision at item A (see above) is requiring a draft mitigation plan to accompany the draft analysis document. The third revision is to add the phrase "and the need to analyze additional development scenarios." In those cases where the procedures in the new subpart 5a apply and a process is added to the start of the AUAR process to allow commenters to suggest that additional development scenarios meeting certain requirements be reviewed, it is appropriate to allow commenters to address the question of whether the development scenarios analyzed in the draft AUAR are sufficient in view of the input given.

> D. The RGU shall distribute the revised environmental analysis document and its plan for mitigation in the same manner as the draft document and also to any persons who commented on the draft document and to the EQB staff. State agencies and the Metropolitan Council of the Twin Cities have ten days from the date of receipt of the revised document to file an objection to the document with the RGU. A copy of any letter of objection must be filed with the EQB staff. An objection may be filed only if the agency filing the objection has evidence that the revised document contains inaccurate or incomplete information relevant to the identification and mitigation of potentially significant environmental impacts, that the review has not analyzed sufficient development scenarios in accordance with the requirements of this part, or that the proposed plan for mitigation will be inadequate to prevent potentially significant environmental impacts from occurring.

The first revision is to add the phrase "and its plan for mitigation" to the requirements for distribution of the finalized AUAR documents to clarify that the plan for mitigation is an essential part of the AUAR documents. The second revision adds a new justification for the filing of an objection by a state agency or the Metropolitan Council. The addition of

this additional justification for an objection is due to the new requirements in subpart 5a regarding identification of additional development scenarios as alternatives to the specific large project that has triggered the need for the added procedures of subpart 5a. It is reasonable to allow an agency to object on the grounds that its suggestions for additional scenarios have been ignored.

> E. Unless an objection is filed in accordance with item D, the RGU shall adopt the revised environmental analysis document and its~~the~~ plan for mitigation at its first regularly scheduled meeting held 15 or more days after the distribution of the revised document. The RGU shall submit evidence of the adoption of the document and plan for mitigation to the EQB staff and all agencies that have stated that they wish to be informed of any future projects within the area as part of their comments on the draft environmental analysis document. The EQB shall publish a notice of the adoption of the document~~s~~ and the completion of the review process in the EQB Monitor.
>
> Upon adoption of the environmental analysis document and its ~~the~~ plan for mitigation, residential, commercial, warehousing, and light industrial projects and associated infrastructure within the area that are consistent with the assumptions of the document and that comply with the plan for mitigation are exempt from review under parts 4410.1100 to 4410.1700 and 4410.2100 to 4410.2800.

Several minor changes are made here to help clarify that the plan for mitigation is part of the AUAR environmental analysis document, as mentioned above for item D. The changes would replace "the" with "its" in two places where the phrase "the environmental analysis document and [the] its plan for mitigation" is used and to make "documents" singular.

> F. If an objection is filed with the RGU in accordance with item D, within five days of receipt of the objection the RGU shall consult with the objecting agency about the issues raised in the objection and shall advise the EQB staff of its proposed response to the objection. At the request of the RGU, the objecting agency, the EQB staff, and any other affected agency shall meet with the RGU as soon as practicable to attempt to resolve the issues raised in the objection.
>
> Within 30 days after receipt of the objection the RGU shall submit a written response to the objecting agency and the EQB chair. The response shall address each of the issues raised in the objection. The RGU may address an issue by either revising the environmental analysis document or plan for mitigation, or by refuting the comment. ~~explaining why it believes that the issue is not relevant to the identification and mitigation of potentially significant environmental impacts~~.

The wording change here is proposed in order to be less prescriptive of the responses an RGU might give to issues raised in an objection. Currently, the rule provides that if the RGU chooses not to revise the AUAR documents in response to an issue, its other available recourse is to explain why it does not believe that the issue is relevant to "the identification and mitigation of potentially significant environmental impacts." In hindsight, it now appears that this language is not broad enough to cover all possible reasons why an RGU might reject making a revision in the AUAR. Furthermore, in hindsight, this prescriptive language now seems presumptuous on the part of the EQB in telling an RGU how it should respond. The EQB proposes to replace the current language with the simpler but broader language "refuting the comment."

H. If the matter is referred to the EQB under item G, the EQB shall determine whether the environmental analysis document and itsplan for mitigation isare adequate, conditionally adequate, or inadequate. If the EQB finds the documents conditionally adequate or inadequate, the EQB shall specify the revisions necessary for adequacy. The EQB shall only find the documents inadequate if it determines that itthey contains inaccurate or incomplete information necessary to the identification and mitigation of potentially significant environmental impacts, that the review has not analyzed sufficient development scenarios in accordance with the requirements of this part, or that the proposed plan for mitigation will be inadequate to prevent the occurrence of potentially significant environmental impacts.

If the EQB finds the documents adequate or conditionally adequate, the RGU shall adopt the documents under item E. If the documents iswere found conditionally adequate by the EQB, the RGU shall first revise the documents as directed by the EQB. If the EQB finds the documents inadequate, the RGU has 30 days to revise the documents and circulate itthem for review in accordance with items D to H.

The revision to item H parallels the revision to item D that makes failure of the AUAR to analyze sufficient scenarios a basis for an objection. If an objection can be filed on that basis, the EQB must be able to uphold the objection on the same basis. Also, several minor changes are made to singularize "documents" and to use the phrase "its plan for mitigation" to clarify that the plan for mitigation is to be considered part of the AUAR environmental analysis document.

Subp. 5a. **Additional procedures required when certain specific projects are reviewed.** The procedures of this subpart must be followed in addition to those of subpart 5 if a specific project will be reviewed through the procedures of this part rather than through the EAW or EIS procedures and the project itself would otherwise require preparation of an EIS pursuant to part 4410.4400 or will comprise at least 50% of the ground area covered by the alternative urban areawide review.

A. Prior to the approval of the order for review pursuant to subpart 3, the RGU must conduct a public comment process to assist it in identifying appropriate development scenarios and relevant issues to be analyzed in the review. The RGU shall prepare a draft order for review, and distribute and provide notice of its availability in the same manner as for an EAW pursuant to part 4410.1500. The draft order for review must include the information specified in subpart 3.

