

Minnesota Attorney General: Administrative Rules Proceedings

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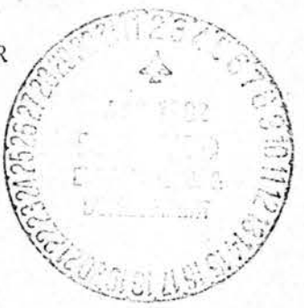

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed Adoption of Rules of the Minnesota Environmental Quality Board Governing the Environmental Review Program.

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before State Hearing Examiner Kent B. Roberts on November 24, December 1, 14, 15 and 21, 1981 in St. Paul, Minnesota, and on December 2, 1981 in Duluth, Minnesota.

This Report is a part of a rule-hearing proceeding pursuant to Minn. Stat. §§ 15.0411 through 15.0417 and 15.052 to determine whether the proposed rules should be adopted by the Minnesota Environmental Quality Board.

Catherine F. Haukedahl and Christie B. Eller, Special Assistant Attorneys General, appeared for and on behalf of the Minnesota Environmental Quality Board Staff ("MEQB Staff", "MEQB" or "Agency"). The Agency personnel who appeared throughout the hearing were Tom Rulland, the MEQB's manager of the Environmental Review Division, and Ken Kadlec, an MEQB environmental planner.

The MEQB must wait at least five working days before taking any final action on these rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4 (1980), this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the Findings of this Report, he will advise the MEQB of actions which will correct the defects and the MEQB may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in those instances where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the MEQB may either adopt the recommendations of the Hearing Examiner to cure the defects or, in the alternative, if the MEQB does not elect to adopt the recommendations, it may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Stat. § 15.0412, subd. 4d (1980). If the MEQB elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the MEQB shall submit the rule to the Attorney General for review of form and legality. If the MEQB makes changes in the rule other than those recommended by the Hearing Examiner, then it shall submit a rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Stat. § 15.0412, subd. 4e (1980).

When the MEQB submits the rule to the Attorney General, it shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

Procedural Requirements

1. On August 3, 1981, the Minnesota Environmental Quality Board filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.

2. On September 7, 1981, a Notice of Hearing and a copy of the proposed rules were published at 6 State Register 354. The public hearings were originally scheduled to be held in late October, 1981.

3. On September 28, 1981, the Chairman of the MEQB issued a New Order for Hearing, rescheduling the hearings for November 23, 24 and December 1, 1981 in St. Paul, Minnesota and for December 2, 1981 in Duluth, Minnesota.

4. On October 5, 1981, the MEQB published a Notice of Postponement at 6 State Register 607 cancelling the earlier scheduled October hearings.

5. On October 19, 1981, the MEQB published a Notice of Hearing at 6 State Register 665 announcing the revised hearing dates.

6. On October 19, 1981, the MEQB mailed the Notice of Hearing to all persons and associations who had registered their names with the MEQB for the purpose of receiving such notice.

7. On October 28, 1981, the MEQB filed the following documents:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) The Statement of Need and Reasonableness.
(e) The names of Agency personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.
(g) An Affidavit of Additional Notice.
(h) All materials received following a Notice of Intent to Solicit Outside Opinion published at 4 State Register 1625 (April 7, 1980).

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

8. On November 23, 1981, the hearing was postponed by the Hearing Examiner due to severe and inclement weather. Ultimately, the hearing was held on December 14, 1981.

9. The record remained open through January 11, 1982 for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 20 calendar days following the hearing.

10. On January 27, 1982, the Examiner requested the MEQB Staff to submit a copy of the proposed rules which incorporated amendments which the Staff stated they agreed with in their written comments. (See MEQB Exs. 23, 35 and 36).

11. On February 11, 1982, the Staff submitted the amended proposed rules to the Examiner. (MEQB Ex. 38). Although this was after the close of the record, this clerical task involved no substantive changes except for one. (See, Fn. 4). Preparation of the amended proposed rules by the MEQB Staff greatly simplified the review by the Hearing Examiner of a lengthy and complicated record.

12. Pursuant to Minn. Stat. § 15.0412, subd. 4d(d) (1981 Supp.), this Report must be "completed within 30 days after the close of the hearing record unless the chief hearing examiner, upon written request of the agency or the hearing examiner, orders an extension." On February 11, 1982, the Chief Hearing Examiner granted the Hearing Examiner's request for a two-week extension of time (i.e., to March 1, 1982) to issue this Report.

13. On March 1, 1982, the Chief Hearing Examiner granted the request of the Hearing Examiner for a four-week extension of time (to March 29, 1982) to issue this Report.

14. Minn. Stat. § 116D.04, subd. 5a (1980) grants to the MEQB statutory authority to adopt 6 MCAR §§ 3.021-3.056 as rules, except as noted below.

I. A BROAD OVERVIEW OF THE PROPOSED RULES.

15. In 1980, the Minnesota Legislature addressed a number of concerns - voiced by the MEQB, industrial and environmental groups - when it amended the Minnesota Environmental Policy Act (MEPA), 116D.01 et seq. (see, Statement of Need and Reasonableness ("SONR", p. 2)). Industry complaints focussed primarily on the unnecessary delay resulting from MEPA compliance, the burden of redundant and excessive paper work, and the cumbersome nature of the process generally. (SONR, p. 7; see also, 6 MCAR § 3.021 D.1.-5.). Environmentalists, on the other hand, advocated the need for more public involvement in and greater emphasis on environmental review. In the opinion of environmentalists, state and local agencies were not giving enough consideration to environmental factors in many proposed projects. Id. The MEQB urged for further decentralization of decision-making authority to allow local and state governmental agencies to make final administrative decisions regarding the need for and adequacy of environmental review. Id. The Minnesota Legislature responded to these concerns by mandating a cohesive, thorough and expeditious process for governmental agencies to follow in order to incorporate environmental review into their decision-making.

The basic structure of the amended MEPA process as outlined in the proposed rules, 6 MCAR §§ 3.021-3.056, is straightforward. An integral part of these proposed rules is the classifying of "governmental actions" into four categories - those which require an environmental impact statement (the mandatory "EIS" category, § 3.039); those which do not require an EIS (the exemption category § 3.041); those which require an environmental assessment work sheet (EAW) to determine whether the responsible governmental unit (RGU) need prepare an EIS (the mandatory EAW category, § 3.038); and those where a governmental unit is given discretion to order an EAW or an EIS for an activity that does not exceed mandatory EAW or EIS thresholds (the discretionary EAW and EIS categories, §§ 3.029 C. and 3.040). If a project falls within the third or fourth category, the RGU will perform an environmental assessment, and, based on its findings, either commence the EIS process (§§ 3.028 and 3.028 C.1.) or prepare a finding of no significant environmental impact (§ 3.028 A.2.)

Once the RGU decides on the need for an EIS, either as a result of mandatory classification or after preparation of an EAW, a notice is published and the "scoping" period commences. § 3.030. Scoping is used to "identify only those issues relevant to the proposed project, define the form, level of detail, content, alternatives, timetable for preparation, and preparers of the

EIS, and to determine the permits for which information will be developed concurrently with the EIS." § 3.030 A. During scoping, the RGU meets with other related governmental agencies and other interested parties (e.g., the project proposer and citizen environmental groups) in order to determine which issues to analyze in depth and which to eliminate. § 3.030 C. and D. Scoping provides a vehicle for improving coordination among agencies and for identifying significant environmental issues. Minn. Stat. § 116D.04, subd. 2a(e)(1980).

After the scoping decision is made, the RGU must then draft an EIS and circulate it to other governmental agencies and the public for comments on its adequacy and on the merits of the alternatives discussed. § 3.031 A.-E. The RGU must assess any comments received and modify the draft EIS when warranted. § 3.031 F. If other than minor changes in the draft EIS are suggested from the comments received, the draft EIS must be rewritten. § 3.031 F.2. The RGU then prepares and circulates its final EIS. § 3.031 F.3. If "(a) [s]ubstantial changes have been made in the proposed project that affect the potential significant environmental effects of the project; or (b) [t]here are substantial new information or new circumstances which significantly affect the potential environmental effects from the proposed project which have not been considered in the final EIS or that significantly affect the availability of prudent and feasible alternatives with lesser environmental effects," the RGU must prepare a supplement to the final EIS and circulate it. § 3.031 I.1.-3.

Even after completing the EIS, no physical construction can begin until the EIS has been determined adequate or a variance is granted. §§ 3.031 G.1., 5.; 3.032 C., D. After the determination of adequacy, final decisions are made by governmental units on those permits identified in the scoping process and a record of decision is prepared. § 3.031 H.1., 2. The record of decision must state how the governmental unit "considered the EIS in its decision." Id.

MEPA and these proposed rules also provide that decisions on the need for an EAW, the need for an EIS and the adequacy of an EIS may be reviewed by a declaratory judgment action in the District Court of the county where the proposed project, or any part thereof, would be undertaken. Minn. Stat. § 116D.04, subd. 10 (1980); 6 MCAR § 3.023 D.

A flow chart, which is attached hereto and made a part of this Report, is set forth as Appendix A. This flow chart, which was prepared by the Examiner from the amended proposed rules (MEQB Ex. 38), sets forth in very rough form the environmental review process in 6 MCAR §§ 3.021-3.056.

II. THE AUTHORITY, PURPOSE, DEFINITIONS, AND RESPONSIBILITIES: 6 MCAR §§ 3.021 - 3.024.

A. Authority and Purpose: § 3.021.

16. Section 3.021 B. The brief testimony received at the hearings on this proposed rule focussed on its applicability to projects which were either substantially completed or scheduled to receive governmental approvals near the effective date of these rules. Vol. IV, Tr. 172-175. Concern was noted especially for projects which did not fall within a mandatory category under the existing rules (MEQB Ex. 14), but now fall within a mandatory or discretionary category in these proposed rules. The complex issue essentially raised is the

degree to which the requirements of these proposed rules will be held applicable to projects which are, to some degree, ongoing when the rules become effective (e.g., such as receipt of building permits, incurring financial obligations or expense prior to construction, actual grading or excavating of the land). There are no Minnesota Supreme Court decisions interpreting MEPA on this specific issue. However, this issue was a major source of litigation at the federal level in the early days after the National Environmental Policy Act of 1969 (NEPA) was promulgated.[1]

The first NEPA cases framed this issue as one of retroactivity[2] and generally held that NEPA could not be applied retroactively. Brooks v. Volpe, 329 F.Supp. 118, 120, n.6 (W.D.Wash. 1971), rev'd 460 F.2d 1193 (9th Cir. 1972); Investment Syndicates, Inc. v. Richman, 318 F.Supp. 1038, 1039 (D. Ore. 1970); Pennsylvania Environmental Council, Inc. v. Bartlett, 315 F.Supp. 238, 253 (M.D.Pa. 1970), aff'd 454 F.2d 613 (3rd Cir. 1971). The tide began to shift from this restrictive approach to one more sympathetic to the purposes of NEPA with Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F.Supp. 749 (E.D. Ark. 1971), modified 470 F.2d 289 (8th Cir. 1972). The Court dealt in that case with a public works project authorized by Congress in 1958 with construction work beginning in 1963. Id. at 744. At the time of the litigation, two-thirds of the project had been completed in terms of estimated total cost, but no construction work had been done on the Gilliam Dam which was a major part of the project. The Court noted that some Courts had dealt with this kind of project in terms of retroactivity but stated that Plaintiffs were not asking the Court to undo or set aside any past actions. Instead, they were seeking the application of existing law to anticipated future actions. Id. at 743. The Court made a very important distinction concerning work on a project completed prior to the effective date of NEPA:

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[1] National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (1976). There are "notable similarities between MEPA and NEPA", and where the language of these two Acts are similar, federal court decisions interpreting the procedural requirements of NEPA are considered persuasive (for purposes of this Report) in interpreting the State Act. Vogel, Commentary on the Minnesota Environmental Policy Act (1979) (MEQB Ex. 15, p. 70). But, "some important differences do exist" and extreme care must be exercised in drawing too many parallels between the two Acts. Id. For example, all federal agencies must comply with NEPA's § 102(2) provisions "to the fullest extent possible." 42 U.S.C. § 4332 (1976). In contrast, MEPA only requires compliance "to the fullest extent practicable". Minn. Stat. § 116D.03, subd. 1 (1980). See, No Power Line v. Minnesota Environmental Quality Council, 262 N.W. 2d 312, 325 (Minn. 1977) for discussion of this distinction.

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[2] 82 C.J.S. Statutes, § 412, defines a retroactive law as a:

> "Law which looks backward or on things that are past; a retroactive law is one which acts on two things that are past. In common use, as applied to statutes, the two words [retrospective and retroactive] are synonymous, and in this connection may be broadly defined as having reference to a state of things existing before the act in question. A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed." [Footnotes omitted]

"The Court is not suggesting that the status of work should not be considered in determining whether to proceed with a project. It is suggesting that the degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of a project as required by NEPA." Id. at 746.

Most of the other circuits eventually adopted the Environmental Defense Fund, supra, approach. Environmental Defense Fund v. TVA, 468 F.2d 1164, 1177 (6 Cir. 1972); Scherr v. Volpe, 466 F.2d 1027, 1034-38 (7th Cir. 1972); Brooks v. Volpe, 460 F.2d 1193, 1194 (9th Cir. 1972); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323, 1330-32 (4th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111, 1120-21 (9th Cir. 1972); Calvert Cliffs Coordinating Comm., Inc. v. AEC., 449 F.2d 1109, 1128-29 (D.C. Cir. 1971).

While the above NEPA cases do allow for preparation of an EIS even though the project was initiated to some degree prior to enactment of NEPA, these courts generally have placed a common-sense limitation on NEPA's applicability:

"At some stage of progress, the cost of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project in accordanace with [NEPA]. At some stage, federal action may be so 'complete' that applying the Act could be considered a 'retroactive' application not intended by Congress. The Congressional command that the Act be complied with 'to the fullest extent possible' means, we believe, that an ongoing project was intended to be subject to [NEPA] until it has reached that stage of completion, and that doubt about whether the cricial stage has been reached must be resolved in favor of applicability. . . the cases refusing to apply [NEPA] 'retroactively' to projects ongoing at the effective date of the Act are not inconsistent with this principle because in those cases, the factor determining the applicability of [NEPA] appears to have been the stage of completion of the project." [Case Citations omitted.] Arlington Coalition, supra at 1331.

It is not entirely clear how the Minnesota Supreme Court would resolve a comparable MEPA issue. For, as was the situation in the NEPA cases, three competing legal interests are involved simultaneously. First, there is the basic principle that rules are presumed to have no retroactive effect unless clearly and manifestly intended by the Legislature. Minn. Stat. § 645.21 (1980); Mason v. Farmer Ins. Co., 281 N.W.2d 344 (Minn. 1979). Second, divesture of a private vested interest is constitutionally prohibited. Ridgewood Development Co. v. State, 294 N.W.2d 288, 294 (Minn. 1980); and third, there is the mandate that agencies are to give "paramount" consideration to the protection of the environment. Floodwood-Fine Lakes, et al v. Minnesota Environmental Quality Council, 287 N.W.2d 390 (Minn. 1979).

While it is not possible to specifically enumerate for all cases the point of completion beyond which these proposed rules would not be legally applicable, it is necessary to have a rule which is flexible and yet strikes a balance with all the competing interests mentioned above. When this proposed rule is also read in conjunction with § 3.041 A.2. and 4.[3], such a balance

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[3] Section 3.041 A.2. and 4., in the amended rules, reads as follows:

2. Projects for which all governmental decisions have been made.

is achieved. These two proposed rules embody the concepts in the NEPA and the Minnesota cases cited above. Therefore, this proposed rule is found to be needed and reasonable.

B. Section 3.022 B.: Definitions.

17. "Action", "Activity", and "Governmental action". The SONR (p. 8) states that these "three definitions should be read in reference to each other." Comments at the public hearings indicated that this approach created not only confusion but also inconsistencies throughout the rules as originally proposed. See, Vol. I, Tr. 51, 75-76 (Northern States Power (NSP)); Vol. III, Tr. 26-27, Pub. Ex. 25 (the Department of Natural Resources (DNR)); and, Vol. III, Tr. 46, Pub. Ex. 26 (the Department of Transportation (DOT)). In response to these comments, the MEQB Staff in the amended proposed rules (MEQB Ex. 38), deleted the definitions of "activity" and "action" from § 3.022 B. and added a definition of "project". "Action" and "Activity" were then deleted throughout most, but not all, of the amended rules and "project" was inserted therein where appropriate. (e.g., §§ 3.033 A. and 3.041 A.). The only definition of "project" in the "official record"[4], which the Examiner can consider at this time is a quote from Minn. Stat. § 116C.24, subd. 7 (see, MEQB Ex. 35, p. 1) which reads as follows:

> "'Project' means a new activity or an expansion of or addition to an existing activity, which is fixed in location and for which permits or approvals are required from a governmental unit prior to construction."

The above definition of "project" and the MEQB Staff's other amendments discussed in this Finding are needed and reasonable.

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(Fn. 3 cont. from page 6.)

* * *

> 4. Projects for which a substantial portion of the project has been completed and an EIS would not influence remaining implementation or construction.

At the hearing, it was suggested that the test in § 3.041 A.4. should be bifurcated. That is, the "and" should be deleted and replaced with "or". However, adopting that approach would be inconsistent with MEPA and the NEPA cases cited above in the text.

4 The MEQB Staff proposed the following definition of "project" in the amended rules (MEQB Ex. 38):

> "'Project' means a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. The determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving new projects."

Since this definition was submitted after the record closed, it is beyond the scope of the "official record" and cannot be considered by the Examiner at this time. The only definitions of "project" which the Examiner could consider were those definitions submitted on or before January 11, 1982 by the public (Pub. Ex. 25) and the Staff (MEQB Ex. 35, p. 1). (See, Finding 9). If the MEQB Staff now believes the "new" definition of "project" is the better definition (cf, MEQB Ex. 35, p. 1), then they may submit this definition to the Chief Hearing Examiner when he conducts his "substantial change" review for the entire rules. At this point, the Examiner simply cannot consider the definition set forth in the amended rules since it is obviously beyond the official record.

18. "Agricultural land". This definition is patterned after the definition found in the Minnesota Agricultural Property Tax Law, Minn. Stat. § 273.111, subd. 6, part 22 (1980). The proposed definition determines agricultural use on the basis of current and past land use - within the last five years. According to Sensible Land Use Coalition (SLUC), this definition is overly broad and would be extremely difficult to administer at the local level due to both the lack of records and inexperience in assessing prior land use. (Pub. Ex. 86; Vol. IV, Tr. 85-86). SLUC's preferred recommendation is to delete the entire definition of "agricultural land". In the alternative, SLUC recommends at least deleting the phrase "within the last five years".