B. Government units and interested persons shall participate in the public comment process in accordance with part 4410.1600, except that the nature of the comments should be to suggest additional development scenarios to be addressed in the review and relevant issues to be analyzed. Comments may suggest additional scenarios, including development at sites outside of the proposed alternative urban areawide review boundary, if they would likely minimize or avoid potentially significant environmental impacts that may result from development of the scenarios based on or incorporating the plans for the specific project or projects that require use of the procedures of this subpart. The comments must provide reasons why a suggested additional scenario is potentially environmentally superior.

C. The RGU must consider all timely and substantive comments received when finalizing the order for review. The RGU shall apply the criteria for excluding an alternative from analysis found at part 4410.2300, item G, in determining if a suggested alternative scenario should be included or excluded. If the RGU excludes a suggested additional development scenario it must document its reasons for excluding the scenario in a written record of decision.

D. The RGU shall adopt the final order for review within 15 days of the end of the comment period. A copy of the order and the RGU's record of decision for its adoption must be sent within 10 days of the decision to the EQB and to anyone who submitted timely and substantive comments.

This entire subpart is new. It specifies the additional procedures of review that would be required whenever the AUAR would include a specific development project which either requires a mandatory EIS on its own or covers at least 50% of the geographic (or ground) area within the AUAR boundaries. A diagram in included in the appendices showing how the proposed additional procedures fit into the steps of the AUAR process and how the amended process compares to the steps of the EIS process.

The background to this amendment is that current rule language authorizes an RGU to use the AUAR process for reviewing individual projects (part 4410.3610, subpart 2, paragraph 2) although it was developed primarily to enable the review of an entire geographic area without reference to plans for specific projects. Critics have questioned whether the use of the AUAR process for the review of individual projects reduces the quality of the review compared to what would be achieved if the project was reviewed through the regular EAW/EIS process, and suggested that the rules be amended to prohibit review of a single project that would otherwise require an EIS. That proposal was included with the Request for Comments. Several commenters raised objections to

this proposal. One was that the EQB could create a disincentive for the master planning of the entirety of a property owner's holdings if doing a master plan would make the whole property a "single project" for environmental review purposes. Another was that if this prohibition was established, proposers and RGUs would likely find ways around it anyway, such as withholding formal project applications until after the AUAR was completed or adding "extra" land to the AUAR area so that it was no longer reviewing a single project.

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.

The additional procedures that are proposed to be required are specified in items A to D of subpart 5a. The procedures are modeled after the procedures for EIS scoping, as specified at part 4410.2100. First, (item A) the RGU would provide public notice of its intent to prepare an AUAR covering a project for which the special procedures are required. Notice would be given as for an EAW, which is the standard method of providing notification under the environmental review process. The notice would be based on a draft version of the order for review required under subpart 3; the draft order would indicate the boundaries of the AUAR and the development scenarios proposed to be reviewed (including one or more scenarios incorporating the specific project in question). Item B specifies that in response to the notice interested persons and agencies may comment, following the same process and timeline (30 calendar days) as for commenting on an EAW, about whether additional development scenarios ought to be included, on the basis that such scenarios would likely be less environmentally harmful than the scenarios based on the specific project.

Item C specifies the standard for the RGU's decision on whether or not to add any suggested additional development scenarios. The proposed standard is the same set of criteria that the rules already specify for decisions on which alternatives to include in an EIS analysis, as found at part 4410.2300, item G. Using the same criteria will ensure that the same standards for what alternatives need to be analyzed for a given project apply whether that project is reviewed through an EIS or an AUAR.

Item D sets a deadline for the RGU to make its decision about adding additional development scenarios of 15 working days. This is the same deadline as for an RGU's

scoping decision following an EIS scoping process. Item D would also provide that the RGU distribute its finalized order for review and its rationale regarding development scenarios excluded within 10 working days of its decision.

The proposed amendments in items B to D would add about 6-8 weeks (depending on how soon after the comment period the RGU was ready to make its decision) of additional time to the formal steps of the process if the AUAR included a specific project that triggered the need for the additional review. It should be noted, however, that the additional time at this point in the process may be offset by savings in time at later stages due to avoidance of controversy over the issue of whether other alternatives should have been addressed and whatever steps are needed to resolve that controversy if it arises.

4410.3800 GENERIC EIS.

Subp. 5. **Criteria.** In determining the need for a generic EIS, the EQB shall consider:

A. if the review of a type of action can be better accomplished by a generic EIS than by project specific review;

B. if the possible effects on the human environment from a type of action are highly uncertain or involve unique or unknown risks;

C. if a generic EIS can be used for tiering in a subsequent project specific EIS;

D. the amount of basic research needed to understand the impacts of such projects;

E. the degree to which decision makers or the public have a need to be informed of the potential impacts of such projects;

F. the degree to which information to be presented in the generic EIS is needed for governmental or public planning;

G. the potential for significant environmental effects as a result of the cumulative impacts of such projects;

H. the regional and statewide significance of the impacts and the degree to which they can be addressed on a project-by-project basis; ~~and~~

I. the degree to which governmental policies affect the number or location of such projects or the potential for significant environmental effects;

J. the degree to which the cost of basic information ought to be borne by the public rather than individual project proposers;

K. the need to explore issues raised by a type of project that go beyond the scope of review of individual projects; and

L. the need to understand the long term past, present and future effects of a type of action upon the economy, environment and way of life of the residents of the state.

This amendment would add three additional criteria to the list of criteria that the EQB may consider when determining if a Generic EIS should be ordered. These additional factors came to the attention of the EQB during consideration of the Generic EIS on Animal Agriculture. Proposed item L is language used by the Legislature in the bills authorizing funding for the Animal Agriculture GEIS and also in the bill authorizing funding for the scoping of a GEIS on Urban Development (no funding was ever authorized for the preparation of the that GEIS).

Subp. 8. **Relationship to project-specific review.** Preparation of a generic EIS does not exempt specific activities from project-specific environmental review. ~~Project-specific environmental review shall use information in the generic EIS by tiering and shall reflect the recommendations contained in the generic EIS if the EQB determines that the generic EIS remains adequate at the time the specific project is subject to review.~~

The amendment proposed at this subpart would delete entirely the second sentence of the subpart This sentence concerns the use of GEIS material in the review of a specific project through an EAW or EIS, and the role of the EQB in determining if GEIS information is still suitable for use in project specific review. The rulemaking records from the 1982 rulemaking when this provision was adopted indicate that the original motivation for this provision was concern that RGUs would ignore GEIS information and recommendations and instead require project proposers to restudy issues already covered by a GEIS in review of specific projects. Thus the provision states that RGUs "shall use information" and "shall reflect the recommendations" contained in the GEIS – the intent was to force RGUs to use the GEIS information to minimize costs to project proposers. In practice, the concern that RGUs will ignore GEIS material has never become an issue. EQB has never heard of a complaint that an RGU tried to avoid using information or recommendations available in a GEIS.

On the other hand, there have been significant public concerns over RGUs using information from a GEIS instead of gathering new information. There have been two lawsuits over the alleged improper reliance on GEIS information rather than new data, both of which reached the Court of Appeals, and one of which reached the Minnesota Supreme Court. This issue relates to the qualifier about the use of GEIS information contained in the second clause of the sentence in question: "…if the EQB determines that the GEIS remains adequate at the time the specific project is subject to review."

Although this provision was adopted into the rules in 1982 it was never applied until 2000. When the provision about the EQB determining the continued adequacy of a GEIS was first applied in 2000, its use revealed a number of unexpected problems that apparently had not been foreseen in 1982. First of all, the provision seems to require an EQB determination prior to *each* time a GEIS is to be used. This could be an administrative nightmare for the EQB if there were many projects for which information could be used from a certain GEIS. (To date the EQB has been fortunate in this regard because for two of the three GEISs prepared (Forestry GEIS and Red River Basin Water Resources Projects GEIS) there have been very few specific projects of the type covered by the GEISs proposed, whereas for the Animal Agriculture GEIS, although there are many animal feedlot projects reviewed, the GEIS information is not suited to being tiered into project-specific review because it deals with issues at a broader, non-project specific level.)

The second problem discovered with this provision is that it provides no guidance about how the EQB should determine if the GEIS recommendations remain adequate, except that it seems to require EQB to make the determination with respect to the *GEIS as a whole* and without regard to how an RGU may intend to use it. After having dealt with this rule twice (2000 and 2005), EQB believes that in this respect the provision is logically flawed. The first logical flaw is that the provision is contrary to the obvious fact that information becomes dated at variable rates. Some information in a GEIS may remain as up-to-date and accurate as the day it was written while other information may be totally superseded by new information. Therefore, the very concept of whether a GEIS is adequate *as a whole* makes little sense. The second logical flaw is related: if the information ages at different rates, the logical course of action for EQB review would be to inquire as to what GEIS information as RGU intended to use and in what way. Then the EQB could make an informed judgment about whether the specific use of that specific information was appropriate. However, that is not what the rule seems to require. The rule says the EQB should vote the adequacy of the entire GEIS up or down regardless of what use of it the RGU intends to make, and that is the course of action that the EQB has taken in the two specific cases brought before it.

In the Request for Comments documents the EQB specifically asked commenters to provide input on how the flaws in this provision could be resolved. The document stated: "The EQB is interested in receiving comments on how the identified problems with this subpart could be resolved." Unfortunately, no commenters responded to this request.

Despite the lack of suggestions about how it would be done, the EQB could attempt to revise the language of this rule to avoid its logical pitfalls and to avoid undue administrative problems in its application. However, EQB is pursuing a different solution, that of simply deleting the sentence altogether. The reason for this choice is the realization that the sentence is largely redundant when compared to other existing provisions of the rules. The EQB staff came to realize the redundancy only after the EQB made its second determination of a GEIS's ongoing adequacy in the spring of 2005. The EQB believes that the following provisions already in the rules guide the proper use of GEIS information in project-specific environmental review:

(1) An RGU is always required to use its best judgment about the accuracy and completeness of information in environmental review documents. Rule provisions relating to this are found at: 4410.0400, subpart 2; 4410.1400; 4410.1600 in conjunction with 4410.1700, subpart 4; 4410.2500; 4410.2700, subpart 1; 4410.2800, subpart 4; & 4410.3000, subpart 3. The requirements apply equally to the use of GEIS information as to the use of information from any other source. An RGU does not need the EQB to judge the accuracy of other information it uses; why does the EQB need to determine the validity of GEIS information before it can be used? If an RGU wishes to consult the EQB regarding the accuracy or currency of certain GEIS information it can do so informally. Any person aggrieved by how GEIS or any other information is relied on in environmental review has the right to challenge the RGU's decisions in district court.

(2) In cases of major projects where an RGU is using GEIS information in preparing an EIS, issues of misuse of the GEIS information can be brought before the EQB under provisions of part 4410.2800, which provides for the EQB to make the determination of adequacy on the final EIS.

(3) When an RGU uses GEIS information in preparing an EAW for a specific project, one of the criteria that must be addressed in making the EIS need decision, part 4410.1700, subpart 7, item D, provides that the RGU must consider whether the impacts "can be anticipated and controlled as a result of other available environmental studies…including other EISs." This allows the RGU to consider GEIS information in making the determination of EIS need, and in some cases to avoid the need to do further environmental analysis because of the GEIS information. If anyone believes the RGU misuses the GEIS information to avoid an EIS, the decision is appealable in district court.

In the Request for Comments, the EQB had proposed another amendment to this subpart, which would have added an additional modifying clause to the first sentence. This modifying clause would have allowed the EQB to specify, at the time it ordered a GEIS, that the GEIS would be a substitute for certain project-specific reviews, provided that certain conditions were met. This idea was taken from a 2004 report on streamlining environmental review for the forest products industry. However, the EQB has abandoned that idea because of the following provisions already in the rules. The GEIS rules at part 4410.3800, subpart 7, item D, covering GEIS content, provide for the creation through a GEIS of an 'alternative review' procedure for certain types of projects which the EQB could approve as a substitute for the regular EAW/EIS process, provided that the requirements for an 'alternative review' in part 4410.3600 are met. This allows for a customized, streamlined review process to be developed in conjunction with preparation of a GEIS. Because of this provision, the EQB now feels that the originally proposed addition to the first sentence of 4410.3800, subpart 8 is not needed. Furthermore, in hindsight it appears that the idea of designating how a GEIS would substitute for project specific review before the GEIS analysis had been undertaken would not be viable. There are too many unknowns and uncertainties in GEIS preparation to allow for an accurate forecast in advance of the level of detail of information that can be obtained.