This proposed definition is needed and reasonable because of the addition of the mandatory EAW category relating to the permanent conversion of agricultural land (§ 3.038 AA), a category SLUC opposes. As explained later in this Report, that category is found to be needed and reasonable. (See, Finding 112). The basis for the five-year time limit, as explained in the SONR (p. 9) is that in some years, marginal lands are often used for agricultural purposes. Using land in this manner "creates an ambiguity as to whether the land should be classified as natural or agricultural." Id., at 9. This ambiguity is clarified by placing a five-year time limit on classifying land as agricultural.

The Staff adopted the two proposed amendments of the Minnesota Department of Agriculture. (Pub. Ex. 42; Vol. V, Tr. 142-144). The phrase "for sale" was deleted. Since the proposed definition was taken from the agricultural tax law, use of "for sale" in that context was necessary. But, for land protection, the definition should be tied directly to the land use rather than to economic considerations. Second, the last sentence of the definition was amended to read "under the same ownership and/or management." Land could be owned by one person but managed by another. It is not necessary to meet both criteria for land to be considered part of the same operation.

The definition, as amended, is needed and reasonable.

19. "Approval". SLUC contends that this definition, as proposed, is extremely broad and will create uncertainty. SLUC points out that, for example, in the construction business, permits or other approvals are needed from the early stages of planning and development to even after the construction of a building is completed. In Minneapolis, the construction of a large building requires permits or "entitlements" which are issued after a building has been constructed. And, most communities require the issuance of certificate of occupancy prior to actual use of a building. Therefore, SLUC believes that since so many approvals or permits are required throughout the land development process, environmental review could be triggered virtually any place in the process, even as late as after construction of the building is completed (since some "approval" is still needed). SLUC proposes two amendments in order to "clarify the situation and provide a reasonable end point which will ensure that environmental information is generated at a point when it can be utilized by the governmental decision-makers and public in fashioning the appropriate authorization." (Pub. Ex. 86). First, in addition to the existing definition, for projects for which a conditional or special use permit is required, approval would mean the "decision to grant such a permit." And second, for projects governed by a subdivision or planned development regulations, approval would

refer "to the issuance of preliminary subdivision or planned development approval." Adoption of SLUC's approach, as noted by the MEQB Staff, would unduly restrict the applicability of environmental view to only one approval; and, in complex projects where other subsequent governmental approvals may be required, environmental review would then be foreclosed. If the SLUC is concerned about unnecessary and duplicative review for situations where projects have been either approved or completed, § 3.041 A.2. and 4. do adequately and reasonably protect those concerns. The rule is reasonable and needed as proposed.

20. "Attached units". The second sentence of this definition places mixed developments, i.e., attached and unattached units, in the lower thresholds applicable to "unattached" dwellings. SLUC contends that the lumping of all mixed developments is unreasonable and recommends differentiating between attached and unattached units on the basis of a "percentage" formula. (Pub. Ex. 86). This approach was apparently considered in an earlier draft of these rules but rejected because it was too "speculative" and "unnecessarily complicated" the rules. (SONR, p. 11). Other reasons also exist which necessitate rejection of this amendment. The land use implications of unattached residential development are significantly greater than for attached residential development. (MEQB Ex. 35, p. 8). SLUC's threshold's percentages are simply too high to account for the differences in environmental impacts between unattached and attached units. Id. The rule is needed and reasonable as proposed.

21. "Expansion". This definition clarifies types of activities which may cause a project to fall within a mandatory category. SLUC recommends limiting "expansion" to a threshold capacity increase of "20% or more". (Volume IV, Tr. 89; Pub. 86). The rationale for this proposal is that confusion and unreasonable results will occur in connection with those mandatory categories for which no internal expansion threshold is provided. However, after reviewing all of the mandatory categories where no expansion threshold is provided (e.g., § 3.039 L.2. and R.), even a 20% or less expansion has the potential to significantly affect the environment. A 20% (or any fixed percentage) expansion threshold, in terms of its effect on the environment, is simply not of equal significance for all types of projects. (See, SONR, p. 15). The rule is needed and reasonable as proposed.

22. "Final approval" and "Final decision". Numerous comments were received that the rules could be clarified by the deletion of these two definitions. (Vol. I, Tr. 58-62 (NSP); Vol. III (Tr. 28) (DNR); Vol. III, Tr. 46, Pub. Ex. 26 (DOT)). In response thereto, the Staff deleted both definitions. (MEQB Ex. 38). In the rules as originally proposed, "final approval" was used only at 6 MCAR § 3.055 C.12. and 3.056 C.5. "Final approval" was deleted and "final decision" was inserted therein in the amended rules. With these amendments, "final approval" no longer appears in the rules. The justification for deleting "final decision" was that it is basically a self-explanatory term and therefore a definition is really not needed. The Examiner agrees. The commonsense definition of "final decision" is that point in time in the governmental decision-making process wherein the governmental unit makes an irrevocable decision regarding the proposed project. (SONR, p. 15). The rule, as amended, has been demonstrated to be needed and reasonable.

23. "Local governmental unit". The term "organized" is used in this definition to modify "watershed". The intent of using this modifier is to refer

to watershed districts which are established pursuant to Minn. Stat. § 112.34 et seq., so as to exclude informal and ad hoc organizations that commonly, but improperly, label themselves as "watershed districts". (MEQB Ex. 36, No. 8). SLUC recommends deletion of "organized" since no statutory definition exists for "organized watershed districts". SLUC is correct and the rule, as proposed, is unreasonable. The rule can achieve the desired distinction and be made reasonable by deleting "organized" and inserting after "watershed districts" the phrase "established pursuant to Minn. Stat. § 112.34 et seq."

24. "Permanent conversion". This definition is intended to refer to those types of land uses in which the essential character of the physical features of the land will be substantially altered. SLUC contends that the phrase "impairs the ability" is not synonymous with "permanent" and is a subjective term which will lead to uncertainty in the administrative process. Therefore, SLUC recommended that the phrase "prevents the reconversion" should be substituted therein. SLUC's amendment was considered but rejected in earlier drafts of the rules because of the controversy "over the degree to which land can be reconverted." (MEQB Ex. 36, No. 8). While "impairs the ability" is hardly a term of precision, adoption of SLUC's amendment would merely substitute one form of semantical imprecision for another. If there is any ambiguity with respect to "impairs the ability", the SONR provides some interpretative guidance. The intent of the definition is to focus "on land uses in which the land is rendered incapable of being reconverted to its original natural state." (SONR, p. 21; Emphasis added). The rule is reasonable as proposed.

25. "Scram Mining". Section 3.041 G.3. refers to the exemption for "scram mining operations". Scram mining operations is not defined anywhere in the rules. DNR witnesses testified at the hearing that they had received questions from proposers and other governmental units regarding the meaning and scope of scram mining. In the rules, as amended, the Staff added the following definition to § 3.022 B.:

> "'Scram mining' has the meaning given in 6 MCAR § 1.0401 B.16." (MEQB Ex. 38).

Without this definition, the rules would be unreasonable. Inclusion of this definition is not a substantial change.

26. "Permit". Two state governmental agencies, the DOT and the DNR (Pub. Exs. 25 and 26), propose deleting this definition and inserting therein the definition of permit given in Minn. Stat. § 116C.24, subd. 5) (1980). The definition, as proposed, was derived from the New York statutes relating to environmental review, N.Y.Stat. § 617.2(u) and is "intended to be broad". (SONR, pp. 21-22). The amendments proposed by DOT and DNR would unduly restrict the application of these rules by eliminating environmental review whenever a governmental unit commits to issue or issues a discretionary contract, grant, subsidy, loan or other form of financial assistance. Therefore, the rule is needed and reasonable as proposed.

27. "Phased actions". A question arose at the hearing as to the length of time applicable to a "phased action". (Vol. I, Tr. 112-117 (NSP). No specific suggestion was given by NSP to limit this rule to any definitive period of time. Even if a time limit was suggested, it would not be reasonable due to the number and wide variety of projects affected by this proposed rule. (See, § 3.028 E.). RGUs will decide the applicable period of time on a case-by-case

basis. (SONR, p. 22). Lehmann & Associates criticized this definition as "vague" but offered no clarifying language. Vol. VI, Tr. 40, Pub. Ex. 53. The rule, as propsed, is needed and reasonable. However, in the amended rules, there are two editorial errors. At the end of paragraph a., the colon should be changed to a semicolon. In addition, after the word "determines", the colon that was deleted should be retained.

28. "Sociological effects". The MEQB Staff deleted this definition. Under Minn. Stat. § 116D.04, subd. 2a, an EIS must analyze significant environmental effects as well as economic, employment and sociological effects. These rules include comprehensive provisions for scoping which limit and define the issues to be addressed in the EIS. If the definition of "sociological effects" had been retained, RGUs and other parties who wanted to appropriately limit scoped issues relating to sociological issues may have been prohibited from doing so and be forced to consider additional, but unnecessary requirements in the EIS by virtue of the breadth of this definition. Vol. III, Tr. 47, 48; Vol. IV, Tr. 93. The definition, as proposed, was unnecessary and added nothing to the clarity of these rules. The deletion is needed and reasonable and is not a substantial change.

29. "Wild and scenic rivers district." The proposed definition limits wild and scenic rivers districs to those designated by the Commissioner of DNR or by Congress. However, the Minnesota Legislature also has the authority to designate wild and scenic rivers districts pursuant to Minn. Stat. § 104.35, subd. 4 (1980):

> "The legislature may at any time designate additional rivers to be included in the system, or change the classification of rivers theretofore classified by the commissioner."

DNR recommends that this definition be amended in part as follows:

> ". . .has been designated by the Commissioner of DNR or by the Legislature of the state of Minnesota for inclusion within...." (Pub. Ex. 100).

No comments were received from the MEQB Staff on the DNR's proposed amendment. There appears to be no reasonable reason to limit the scope of this definition to exclude designations by the Legislature. Therefore, the rule is unreasonable. The rule can be made reasonable by including within it wild and scenic river districts designated by the Legislature.

30. "Wild and scenic Rivers district." At the hearings, the Sierra Club suggested expanding this definition to include comprehensive land use plans of the Mississippi River Headwaters Board established pursuant to Minn. Stat. § 114B.01 et seq. (1981 Supp.) and any other river or river segment, and adjacent lands, subject to similar controls by the Legislature and designated by the EQB by resolution. Under Minn. Stat. § 114B.01(a) (1981 Supp.), the Legislature specifically found that the "Mississippi River from its outlet at Lake Itasca, Clearwater County, to the southerly boundary of Morrison County, Minnesota, possesses outstanding and unique natural, scientific, historical, recreational and cultural values deserving of protection and enhancement". This new law provides for a special joint powers board (comprising the counties of Clearwater, Hubbard, Beltrami, Cass, Itasca, Aitkin, Crow Wing and Morrison) to prepare, adopt and implement a river plan for the upper Mississippi River comparable to that under the state wild and scenic river system. Minn. Stat.

§ 114B.02, subd. 2 (1981 Supp.). In fact, the Upper Mississippi River Board adopted a comprehensive land use plan on February 12, 1981 and counties are now required to adopt land use ordinances consistent with this plan. Minn. Stat. § 114B.03, subd. 1 (1981 Supp.). The MEQB staff stated they opposed including this special river area in a definition of "wild and scenic rivers district" but did not oppose including it in applicable categories in §§ 3.038 and 3.039. Without an amendment to these rules that provides for environmental review for the upper Mississippi River and other rivers subject to similar control by the Legislature, these proposed rules are unreasonable. The Staff failed to offer any rational basis for this exclusion. The MEQB Staff can select whatever means they desire to correct this deficiency. The easiest way does appear to just adopt the Sierra Club's approach. This would not be a substantial change.

see CHE 4/1 + added definition p. 7 - 9.

31. "Wild and scenic rivers district ordinances". This definition indicates that "ordinances must be approved by the Commissioner of DNR pursuant to 6 MCAR NR 81" in order to be considered a state-approved wild and scenic rivers dis- trict ordinance. NR §§ 78-81 are DNR's general rules relating to wild and scenic river systems; however, they are not applicable to the Lower St. Croix National Scenic Riverway which was included in the Federal Wild and Scenic Rivers System by the Lower St. Croix River Act of the 92nd Congress, Pub. Law 92-560. Pursuant to Minn. Stat. § 105.25, subd. 3 (1974), the DNR promulgated rules in 1976 (NR 2200-2202) that specifically applied to the Lower St. Croix National Scenic Riverway. DNR recommends that this definition of "wild and scenic rivers district ordinances" be expanded to allow for the inclusion of the lower St. Croix by adding at the end of the second sentence "or 6 MCAR NR 2202". (Pub. Ex. 100). While the MEQB Staff never commented on the DNR proposal, there appears to be no reasonable reason to limit the definition as proposed. Thus, this rule is unreasonable. The rule can be made reasonable by adopting DNR's amendment.

added p. 12

32. "Wilderness area". The DNR has jurisdiction over wilderness areas designated pursuant to Minn. Stat. § 86A.04, subd. 6 (1980). In addition to wilderness areas designated by the State pursuant to State Law, there also can be designations of national wilderness areas within Minnesota by an Act of Congress. The DNR proposes that federally-designated wilderness areas in Minnesota should be included in the definition of wilderness areas in order to allow adequate environmental review of actions affecting them. Although DNR pointed out that the Federal Government has or shares responsibilities with the State for the units of national wilderness systems that lie in Minnesota, they fail to cite any federal acts or regulations which delegate to the DNR the authority to regulate activities or projects in federal wilderness areas. Without submission of specific and clear authority to regulate projects and activities on federal lands, the presumption under the law is that DNR has no such authority. Authorization for state regulation over federal installations and activities on federal property "is found only when and to the extent there is a 'clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation' clear and unambiguous'." Train v. Hancock, 426 U.S. 167, 179 (1976); see also, Nat'l. Ass'n. of Property Owners v. U.S., 499 F.Supp. 1223 (D. Minn. 1980), aff'd as State of Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 50 U.S.L.W. 3709 (U. S. March 9,

1982) (No. 81-1198). DNR may indeed have some shared regulatory authority with the Federal Government for wilderness areas which lie in Minnesota, but the extent or degree of this authority was not demonstrated at this hearing. Based upon what is in the record, the rule is reasonable as proposed.

33. Deletion of "adverse" in the phrase "significant environmental effects". In commenting on § 3.029 C.1., the Sierra Club noted that the word "adverse" was used as a modifier of "significant environmental effects". Vol. IV, Tr. 40-42. In fact, the use of "adverse" in this manner is common throughout many of the other rules as originally proposed. (e.g., see, definition of "phased action" and § 3.028 B.). In support of their argument to delete "adverse", the Sierra Club contends that there are many projects which are beneficial or at least not arguably adverse but which nonetheless significantly affect the environment. Under the reasoning of the Sierra Club, projects which cause significant environmental effects may escape environmental review since, it could be argued that none of the effects are really adverse. In the rules, as amended, the MEQB Staff deleted "adverse" from § 3.029 C.1., but went one step further by deleting "adverse" anywhere in the rules where it modified "significant environmental effects". (MEQB Ex. 38).

There is no statutory requirement that these proposed rules frame an environmental review test solely in terms of "adverse" impact. Minn. Stat. § 116D.04, subd. 2a (1980), merely states that where there is potential for significant environmental effects from any major governmental action, then environmental review is warranted.

At the federal level, courts have indicated that the determination of a similar phrase in NEPA - "major Federal actions significantly affecting the quality of the human environment"[5] - should include all effects, adverse or beneficial. Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 426-427 (5th Cir. 1973). Furthermore, in defining "significantly" in the new federal CEQ regulations, the regulations require consideration of both adverse and beneficial effects. (A significant effect "may exist even if the federal agency believes that, on balance, the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1) (1980)).

This deletion brings consistency to these rules since other sections already require consideration of both beneficial and adverse environmental effects (e.g., §§ 3.031 B.2.h. and 3.027 A.4.). The deletion is reasonable and does not constitute a substantial change.

C. General Responsibilities and RGU Selection Procedures: 6 MCAR §§ 3.023 and 3.024.

34. Section 3.023 D. The MEQB Staff adopted SLUC's amendment to this rule. (MEQB Ex. 36, No. 8). The need for this amendment arises because the opportunity to appeal an RGU's decisions, for due process reasons, must begin with a noticed event. The amended rule allows for judicial review to be initiated within 30 days after notice of the RGU's decision is published in the EQB Monitor, not from the RGU's decision itself. The amendment to the rule is needed and reasonable and is not a substantial change.

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[5] 42 U.S.C. § 4332 (1976).

35. Section 3.023 D. This provision is based on the statutory language found at Minn. Stat. § 116D.04, subd. 10 (1980). Under the statute, only the decisions on the need for an EAW, the need for an EIS, and the adequacy of an EIS, can be reviewed by a declaratory judgment action in District Court. Id. Judicial review must be initiated within 30 days after the governmental unit makes a final decision. Id. The statute is silent regarding the reviewability of the need decision for a supplemental EIS. Therefore, DNR proposed that any decision on the need for a supplemental EIS should be incorporated in this section as a decision subject to review by a declaratory judgment action. (Pub. Ex. 100). The MEQB Staff properly rejected this amendment. Adoption of DNR's proposal would expand the "jurisdiction" of district courts via a rule, a power which administrative agencies lack. The power to establish the "jurisdiction" of courts resides in the Legislature, not administrative agencies. Minn. Const. Art. VI, § 1. Whether or not the district court even has the jurisdiction to review a supplemental EIS need or adequacy decision is an issue the court must decide, if and when that issue becomes "ripe" for review. Therefore, the rule is found to be reasonable without the DNR's proposed amendment.

36. Section 3.023 D. NSP proposes that the final scoping decision should be subject to judicial review in order to avoid delay. (Vol. I, Tr. 65-70; Pub. Ex. 2). Minn. Stat. § 116D.04, subds. 2a(e) and 10 (1980) require the scoping decision to be incorporated into the order requiring an EIS and authorize judicial review of the need decision for an EIS. NSP contends that, except in the circumstances specified in § 3.03 E.5. (§ 3.030 E.3., in the rules as amended), a scoping decision which requires analysis on an irrelevant issue or excludes analysis of a significant issue cannot be challenged until after an adequacy decision is rendered (a year delay or longer). If, as NSP suggests, the final decision were immediately appealable, preparation of the EIS on all other issues not in controversy could proceed simultaneously with adjudication of the appeal and avoid the above-mentioned delay. While NSP's approach to this problem is reasonable and practical, nevertheless, the amendment must be rejected. Minn. Stat. § 116D.04, subd. 10 (1980) specifically limits what District Courts can review and review of a "scoping decision" is not enumerated therein. Interpreting the statute to allow for a review of a scoping decision does not fit neatly within the accepted interpretations of "need for an EIS" and "adequacy of an EIS," in spite of § 116D.04, subd. 2a(e) to the contrary. Moreover, adoption of NSP's amendment would improperly expand the jurisdiction of district courts. (See, Finding 35). This rule is reasonable without the amendment proposed by NSP.