4410.4300 MANDATORY EAW CATEGORIES

Subp. 15. **Air pollution.** ~~Items A and B designate the RGU for the type of project listed:~~

~~A.~~ For construction of a stationary source facility that generates 250~~100~~ tons or more per year or modification of a stationary source facility that increases generation by 250~~100~~ tons or more per year of any single air pollutant after installation of air pollution control equipment, the PCA shall be the RGU.

~~B. For construction of a new parking facility for 2,000 or more vehicles, the PCA shall be the RGU, except that this category does not apply to any parking facility which is part of a project reviewed pursuant to part 4410.4300, subpart 14, 19, 32, or 34, or part 4410.4400, subpart 11, 14, 21, or 22.~~

Two changes are proposed in this subpart. In item A, the threshold for air emission sources is proposed to be changed from 100 tons per year to 250 tons per year. Item B, relating to parking facilities, is proposed to be deleted entirely.

The threshold for air emission facilities in item A was changed to 100 tons per year in 1982. Since then, item A has been changed only to add that the 100 tons per year threshold applies to modifications of existing facilities as well as new facilities. The MPCA has had 23 years of experience working with this threshold. A threshold change to 250 tons per year is based on recommendations of the MPCA staff. This staff is responsible for permitting facilities that emit air pollutants and environmental review of other projects that are sources of air emissions. A threshold of 250 tons would coincide with the federal threshold for the Prevention of Significant Deterioration permitting review.

There are programs and permits in effect now that were not in effect at the time the current threshold of 100 tons was set. The state of Minnesota now has the Federal Clean Air Act Title V program (sometimes called Part 70 permit). In Minnesota, this is a combined construction and operating permit. A facility needs a Part 70 permit if its potential to emit air pollutants meets or exceeds specific thresholds, which are:

- 100 tons per year of any criteria pollutant (sulfur dioxide, nitrogen oxides, particulate matter less than 10 microns in diameter; carbon monoxide, and lead);
- 10 tons per year or more of any single hazardous air pollutant (about 185); or
- 25 tons per year or more of any combination of hazardous air pollutants.

There are public notice requirements for Part 70 permits as well as EPA review. In addition, facilities emitting over 100 tons per year of one or more air pollutants often have to conduct air dispersion modeling, undergo an air emissions risk analysis, and for some modifications to existing facilities, must go through a Prevention of Significant Deterioration review, which includes installing best available control technology. The MPCA staff believes that the air emissions permitting program addresses all major and

minor concerns regarding air pollutants from new or expanding facilities, particularly those below 250 tons per year of a single pollutant.

Certain air emission facilities of concern to the MPCA and the general public are captured in other mandatory environmental review categories. These are:

- Electric Generating Facilities (25 Megawatts and over) – subpart 3;
- Petroleum Refineries - subpart 4;
- Fuel Conversion Facilities (mainly ethanol plants) – subpart 5;
- Metallic Mineral Mining and Processing – subpart 11;
- Paper or Pulp Processing Mills – subpart 13; and
- Solid Waste (Incineration) – subpart 17D.

Other potential facilities of concern such as biomass to energy plants under 25 megawatts, soybean oil, and coatings (printing and painting) would most likely be over a 250 ton per year threshold.

Environmental review serves the purpose of helping the public, proposer, and government bodies to understand the environmental impact of a proposed project. For that reason, an EAW for the Air Pollution category not only identifies the effects of air pollutants, it also addresses water and waste related issues , as well as issues such as transportation patterns, truck traffic, archeological significance, and wildlife impacts. Between 2000 to 2003, 14 EAWs were completed under the Air Pollution category. Based on a review of these 14 EAWs, it is reasonable to conclude that the amount of air emissions from these projects has little, or no, relationship to the impact of the other environmental issues listed above. Furthermore, of the few public comments that came in on these projects, almost all were about air emissions or issues related to air that are addressed in the air emissions permit. Therefore, the environmental review threshold provides a rather "hit-or-miss" approach for examining other issues, and does not justify setting the threshold at 100 tons per year.

These rule revisions will not change the ability for the public to petition the EQB for a proposed project to complete an EAW that is less that 250 tons per year. There are no exemptions for environmental review given to the Air Pollution Category.

Because of the extensiveness of air emission permit programs at the MPCA, other environmental review categories covering air emissions, the weak relationship between air emissions and other issues, and the ability of the public to petition for an EAW, it is reasonable to increase the air pollution category threshold from 100 to 250 tons.

It is also proposed to delete item B which requires preparation of an EAW for construction of certain parking facilities. One of the purposes of environmental review is to inform the governmental agency that has a permit(s) to issue for a project. The Minnesota legislature repealed the indirect source permitting ("ISP") program in 2001. Therefore, the MPCA no longer issues indirect sources permits. In addition, the MPCA has not prepared an EAW on a parking facility in at least seven years.

Typically, large parking facilities are associated with other projects such as office complexes or commercial sites such as the Mall of America. Parking facilities associated with commercial projects that require environmental review are excluded from item B because the traffic and parking issues are covered in the environmental review document for the whole project.

And last, one of the reasons for adding this category was concern about stormwater runoff from parking facilities. The 1982 SONAR estimates that 1,000 vehicle spaces corresponded to seven acres. Currently in Minnesota, proposers of projects must obtain a stormwater construction permit if they will disturb one acre or more.

Subp. 18. **Wastewater systems.** Items A to C designate the RGU for the type of project listed:

A. For expansion, modification, or replacement of a municipal sewage collection system resulting in an increase in design average daily flow of any part of that system by 1,000,000 gallons per day or more~~, the PCA shall be the RGU.~~ if the discharge is to a wastewater treatment facility with a capacity less than 20 million gallons per day, or for expansion, modification, or replacement of a municipal sewage collection system resulting in an increase in design average daily flow of any part of that system by 2,000,000 gallons per day or more if the discharge is to a wastewater treatment facility with the capacity of 20 million gallons or greater, the PCA shall be the RGU.

B. For expansion or reconstruction of an existing municipal or domestic wastewater treatment facility which results in an increase by 50 percent or more and by at least 200,000 ~~50,000~~ gallons per day of its average wet weather design flow capacity, or construction of a new municipal or domestic wastewater treatment facility with an average wet weather design flow capacity of 200,000 ~~50,000~~ gallons per day or more, the PCA shall be the RGU.

C. For expansion or reconstruction of an existing industrial process wastewater treatment facility which increases its design flow capacity by 50 percent or more and by at least 200,000 gallons per day or more, or construction of a new industrial process wastewater treatment facility with a design flow capacity of 200,000 gallons per day or more, 5,000,000 gallons per month or more, or 20,000,000 gallons per year or more, the PCA shall be the RGU. This category does not apply to industrial process wastewater treatment facilities that discharge to a publicly-owned treatment works or to a tailings basin reviewed pursuant to subpart 11, item B.

This category has a history of revisions. It has evolved as MPCA staff have worked with the thresholds and within other wastewater programs. The wastewater systems category first appeared in rule in 1982. The threshold for new wastewater treatment facilities

(WWTF) was set at 30,000 gallons per day (gpd) or more, or at a level about equivalent to serving 300 people. Expansions of WWTFs were set at 50,000 gpd or more, or roughly the amount to serve 500 people. For expansions, an increase of capacity of 50% or more was coupled with the 50,000 gpd threshold. The same thresholds held true for new sewer systems or sewer expansions.

In 1986, the rule was changed to reflect the MPCA's experience with the new category thresholds. For sewer systems, the thresholds were changed to reflect the size of cities. This ranged from 500,000 gpd in first and second class cities to 50,000 gpd in an unincorporated area. If the city was served by the Metropolitan Council (previously Metropolitan Waste Control Commission) or the Western Lake Superior Sanitary Sewer District (WLSSD), then the threshold was also 500,000 gpd. In addition, the 50,000 gpd increase was deleted for expansions, but the 50% increase was retained. New WWTF kept the 30,000 gpd level. In 1988, language was clarified for this category, but also the threshold for new WWTF was changed to 50,000 gpd to take into account infiltrated water in "average wet weather flow."

Lastly, in 1997, the threshold for sewer extensions was raised to 1,000,000 gallons per day for cities of any size. The major rationale was that the extensions MPCA was seeing were minor expansions of much larger systems and the increase in water flow occurred gradually over a period of many years. The 50,000 gpd threshold for WWTF expansions was reinstated because using 50% could result in completing an EAW on a minor expansion to a small treatment plant. In addition, a new threshold was included for discharges of major industrial projects. That level was set at 200,000 gpd.

A change in threshold for sewer extensions is proposed for this rulemaking. The proposed change is to increase the threshold to 2,000,000 gpd for systems that discharge into a wastewater treatment facility with the capacity of twenty million gallons per day (MGD) or greater. Currently, this would affect sewer extensions discharging to the Metropolitan Treatment Facility in St. Paul (251 MGD) the Western Lake Superior Sanitary Sewer District (WLSSD) in Duluth (56.5 MGD), Seneca in Eagan (34 MGD), and Blue Lake in Shakopee (32 MGD). The Metropolitan Treatment Facility, Seneca, and Blue Lake are operated by the Metropolitan Council Environmental Services (MCES) Division.

Between the years 2000 and 2003, the MPCA completed 11 EAWs for sewer extensions. Two of the 11 projects would have been below the new 2,000,000 gpd threshold for discharge to a WWTF with the capacity of 20 million gallons or greater. (EAWs were prepared on two sewers extensions less than 1,000,000 gpd as a result of petitions.) The change is warranted because sewer extensions within the Metropolitan Area are very routine, and the issues associated with them are typically related to enabling residential development. Municipalities in the Metropolitan Area are required to prepare Comprehensive Plans, which enable these municipalities to anticipate development. Moreover, a 1,000,000 gpd sewer extension represents no significant percentage of daily flow in treatment plants over 20 million gallons. The facilities in Minnesota are well above that - between 251 and 32 million gallons per day of average wet weather flow.

Smaller communities frequently may not have comprehensive plans, and a 1,000,000 gpd sewer extension represents a much larger percentage of average wet weather flow in a WWTF of less than 20 million gallons per day. In fact, all but ten facilities in Minnesota have capacities below 10 million gallons per day.

A change in the threshold for new and expanding WWTF is also proposed in this rulemaking. A threshold change to 200,000 gpd (keeping the 50% for expansions) is recommended by MPCA staff. The MPCA has lived with the current thresholds for eight years and is recommending the change based on its experience. This staff is responsible for reviewing water quality standards, reviewing facility plans, and permitting WWTFs. This threshold would align with the industrial process threshold of 200,000 gpd and also with the threshold to complete a nondegradation review.

Wastewater Systems projects are typically needed by municipalities in order to continue to grow or to upgrade outdated or failing treatment processes. Even without environmental review, there are several programs and permits that review WWTF projects (water quality standards, facility plans, wastewater NPDES) and some do require public notice. MPCA staff believes these are sufficient for proposed projects under the 200,000 gpd threshold.

In reviewing data from years 2000-2003, 15 new WWTFs and 27 expansion projects completed an EAW for a total of 42 EAWs; 21 of those projects were under 200,000 gpd. The majority of Wastewater Systems projects, and particularly those under 200,000 gpd, tend to be noncontroversial. Few, if any, citizen comments are submitted on these projects. Only two of the 21 projects mentioned above had requests for an Environmental Impact Statement. The petition process (Minn R. 4410.1100) should pick up any projects under the suggested new thresholds that require further analysis.

If the State Revolving Fund (SRF) provides loans for the planning, design, and construction of a WWTF, the proposer must complete an Environmental Information Worksheet (EIW). EIWs are now used for proposed projects that are under 50,000 gpd. The EAW is used in place of the EIWs for those projects receiving SRF loans that are above 50,000 gpd. Currently, the EIWs ask the same questions as the EAWs, but the answers are less detailed. This is because the facilities are small. Since EIWs will now be used for facilities 50,000 and 200,000 gpd, it is assumed that more detail will be incorporated.

Subp. 19. **Residential development.** An EAW is required for residential development if the total number of units that may ultimately be developed on all contiguous land owned or under an option to purchase by the proposer, and that is zoned for residential development or is identified for residential development by an applicable comprehensive plan or annexation agreement, equals or exceeds a threshold of this subpart. In counting the total number of ultimate units, the RGU shall include the number of units in any plans of the proposer; for land for which the proposer has

not yet prepared plans, the RGU shall use as the number of units the product of the number of acres multiplied by the maximum number of units per acre allowable under the applicable zoning ordinance or, if the maximum number of units allowable per acre is not specified in an applicable zoning ordinance, by the overall average number of units per acre indicated in the plans of the proposer for those lands for which plans exist. If the total project requires review but future phases are uncertain, the RGU may review the ultimate project sequentially in accordance with part 4410.1000, subpart 4.