37. Section 3.023 D. DNR proposes limiting judicial review of the final decision of the need for an EIS to a review on the record formulated during the environmental review process. (Pub. Ex. 100). As DNR admitted at the hearing, (Vol. IV, TR. 122-123), the intent of this amendment is to preclude a "trial de novo" in district court.

One reason which compels rejecting DNR's amendment is that it is not needed. The Minnesota Supreme Court in Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (1977), has "indicated its disapproval of such [trial de novo] procedures, reasoning that such de novo action might place a court in the position of the administrative agency, an unconstitutional violation of the separation of powers doctrine." Keppel and McFarland, 1 Mason's Minnesota Civil

Practice 163-164, n. 99 (1979); see also, Peltz and Weinman, NEPA Threshold Determinations: A Framework of Analysis, 31 Univ. of Miami L.Rev. 71, 82-84 (1976); Grad, 2 Treatise on Environmental Law, § 9.02 [1][a][i], pp. 9-43 & 44 ("[t]he requirement of a de novo review, with the [federal] court assuming the obligation of a full hearing . . . still appears to be the minority rule"); State ex rel Lucas v. Board of Education, 277 N.W.2d 524 (Minn. 1979); Benell v. City of Virginia, 104 N.W.2d 63 (Minn. 1960); but cf, Minn. Stat. § 555.09 (1980).

DNR's amendment is also lacking in constitutional authority. Certainly, the Legislature can by statute in certain instances, limit or expand the jurisdiction of appellate courts. Minn. Const., Art. VI, § 1. However, the constitutionality of any rule, promulgated by an administrative agency, which limits the review powers of a district court is highly questionable. The appropriateness of trial de novo is best resolved by a district court or ultimately by the Minnesota Supreme Court, rather than by administrative fiat.

The rule is reasonable without DNR's amendment.

38. Sections 3.024 E.2. and 3.024 F. The rules do not define in every situation which governmental unit is the proper RGU, especially where projects involve multiple permits. The MEQB Staff acknowledges that there is no time limitation on the designation of a RGU in the proposed rules. Vol. I, Tr. 70-73. NSP proposed an amendment to place a time limitation for designating an RGU. (Pub. Ex. 3) Inclusion of a time limit on a RGU designation will provide for prompt resolution of the issue, prevent a proposer from being bounced between RGUs, and allow the review process with the proper governmental unit without possible delays. In rejecting this amendment, the MEQB Staff stated that it was "unnecessary" and would be "burdensome to governmental units". (MEQB Ex. 35, p.6). In reality, NSP's proposal is quite the opposite. It is an action-forcing amendment that serves as an incentive to prod the MEPA process along, thereby preventing additional delay. Without any time limit for selecting an RGU, this rule is unreasonable as proposed. The rule can be made reasonable by selecting some time period for selecting an RGU. The time period can be different from that selected by NSP.

selected - p. 14. See also CHE 4/1

III. THE ENVIRONMENTAL ASSESSMENT WORK SHEET: 6 MCAR §§ 3.025-3.028

39. Section 3.025 C.1., 2., and 3. Under the provisions in paragraphs C.1. and C.2., a governmental unit "with jurisdiction or approval authority" over a proposed project can determine that an EAW must be prepared. "Approval authority" is defined in these proposed rules. (See, § 3.022). "Jurisdiction" is not.

Without a definition of "jurisdiction", its meaning is open to various interpretations. For example, there are numerous governmental units which can have either "geographic review jurisdiction" or "process review jurisdiction" or both over individual land use activities. Most housing developments are within the "geographic jurisdiction" of a municipality, a county, a sewer district, a watershed district and the metropolitan council. Yet, not all of these entities may or should have any environmental review process jurisdiction.

Thus, the meaning of "jurisdiction" in the context of these rules, as proposed, is vague. If jurisdiction is used to mean essentially the same as

"approval authority", then its use is redundant. If jurisdiction has a meaning distinct from "approval authority", then it must be defined. The MEQB Staff's comments on this particular issue have been carefully considered, but do not adequately answer the questions raised by SLUC. (cf, MEQB Ex. 36, No. 8 and Pub. Ex. 86). The rule, as proposed, is therefore unreasonable. The rule can be made reasonable by defining the term "jurisdiction", or deleting "jurisdiction" from paragraphs C.1. and 2., or amending the rule as follows: deleted p. 15

"When a government unit, with any jurisdiction to approve a proposed project . . ."

None of these cures would be a substantial change.

40. Section 3.025 C.1. and 2. The MEQB Staff acknowledges that if all the characteristics of the proposed activity are within the exemption categories of 3.041, a RGU cannot require an EAW on its own initiative or after a petition. Vol. I, Tr. 73-74. Staff further acknowledges that the MEQB cannot order an EAW after the RGU has made a decision concerning the need for an EAW on the same project. Vol. I, Tr. 74. However, nothing in the proposed rules specifically prohibits either of these possibilities. The rule, as proposed, is unreasonable. Reference to the exempt categories must be placed in paragraphs C.1., 2., and 3. to insure that the discretionary authority is not used to require an EAW for an exempt activity. Language to that effect will make the rule reasonable. language added p. 15.

The MEQB Staff rejected NSP's amendment (Pub. Ex. 4) which would have cured this defect. Instead, the MEQB proposed an amendment of its own (which was not included in the rules as amended), to clarify this matter. (MEQB Ex. 35, p. 66). The amendment proposed by the MEQB Staff would require the determination of the "primary purpose" of a project by a RGU, which is a decision to be made by an RGU without any defined standards or criteria. If the MEQB Staff amendment was incorporated into the amended rules, it would be found to be illegal until the term "primary purpose" was defined. NSP's approach to resolving this entire dilemma does appear to be quite reasonable. (See, Pub. Exs. 4 and 99).

41. Section 3.026 A. The rule, as proposed, allows any person to request the preparation of an EAW by filing a petition. The MEQB Staff acknowledges that a proposer should also have the authority to file a petition requesting the MEQB to designate a RGU to determine the need for an EAW. Vol. I, Tr. 77. This authority is necessary because of the significant "gray area" (i.e., the discretionary categories) between the mandatory and exempt categories. NSP proposed an amendment which would allow a petition to request that an RGU determine the need for the preparation of an EAW. (Pub. Ex. 5). The MEQB Staff, in rejecting NSP's amendment, asserts that § 3.026 D., E. and F., adequately address NSP's concerns; and, that NSP's amendment might confuse citizens who would submit petitions to a RGU, rather than the MEQB. (MEQB Ex. 36, p. 7). However, it is unlikely that citizens would be confused considering § 3.026 C., which states: "The petition shall be filed with the EQB." Because other sections of this rule clarify the problem which Public Ex. 5 addresses, it is found that the rule is not unreasonable as proposed. The MEQB, at its option, may adopt Public Ex. 5 to clarify this issue, but it need not do so. no change

42. Section 3.026 B. This rule, as proposed, sets forth what is required to be in any petition. Comments were received from the Metropolitan Inter-

County Association (MICA), the City of St. James, the Southern Minnesota Municipal Power Agency and Lehmann & Associates, contending that the petition process should include age and residency requirements to prevent "frivolous petitions". (See, Pub. Exs. 22, 53, 84 and 93). The Minnesota Legislature, in its consideration of the 1980 amendments to MEPA, "specifically considered and rejected the concept of having age and residency requirements." (SONR, p. 45). To the extent any petition is frivolous, the RGU can merely dismiss it, in the same fashion that "a plaintiff can be hastened from the court by a summary judgment." Barlow v. Collins, 397 U.S. 159, 175 n. 10 (1970). The rule is reasonable as proposed without any age and residency requirements.

43. Section 3.026 B.4. Under this rule, as amended, the petition must include a "brief description of the potential environmental effects which will result from the project." A petition contains allegations, not predetermined facts. The rule is unreasonable as amended. The rule can be made reasonable by inserting the word "alleged" prior to the word "potential" or, alternatively, the word "will" in the second line can be changed to "may". so changed p-16

44. Section 3.026 B.5. During the hearing, Clear Air Clear Water Unlimited (CACWU), DNR, the Northern Sun Alliance (NSA), and the Nuclear Policy Study Group all raised a question as to the meaning of "material evidence" as used in § 3.026 B.5. and requested that that term be defined in the rules. For the reasons given below, a definition of material evidence is unnecessary.

The standard of "material evidence" was used in MEPA prior to the 1980 amendments. Minn. Stat. § 116B.04, subd. 3 (1978). "Material evidence" has been explained by this Office as "[a]ny non-frivolous understandable evidence . . . [that] would be sufficient to accomplish the triggering of the environmental review process". In the Matter of the Determination of the Need for an EIS for the Proposed River Ridge Development Project, EQB-81-005-PR Order dated July 16, 1981 (MEQB Ex. 36). Thus, this term has a well-settled meaning in relevant law, and, according to the MEQB Staff, which has considerable expertise in this area, "has been consistently applied . . . and has generated little question or controversy [in the past]." (MEQB Ex. 36).

It is true that the above cases arose out of the former petition process, pursuant to which a petition resulted in a public hearing on the need for an EIS. Minn. Stat. § 116D.04, subd. 3 (1978). At that public hearing, the MEQB had the discretion to determine whether or not the contents of the petition contained requisite facts which could lead to an Order for the preparation of an EIS. Under the 1980 amendments and the proposed rules, a valid petition will result in the preparation of an EAW rather than a hearing. Minn. Stat. § 116D.04, subd. 2a(c) (1980); 6 MCAR § 3.026. However, these different results should not affect the appropriateness of the previously determined definitions of material evidence, as some have argued. Vol. III, Tr. 106-110. The use of the same terminology by the Minnesota Legislature in establishing the new petition process amply demonstrates their intent that the standard should remain the same.

The standard described above is, in fact, very low. The term "material evidence" focusses only on whether evidence is present, rather than the weight of the evidence. Hohenberg Bros. Co. v. Missouri Pacific R. Co., 586

S.W.2d 117, 119 (Tenn. App. 1979) (under the material evidence test, it is simply a search of the record to ascertain if material evidence is present to support findings; it matters not where the weight or preponderance of the evidence lies under material evidence review.); St. Louis I.M. & S.Ry. Co. v. Woodruff, 115 S.W. 953, 956 (1909); see also, Words and Phrases "Material Evidence", Vol. 26A, p. 246.

As noted in the SONR, the material evidence standard acts only as a

> "safeguard against the submission of frivolous petitions [and] should not be [considered a requirement for] a comprehensive analysis of scientific evidence demonstrating potential adverse effects. Rather, the intent is to require a good faith presentation by the petitioners demonstrating a reasonable person standard that significant adverse environmental effects may result from the proposed action . . . . The function of the material evidence provision is to bring legitimate concerns to the attention of the governmental unit." at p. 46

CACWU's thoughtful discussion and proposed definition of material evidence offers no solution to this question. It is conceded that by failing to define "material evidence", it may leave the RGUs, which admittedly must make the determination as to what is "material evidence", with a difficult task in some instances. But, this problem is not resolved by using conclusionary terms such as "specific facts" and "real dispute". (Pub. Exs. 23 and 98). In essence, the CACWU's definition of "material evidence" merely forces the RGU to examine the problem from another dimension. For example, when are there "specific facts" or a "real dispute"? Therefore, it is found that this rule is needed and reasonable.

45. Section 3.026 D. This provision requires a petitioner to notify the project proposer in writing at the time they file a petition with the EQB. The intent of this rule is to allow the project proposer to become involved "early in the process to attempt to resolve concerns of the petitioners and to provide required information to the RGU making the decision." (SONR, p. 47). As a result of early notification and participation, the RGU can then expeditiously and effectively resolve the issue as to whether an EAW must be prepared. CACWU and NSA commented that this rule is unfair since it places them in a position to receive "potential harassment" from a project proposer; and, that it is likely to discourage public participation in the environmental review process. These two environmental groups, as well as DNR, recommend that the EQB or the proper RGU, and not the petitioners, should notify the proposer of the project. (Pub. Exs. 98 and 100; Vol. III, Tr. 110-111). The MEQB Staff acknowledges that transferring the responsibility of notifying the proposer to the EQB or the proper RGU would neither be a significant additional burden nor a substantial time delay. The real loss would be with respect to the failure of the process to facilitate early and meaningful dialogue between the parties. (MEQB Ex. 36, No. 5). This very same amendment was considered in earlier drafts of the rules but was not adopted primarily because the harassment argument did not appear to be justified in view of past experience of the current rules. (SONR, p. 47). None of the groups testifying in support of the amendment presented any specific evidence that contradicts the above statements in the SONR. The rule is reasonable as proposed.

46. Section 3.026 E. SLUC recommends that the first sentence of this rule should be revised to include "section 3.026 A. and B.1., 2., 3., 4. and

5." (Pub. Ex. 86). There appears to be no reason whatsoever for the EQB to forward a petition to an RGU for processing if it does not contain an allegation as to potential environmental effects (B.4.) and material evidence supporting those allegations (B.5.). Review by the EQB chairperson to determine whether the allegations and evidence are present does not imply substantive review of the allegations or the evidence. If the factors of § 3.026 B.4. and 5. are absent, the RGU has nothing on which to perform its review. SLUC's amendment accurately reflects the intent of this provision as stated in the SONR:

> "If the petition complies with those four requirements [section 3.026 A. and B.1., 2., and 3.] and presents information on the environmental impacts and material evidence requirements, it is deemed adequate for the purposes of the EQB." At 47-48. [Emphasis added].

Thus, since this rule omits what the SONR states the EQB will consider, it is unreasonable. Assertions in the SONR are no substitute for provisions of the rule. At least one way to make the rule reasonable is to adopt the SLUC amendment. But without some change, it is found to be unreasonable.

changed to include "4" + "5"

47. Section 3.026 E. This rule authorizes the EQB to determine the proper RGU. It is implied, but not stated, that the chairperson of the EQB would use the provisions in § 3.024 in designating a RGU after the receipt of a petition. The DNR recommends insertion of language in this rule referencing § 3.024 specifically. While the rule is not unreasonable without this amendment, the clarity would be improved with it.

inserted p. 16

48. Section 3.026 F. and 3.028 A.3. NSP proposed an amendment (Pub. Ex. 6) to these two rules to require that the record maintained by an RGU shall include "specific findings of fact" for issues which are relevant to determination of the EAW and EIS. Vol. I, Tr. 79-80. The intent of NSP's amendment is to avoid the problem of RGUs merely reciting testimony rather than supporting their conclusions with facts. The MEQB Staff adopted NSP's amendments for both §§ 3.026 F. and 3.028 A.3. Dicta from the Minnesota Supreme Court's decision in Hibbing Taconite Co. v. Minnesota Public Service Co., 302 N.W.2d 95, 11-12 (Minn. 1980) supports the MEQB Staff's adoption of NSP's reasonable amendment:

> We note that PSC's failure to adequately state the facts it relies on in support of its determination of the rate of return complicates the reviewing court's role. An examination of the PSC's discussion of the growth factor, one component of the rate of return on common equity, highlights the problem a reviewing court encounters when the PSC fails to set forth the factual basis for its determination. . . . A reviewing court cannot intelligently pass judgment on the PSC's determination unless it knows the factual basis underlying the PSC's determination. Judicial deference to the agency's expertise is not a substitute for an analysis which enables the court to understand the PSC's ruling. Henceforth, we deem it necessary that the PSC set forth factual support for its conclusion. The PSC must state the facts it relies on with a reasonable degree of specificity to provide an adequate basis for judicial review. We do not require great detail but too little will not suffice."

Without the Staff's amendments to these two rules, they would be unreasonable. Hibbing Taconite Co., supra. But with the amendments, the rule is found to be reasonable.

amended p. 16, 20

49. Section 3.026 F. Under the rule as proposed, the only evidence the RGU can consider in determining the need for an EAW is the "evidence presented by the petitioners or otherwise known to the RGU". From this evidence, the RGU

must develop a record of its decision, documenting with specific findings of fact, why it determined an EAW was or was not required. (SONR, p. 48). SLUC argues that minimal procedural due process necessitates an opportunity for "proposers and other persons" to submit competing evidence in this process for determining whether an EAW need be prepared.

According to the SONR, the "purpose of [the] record is to demonstrate that concerns of both parties were listened to and a decision was based on the merits of the record." (At. p.48). But, if proposers are not allowed to submit competing evidence along with petitioners, as the MEQB Staff contends, then how can the concerns of both parties be listened to? Through just oral testimony? If so, what justification is there for excluding written evidence from the proposers? Is a decision truly based on the merits of the record if evidence is received only from one party? And, since "trials de novo" are strongly disapproved of, Reserve Mining, supra, cannot an argument be made in District Court that the RGU's need decision was "arbitrary and capricious" because the RGU did not allow or consider the proposer's written evidence? The arguments of the MEQB Staff have been carefully considered in this matter, but are not persuasive. (MEQB Ex. 36, No. 8). The rule is found to be unreasonable.

For this rule to be made reasonable, the following amendments must be incorporated. First, "proposers or other persons" must be allowed to submit evidence to the RGU. Second, since "competing evidence" is being supplied to the RGU, the RGU must be allowed to balance the information received to reach a determination that an action may or may not have the potential for significant environmental effects. And third, time periods must be established, balancing the proposer's right to submit evidence with the RGU's need for sufficient time to reach a reasoned decision. Likely, the RGU will need more than 15 days to decide on the need for an EAW.

allowed p.16 but no other changes - see FoF 49

50. Section 3.026 G. DNR proposes adding a provision to this rule which would require an EAW to be prepared if the RGU fails to meet its time deadlines. (Pub. Ex. 100). The DNR's proposal is not needed. Minn. Stat. § 116D.04, subd. 11 (1980), states that:

> "[i]f the board or governmental unit which is required to act within a time period specified in this section fails to so act, any person may seek an order of the district court requiring the board or governmental unit to immediately take the action mandated by subdivisions 2a.[(b)] and 3a."

The legal remedy to prompt a dilatory RGU is a mandamus action in district court. Minn. Stat. § 586.01 et seq. (1980); 51 MSA RCAP 120 (1980). Once the legislature has specified a remedy, it is improper for the rule to specify a different one.