It is proposed to add the phrase “or annexation agreement” in the first sentence so that land identified as intended to be developed as residential by an annexation agreement will be treated in the same manner as such land identified by a zoning ordinance or a comprehensive plan. Currently, the rules only cover the cases where land is identified as future residential in zoning or comprehensive plan documents. Experience shows that in many cases where land is urbanizing and being incorporated into a municipality from a township, it is the annexation agreement that first identifies that the land is intended to be developed as residential while it may take time for the plans and zoning to catch up. Thus, annexation agreements should be added to the list of governmental documents that indicate that land will be developed in the future as residential.

Subp. 27. **Wetlands and public ~~protected~~ waters.** Items A and B designate the RGU for the type of project listed:

A. For projects that will change or diminish the course, current, or cross-section of one acre or more of any public ~~protected~~ water or public waters ~~protected~~ wetland except for those to be drained without a permit pursuant to Minnesota Statutes, chapter 103G, the local government unit shall be the RGU.

B. For projects that will change or diminish the course, current, or cross-section of 40 percent or more or five or more acres of types 3 through 8 wetland of 2.5 acres or more, excluding public waters ~~protected~~ wetlands, if any part of the wetland is within a shoreland area, delineated flood plain, a federally designated wild and scenic rivers district, the Minnesota River Project Riverbend area, or the Mississippi headwaters area, the local government unit shall be the RGU.

The Legislature amended State water laws to replace the term “protected waters” with "public waters" and the term “protected wetland” with "public waters wetland." This amendment would update these rules to use the correct terms.

Subp. 31. **Historical places.** For the destruction, in whole or part, or the moving of a property that is listed on the National Register of Historic Places or State Register of Historic Places, the permitting state agency or

local unit of government shall be the RGU, except this does not apply to projects reviewed under section 106 of the National Historic Preservation Act of 1966, United States Code, title 16, section 470, ~~or~~ the federal policy on lands, wildlife and waterfowl refuges, and historic sites pursuant to United States Code, title 49, section 303, or by a local heritage preservation commission certified by the State Historic Preservation Office pursuant to 36 CFR 61.5 and 61.7. This subpart does not apply to a property located within a designated historic district if either the property is listed as "non-contributing" in the official district designation or if the State Historic Preservation Office issues a determination that the property is non-contributing.

The revisions to this category were suggested in discussions about the present category thresholds with the staff of the Minnesota Historical Society's State Historic Preservation Office (SHPO). The revisions would add two additional reasons or situations where no EAW would be required prior to the destruction of a property on the National or State registers of Historic Places.

The present rules recognize two situations as not requiring preparation of the EAW. These both involve review of historic values through other established federal processes. It is now proposed to add another such situation, namely where the destruction will be reviewed by a certified local heritage preservation commission. The State Historic Preservation Office believes that review by such a commission gives adequate oversight over historic places without preparation of an EAW. To be certified, a local heritage preservation commission applies to SHPO, which reviews the application and local ordinance for consistency with nationwide standards established in the Code of Federal Regulations at the cited locations.

The second situation proposed to be added is not a substitute form of review but rather has to do with the nature of the property proposed for destruction. In some cases, the historic place included on the National or State Register is an entire district rather than a single structure. In such districts, not all the properties actually have or contribute to the historic value of the district. A "non-contributing property" is a property located within the boundaries of a designated historic district but which itself is not historic and does not contribute to the historical attributes of the district as a whole. Often, non-contributing properties are buildings constructed many years after the period during which the historic buildings of the district were built. Sometimes these non-contributing properties are identified as being non-contributing in the historic place designation documents, but not always. It is proposed that the destruction of non-contributing properties not require preparation of an EAW if either they are identified as being non-contributing in the designation documents or if the State Historic Preservation Office reviews the matter and issues a determination that the property is non-contributing.

4410.4400 MANDATORY EIS CATEGORIES

Subp. 5. **Fuel conversion facilities.** Items A and B designate the RGU for the type of project listed:

B. For construction or expansion of a facility for the production of alcohol fuels which would have or would increase its capacity by 50,000,000 or more gallons per year of alcohol produced if the facility will be in the seven-county Twin Cities metropolitan area or by 125,000,000 or more gallons per year of alcohol produced if the facility will be outside the seven-county Twin Cities metropolitan area, the PCA shall be the RGU.

Item B pertaining to the EIS thresholds for ethanol plants is proposed to be amended to make the rule consistent with a revision made by the 2004 Legislature. The Legislative changes raised the threshold to 125,000,000 gallons per year for facilities outside of the seven-county twin Cities metro area.

Subp. 14. **Residential development.** An EIS is required for residential development if the total number of units that the proposer may ultimately develop on all contiguous land owned by the proposer or for which the proposer has an option to urchase, and that is zoned for residential development or is identified for residential development by an applicable comprehensive plan or annexation agreement, equals or exceeds a threshold of this subpart. In counting the total number of ultimate units, the RGU shall include the number of units in any plans of the proposer; for land for which the proposer has not yet prepared plans, the RGU shall use as the number of units the product of the number of acres multiplied by the maximum number of units per acre allowable under the applicable zoning ordinance, or if the maximum number of units allowable per acre is not specified in an applicable zoning ordinance, by the overall average number of units per acre indicated in the plans of the proposer for those lands for which plans exist. If the total project requires review but future phases are uncertain, the RGU may review the ultimate project sequentially in accordance with part 4410.2000, subpart 4.

The amendment here is analogous to that at part 4410.4300, subpart 19.

Subp. 20. **Wetlands and public ~~protected~~ waters.** For projects that will eliminate a public ~~protected~~ water or public waters protected wetland, the local government unit shall be the RGU.

The amendments here are analogous to those at part 4410.4300, subpart 27.

4410.4600 EXEMPTIONS.

Subp. 2. **Standard exemptions.** The following projects are

standard exemptions:

A. projects for which no governmental decisions are required;

B. projects for which all governmental decisions have been made. However, this exemption does not in any way alter the prohibitions on final governmental decisions to approve a project under part 4410.3100;

C. projects for which, and so long as, a governmental unit has denied a required governmental approval;

D. projects for which a substantial portion of the project has been completed and an EIS would not influence remaining ~~implementation or~~ construction; and

E. projects for which environmental review has already been completed ~~initiated under the prior rules~~ or for which environmental review is being conducted pursuant to part 4410.3600 or 4410.3700.

Amendments are proposed to items D and E of this subpart to clarify and update their meanings. In item D, the current wording states that a project is not exempted until construction is substantially completed and construction and "implementation" could no longer be influenced by EIS information. The rule does not specify what the term "implementation" means as used here, and it has been interpreted to mean the *operation* of a project *after construction*. To remove any implication that the post-permitting, post-construction operation of a project is subject to environmental review, it is proposed to delete the words "implementation or."

Item E is proposed to be amended because it still refers to projects "for which environmental review has already been initiated under the prior rules" (meaning the pre-1982 rule version of the rules). It is time to remove that reference. At the same time, amendment of this item creates the opportunity to correct the potential problem that the current rules nowhere actually state explicitly that once review has been completed, the project is not subject to review again (unless the conditions for an EIS supplement or a new EAW are met). Both of these problems could be resolved at the same time by rewording this item as proposed.

Subp. 19. **Animal feedlots.** The activities in items A to D~~C~~ are exempt.

A. Construction of an animal feedlot facility with a capacity of less than 1,000 animal units, or the expansion of an existing animal feedlot facility to a total cumulative capacity of less than 1,000 animal units, if all the following apply:

(1) the feedlot is not in an environmentally sensitive location as listed in part 4410.4300, subpart 29, item B;

(2) the application for the animal feedlot permit includes a written commitment by the proposer to design,

construct, and operate the facility in full compliance with PCA feedlot rules; and

3) the county board holds a public meeting for citizen input at least ten business days prior to the PCA or county issuing a feedlot permit for the facility, unless another public meeting for citizen input has been held with regard to the feedlot facility to be permitted.

BA. The construction of an animal feedlot facility of less than 300 animal units or the expansion of an existing facility by less than 100 animal units, no part of either of which is located within a shoreland area; delineated flood plain; state or federally designated wild and scenic rivers district; the Minnesota River Project Riverbend area; the Mississippi headwaters area; an area within a drinking water supply management area designated under chapter 4720 where the aquifer is identified in the wellhead protection plan as vulnerable to contamination; or 1,000 feet of a known sinkhole, cave, resurgent spring, disappearing spring, Karst window, blind valley, or dry valley.

CB. The construction or expansion of an animal feedlot facility with a resulting capacity of less than 50 animal units regardless of location.

D. The modification without expansion of capacity of any feedlot of no more than 300 animal units if the modification is necessary to secure a Minnesota feedlot permit.

The amendment proposed to this subpart merely updates the rules to include an exemption created by the 2003 Legislature in chapter 128, article 3, section 40. The wording added is slightly modified from the law to fit the format of the rules.

4410.5200 EQB MONITOR PUBLICATION REQUIREMENTS.

Subpart 1. **Required notices.** Governmental units are required to publish notice of the items listed in items A to P in the EQB Monitor, except that this part constitutes a request and not a requirement with respect to federal agencies.

A. When a project has been noticed pursuant to item D, separate notice of individual permits required by that project need not be made unless changes in the project are proposed that will involve new and potentially significant environmental effects not considered previously. No decision granting a permit application for which notice is required to be published by this part shall be effective until 30 days following publication of the notice.

(1) For all public hearings conducted pursuant to

water resources permit applications, Minnesota Statutes, chapter 103G, the DNR is the permitting authority.

(2) For notice of public sales of permits for or leases to mine iron ore, copper-nickel, or other minerals on state-owned or administered mineral rights, Minnesota Statutes, sections 93.16, 93.335, and 93.351, and part 6125.0500, the DNR is the permitting authority.

(3) For section 401 certifications, United States Code 1976, title 33, section 1341, and Minnesota Statutes, section 115.03, the PCA is the permitting authority.

(4) For construction of a public use airport, Minnesota Statutes, section 360.018, subdivision 6, the DOT is the permitting authority.

~~(5) For special local need registration for pesticides, Minnesota Statutes, section 18A.23, and parts 1505.0870 to 1505.0930, the MDA is the permitting authority.~~

P. Notice of the availability of a draft Alternative Urban Areawide Review document.

Q. Notice of the adoption of a final Alternative Urban Areawide Review document.

R. Notice of other actions that the EQB may specify by resolution.

In item A, subitem 5 regarding pesticide special local need registrations is proposed to be deleted because Minnesota Rules parts 1505.0870 to 1505.0930 were repealed in 2000. The SONAR for that rule revision stated:

> "1505.0840 – 1505.0950; 1505.0970; 1505.0990 – 1505.1020; 1505.1040 – 1505.1070; 1505.1110; 1505.1130 – 1505.1230; 1505.1270 and 1505.1280.
> "These rules are obsolete due to statutory changes. The federal Insecticide & Rodenticide Act (FIFRA) and the state Pesticide Control Law have both been amended, and the rules being repealed were either replaced or contradict current statutes. States are obligated to conform to FIFRA. These statutory changes impact the whole arena of pesticide use, storage and disposal."

Items P and Q are proposed to be added to include the Monitor notices of the key events in the Alternative Urban Areawide Review process in the list of required Monitor notices. These two entries were inadvertently left off the list in past rulemakings.

4410.5600 COST AND DISTRIBUTION [of EQB Monitor].

Subp. 2. **Distribution.** The EQB Monitor may be published by electronic means, including by posting at the EQB internet website and by electronic mail to persons who have registered with the EQB to receive the EQB Monitor. ~~The EQB may further provide at least one copy to the Print Communications Division for the mailing of the EQB Monitor~~

~~to any person, governmental unit, or organization if so requested. The EQB may assess reasonable costs to the requesting party. Ten copies of each issue of the EQB Monitor, however, shall be provided without cost to the Legislative Reference Library, ten copies to the State Law Library, and at least one copy to designated EQB depositories.~~

The amendment here would explicitly authorize the EQB to distribute the EQB Monitor by electronic means only. As of the start of fiscal year 2006, this is the method by which the Monitor has been distributed, and the EQB has received no complaints about the elimination of mailed paper copies.