51. Section 3.026 G.1. and 2. The use of "may" in these rules renders them arbitrary and illegal. These defects are correctable by adding the words "if needed" to the end of the proposed rule. In the alternative, the defect can be cured by substituting the word "shall".

changed to "shall" — see CHE 4/1 + CHE 6/8

This is but one of a number of rules which would grant discretion to a person without specific standards to guide the exercise of that discretion. Minn. Stat. § 15.0411, subd. 3 (1981 Supp.) defines "rule" to "make specific" the law. This is a substantive provision of law which must be met (Minn. Stat. § 15.052, subd. 3 (1981 Supp.)). In this particular case, there does not appear to be any intent to grant discretion; however, the wording of the rule leaves room for its exercise. It must be changed.

52. Section 3.026 H. The MEQB Staff has amended this rule to require the RGU to notify the proposer, the Petitioner's representive and the EQB Staff "within five days of the [RGU's] decision" (MEQB Ex. 38). The need for this amendment is that judicial review of the EAW need decision must be commenced within 30 days after the RGU decision is published in the EQB Monitor since, for due process reasons, the right to appeal any adverse decision must begin from a noticed event. (See, § 3.023 D., Finding 34) Therefore, any delay in noticing the RGU's decision will cause additional delay in the entire environmental review process itself. The MEQB's amendment is needed and reasonable.

amended p. 17

53. Section 3.027 C.1. This rule, as amended, contains discretionary language that permits preparation of the EAW "by the proposer or its agent." While these rules provide that the RGU shall be responsible for the completeness and accuracy of the information and decisions in the EAW (§ 3.023 B.), this process of permitting EAW document preparation by a non-RGU project proposer is not encouraged by MEPA.

MEPA specifically states that the EIS shall be "prepared by the responsible governmental unit." Minn. Stat. § 116D.04, subd. 2a (1980). Even prior to preparing the EIS, the RGU's involvement in the EAW process is extensive. The RGU has the responsibility of notifying those affected persons as to when the EAW has been completed. Section 3.027 D. The RGU also receives the written comments regarding the accuracy and completeness of the EAW and must develop a record regarding its decision on the EAW. Sections 3.027 E. and 3.028 A.3. Even in Minn. Stat. § 116D.04, subd. 2a(d) (1980), where the MEQB is given discretion in a very limited situation to order preparation of an EAW, that statute makes it clear that preparation of an EAW is to be done "by a responsible governmental unit." While no specific statutory language actually prohibits EAW preparation by a non-RGU, there are persuasive reasons why an RGU, not a project proposer, should be responsible for the environmental document preparation.

Actual document preparation by a non-governmental project proposer has no similar parallel in NEPA (see, Fn. 1). The question arose early under NEPA as to whether the duty to prepare an EIS is delegable, or whether an EIS not prepared by the federal agency (e.g., an EIS prepared by a state agency, a private grantee of federal funds, or an applicant for a federal permit) may be adopted as the agency's own. Grad, supra, in § 9.02[2][a] notes the following:

> "Although the cases 'line up' on opposite sides of the delegation issue, most of them share a common concern for the integrity of the process of preparing environmental impact statements, evidencing a common desire to avoid both contamination of the process by special interests in the advancement of the project, and a mere formal, routine approval or adoption by federal agencies of statements they did not themselves prepare." (at pp. 78.1).

Admittedly, Grad's comments do relate only to the preparation of an EIS. However, the new CEQ federal regulations now reflect earlier concerns not only for agency responsibility for the preparation of an EIS but also for an environmental impact assessment (EIA), which is similar to MEPA's EAW. 40 C.F.R. §§ 15.06.2-15.06.6 (1980); Grad, supra, § 9.02[2][a], pp. 9-78.2-78.3. These federal regulations contain a careful system of checks and balances for both the preparation of an EIS and an EIA so as to maintain the integrity of a process. Grad, Id.

Environmental groups, such as the Sierra Club and Northern Sun Alliance, as well as industry (NSP), all criticized this proposal of allowing the initial environmental analysis documentation to be done by a non-RGU project proposer. One main reason for their disapproval is best stated by the representative from NSP:

> "If I were a participant in a process and I saw that the EAW had been prepared by the proposer, I guess I would have the feeling that the process was somewhat rigged." Vol. I, Tr. 92.

Although MEPA does not preclude adoption of this rule, as amended, the rule is nonetheless unreasonable for two reasons. First, the MEQB Staff has failed to demonstrate the reasonableness of proposer-prepared EAWs. Secondly, the use of "may" makes the rule an impermissible delegation. For example, under what circumstances "may" an RGU delegate EAW preparation to the "project proposer or its agent"? The defect is correctable by adopting criteria and standards that would determine when an RGU may delegate its authority. But even if standards and criteria are supplied, the MEQB must avoid allowing EAW preparation by a project proposer or the proposer's agent.

54. Section 3.027 C.2. The MEQB Staff adopted NSP's amendment (Pub. Ex. 9) for this section. Prior to this amendment, this rule had the same problems mentioned above in Finding 53. Adoption of NSP's amendment cured these problems. Without this amendment, the rule would be unreasonable for the reasons stated in Finding 53. While the rule is reasonable as amended, the Examiner would make one suggestion. After the word "prepared", insertion of "by the RGU" would improve the clarity of this rule. However, the rule as amended is reasonable.

55. Section 3.027 C.3. On December 18, 1981, the MEQB Staff stated that they had adopted Public Exhibit 9 (NSP's amendment) in its entirety. (MEQB Ex. 35, p. 9). In the rules as amended, it is obvious they have deviated from this earlier statement and rejected part of NSP's amendment. This amended rule still permits EAW preparation by the "proposer or its agent" without standards or criteria to guide the RGU's delegation. NSP's amendment would have cured this defect. For the reasons stated in Finding 53, this rule, as amended, is likewise unreasonable and illegal. The rule can be made legal by adopting the option mentioned in Finding 53 or by adopting NSP's amendment in its entirety.

56. Section 3.027 D.1. The first time gap referred to in Pub. Ex. 7 (an NSP exhibit) is that there is no time limitation on the RGU to provide a copy of the EAW to the MEQB Staff and the other persons listed in § 3.027 D.1. Although this may appear to the MEQB Staff as "a purely clerical task", its completion triggers publication of the notice of the availability of the EAW in the EQB Monitor (§ 3.027 D.1.) which in turn triggers the comment period (§ 3.027 E.) and the EIS need determination (§ 3.028). (MEQB Ex. 35, p. 8). Any delay in the RGU providing a copy of the EAW to the MEQB Staff results in a delay in all subsequent events. The Staff rejected NSP's proposal, which would have required the RGU to provide one copy of the EAW to the MEQB Staff "within three days after the RGU" approves the EAW. Vol. I, Tr. 80-91 and 101-103. Contrary to the MEQB Staff's assertions, NSP's amendment does not presuppose "open hostility" (MEQB Ex. 35, p. 8); rather, it provides direction to an RGU in the same manner as all the other time limitations in the proposed rules. Moreover, NSP's amendment imposes a reasonable duty on a RGU, which if

followed, would prevent the environmental review process from being unreasonably delayed. The rule has not been demonstrated to be reasonable as proposed. The rule can be made reasonable by including a time period in which the RGU must send the EAW to the MEQB. NSP's three-day period appears to be reasonable. Of course, the MEQB Staff could adopt a shorter period or a reasonably longer period. included p. 18

57. Section 3.027 D.1. This subsection lists the state agencies and members of the public that are to receive copies of the EAW. Numerous amendments were submitted which, if adopted, would have reduced the distribution list. (Pub. Exs. 26 and 86). The SONR, at pp. 55-58, gives adequate and reasonable reasons for not deleting any of those on the EAW distribution list. But, the rule as proposed is unreasonable for one reason. As noted by the Sierra Club, there has been no demonstration of a reasonable basis for excluding from the distribution list "[t]he representative of any petitioners pursuant to § 3.026." Vol. IV, Tr. 34-35. The rule can be made reasonable by adopting this amendment. so amended p. 19

58. Section 3.027 D.2. This is the first of a number of places in the rules which provides for public notice by means of a press release to a newspaper of general circulation in the area where the project is proposed. See also, 6 MCAR §§ 3.030 C.1.b. and C.2.a. (Scoping); 3.030 F (EIS preparation notice); 3.031 E.6. and 7. (Draft EIS); 3.031 F.5. and 6. (Final EIS); and, 3.031 G.7. (The EIS adequacy decision). Sierra Club, NSP, National Audubon Society and Northern Sun Alliance all questioned the (1) constitutional sufficiency (in terms of procedural due process) and (2) the reasonableness of issuing notice to the public by means of a press release and publication in the EQB Monitor. These groups advocated requiring at least publication of "legal notice" in a local newspaper.

Although the Minnesota Legislature, when it enacted MEPA, provided for public participation in certain environmental protection issues, there is no constitutional procedural due process right for such participation by the public. In fact, unless the failure to obtain notice of environmental review proceedings would deprive a person of life, liberty or property, which is unlikely, procedural due process would not be an issue in any legal proceedings.

All that is required as a minimum to satisfy procedural due process is reasonable notice and an opportunity to be heard. Greene v. McElroy, 360 U.S. 474 (1959). Even assuming ad arguendo that a procedural due process right exists here, basic due process standards have been satisfied in these proposed rules since they provide for (1) "personal" notice to persons directly affected,[6] and (2) "general" public notice by means of publication in the EQB Monitor and a press release. Greene, supra.

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[6] Under 6 MCAR § 3.027 D., an EAW must be sent to, among others, the "proposer" (D.1.b.), and "any other person upon written request" (D.1.k.); § 3.028 A.4. requires that notice of the scoping decision be provided "to all persons on the EAW distribution list" (§ 3.027 D.1.a.-k.), "to all persons and governmental units that commented in writing" and "to any person upon written request"; § 3.031 E.3. and 4. require that the draft EIS be provided to the proposer and a summary of the draft "to any person that submitted substantive comments on the EAW" that did not receive the entire draft; § 3.031 F.3. requires

The MEQB, in providing for public participation, has developed rules that are consistent not only with established due process principles, but also with the intent of MEPA. In only two instances does MEPA require published notice. First, Minn. Stat. § 116D.04, subd. 2a(b), requires the RGU to publish notice of the completion of the EAW "in a manner to be determined by the board". And second, Minn. Stat. § 116D.04, subd. 2a(g), requires the RGU to publish EIS preparation notice. The limited legislative directive in mandating notice requirements indicates an intent to vest the EQB with some discretion to develop reasonable procedures that would maximize public participation.

While there is no requirement in MEPA, the Minnesota Constitution, or case law that requires that public notice be given by legal advertisement, there are "significant policy reasons", as noted by NSP, for requiring at least the publication of "legal notice". (Pub. Ex. 99, p. 5). The "primary reason" the MEQB staff selected the press release over published legal notice was to "minimize costs" to the RGU. (SONR, p. 57, ¶ 5). NSP points out that the cost factor argument is not an adequate reason to refrain from requiring published legal notice in view of the Staff's acknowledgment that "publication costs may be charged back [to the proposer] if they are incurred after the issuance of a positive declaration pursuant to 6 MCAR § 3.028 A." (MEQB Ex. 35, p. 14). Thus, of the six noticed provisions in the proposed rules (6 MCAR §§ 3.027 D.2., 3.030 C.2.a., 3.030 F., 3.031 E.6. and 7., 3.031 F.5. and 6., and 3.031 G.7.), five of the above occur after a positive declaration and would result in no cost to an RGU if charged back to the proposer.

In selecting the press release and publication in the EQB Monitor over legal notice, the MEQB Staff weighed and compared not only the costs but also the reliability of publication and the readability of each. Now, cost is no longer a factor in the "selection equation". Therefore, considering the disadvantages of the press release ("a newspaper is not required to print the news release", SONR, p. 57), and the EQB Monitor (which has "limited availability locally and being seldom if ever read on a local basis", SONR, p. 57), these rules must require at least published legal notice. In other words, the rules as proposed are unreasonable. The rules can be made reasonable by requiring, as a minimum, published legal notice (e.g., see the five amendments in Pub. Ex. 10). In the opinion of the Examiner, the best notice that could be given to enhance public participation is to provide for both a press release and legal notice.

required but only if paid for by proposer p. 19

59. Section 3.027 E.3. The use "may" and the absence of any standards or criteria therein renders this rule illegal. The rule can be made legal by adopting a standard similar to that used in § 3.035 C., § 3 (". . . if it determines that a meeting is necessary or useful.").

so adopted p. 20

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(Fn. 6 cont. from page 23)
that the final EIS be provided to all persons receiving the draft EIS, to anyone who submitted substantive comments on the draft EIS, and to the extent possible, to any person requesting the final EIS; § 3.031 G.7. requires that notice concerning the adequacy of the final EIS be given "to all persons receiving a copy of the final EIS." The EIS preparation notice (§ 3.030 G.) requires only publication in the EQB Monitor and a press release. Personal notice is not needed since the preparation notice merely triggers the 280-day period for EIS preparation. No public comment or appeal period is triggered by the EIS preparation notice.

60. Section 3.028 A.1.b. The use of "may" makes this rule illegal. Under what circumstances "may" the EQB chairperson grant or deny an extension? The defect is correctable by substituting the word "shall" or adding standards to guide the decision-maker.

changed to shall p. 20

61. Section 3.028 B. MEPA requires the preparation of an EIS whenever there is potential for "significant environmental effects resulting from any major governmental action." Minn. Stat. § 116D.04, subd. 2a (1980). This phrase can be read in either of two ways. It can be approached as a "singular test" compelling the conclusion that governmental action is major so long as the action relates to a significant effect on the environment. Alternatively, it can be interpreted as a "dual test" requiring the determination of the magnitude of the governmental action as well as the significance of the effect. The MEQB proposes adoption of the singular test in these rules (SONR, p. 62). The Minnesota Association of Commerce and Industry (MACI), on the other hand, argues that the dual test must be adopted in order for these rules to be consistent with the legislative intent of MEPA. Vol. V, Tr. 71-77. (See also, Pub. Ex. 101). Neither MEPA nor its opaque legislative history provides any guidance regarding which test must be adopted. However, since this phrase in MEPA is similar to that in NEPA,[7] examination of federal case law on this issue is helpful to resolve which test is not only statutorily permissible but also needed and reasonable.

The federal circuits have been sharply divided in their approach to the "major action" and "significantly affecting" conditions of the EIS requirement. The majority view is that the two criteria are inseparable so that any federal action with a significant environmental impact is automatically subject to EIS requirement. Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314 (8th Cir. 1974) ("[t]he threshold question as to whether there is a major federal action requiring NEPA compliance is not presented in the majority of cases." Id. at 1319); City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975); Wyoming Outdoor Coordinating Council v. Butz, 484 F.2d 1244 (10th Cir. 1973); Citizens for Responsible Area Growth (CRAG) v. Adams, 477 F.Supp. 994, 999 n. 6 (D.N.H. 1979); Patterson v. Exon, 415 F.Supp. 1276, 1281 (D.Neb. 1976). In Butz, supra, the Eighth Circuit Court of Appeals emphasized the purpose of NEPA as concern for the environment. The Court concluded:

> "To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act . . . [I]f the action [could be characterized as minor, but] as a significant effect, it is the intent of NEPA that it should be the subject of the detailed consideration mandated by NEPA . . ." Id. at 1321-1322."

The essence of the majority view is that by bifurcating the statutory language, it would be theoretically possible to speak of any "minor federal action" significantly affecting the quality of the human environment and, therefore, to find the EIS requirement inapplicable. Butz, supra, at 1322. The thrust of the singular test is to concentrate attention on the significance of the action

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7 NEPA limits the EIS requirement to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (1976).

and to assume that if the effect is significant, the action is, a priori "major." Under the singular test, the "real test is the dimension of the environmental impact". Grad, supra, § 9.02[1][a][i] at p. 9-45.

A significant minority of cases have found it necessary to separate the two questions and that a proper analysis requires separate consideration of each. Hanly v. Mitchell, 460 F.2d 640, 644 (2nd Cir. 1972), cert. denied, 409 U.S. 990 (1972); Scherr v. Volpe, 466 F.2d 1027, 1032-33, (7th Cir. 1972); Scenic Rivers Association v. Lynn: The Effect of NEPA on the Interstate Land Sales Act, 124 U.Pa.L.Rev. 250, 260 (1975). The argument of the courts adopting a dual test is that the two-pronged approach follows the statutory language more closely, and since the singular test gives virtually no effect to the word "major", it runs contrary to the requirement that a court give meaning to all words of a statute when construing it. NAACP v. Medical Center, Inc., 584 F.2d 619 (3rd Cir. 1978).

However, as a practical matter, the search for usable standards to determine what is "major" has proven to be elusive by the "dual test" courts. In general, the resolution has depended on a case-by-case analysis guided by rather flexible standards. For example, in Transcontinental Gas Pipeline Corp. v. Hackensack Meadowlands Development Commission, 464 F.2d 1358 (3rd Cir. 1972), cert. denied, 409 U.S. 1118 (1973), the Court resorted to the reasonable man to set the standard for determining whether approval by the Federal Power Commission of the construction of a liquid natural gas facility was "major action". The Court found that since the facility had been in operation for a considerable period, did not require the expenditure of any federal funds and involved no taking of any public lands, "approval of the construction of the facility is certainly not the type of 'action' which most reasonable men would conclude, without any guidelines, to be either 'major' or even an 'action'." Id. at 1366-67. Courts which adhere to the dual test also frequently consider the cost as an index, although without developing any specific thresholds. Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dept., 446 F.2d 1013, 1025 (5th Cir. 1971), cert. denied, 406 U.S. 923 (1972) ("We have no difficulty in characterizing a project of this size [$18,000,000] as 'major'."); Julis v. City of Cedar Rapids, 349 F.Supp. 88 (N.D. Iowa 1972) ($300,000 of federal funds spent on a highway project costing $650,000 was not "major").

This general type of analysis is typical of the cases in the dual test area. Because of the lack of guidance in NEPA and its murky legislative history, the Courts have had to develop a common law based primarily on broad policy considerations, limiting the requirement of an EIS to those federal actions that "require substantial planning, time, resources or expenditures." Citizens Organized to Defend the Environment v. Volpe, 353 F.Supp. 520, 540 (S. D. Ohio 1972); see also, Kleppe v. Sierra Club, 427 U.S. 390, 421 (1976), (Marshall, J., dissenting). As a general proposition, of those circuits which follow the dual test, few have found actions to be too small to meet the "major" action test. See, The Scope of the Program EIS Requirement: The Need for a Coherent Judicial Approach, 30 Stan. L.Rev. 767, 776 n. 42 (1978).

The new CEQ Federal regulations adhere to the singular test but still separately define "major Federal action" and "significantly". 40 C.F.R. §§ 1508.18 and 1508.27 (1980). The new Federal regulations state that the

word "major" has no meaning independent of the word "significantly". Id. at § 1508.18. The CEQ's approach in adopting a singular test represents a reversal from earlier CEQ "guidelines" which stated that major and significantly were "intended to imply thresholds of importance and impact that must be met before a statement is required." 40 C.F.R. § 1500.6(c) (1977).

There is only one U.S. Supreme Court decision that even remotely addresses this issue, Andrus v. Sierra Club, 442 U.S. 347 (1979). Dicta in Andrus suggests that the Supreme Court expects lower courts to adhere to the CEQ singular test interpretation in the regulations. See, NEPA After Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality, 66 Va.L.Rev. 843, 864 (1980).

Like the CEQ, the MEQB's adoption of the singular test represents a change from the current rules. The current rules follow the dual test. (SONR, p. 62). The MEQB's reasons for adopting a singular test are that:

> "The singular test [is] a more direct approach and more in keeping with the legislative declaration of state environmental policy. This interpretation is also consistent with the decentralization of responsibility for the implementation of the environmental review program. The test of whether a project is major is more subjective than the test for significant environmental effects. Implementation of the test of whether a project is major would be likely to vary considerably among local and state agencies." (SONR, p. 62).

The MEQB has statutory authority to adopt the singular test in these rules, and its use therein is found to be needed and reasonable. Even though this rule has been found to be reasonable, it could be improved. Throughout these rules, the word "major" has been omitted as a modifier of "governmental action," which is a radical departure not even the CEQ regulations adhere to in adopting a singular test. Such an omission leaves the impression that the MEQB has intentionally ignored part of the statutory test (i.e., to consider major governmental action) instead of reflecting what may be the true intention of the MEQB for the omission - to imply adoption of the singular test. While insertion of "major" throughout these rules may create more confusion, the MEQB may want to specifically state in this rule that the singular test has been adopted. However, the rule is not unreasonable if the MEQB decides not to do this.

"major" not inserted. 9.20

62. Section 3.028 C. Representatives from NSP (Vol. I, Tr. 109-112), Sierra Club (Vol. IV, Tr. 38-40), and the mining industry (Vol. VI, Tr. 40,45-46) were concerned with the statement in § 3.028 B. that criteria for an RGU to determine the need for an EIS which are specified in § 3.028 C., are "not exhaustive"; and, the statement in the SONR at page 63 that the "Guide to the Rules" (to be published later) will incorporate further guidance for RGUs. These groups urge that, regardless of whatever criteria the MEQB intends to be applied in an EIS need determination, all possible criteria must be explicitly defined in these rules. Otherwise, this rule should be declared illegal.

As a starting point in analyzing this issue, it is important to recognize that all these groups essentially seek to define what is "significant", since every governmental action, no matter how limited in degree or scope, has some effect on the environment. While the Minnesota Legislature could have imposed the EIS requirement on all major governmental actions, it did not do so. Since the Legislature added the word "significant", it must be given some meaning.

The MEQB has listed four criteria which place some minimal boundaries or limits on the meaning of "significant". But, these "criteria are not exhaustive but are considered [only] indicators." Section 3.028 B. The MEQB apparently intends either to allow RGUs and ultimately the Minnesota Supreme Court to further define "significant" or, "expand" the criteria in the "Guide to the Rules" at a later date. Both approaches are unacceptable.

The failure to define all the criteria is contrary to the policies of the Minnesota Administrative Procedures Act (Minn. Stat. §§ 15.041 et seq. (1981 Supp.)), contrary to the predictability policy of the 1980 MEPA amendments (§ 3.021 D.4.), will frustrate judicial review and is likely to foster inconsistent decisions amongst RGUs. It is a seminal principle of adminstrative law that unwritten criteria and standards are undesirable. For, as noted in Sunray Drive-In Dairy, Inc. v. Oregon Liquor Control Com'n., 517 P.2d 289 (Ore. Ct. App. 1973)[8]:

> "Unwritten standards and policies are no better than no standards and policies at all. Without written, public standards, the entire system of administrative law loses its keystone. The ramifications affect every party and every procedure involved in the fulfillment of the agency's responsibility under the law, e.g., the public, the applicant, agency personnel, the participants in the hearing, the commission, the legislature and the judiciary.

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[8] Sunray Dairy is an extremely fascinating case. In Sunray, an applicant applied to the Oregon Liquor Control Commission (OLCC) for a package store liquor license. Under Oregon law, the OLCC was given broad power to refuse liquor licenses. The OLCC could deny a license if it had reasonable grounds to believe

> "[t]hat there are sufficient licensed premises in the locality set out in the application, or that the granting of a license in the locality set out in the application is not demanded by public interest or convenience."

Upon receiving the applicant's license application, the OLCC conducted an investigation and reached the following conclusions: A sufficient number of licensed premises were available in the locality; local objections militated against issuing a license; and applicant's inventory was not sufficient to be considered a grocery store. The OLCC's denial of the application raised the following questions which the Oregon Court of Appeals found troubling: What is a sufficient number of licensed premises? How is public opposition to the proposed license determined? How much opposition is necessary to block granting of a license? And finally, are all grocery stores allowed package licenses, and if so, what is a grocery store? The OLCC officials did not resolve these questions upon ascertainable written standards, but upon their own experience and judgment.

The Oregon Court of Appeals held that the failure of the OLCC to publish rules and regulations establishing standards by which liquor licenses were to be granted or denied made it impossible for the Court to review the agency action. The case was remanded to allow the OLCC to establish and publish written standards which define how the broad terms in the liquor statute quoted above were to be applied. It is interesting to note that the enabling statute did not explicitly require the OLCC to adopt pre-enforcement rules.

Although the "Sunray Dairy doctrine has been argued in analogous cases to the Oregon Supreme Court, that tribunal so far has declined explicitly to endorse or disallow the doctrine." Frohnmayer, the Oregon Administrative Procedure Act: An Essay on State Administrative Rulemaking Procedure Reform, 58 Ore. L.Rev. 411, 442-443 (1980). In Oregon, "Sunray Dairy stands as a warning to agency administrators operating under broad grants of statutory authority that they should adopt pre-enforcement rules, even if the agency enabling statute does not explicitly command such action." Id. at 443.

"The policies of an agency in a democratic society must be subject to public scrutiny. Public standards are essential to inform the public. Further, they help assure public confidence that the agency acts by rules and not from whim or corrupt motivation. In addition, interested parties and the general public are entitled to be heard in the process of rule adoption under the Administrative Procedures Act.

"An applicant for a license should be able to know the standards by which his application will be judged before going to the expense in time, investment, and legal fees necessary to make the application. Thereafter, he is entitled to even treatment by rule of law and reasonable confidence that he has received such treatment. This cannot be achieved without published rules.

"Cases are usually disposed of without litigation. In most situations, the law and the agency policy are expressed in the actions of agency personnel who deal with the public. Written standards and policies are essential to assure an acceptable degree of consistency of practice among the personnel of the agency.

* * *

"The parties to a hearing of a contested case must know what is to be heard in the hearing. The agency and the applicant are entitled to know what they are required to prove and disprove in order to gather and present their evidence. The hearings officer must have standards so that he can determine questions of materiality and relevance and propose appropriate findings and conclusions to the commission.

"Written standards enable the decision-making body, in this case the commission, to make its decisions by rule of law rather than for subjective or ad hominem reasons.

* * *

"The legislature is entitled to know whether or not the policies and practices of the agency are consistent with the legislative policies upon which the delegation of legislative power to the agency is based. In the absence of published rules, members of the legislature must form their judgments instead upon rumor, individual cases, isolated news reports and other fragmentary, impressionistic and often unreliable sources of information. Published standards are necessary to the proper performance of the duty of legislative oversight of executive agencies operating under legislative delegations of power.

"Finally, . . . the parties to a contested case are entitled to judicial review under [Oregon law]. Judicial review is among the standards which serve to legitimize broad legislative delegations of power to administrative agencies. [Citations omitted]. In the absence of standards, however, the courts are unable to perform that task of judicial review." 517 P.2d at 293-294.

Further, if the MEQB intends to define or expand these criteria in the "Guide to the Rules", then the Guide itself would constitute a "rule" within the definition of Minn. Stat. § 15.0411, subd. 3, and be subject to hearing prior to its adoption. McKee v. Likins, 261 N.W.2d 566 (Minn. 1977); Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238 (Minn. 1980); and Minn. Stat. § 15.0413 (1981 Supp.).

In short, since the criteria for an EIS need determination in these rules are not exhaustive and not set forth, this rule is illegal. Two options are available to the MEQB to correct this deficiency.

The first option is to set forth all the criteria needed for an EIS need determination[9] (i.e., define "significant"). While a mere listing of the criteria does not constitute a "magic formula"[10] which could be applied in an objective manner at all times (since the underlying concepts of environmental protection do not lend themselves to "slot machine" analysis), such an approach offers a workable framework to assist the RGU decision-maker in reaching a threshold determination concerning the necessity of preparing an EIS. Sunray Drive-In Dairy, supra.

The second option available to the MEQB is to delete the entire second sentence in § 3.028 B. ("The criteria are not exhaustive but are considered indicators of the impact of the action on the environment.") However, only four criteria (§ 3.028 C.1.-4.) would then be available for the threshold EIS need determination (or the "significant" determination). Whether these criteria would be sufficient to adequately define "significant" is a decision the MEQB will have to make. It is the MEQB's prerogative to select other options. The

deleted p.21

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9 The SONR, at p. 63, noted that earlier drafts of the rules contained a "more comprehensive listing of potential types of environmental effects that should be considered by the RGU." This comprehensive list of criteria was "rejected because of state agency concerns that the listing would entail a detailed and extensive record of decision for every EAW prepared." While those concerns are valid, other more important concerns, such as the policies of the Administrative Procedures Act and the predictability policy of MEPA take precedence. Therefore, the "comprehensive listing" of standards and criteria is one way to make this rule reasonable. Sunray Dairy, supra.

10 Attempting to define "significance" in NEPA, without a regulation setting forth defined criteria, has been a difficult, and often frustrating, task for federal courts, agencies and legal scholars, as noted in NEPA after Andrus v. Sierra Club: The Doctrine of Substantial Deference to the Regulations of the Council on Environmental Quality, 66 Va. L.Rev. 843, 865-67 (1980):

> "Because of the factual nature of the inquiry, courts have failed to develop precise legal standards by which to evaluate significance. In Hanly v. Kleindeinst, (Hanly II) [471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973)], the Court attempted to define 'significance' by measuring: '1) the extent to which the actions will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and 2) the absolute quantitative adverse environmental effects of the action itself. . . .'
>
> "As suggested by the Hanly II court's fruitless search for assistance in defining 'significance', the original CEQ guidelines were vague: 'a precise definition of environmental 'significance,' valid in all contexts, is not possible.' The guidelines suggested only that "cumulative" impact should be considered, and that "[p]roposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases." The new CEQ regulations, however, attempt to formulate a standard by listing specific factors regarding the context and intensity of the effects to determine "significance." While these factors are themselves vague and courts will undoubtedly interpret and elaborate them, they provide a uniform guide to evaluating significance.
>
> "Neither the Hanly II test nor the CEQ definition [which lists all of the criteria defining 'significantly'] can definitively settle an issue so complex and fact-specific as what constitutes a significant environmental effect. The CEQ definition, however, provides a more specific framework for analysis than has existed previously." [Citations to footnotes omitted; emphasis added].

options mentioned above are just suggestions. Either would make these proposed rules legal. However, adoption of criteria and standards would be a substantial change.

63. Section 3.028 E.3. The problem with this rule is the vast discretion allowed without any standards whatsoever:

> ". . . the RGU may, at its option, treat the present proposal as a total proposal, or select only some of the future elements for present consideration in the threshold determination and EIS." [Emphasis added]

The use of "may" and "some", without any additional standards and criteria, creates a discretion problem and renders the rule illegal. For example, when "may" the RGU treat the present proposal as the total proposal or select only some of the future elements for present consideration in the threshold determination and EIS? Further, how can an RGU know how to select "some of the future elements", absent criteria? Additional standards and criteria must be set forth to guide the RGU in its selection process. Changing the "may" to "shall" is not going to cure the defect entirely, but it is a step in the right direction.

This rule is also unreasonable. The SONR states at page 65:

> ". . . This language [in section 3.028 E.3.] applies to activities where a need has been established and the purpose of environmental review is to develop a design with minimal environmental impact."

NSP proposed Public Exhibit 12 to accomplish the above-quoted intent of the MEQB. NSP's amendment would merely require that a governmental unit determine need prior to any RGU action. The MEQB Staff stated that adoption of NSP's amendment would be contrary to the MEQB's position "that it does have jurisdiction to consider need in situations . . . when no determination of need is made by a governmental agency." (MEQB Ex. 35, Appendix G). The MEQB's reasons for rejecting NSP's proposal are insufficient in view of the above-quoted material from the SONR. The intent of Public Exhibit 12 is to reflect what is in the SONR, which the proposed rule does not now do. At least, one way to cure the defects is to adpt Public Ex. 12.

IV. THE ENVIRONMENTAL IMPACT STATEMENT: 6 MCAR §§ 3.029 - 3.033

64. Section 3.029 A. The primary function of an EIS, as stated in Minn. Stat. § 116D.04, subd. 2a (1980), is to describe the proposed action in detail, analyze its significant environmental effects, discuss appropriate alternatives to the proposed action, and their impacts, and explore methods by which adverse environmental impacts of an action could be mitigated. There is no statutory authority for an EIS to "institute methods" for reducing adverse environmental effects, as is stated in the current rule. Vol. I, Tr. 112-117. The rule, as proposed, exceeds statutory authority. The rule can be brought into conformance with the statute by deleting the word "institute" and inserting therein "explores".

65. Section 3.030 D.1. The use of "may" in the first sentence renders this rule arbitrary and illegal. The effect is correctable by stating that written comments "must" be filed with the RGU during the scoping period. In other words, the permissive language must be deleted and mandatory language must be inserted therein.

66. Section 3.030 D.2. This provision provides that governmental units and other interested persons shall be responsible for participating in the scoping process within the time limits prescribed in these rules. Although the language is "somewhat permissive" (SONR, p. 70), it does emphasize the importance of public involvement at the earliest stage possible since courts may later refuse to consider objections to agency decision-making which were (1) not mentioned at all during the scoping process, or (2) labelled as insignificant during scoping. In this view, if, for example, an environmental group did not express its opinion during scoping (or avail itself of the opportunity to participate in scoping), it would not be later allowed to complain that the decision was improper. Ogunquit Village Corp. v. Davis, 553 F.2d 243 (1st Cir. 1977) and 6 MCAR § 3.030 E.5. suggest this result. In Ogunquit Village, the Court declined to order reconsideration of a completed project, noting the Plaintiff had had ample opportunity to suggest alternatives at an earlier stage.

Minnesota Power proposes an amendment to this rule that would require participation by "governmental units and other persons". (Pub. Ex. 85). At least one purpose of this amendment is to remove the "permissive language" so as to preclude agencies or other persons from raising issues after the scoping decision is final. But, cases like Ogunquit Village, as well as § 3.030 E.5. (E.3. in the rules as amended), stand as an adequate guard to prevent (or estop) governmental agencies and other groups from raising issues after the scoping decision is final. As the Ogunquit Village court noted:

> "The process puts burdens on . . . agencies; but it also demands, if it is to achieve its objective, a certain duty of attentiveness from citizens. If there were more watchfulness on the receiving end, there would be much less likelihood of getting done what would, in the best of all possible worlds, call for a redoing." At 553 F.2d 246.

The rule is reasonable as proposed

67. Section 3.030 E.1. DNR proposes that a disclaimer should be added stating that any permits inadvertently omitted in the scoping process are still necessary to obtain from the appropriate agency. (Pub. Ex. 100). This amendment is unnecessary since the MEQB has no statutory authority to divest any agency of its statutorily authorized permitting jurisdiction. Vol. III, Tr. 37. However, it could be added to the rule as a courtesy to the public. Its addition would not be a substantial change.

not added p.25

68. Section 3.030 E.2. The use of "may" renders this rule arbitrary and illegal. The defect is correctable by substituting "shall".

not changed p.25 see CHEC

69. Section 3.030 E.5. This rule (now E.3. in the rules as amended (MEQB Ex. 38)) allows for RGUs to unilaterally alter the scoping decision if substantial new information comes to light or if a project proposer alters the proposal in a manner that may substantially alter the impacts of the proposed project. Absent either of these two conditions, the consent of the proposer is required to alter the scope of the EIS.

Sierra Club and CACWU attacked this rule as being "absolutely irrational" (Vol. IV, Tr. 43-45), and "one that conflicts with MEPA by not allowing the RGU the flexibility it needs in order to fulfill the mandate of Minn. Stat. § 116B.02, subd. 2." (Pub. Ex. 98). These environmental groups contend that if the RGU has any concern that the "final" scoping decision would lead to an

inadequate EIS, the RGU should be allowed to unilaterally amend the scoping document. Otherwise, a court test of adequacy is virtually inevitable, resulting in further delay to the entire environmental review process. Furthermore, conditioning amendment of the scoping decision "on the agreement of the proposer" has, according to these groups, no basis in MEPA or in the underlying philosophy of environmental review. The argument is that since MEPA mandates the RGU to prepare an adequate EIS, the proposer's reluctance to have the scope of the EIS changed or his belief that a new concern is insignificant, should not be factors in determining whether the RGU expands the scoping decision. Both environmental groups recommended at least deletion of the phrase "without the agreement of the proposer".

While Sierra Club's and CACWU's arguments are appealing, other equally valid considerations, such as finality in the environmental review process, prevent adoption of their amendment. Without this rule, there would be no finality to the scoping process. Absent a final scoping decision, virtually anyone, at any point prior to completion of the EIS, could attack the adequacy of the scoping decision. If that were the case, the environmental review process would degenerate into a "continuously revolving door" for project proposers. Everytime a "valid concern" was raised, the review process would drag or come to a halt until that issue was resolved. There must come a point when argument and debate over what is or is not a significant environmental issue ceases. The law "throbs with [this] tension between the need for right resolution in a given case and the need for finality." Ogunquit Village, supra, at 246.

Granted, this rule places a burden on governmental agencies and others to think carefully and "dream out loud" early on in the EIS process (including environmental groups). But, to the extent that scoping utilizes participation by concerned groups other than governmental units, differing viewpoints will receive attention early in the process, decreasing the likelihood that important questions will be overlooked. If a significant issue, i.e., a "substantial change" or "substantial new information", is brought to the attention of the RGU after the scoping decision becomes final, this rule still allows the RGU to amend the decision.