4410.6100 DETERMINING EIS ASSESSED COST.

Subpart 1. **Proposer and RGU agreement.** Within 30 days after the RGU's scoping decision has been issued ~~EIS preparation notice has been published~~, the RGU shall submit to the proposer ~~EQB~~ a ~~written~~ draft cost agreement ~~signed by the proposer and the RGU~~. The agreement shall include the EIS estimated cost and a brief description of the tasks and the cost of each task to be performed by each party in preparing and distributing the EIS. Those items identified in part 4410.6200 may be used as a guideline in determining the EIS estimated cost. ~~If an agreement cannot be reached, the RGU or the proposer shall so notify the EQB.~~ The proposer may request changes in the cost agreement. If within 30 days after the proposer receives the draft cost agreement, the RGU and proposer have not signed a cost agreement, either party may refer the matter to the EQB pursuant to part 4410.6410. If the RGU and proposer sign the cost agreement, the RGU shall submit a copy to the EQB.

The underlying reasons for these revisions are been explained along with the revisions to part 4410.2100, subp. 9, regarding the EIS Preparation Notice. This is part of the rationalization of the procedures for scoping and initiating preparation of an EIS. The rule now merely states that within 30 days of the triggering event (which is now the EIS Preparation Notice) the RGU and proposer are to sign a cost agreement. Here, instead, within 30 days of the scoping decision the RGU would submit a draft of the proposed cost agreement to the proposer. The amendment explicitly provides for the proposer to ask for revisions, and implicitly, for the two parties to negotiate until agreement is reached. In the event that agreement cannot be reached within 30 days, the proposed language would explicitly allow either party to invoke the EQB cost dispute resolution procedures at part 4410.6410.

4410.6200 DETERMINING EIS COST.

Subpart 1. **EIS cost inclusions.** In determining the reasonable cost of preparing and distributing an EIS, the following items shall be included:

A. the cost of the RGU's staff time including direct salary and fringe benefit costs, unless the RGU elects to waive these costs;

B. the cost of consultants hired by the RGU;

C. other direct costs of the RGU for the collection and analysis of information or data necessary for the preparation of the EIS;

D. indirect costs of the RGU not to exceed the RGU's normal operating overhead rate, unless the RGU elects to waive these costs;

E. the cost of printing and distributing the scoping EAW and draft scoping decision document, draft EIS and the final EIS and of public notices of the availability of the documents; and

F. the cost of any public hearings or public meetings held in conjunction with the preparation of the EIS.

In items A and D it is proposed to specifically allow an RGU to elect to waive its obligation to collect its staff and related indirect costs incurred in preparing an EIS. An issue has arisen over the years within some state agencies that had staff paid for with General Fund money to perform Environmental Reviews about why they should need to charge the proposer for staff-related costs. This change would allow an RGU in that situation to waive charging the staff-related costs of preparing an EIS. It should be noted that due to staff reductions within most agencies, this amendment is less likely to be used than it might have been in the past.

4410.6500 PAYMENT OF EIS COST.

Subpart 1. **Schedule of payments.** The proposer shall make all cash payments to the RGU according to the following schedule:

A. The proposer shall pay the RGU for the full cost estimated by the RGU to be necessary for the scoping of the EIS not later than the date of submission by the proposer of the completed data portions of the scoping EAW or within 5 days of issuance of a positive declaration. The RGU shall not proceed with the scoping process until this payment is made. Upon issuance of the scoping decision, the RGU shall provide the proposer with a written accounting of the scoping expenditures. If the payment made by the proposer exceeds the expenditures, the balance shall be credited against the cash payments required from the proposer for preparation of the draft EIS. If the RGU's reasonable expenditures for scoping exceed the cash payment received, the proposer shall pay

the balance before the RGU commences preparation of the draft EIS.

B. At least one-half of the proposer's cash payment shall be paid within ten days after the RGU and the proposer agree to the estimated cost of preparing and distributing an EIS in accordance with the scoping decision issued under part 4410.2100 or the cost has been determined by the EQB pursuant to part 4410.6410, subpart 2. The RGU shall not proceed to prepare the draft EIS until this payment has been received.

C. The remainder of the proposer's cash payment shall be paid on a schedule agreed to by the RGU and the proposer.

D. If there is a disagreement over the EIS cost, such payment shall be made within 30 days after the EQB has determined the EIS cost pursuant to part 4410.6410.

If the cash payments made by the proposer exceed the RGU's actual EIS costs, the RGU shall refund the overpayment. The refund shall be paid within 30 days of completion of the RGU of the accounting of the EIS costs.

In item A a phrase is proposed to be added to make the directions complete about when the proposer must pay the RGU for the estimated scoping costs. The current rule is silent about what happens when the EIS was initiated by a "positive declaration." The added phrase was inadvertently left out of past rule versions.

Subp. 6. **Prohibition on state agency permits until notice of final payment.** Upon receipt of final payment from the proposer, the RGU shall promptly notify ~~the EQB of receipt of final payment, unless the EIS cost is in dispute under part 4410.6410. Upon notice of receipt of the final payment by the proposer, the EQB shall notify~~ each state agency having a possible governmental permit interest in the project that the final payment has been received.

Other laws notwithstanding, a state agency shall not issue any governmental permits for the construction or operation of a project for which an EIS is prepared until the required cash payments of the EIS assessed cost for that project or that portion of a related actions EIS have been paid in full.

The current rule requires a roundabout method of notifying state agencies that EIS final payments have been made to the RGU and that therefore the prohibition on permit issuance is over. The amendment would direct the RGU to notify permitting agencies directly rather than going through the EQB.

VI. LISTS OF WITNESSES & EXHIBITS AT HEARINGS

A. Witnesses

The EQB anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Mr. Gregg Downing, EQB staff, will testify about the development and content of the rules.

[Witnesses from the MPCA staff who will be available to explain and support the proposed amendments to the air pollution sources and wastewater systems EAW categories will be listed upon receipt of the names from MPCA]

B. Exhibits

In support of the need for and reasonableness of the proposed rules, the EQB anticipates that it will enter the following exhibits into the hearing record:

- Fact sheets on the background for the revision of the for mandatory EAW categories for air pollution sources, wastewater systems and historical places.
- February 2005 Request for Comments & table of possible rule amendments
- Timeline diagrams for procedural changes to the rules for :
  - Revised EIS scoping & cost agreement process
  - Special AUAR procedures

VII. CONCLUSION

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

Dated: _____ _____

Robert A. Schroeder
Chair
Environmental Quality Board