While the rule is reasonable without the proposed amendments from Sierra Club and CACWU, it is nonetheless both illegal and unreasonable for other reasons. First, the use of "may" creates a discretion problem. The rule can be made legal by changing "may" to "shall". Second, "if substantial changes are made in the proposed project or substantial new information arises relating to the proposed project", those "changes" and "information" should be determined relative to their potential to significantly affect the environment. This second (unreasonable) defect may be cured by adopting limiting language similar to that contained in § 3.031 I.1.a. and b.

changed p.25.

adopted p.25,26

70. Section 3.031 B. In an effort to reduce paperwork, these rules emphasize conciseness. To that end, the rules specify that the EIS must be "written in plain and objective language" and must discuss only those impacts, mitigation measures and alternatives identified in the scoping decision. § 3.031 B.1., 2.g., h., and i. The imperative in MEPA is that an "impact statement [must] be an analytical rather than an encyclopedic document." Minn. Stat. § 116D.04, subd. 2a (1980). Southern Minnesota Municipal Power Agency (SMMPA)

urges that the objective for conciseness would be further enhanced by limiting the size of a draft EIS to a maximum of 250 pages. (Pub. Ex. 93). Admittedly, there is a danger of bulky EISs being unused and unusable. However, a "page limit rule" has the potential to constrain a thorough analysis of environmental factors. But cf., 40 C.F.R. 1502.7 (the text of a final EIS is limited to less than 150 pages, allowing up to 300 pages for proposals of unusual complexity). Projects and their impacts cay vary tremendously. It would be inappropriate to apply the same page limitation to all. The rule is reasonable as proposed.

71. Section 3.031 D. This rule instructs RGUs how to deal with incomplete or unavailable information. In many instances, RGUs will be forced to acknowledge that they are dealing with gaps in relevant information or scientific uncertainty when analyzing a project's potential for significant environmental effects. While MEPA requires a thorough analysis of environmental factors in an EIS, there is also a need to act under conditions of less than perfect knowledge, which this rule recognizes. If essential information proves to be completely unobtainable, § 3.031 D. requires the RGU to consider whether any action should be taken at all in the presence of this uncertainty. The RGU must balance the "need for the action" against the "risk and severity" of the adverse but uncertain impact. If the RGU decides to embark on the project, it must perform a "worst case" analysis, indicating the probability of an adverse occurrence. The intent of this rule is to force systematic balancing of the conflicting needs for action and complete information, and to remove the temptation to ignore unfavorable information.

NSP proposes that the determination with respect to the "incomplete or unavailable information" should be made at the time of scoping, be incorporated into the scoping decision and be subject to judicial review immediately within a 30-day period. Vol. I, Tr. 124. The concern of NSP is that without this amendment, the "incomplete and unavailable information" issue could be raised later to attack the adequacy of an EIS and, if successful, require the preparation of a supplemental EIS. Id.

Adopting a rule requiring the determination at the scoping stage as to whether information is unattainable or incomplete straitjackets the EIS process and thwarts the basic function of an EIS, i.e., to gather available information. The environmental review process must retain some flexibility to add new and relevant information that comes to light throughout the entire EIS preparation process. Admittedly, RGUs are given wide discretion under this rule to determine when information can or cannot be obtained. But, there are safeguards. If the information is determined by the RGU to be unattainable or incomplete, that decision is likely to be upheld on appeal so long as the decision was not arbitrary or capricious. The rule is reasonable as proposed.

72. Section 3.031 E.2., 8. and 9. Once the draft EIS is prepared, the RGU is required to make the draft available for public review and comment and hold an informational meeting in the county where the project is proposed. § 3.031 E.2. The informational meeting must be held not less than 15 days after publication of the notice of availability in the EQB Monitor. Section 3.031 E.8. The record remains open for public comment not less than ten days after the last date of the informational meeting. Section 3.031 E.9. CACWU and DNR contend the time limit requirements in E.8. and 9. are unreasonably short and do not allow for adequate study of the draft EIS by the public and

interested agencies. Volume II, Tr. 33-37 (Pub. Exs. 98 and 100). Both groups propose longer time periods ranging from "between 30 and 45 days" (for E.8.) and "30 days" (for E.9.).

When the Minnesota Legislature amended MEPA, specific time limits were placed for the preparation of environmental documents. Neither DNR nor CACWU submitted any evidence regarding how their time periods would affect other time limitations statutorily imposed on the entire environmental review process. Obviously, increasing the public comment period will cut into other time periods. And, without any specific suggestions regarding other time periods which could be shortened, the proposed amendments must be rejected. While the MEQB's proposed time periods could hardly be characterized as "exceedingly long", neither are they unreasonably short. The 15-day time requirement in E.8. "is in reality approximately 21 actual days when viewed in light of the definition of days." SONR, p.80. And, the ten-day time requirement in E.9. "is in reality approximately 14 actual days when viewed in light of the definition of days." Id. The establishment of these strict time periods fits within one of the stated objectives of these rules - to reduce delay and uncertainty in the environmental review process. Section 3.021 D.4. The time periods, as proposed in the rule, will be more demanding on persons wishing to comment, but in light of the Legislature's concern over time, they are found to be reasonable.

73. Section 3.031 E.9. The use of "may" in the second sentence makes this rule arbitrary and illegal. The defect is correctable by substituting "must" for "may" and deleting "any time".

not changed - see FoF 73

74. Section 3.031 E.10. The use of permissive language ("need not") renders this rule arbitrary and illegal. For example, under what circumstances can late comments be considered in the preparation of an EIS? The defect is correctable by substituting "shall not".

ref. to "late comments" deleted

75. Section 3.031 F.1. After a public information hearing, comments received on a draft EIS are likely to be wide-ranging. This rule, in order to protect the integrity of the scoping process, needs to make it clear that the RGU's obligation is to discuss and respond to comments relating to issues "relevant to" and "consistent with" the scoping decision. Section 3.030 A. However, the MEQB staff interprets the rule, as proposed, as requiring that "[a]ll responsible, substantive comments deserve adequate redress." MEQB Ex. 36, No. 8. Apparently, the Staff is suggesting that "substantive comments" also include those comments which refer to issues beyond the final scoping decision. If so, that position is incorrect. A comment is "substantive" only in terms of its direct relationship to the issues identified in the final scoping decision. Section 3.030 E. Requiring RGUs to respond to comments that refer to issues outside the scoping decision is unreasonable. The proposed rule is found to be impermissibly vague. At least one way to make this rule legal is to adopt SLUC's amendment. (Pub. Ex. 86).

so clarified p. 31

76. Section 3.031 G.1.a.-e. The submission of a request for intervention from the RGU, the proposer or interested parties, is not a reasonable, substantive basis for deciding whether the MEQB should intervene. Section 3.031 G.1.a., b., and c. One of the major policies underlying the 1980 amendments

was limiting the role of the MEQB. This policy is thwarted by the rule as proposed. Thus, this rule is unreasonable. The Staff failed to make any convincing arguments in support of this rule. One approach to make this rule reasonable is as follows:

"The RGU shall determine the adequacy of the final EIS unless notified by the EQB that the Board will assess the adequacy on its own initiative or at the request of the RGU, the proposer of the project or other interested persons. The notice shall be issued no later than 60 days following publication of the preparation notice in the EQB Monitor. The EQB may intervene only if:

(a) The Board determines that the RGU is or will be unable to provide an objective appraisal of the potential impacts of a project; or, [see, SONR at pp. 83-4]

(b) the project involves complex issues which the RGU does not have the technical ability to address; or,

(c) the project will have multi-jurisdictional effects."

inserted p. 32

It is the prerogative of the MEQB to select other wording. The language proposed above is just one approach. But, some other language must be inserted for this rule to be reasonable.

77. Section 3.031 G.4. By consent of the "parties", or by the Governor for good cause, the time for determination of the adequacy of an EIS can be extended. The language in this rule is quoted directly from Minn. Stat. § 116D.04, subd. 2a(g) (1980). The term "parties" is, however, not defined anywhere in the statute or the proposed rule. Nor is there any indication what procedure one has to follow to achieve the status of a "party". Also, the proposed rules seem to use the term "parties" synonymously with "persons". (cf, § 3.031 G.2.7. and H.3.) The SONR, at page 84, states:

> "The legislative intent is to keep this as a rigid time constraint; therefore, the consent of the Governor or mutual consent of the parties, i.e., the proposer and the RGU, is required." (Emphasis added)

If the proposer and the RGU agree to extend the time for preparation of an EIS, what does another "person" have to do to be considered a "party" who could overrule this agreement? If the MEQB intends the term "parties" to refer to anyone other than the RGU and the proposer, § 3.031 G. and H. should be amended to define "parties" and how a "person" achieves that status. In short, the rule, as proposed, is impermissibly vague. NSP's amendment (Pub. Ex. 13) may be too limiting a definition of "party" (i.e., the proposer and the RGU). To make this rule legal, the MEQB must, in some way, distinguish between the party and person status used indiscriminately in these rules. (e.g., §§ 3.031 G., H., and 3.033 C.).

inserted p. 33

78. Section 3.031 G.5.c. This rule states, in part, that the final EIS is adequate if it was prepared in "substantial compliance" with the procedures of the Act and these rules. The language "substantial compliance" creates a vague standard which must either be defined, or standards and criteria, by which determination for compliance will be made, must be added. As stated previously, Minn. Stat. § 15.0411, subd. 3 (1981 Supp.), the definition of "rule", includes the mandate that rules are "made to implement or make specific the law enforced or administered" by the agency. The inclusion of a vague and undefined standard does not comply with this requirement. A rule, such as this one, which contains non-specific language, fails to comply with substantive

provisions of law and may not be adopted. Thus, the rule is illegal as proposed. Adopting standards or deleting the word "substantial" will make the rule legal. While the MEQB Staff does not oppose deletion of the word "substantial", they believe that a court will create a "substantial compliance" doctrine for MEPA regardless of the deletion. (e.g., City of Minneapolis v. Wurtele, et al, 291 N.W.2d 386, 391 (Minn. 1980)). But, until a court or the Legislature does so, the MEQB cannot leave this rule vague and standardless. Deletion of "substantial" would not be a substantial change.

deleted p. 33

79. Section 3.031 G.5.a. Technically, an EIS analyzes and describes environmental issues, rather than "answers" "questions". See, Minn. Stat. § 116D.04, subds. 2a (1980). While the rule, as proposed, is not unreasonable, its clarity could be improved by noting this distinction.

changed to "answered"

80. Section 3.031 H.2. One of the outcomes of the scoping process is the identification of those permits which are related to the issues to be addressed in the EIS. For those permits, this rule requires that a "public record" must be prepared indicating how the EIS information was used in arriving at the permitting decision. SLUC proposes amending the rule to allow governmental agencies to prepare a public record that merely indicates "that it consider[ed] the EIS prior to and in its decision." (Pub. Ex. 86).

Without a requirement forcing governmental agencies to develop a public record stating how they considered the EIS, agencies could escape reasoned environmental decision-making by stating they merely considered the EIS. If this latter approach were adopted, they were would be no identification of the alternatives considered, no discussion of which alternatives were environmentally preferable, no discussion of the factors that the Agency balanced in making its decision and their relative weight, and no indication whether the Agency incorporated all practical means of avoiding or minimizing adverse environmental harm. Failure to consider these factors would be contrary to the intent of MEPA. Moreover, without a record explaining how the agency considered the EIS, there would be no record of decision-making for an appellate court to review. The rule is reasonable as proposed.

81. Section 3.031 I. If the preparation of a supplemental EIS is ordered by an RGU, an expeditious and efficient review process is nonetheless still needed. It would be unreasonable to require in every instance the total repetition of the entire EIS preparation process, including the preparation of an EAW in connection with supplemental EIS preparation. Since this rule does allow an RGU to develop alternative supplemental EIS review procedures, subject to EQB approval (I.3.), the rule is not unreasonable in that aspect. However, it is unreasonable for another reason.

Considering all the other time limitations in the proposed rules, including a time limit on EIS preparation, it is inconsistent with the goals of certainty and predictability in the 1980 MEPA amendments to not include some time limit for the preparation of a supplemental EIS. Cf, Minn. Stat. § 116D.04, subd. 2a(g) (1980). Thus, some time limit must be set for determining the adequacy of a supplemental EIS. NSP's proposed 120-day time limit

time limit set p. 34

(Pub. Ex. 14) is one way to make this rule reasonable.[11] Of course, the MEQB Staff can select a shorter or a reasonably longer time period.

82. Section 3.032 D. This section provides a variance procedure to allow for limited construction on a project prior to completion of the environmental review process. This procedure may also cover necessary governmental approvals if such approvals are necessary to allow for the construction. Under this proposed variance procedure, no variance may be requested until after the EAW is filed with the EQB for publication in the EQB Monitor. Section 3.032 D.1. Thereafter, the proposer submits a variance application to the EQB together with a detailed explanation of (1) the proposd construction project or the governmental approvals needed prior to construction; (2) any anticipated environmental effects of undertaking the proposed project or granting the governmental approvals; (3) the reversability of the anticipated environmental effects; (4) the reasons necessitating the variance; and (5) a statement describing how approval would affect subsequent approvals needed for the project and how approval would affect the purpose of environmental review. Section 3.032 D.2.a.-e. After publication of the notice of the variance application in the EQB Monitor, (§ 3.032 D.3.), the public has 20 days to submit comments to the EQB (§ 3.032 D.4.). The EQB is the recipient and decision-maker for all variance requests. A variance will be granted by the EQB if (a) the RGU consents to the variance, and (b) the proposed construction is necessary in order to (1) avoid excessive and unusual economic hardship or (2) avoid a serious threat to public health or safety. Section 3.032 D.5. Any variance issued is limited to only the construction and governmental approvals which are necessary to avoid the consequences that established the need for the variance. Section 3.032 D.7. This variance procedure is not "an exemption from environmental review or from governmental approval." SONR, p. 92.

The inclusion of this variance procedure was, as could be expected, controversial. The National Audubon Society (NAS) argued that § 3.032 D. is unauthorized in its entirety because, when the 1980 amendments to MEPA were drafted, a variance provision was discussed but rejected. (Pub. Ex. 80). However, NAS submitted no evidence from the legislative record to confirm that the Legislature intended to preclude the EQB from incorporating a variance procedure in these rules. Submission of a legislative bill showing deletion of specific language authorizing a variance procedure would have been persuasive. Can Manufacturers Institute, Inc., et al v. State of Minnesota, 289 N.W.2d 416, 424 (Minn. 1979); but cf., Milwaukee v. Illinois, 451 U.S. 304, 332 n.24, (Blackmun, J. dissenting). Since MEPA and its legislative history appear to be silent on this issue, there is nothing to prohibit the MEQB from promulgating a variance procedure. Therefore, pursuant to Minn. Stat. §§ 15.0412, subd.

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[11] NSP also proposed (in Pub. Ex. 14) another limitation on the supplemental EIS procedure. Under NSP's amendment, an RGU could prepare a supplemental EIS only "with the consent of the proposer or after a contested case hearing." This amendment is rejected. Requiring the consent of the proposer before an RGU could order a supplemental EIS unduly limits the ability of the RGU to obtain any needed information. And, while a contested case hearing would protect any vested rights that had accrued to the project proposer, the proper recourse for an aggrieved proposer is an appeal to district court. Whether the district court has the jurisdiction to review the need or adequacy of supplemental EISs is an issue to be determined by the court itself. (See, Finding No. 35).

1a (1981 Supp.)[12], and 116D.04, subd. 5a(k), the MEQB has the statutory authority to adopt a reasonable variance procedure.

83. Section 3.032 D.5.b.(1). Although the MEQB has statutory authority to adopt a general variance procedure, one of the foremost issues raised in this proceeding was whether the granting of an economic hardship variance would nullify or frustrate state environmental policy under MEPA. This issue was raised by the National Audubon Society and Sierra Club with respect to the variance provision which provides for allowing construction in order to "avoid excessive and unusual economic hardship." § 3.032 D.5.b.(1). In particular, both environmental groups argue that this rule is violative of the spirit and intent of MEPA since the granting of an economic hardship variance would sidestep part of the environmental review process in the early but critical stages. This argument is rejected for the following reasons. The standard in MEPA for when an EIS must be prepared is very clear - whenever there is major governmental action with the potential for significant environmental effects. Minn. Stat. § 116D.04, subd. 2a (1980). This rule, as proposed, in no way authorizes a variance from this MEPA statutory standard for environmental review. Rather, it authorizes a variance from the procedure set forth in § 3.032 C. (physical construction of a project is prohibited until certain specified procedural requirements have been met). The granting of an economic hardship variance would not affect the requirement that an EIS be prepared. It would only permit certain very limited construction activities prior to the EIS's completion. (See, § 3.032 D.7., which confines the scope of any granted variance).

In view of the above, the MEQB has not, by providing for an economic hardship variance, violated the EIS preparation standard of MEPA. The MEQB does have statutory authority to adopt an economic hardship variance.

84. Section 3.032 D.5.b.(1). While this rule is not defective for lack of statutory authority, it is defective for another reason. As noted by Sierra Club, the term "excessive and unusual economic hardship" is not defined in these rules and is standardless. Vol. 4, Tr. 51-56. The Sierra Club does not stand alone in its criticism of variances which are standardless. In recent years, many legal scholars have voiced the same concern. Rohan, 6 Zoning and Land Use Controls, § 43.01[4][b] (1981); Note, Zoning Variances, 74 Harv. L. Rev. 1396, 1397 (1961). Professor Rohan, in his zoning treatise, states the following:

defined p.36

> "A basic contention is that the standards articulated in many zoning laws for the granting of variances are too general and vague and therefore leave the agency without precise guidelines for determining when to grant such relief. This has led . . . to the indiscriminate granting of variances, thereby undermining the effectiveness of zoning ordinances. . . . The absence of definitive guidelines, moreover, hampers the courts in reviewing the action of administrative zoning boards in granting or denying variances." [Emphasis added] 6 Zoning and Land Use Controls, § 43.01[4][b], pp. 43-14 and 15.

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12 Minn. Stat. § 15.0412, subd. 1a (1981 Supp.) states as follows:

> "Variance to rule. Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance, it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency granting a request for a variance shall set forth in writing its reasons for granting or denying the variance. This subdivision shall not constitute authority for an agency to grant variances to statutory standards."

If there are no standards or criteria to define "excessive and unusual economic hardship", upon what basis is the RGU to determine whether to consent to the variance prior to its submission to the EQB? Would the EQB, in determining whether to grant this type of variance, look to the physical characteristics of the parcel wherein those unique attributes would result in the excessive and unusual cost? Or, would the Board consider excessive and unusual costs as those that result from the timing of a project proposer's own plans, financial considerations associated with purchase agreements, availability of financing, the effects of different construction costs and business costs over time? Does "excessive and unusual economic hardship" mean the same as "unnecessary hardship" in zoning? See, Rohan, supra, Vol. 6, § 43.02[2].

Although it could be argued that boards and courts should be given discretion to delineate the elements of "excessive and unusual economic hardship" on an ad hoc basis, the Minnesota Legislature has determined otherwise. Before any agency can grant a variance, it must "adopt rules setting forth procedures and standards by which variances shall be granted and denied." [Emphasis added] Minn. Stat. § 15.0412, subd. 1a (1981 Supp.) Since there are no standards defining this term, this rule is contrary to the statute.

In order to clear up this defect, standards or criteria defining "excessive and unusual economic hardship" must be set forth. For guidance in selecting standards, the MEQB staff may wish to review an incisive article by University of Minnesota Law Professor David Bryden, entitled "The Impact of Variances: A Study of Statewide Zoning," 61 Minn. L.Rev. 769 (1977). Another obvious way to clear up this defect is to just delete the economic hardship variance altogether. Unfortunately, it would appear that either of these "cures" would be a substantial change.

85. Section 3.033 A. The MEQB Staff acknowledged that the MEQB intends that § 3.033 should allow the MEQB to review decisions and projects proposed by a state agency. Vol. I, Tr. 142. The MEQB Staff further stated that the rule, as defined, and the amendment in MEQB Ex. 35, p. 13, which includes the term "action", would be broader than the above-stated MEQB intent. Vol. VI, Tr. 32.

In the rules, as amended, the definition of "action" has been deleted from § 3.022 B., but the term is still retained in § 3.033 A.-E. "Action", as defined in the original rules, meant "governmental action", which means "activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated or approved by governmental units." § 3.022 B. Thus, use of "action" (when it was defined in the original rules) made this rule much broader than what the MEQB intended.

Since the definition of "action" has been deleted, there is no reasonable reason to retain this term in this rule. In fact, its use now creates ambiguity and leaves the impression that the MEQB desires a rule much broader than originally intended. Retention of the term "action" makes this rule unreasonable. The rule can be made reasonable by deleting the term "action" and clearly stating that this rule has limited applicability to projects where a state agency is a proposer. (e.g., Pub. Exs. 15 and 86, p. 11). "Action" must also be deleted from § 3.033 B.-E.

86. Section 3.033 E.3. The EQB's decision to reverse, affirm or modify the governmental unit's decision is subject to judicial review pursuant to Ch.

15. Minn. Stat. § 116D.04, subd. 9 (1980). Under the rule, as proposed, the MEQB need not set forth the reasons for its decision. Without a record of the MEQB's decision-making process, there is nothing for an appellate court to review. This rule is unreasonable. The rule can be made reasonable by stating that the EQB must set forth in writing its reason for its decision. (e.g., see, Pub. Ex. 100). stated p. 39

V. SUBSTITUTE FORMS OF ENVIRONMENTAL REVIEW: SECTIONS 3.034-3.037

87. Section 3.034 A. and B. Minn. Stat. § 116D.04, subd. 4a (1980), specifically requires that the Board shall "by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner. . . ." According to the Sierra Club, the Legislature contemplated evaluation and enumeration of specific programs, not a listing of factors necessary to constitute an adequate environmental review alternative. Vol. IV, Tr. 56-57. Sierra Club advocates that this section should be rejected in its entirety and that the MEQB be directed to evaluate programs in existence in state agencies, determine if those programs provide adequate alternative review, and to indicate such programs specifically in the rule to provide guidance for project proposers.

While the MEPA statute could be interpreted as suggested by Sierra Club, the better interpretation is the one adopted by the MEQB and embodied in these rules. Adoption of Sierra Club's approach would impose an onerous, tedious and unreasonable burden on the MEQB to search all statutes, rules and ordinances to determine which programs provide adequate environmental review. Moreover, this burden would be ongoing since existing programs change and new programs are created. The general process outlined in § 3.034 A. allows greater flexibility for the MEQB and places the burden on the governmental unit to come forth and demonstrate why its program is adequate. The MEQB has the statutory authority to adopt this alternative review procedure set forth in § 3.034 A. and B.

88. Section 3.034 A. The use of "may" creates a discretion problem. For example, even if the governmental process meets all the conditions in A.1.-8., "may" the EQB still disapprove the process as inadequate? The rule is illegal. The word "may" must be changed to "shall". Likely, inserting "shall" will also require redrafting of this paragraph. redrafted p. 39

89. Section 3.035 A. and B. By statute, the Minnesota Legislature authorized MEQB to develop rules by which a model ordinance "may be adopted and implemented by local governmental units in lieu of the environmental impact statement process required by this section, providing for an alternative form of environmental review where an action does not require a state agency permit and is consistent with an applicable comprehensive plan." Minn. Stat. § 116D.04, subd. 5a (1980). The model ordinance must provide for "adequate consideration of appropriate alternatives" and insure that "decisions are made in accordance with the policies and purposes" of MEPA. Id. Under this rule, as proposed, before a project is exempt from the procedural rules relating to the preparation, distribution and evaluation of EAWs and EISs, the local ordinance must be approved. Approval of a local governmental unit's ordinance may be achieved in two different ways. First, if the local governmental unit

adopts the model ordinance as presented in these rules (§ 3.035 C.), EQB "approval" is automatic. § 3.035 B.1. Second, the rule would also give the local governmental unit the option to adopt a different environmental review ordinance. But, in that case, the EQB must review and determine if the "ordinance provides for consideration of appropriate alternatives and insures that decisions are made in accord with the policies and purposes of [MEPA.] Section 3.035 B.2. If the ordinance meets those basic requirements, the EQB will approve it.

The Minnesota Inter-County Association (MICA) maintains the EQB has no statutory authority to preempt or limit the authority granted to cities, counties and townships to adopt ordinances. Vol. II, Tr. 44-45. MICA is partially correct. The Legislature has conferred specific responsibility upon the MEQB to ensure that any ordinances adopted by local governmental units meet basic minimal environmental review standards. Minn. Stat. § 116D.04, subd. 5a(h) (1980). If the local governmental unit adopts an ordinance that, in the opinion of the MEQB, fails to meet adequate environmental review standards, then environmental review will proceed under these rules rather than the ordinance. Clearly, the Legislature has, by statute, limited or altered a local governmental unit's ability to adopt ordinances that are inconsistent with the policies and purposes of MEPA. However, the Legislature has not vested the MEQB with power to veto any ordinance inconsistent with MEPA. Local governmental units can either adopt the model ordinance in its entirety or not adopt the model ordinance and then proceed under the environmental review rules. To the extent that these rules grant the MEQB the authority to review and veto a local ordinance that differs from the model ordinance, they are lacking statutory authority. The rules can be made proper by deleting § 3.035 B.2. and 4. As the Agency is redrafting this section, it should consider alerting local units of government that the model ordinance is the only alternative to environmental review. But such an addition is not required.

deleted p. 41

90. Section 3.036 A.1.-6. Criteria A.1.-6. are applicable to all projects and groups of projects; and, although labelled "criteria", they do not provide a basis for determining which projects cannot be adequately reviewed on a case-by-case basis. The true "criteria" are in paragraphs E.1., 2. and 3. Therefore, these first criteria for ordering a generic EIS, expressed in A.1.-6., are unreasonable. This entire section must be deleted.

deleted p. 43 but added on p. 44

91. Section 3.036 B. Sierra Club maintains that the requirement here, (that the EQB, if it orders a generic EIS, must be the RGU) would be a straitjacket preventing the most logical RGU from being selected. The reasons for limiting the RGU solely to the EQB are clearly stated in the SONR (p. 105) and are sufficient to make this rule reasonable as proposed.

92. Section 3.036 C. The use of "may" makes this rule arbitrary and illegal. For example, "may" a "governmental unit or other person" request the PCA or the DNR (rather than the EQB) to order a generic EIS? The defect is correctible by substituting the word "shall".

no change See CAE 4/1

93. Section 3.036 G. The use of "may" in this rule creates the impression (for the first time) that addressing the scoping issues is a permissive requirement, rather than a mandatory requirement. (See, § 3.030 E.1.). If the use of "may" is intentional, what issues "may" an RGU not address? The use of "may" in this rule creates a vagueness problem. This defect can be cured by inserting "are".

"may" deleted p. 44

VI. MANDATORY EAWs, MANDATORY EISs, DISCRETIONARY EISs AND EXEMPTIONS: 6 MCAR §§ 3.038-3.041.

A. Environmental Review in General: The Underlying Philosophy.

94. Several witnesses at the hearing maintained that where a permitting process exists for a certain activity, environmental review should not be required. (e.g., MACI and Lehmann and Associates; Pub. Exs. 53 and 101). This position, as discussed below, is contrary to the purposes and policies of MEPA.

A review of the major portions of MEPA, in particular, § 116D.04, subd. 1a-3a (1980), demonstrates that the Minnesota Legislature did not intend that the mere presence of a permitting process would preclude environmental review of a project. Instead, the requirement to obtain a permit may, in fact, activate the environmental process. For, whenever "there is a potential for significant environmental effects resulting from any major governmental action," an EIS must be prepared. Minn. Stat. § 116D.04, subd. 2a (1980) [Emphasis added]. "Governmental action" is defined very broadly in MEPA as:

> "Activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated or approved by units of government . . ." [Emphasis added] Minn. Stat. § 116D.04, subd. 1a(d) (1980).

Thus, whenever a major activity "permitted" by a governmental unit has the potential for significant environmental effects, an EIS is required.

Other sections in MEPA manifest the Legislature's intent that projects requiring permits are nonetheless subject to environmental review. Minn. Stat. § 116D.04, subd. 2a(e) (1980) states that: "The permits which will be required for the proposed action shall be identified during the scoping process." And, § 116D.04, subd. 2a(f) states:

> "Whenever practical, information needed by a governmental unit for making final decision on permits underlying information needed by a governmental unit for making final decision on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement."

Finally, § 116D.04, subd. 3a, states:

> "Within 90 days after final approval of an environmental impact statement, the final decision shall be made by the appropriate governmental units on those permits which were identified as required and for which information was developed concurrently with the preparation of the environmental impact statement. Provided, however, that the 90-day period may be extended where a longer period is required by federal law or state statute or is consented to by the permit applicant. The permit decision shall include the reasons for the decision, including any conditions under which the permit issued, together with a final order granting or denying the permit."

The plain and simple language in the above provisions demonstrates the Legislature's obvious intent that the information obtained during environmental review was to be available prior to and used during the permitting process. The conclusion that the permitting process is a substitute for environmental review is simply not supported by MEPA.

The Minnesota Supreme Court has also acknowledged on three separate occasions, the complementary, rather than substitutionary, nature of the permitting and environmental review processes. No Power Line v. MEQC, 262 N.W.2d 312, 326 (Minn. 1977) (consideration of just environmental factors in § 116C.57, subd. 4, is "not the equivalent of a properly prepared and assembled

EIS . . ."); PEER v. MEQB, 266 N.W.2d 858, 865 (Minn. 1978) ("Under MEPA, an EIS must be available to guide the agency . . . [and be prepared as early as possible] to serve its proper function in the decision-making process."); Coon Creek Watershed District v. MEQB, No. 81-394 (Minn. Sup. Ct. filed February 12, 1982).

In Coon Creek, a Watershed District was statutorily charged with the operation and maintenance of an Anoka County ditch that was 8.2 miles in length. This ditch had never been repaired since its completion in 1917. In response to a petition from adjoining landowners (who sought to use this ditch again), the Watershed District hired an engineer to assess the need for ditch repair. The engineer's conclusion was that the ditch needed to be cleared of vegetative over-growth to be operative. Opponents of the repair petitioned the MEQB, requesting preparation of an EIS on the project. After a hearing, the EQB found that "although a ditch repair is generally not considered to be the type of action requiring an EIS, [this County] Ditch . . . is distinguished by its length of 8.2 miles." Coon Creek, supra. The MEQB's final conclusion was that "the repair would have significant environmental impact and ordered preparation of an EIS." Id. The Watershed District appealed to the District Court, which affirmed the Order of the MEQB.

At the Minnesota Supreme Court, the Watershed District argued that the mandate to maintain the ditch (Minn. Stat. § 106.471, subd. 2(a) (1980)) exempted it from the provisions of MEPA which required preparation of an EIS "whenever there was a potential for significant environmental effects resulting from any major governmental action". While the Court agreed that the Watershed District was required to make necessary repairs, it disagreed that the repair project was exempt from MEPA:

> "The requirement of an EIS does not preclude the repair but merely ensures that the environmental effects will be considered and that the repair will be done in the least harmful way. As the EQB states in its brief:
>
> > [A]n EIS is not a decision-making document. It does not and cannot prohibit a project from proceeding. Rather, an EIS is an informational document. An EIS examines the environmental consequences of an action, explores alternatives, and suggests measures which could be helpful in mitigating any adverse environmental impact caused by the action. (Citations omitted)." Coon Creek, supra.[13]

It is noteworthy that the Court upheld the MEQB's Order for an EIS even though the ditch repair statute required the district to "give due consideration to conservation of soil, water, forest, wild animals, related natural resources and other public interests affected. . . ." Minn. Stat. § 106.671 (1980). In view of Coon Creek, the Court has tacitly recognized that environmental review under MEPA is far more extensive and encompassing than the limited environmental review undertaken in the permitting process.

Preparation of an EIS in environmental review performs at least two primary functions: (1) to serve as an environmental disclosure statement by detailing the environmental effects of a proposed project in order to allow those who did not have a part in its compilation to understand and consider meaningfully the factors involved therein, Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975); and, (2) to compel the governmental decision-maker

to give serious consideration to any environmental factors in making discretionary choices in the permitting process, Silva v. Lynn, 482 F.2d 1282, 1284-5 (1st Cir. 1973); Monroe County Conservation Council v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972). Absent environmental review, none of the above purposes are assured consideration since a decision by an agency to issue a permit considers only a narrow set of factors or standards. Thus, the environmental review and permitting processes serve overlapping but distinct functions.

While the existence of required permits does not exempt a proposed project from environmental review, so also, the absence of a permit requirement does not obviate the need for environmental review. "Permitting" is only one of several governmental activities that triggers environmental review. (See, definition of "governmental action" above). When no "governmental action" is involved, only then is a project beyond MEPA's reach.

Those who attacked any of the mandatory categories (EAW/EIS) on the sole basis that the existence of a permitting process precludes or makes unnecessary environmental review will not find their comments addressed in this Report. Arguments to that effect are, in view of the discussion above, without merit and are rejected as unfounded.

B. The Reasonableness Standard.

95. The review of these rules is governed by Minn. Stat. § 15.052, subd. 3 (1981 Supp.), which requires the Examiner to determine, and state in his Report, whether the agency has "demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts."

Although "reasonableness" is not defined in either Minn. Stat. § 15.041 et seq. (1981 Supp.), or the Office of Administrative Hearings Rule Hearing Rules, 9 MCAR §§ 2.101-2.199 (1980), it is a requirement that has received comment by courts for many years. Courts have determined that for a rule to be reasonable, at a minimum, it must be consistent with the law, Juster Bros. v. Christgau, 7 N.W.2d 501, 507 (Minn. 1943); not be arbitrary, Hurley v. Chaffe, 43 N.W.2d 281, 284 (Minn. 1950); In re Application of Byron M. Hanson, 275 N.W.2d 790 (Minn. 1978); and, there must be a rational basis for the exercise of the agency's judgment, American Trucking Association, Inc. v. U.S., 355 U.S. 141 (1957). A decision of "less than ideal clarity will be upheld if the agency's rationale may be reasonably discerned," Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974). Where reasonable minds would differ on the reasonableness of the rule, the agency's determination will be affirmed, Thomas Bros., Inc. v. Sec. of State, 282 N.W.2d 273 (Mich. App. 1979); Rible v. Hughes, 24 Cal.2d 437, 445, 150 P.2d 455, 459 (1955). Moreover, a rule is not unreasonable simply because another equally reasonable alternative exists. Federal Security Administrator v. Quaker Oats Co., 318 U.S.218, 233 (1943); Pitts v. Perluss, 27 Cal. Rptr. 19, 377 P.2d 83, 89 (1962).

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13 Federal courts, in interpreting NEPA, have likewise concluded that the permitting process triggers, not exempts, environmental review. Davis v. Morton, 469 F.2d 593, 596-97 (10th Cir. 1972); Conservation Council of North Carolina v. Costanzo, 398 F.Supp. 653, 671 (E.D.N.C. 1975), aff'd, 528 F.2d 250 (4th Cir. 1975); NRDC v. Morton, 388 F.Supp. 829, 836 (D.C. 1976), aff'd, 527 F.2d 1386 (D.C.Cir. 1976), cert. denied 427 U.S. 913 (1976).

Although the entire record will be examined to penetrate to the underlying reasons for the MEQB's decision on threshold limits, policy decision and questions of law, even this examination has limits. Deference must be given to the MEQB's ability to rely on its own expertise, so long as they have submitted sufficient evidence to meet their statutory burden. Industrial Union Dept. AFL-CIO v. Hodgson, 499 F.2d 467, 475-476 (D.C. Cir. 1976); Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976).

Most of the testimony and exhibits offered into the record concerned the mandatory categories (§§ 3.038 and 3.039) and their respective threshold limits. Some of the evidence presented only criticized the threshold limits as unreasonable or offered other threshold limits without any statements as to why the MEQB's limits were unreasonable. That type of evidence is not persuasive and will not be responded to in this Report.

In reviewing the remaining evidence, those who challenged the MEQB's threshold limits as unreasonable bear a fairly heavy burden since "[q]uestions involving the environment are particularly prone to uncertainty." Ethyl Corp., supra, at 24. And, in view of this uncertainty, agency expertise is a very important factor which must be given due consideration when discussing the reasonableness of the rules. With respect to the quantitative threshold limits, the focus of inquiry is whether the MEQB's "numbers are within a zone of reasonableness, not whether its numbers are precisely right." Hercules, Inc. v. EPA, 598 F.2d 91, 106 (D.C Cir. 1978). The bottom line, however, is the statutory test quoted above: whether there has been an affirmative presentation of facts to demonstrate the need and reasonableness of the proposed rule.

To reduce repetition and facilitate comparison, all relevant categories within that category area, i.e., mandatory EAW, mandatory EIS, or exemptions, are discussed together.

C. The Mandatory, Discretionary and Exemption Categories.

96. Sections 3.038 A.; 3.039: Nuclear fuels and nuclear waste. Minnesota Project suggested that construction or expansion of an on-site pool for temporary storage of spent nuclear fuels should be a mandatory EIS category. Pub. Exs. 40 and 41. The MEQB previously ordered, after extensive public hearings, not to require an EIS for the expansion of the storage capacity of the nuclear fuel storage pools at Prairie Island. Pub. Exs. 50 and 51. No witness in this hearing identified any specific environmental effects from such projects which were not examined in the previous contested case hearing. Id. Thus, this rule is consistent with the MEQB's prior decision on this issue. Since such projects are a mandatory EAW category, if new information were to become available, it would be presented at the RGU's EIS need hearing. This rule is reasonable without the Minnesota Projects' amendment.

97. Comments were received urging the Agency to define "storage", "disposal", "away-from-reactor storage", "on-site storage", and "temporary". No specific language was offered by any commentator that would define these terms. This is not surprising since these terms are in a state of "being understood", even by those experts in the nuclear waste area. The MEQB's previous efforts to define these terms were also futile. MEQB Ex. 36, No. 4. Thus, it is reasonable to allow the "state of the art" to define these terms whenever these categories apply. The rule is reasonable without defining these terms.

98. CACWU proposed definitions for the terms "low level and high level nuclear waste." Pub. Ex. 31. The scope of these terms is understood by those responsible for implementing environmental review for projects relating to low level and high level nuclear waste. Because of the highly technical nature of these terms, the clarity and understanding of these rules is not enhanced by CACWU's proposed definitions. Therefore, defining low level and high level nuclear wastes in these rules is not needed.

99. Suggestions were received from CACWU to expand the mandatory EIS category (§ 3.039 A.) to include the construction of an on-site pool for temporary storage of spent nuclear fuel, the construction or expansion of a facility for the storage of high-level nuclear waste, and construction or expansion of a facility for the storage of low level waste for one year longer. Pub. Ex. 31. Since such projects are in the mandatory EAW category, that category provides adequate protection for determining whether the projects proposed by CACWU have the "potential for significant environmental effects." The mandatory EIS category is reasonable without CACWU's amendments.

100. The MEQB Staff amended § 3.039 A.1. by requiring EIS preparation for the construction or expansion of nuclear waste processing facilities. MEQB Ex. 38. The rule was expanded to include "incineration or other waste processing facilities." MEQB Ex. 36, No. 5. This amendment is needed and reasonable. It is not a substantial change.

101. Sections 3.038 J.; 3.039 G; 3.041 G.: Mineral Mining and Processing. Under § 3.038 J.2., an EAW is required whenever a mine is expanded by 328 acres or more. Currently, existing metallic mine operators in Minnesota have submitted applications for a "permit-to-mine" pursuant to DNR's mineland reclamation rules, 6 MCAR §§ 1.0401-1.0406. Pub. Ex. 34. The permit-to-mine review program considers the proposed activities over the life of the mine, including mining and reclamation plans, a description of environmental factors, construction design, air, water, land and noise impacts, possible alternatives and mitigation methods. Notice of the Application is published in a local newspaper to provide for public comment or to request a public hearing on the proposal. Once a permit is issued, it will cover the mine for its entire lifespan, in most cases, 50 or more years. The permits currently under review by DNR are not expected to be issued before these rules are promulgated. DNR contends that no useful purpose would be served by now requiring EAWs to be prepared on the numerous expansions currently under review. Therefore, DNR proposes an amendment to require EAW preparation for expansion "beyond the activities contemplated in the permit-to-mine." Pub. Ex. 100.

As previously noted, the existence of a permitting process does not preclude environmental review. (See, Finding 94). However, the Legislature and the MEQB have provided a means of "alternative review" pursuant to which a permitting process (like the permit-to-mine program) could conceivably be used as a substitute for environmental review. Minn. Stat. § 116D.04, subds. 4a and 5a(g) (1980); § 3.034. But, before an alternative review process may be implemented, it must be approved by the MEQB as addressing the same issues and utilizing similar procedures as an EIS. Section 3.034 A. If DNR desires any relief from EAW preparation for its permit-to-mine program, the alternative review procedures outlined in § 3.034 should be followed. The MEQB Staff (and certainly the Examiner) lack the information at this time to determine whether

adequate environmental review is achieved under the permit-to-mine program. The rule is reasonable without DNR's amendment.

102. Preparation of an EAW is required under § 3.038 J.1. for "mineral deposit evaluation other than natural iron ore and taconite." The reasons for excluding taconite and iron ore are set forth in the SONR at p. 126. Lehmann and Associates contend that this rule is unreasonable because "it distinguishes between one metallic mineral commodity and all the others, even though these commodities may be found in the same geologic areas of the state and involve similar types of operations." Pub. Ex. 53. Lehmann proposes that all metals, other than those having "radioactive characteristics" (e.g., uranium), should be excluded from EAW preparation. Id. The reason the "other metals" were not excluded from this rule is that (1) Minnesota has had relatively little experience in evaluating the impacts of mining and mineral deposit evaluation of other types of mineral deposits" [e.g., copper, nickel and uranium], and (2), there is a lack of regulatory review related to these mining activities. SONR, p. 126. The SONR implies that these "other base metals" have the potential for significant environmental effects, albeit, such effects are unknown. Since Lehmann & Associates presented no substantive, contradictory evidence on this issue (e.g., generic EIS or scientific studies), other than just bare assertions, the Examiner finds that the Agency has demonstrated that this rule is reasonable as proposed. Lehmann's "need" argument is dismissed for the reasons set forth in Finding No. 94.

103. General mine site evaluations are excluded from these rules pursuant to § 3.041 G.1. Exploratory borings "are not included in this exemption because these activities are controversial and the subject of scientific debate as to the significance of potential impacts." SONR, p. 125. Lehmann & Associates disagree with this statement in the SONR, but again, offer no substantive evidence to support their position. Pub. Ex. 74. Further, Lehmann & Associates argue that since exploratory borings must be conducted pursuant to the licensing procedures in Minn. Stat. § 156A.071 (1980), there is no need for environmental review. Id. However, this argument has been discussed and found to be without merit. (See, Finding 94). The Examiner finds that the Agency's proposed rule has been shown to be both needed and reasonable.

104. Sections 3.038 K.; 3.039 H.; 3.041 G.: Non-metallic mineral mining. This subject area is subdivided into categories relating to peat and categories relating to aggregate minerals because the environmental impacts relating to these types of activities differ. MACI, Granite City Ready-Mix, Inc., the Aggregate and Ready-Mix Association and the Minnesota Asphalt Pavement Association all argue that these rules are unreasonable because the threshold levels in §§ 3.038 K.2. and 3.039 H.2. are too high; and, that these rules are not needed since local zoning ordinances provide adequate review of aggregate mining projects. Vol. I, Tr. 149-176; Vol. VI, Tr. 49-53 (Pub. Exs. 69, 73 and 101). The SONR at pp. 127-129, sets forth the MEQB's reasons for the threshold limits selected. These limits are found to be reasonable in light of the absence of facts to the contrary. A bare assertion that the current 320-acre EAW threshold is adequate is insufficient to show that the MEQB's threshold limits are unreasonable. Rather, the evidence from industry should have focussed on why the MEQB's threshold limits do not have the potential for significant environmental effects. The "need" argument is likewise dismissed as without merit for the reasons stated in Finding 94.

105. Sections 3.038 M.; 3.039 J.; 3.041 I.: Industrial/Commercial/Institutional Facilities. SLUC and the Metropolitan Council propose amendments to change the threshold limits in § 3.038 M. Pub. Exs. 86 and 95. Neither amendments set forth clear and adequate reasons that demonstrates that the threshold limits in the rule, as proposed, are unreasonable. The Agency, on the other hand, has presented facts in support of its proposal. Therefore, this rule is reasonable.

106. Section 3.038 N.: Air Pollution. Pickands-Mather and MACI argue there is simply no justification for this category in view of the regulatory requirements of the Clean Air Act, 42 U.S. § 4701 et seq. (1977). Again, the environmental review and the permitting processes serve overlapping but distinct functions. The sole argument from these industrial groups that the existence of a permitting process for air pollution obviates the need for environmental review is rejected. (See, Finding 94).

The SONR at p. 135 gives adequate reasons to support the 100-ton threshold limit. Thus, Southern Minnesota Municipal Power Association's 200-ton threshold limit is rejected. Pub. Ex. 93.

This rule is reasonable as proposed.

107. Sections 3.038 R.; 3.039 M.; 3.041 K.: Residential Development. Different numbers were offered for all the threshold limits in the EAW, EIS and exemption categories by SLUC, Sierra Club, Metropolitan Council, Urban Planning and Design, Inc., and the cities of Brooklyn Park and Cottage Grove. Pub. Exs. 47, 49, 70, 85 and 95. Given the scant evidence that was presented by each group in support of its number when compared with the evidence offered by the Agency in support of its proposal, it is found that the Agency has demonstrated the reasonableness of its proposals. In fact, considering the wide range of numbers proposed, the MEQB's threshold limits strike the middle ground.

108. Sections 3.038 U.; 3.039 O.; 3.041 M.: Highway Projects. New collector roadway construction, if over one mile in length, would be subject to a mandatory EAW pursuant to § 3.038 U.1. Urban Planning and Design, Inc. (Pub. Ex. 47) and Sierra Club (Vol. IV, Tr. 69-70) proposed threshold limits higher and lower, respectively. The SONR at p. 148, sets forth adequate reasons for the one-mile threshold limit, and coupled with the lack of any evidence rebutting the statements therein, this rule is found to be reasonable.

109. Sections 3.038 W.; 3.039 Q.; 3.041 N.: Water Appropriation and Impoundments. The EAW threshold for new appropriations of ground or surface water for irrigation is "540 acres or more in one continuous parcel." Section 3.038 W.1. A more meaningful standard, according to the Sierra Club, would be "540 acres within a certain area regardless of whether it met an absolute standard of contiguousness." Vol. IV, Tr. 70. The SONR is silent on the reasonableness of the "contiguous parcel" limitation. But, DNR, in its statement supporting this rule, noted that "inclusion of continuous acres is important to discern between small and large scale projects." The rule, therefore, is reasonable as proposed. Minn. Stat. § 15.0412, subd. 4c (1981 Supp.).

110. Sections 3.038 Y.; 3.041 P.: Stream Diversion. Routine maintenance and repair of drainage ditches within 20 years of construction or major repair,

is exempted from environmental review under § 3.041 P. By this rule, maintenance or repair of a ditch not performed within 20 years of construction or major repair is placed in the discretionary EAW area. Region Nine Development Commission (RNDC) requests an exemption for all maintenance and repair of drainage ditches. Vol. I, Tr. 28-31 (Pub. Ex. 1). For the reasons below, RNDC's proposal is rejected.

The early 1900's, 1930's and 1950's are considered as periods of intense drainage activity in Minnesota, which resulted in the construction of numerous ditches. MEQB Ex. 36, No. 2. When constructing these ditches, no design plans or specifications were usually used. Id. Quite often, environmental considerations of a ditching project were just ignored. Ditches that proved to be inefficient or no longer needed were simply abandoned whereby the area reverted to its natural condition.

It is the considered opinion of the MEQB Staff that the repair of "defunct ditches" not exempted by § 3.041 P. have the potential for significant environmental effects. Id. RNDC presented no evidence to rebut the Staff's conclusion. Instead, the RNDC resorted to such fall-back arguments that since there are more than 280 miles of drainage ditches in Region Nine that have not been repaired in 40 years or more, local governmental units will be deluged with petitions requesting EAW preparation, thereby resulting in an increase in cost to both RGUs and proposers. RNDC is overstating its case. MEQB records demonstrate that under the current rules, only 13 drainage projects were subjected to environmental review in the entire state. Of the 13 projects, only three were in Region 9. Furthermore, the MEQB projects that, under this rule, only one EAW per year will be prepared. SONR, p. 153. If preparation of an EIS is required, then the "cost of the EIS is merely an additional cost item of the project and can be assessed against the benefited landowners in the same manner as other costs incurred in the repair of "the ditch." Coon Creek Watershed District, supra.

In oral testimony, the representative from RNDC maintained that since DNR has jurisdiction over repair and maintenance of ditches, no environmental review rule was really needed. One of the major flaws in this argument is that DNR does not have such jurisdiction. A petition from landowners requesting the repair of any ditch is heard by either the County Board or the District Court. Minn. Stat. § 106.471, subd. 4 (1980). This localized procedure is totally insulated from state control. Minn. Stat. § 106.671 (1980). Thus, the responsibility for reviewing the environmental impacts of a ditch repair project rests entirely with local units of government. If all ditch repair projects are exempted from environmental review, then local units of government are limited to reviewing environmental impacts solely under the ditch repair statute. Section 106.671 (1980). In Coon Creek, the Supreme Court tacitly recognized that environmental review under MEPA is far more extensive and thorough than under the ditch repair statute. (See, Finding 94). This rule is needed and reasonable.

111. Sections 3.038 Z.; 3.039 S.: Wetlands and Protected Waters. The purpose of § 3.038 Z.2., the provision that received most public comment, is to provide environmental review for actions affecting specific wetlands (types III-VIII) and protected waters within environmentally sensitive areas of the state. Shoreland areas, delineated floodplain areas, and wild and scenic river

districts are covered under this latter category. This limited scope means only minimal areas are included for environmental review while the vast majority of other areas in the state escape such review. The category also allows for "minimal encroachment" without triggering environmental review. For example, 40% of a basin, or up to five acres of a basin, whichever is less, may be altered without initiating an EAW.

The Examiner, as well as MACI and MICA, expressed concern that environmental review of wetlands is limited to just those wetlands enumerated in Minn. Stat. § 105.37, subd. 15 (1980) (the "protected wetlands"). However, the fact that DNR only has jurisdiction over types III, IV and V wetlands is irrelevant to an evaluation of the validity of § 3.038 Z.2. Rather, the focus of inquiry is whether there is some governmental action that is required for a particular project. If no government approval is required for a project affecting wetlands, then environmental review is not initiated. And, even if a large degree of governmental action is involved, the environmental review process "does not and cannot [by itself] prohibit a project from proceeding." Coon Creek Watershed District, supra [Emphasis added] (See, Finding 94). The limited function of environmental review is to develop "information on impacts and alternatives to be considered in decision-making." Pub. Ex. 100. Projects may or may not be modified, depending on the nature of the information developed in the environmental review process.

It is noteworthy that this rule designates local governmental units as the appropriate RGU and not the DNR since the wetland types in Z.2. are more likely to be affected by the land use decisions made routinely by county, city and township governments. Since "most counties, cities and townships do not have ordinances dealing specifically with wetland drainage," DNR envisions very few situations that will require an EAW. Pub. Ex. 100. The largest "impact will be in urbanizing areas of shorelands, floodplains and wild and scenic rivers where approval for plats, subdivisions, buildings, etc., will trigger environmental review if the provisions of this category are met." Id.

The Examiner wants to emphasize that the environmental review process for the protected waters and protected wetlands category does not create a new permitting process for local governmental units. Instead, the process will enable decision-makers to receive information so as to enable them to make wise decisions regarding protection of the environment.

If there are further questions on this issue, the reader is referred to DNR's thorough analysis in Pub. Ex. 100. The SONR and the information contained in Pub. Ex. 100, Appendix No. 3, demonstrate the need and reasonableness of this rule.

112. Sections 3.038 AA.; 3.041 Q.: Agriculture and Forestry. Because conversion of prime agricultural land to other uses is a recognized problem in Minnesota, agricultural land conversion is included for the first time in the environmental review rules as a basis for requiring the preparation of an EAW. Vol. V, Tr. 144-146 (Pub. Ex. 43). SLUC advances two separate arguments to support its proposal to delete § 3.038 AA. in its entirety.

First, SLUC cites to State, by Skeie v. Minnkota Power Coop., Inc., 281 N.W.2d 372 (Minn. 1979), contending that the Minnesota Supreme Court found the "productive use of farmland" was not a natural resource protected by the Minnesota Environmental Rights Act. SLUC's reliance on Skeie is misplaced.

For the Court explained that:

> "No evidence was offered to show that the land would be polluted or impaired or destroyed in any specific way. . . . if the landowner had introduced evidence to prove that the presence of a powerline would have made the soil sterile; or caused its erosion, or limited its cropping potential in some significant irreversible way, we would have a different situation. But this was not done. The missing evidence is that which distinguishes intrusion upon land which cannot be compensated by damages from those which can, the distinction is a critical one." At pp. 373-74.

Thus, the Court contemplated that under the appropriate circumstances, MERA would protect agricultural land.

Second, SLUC advocates that although agricultural land preservation was not expressly or impliedly referred to in MEPA, "this end has been expressly included in the Minnesota Municipal Planning Act, Minn. Stat. § 462.351 (1980), and the Metropolitan Agricultural Preserve Act, Minn. Stat. § 473H.01 et seq. (1980)." Pub. Ex. 86. Both of these acts require some form of comprehensive planning and zoning for land development. Sections 462.353 and 473H.04. SLUC's argument is that local governments should be excluded from the environmental review process if an acceptable comprehensive land plan has been adopted. The problem with SLUC's argument is that the MEQB has recognized that many of the local comprehensive plans do not provide adequate environmental review. MEQB Ex. 36, No. 15. While the Municipal Land Planning Act is a significant advancement for addressing zoning issues, the Act is lacking in consideration of environmental protection elements. Id. If, in the future, a municipality believes that its comprehensive plan incorporates adequate environmental review, the plan should be submitted to the MEQB for consideration under the alternative review program. Section 3.034.

The rule, as proposed, is reasonable.

113. Sections 3.038 BB.; 3.04 R.: Animal Feed Lots. Currently, there is discretionary EAW authority from the exemption level of 100 animal units to the mandatory EAW threshold level of 1,000 animal units. Region Nine Development Commission (RNDC) requests raising the exemption threshold for feedlots to 500 animal units. Pub. Ex. 67. Because the RNDC failed to present any evidence that demonstrates or suggests the present exemption thresholds have no potential for significant environmental effects (in contrast to the Agency, which did present evidence of such effects), their amendment is rejected. The RNDC focussed its arguments on speculative theories that the "large gray area" (i.e., the discretionary EAW) will likely result in "court challenges, added expense and adversarial situations for local RGUs." This type of argument is not persuasive and therefore, the rule is reasonable as proposed.

114. Pesticides. No mandatory EAW or EIS requirements were proposed for this category. Comments from the National Audubon Society, Sierra Club and private citizens urged inclusion of a mandatory pesticide category.

Methods to address the need for environmental review for pesticide use were considered in the earlier public meeting process. However, no method was determined to be acceptable by the MEQB. SONR, p. 163. Although "pesticides" are excluded from the mandatory EAW/EIS categories, it was deemed more reasonable by the MEQB to "allow for environmental review on a discretionary basis." Id. The Minnesota Administrative Procedure Act gives a great deal of latitude to agencies to not propose rules. There is, however, a procedure to

allow citizens or groups to request an agency to propose a rule (see, Minn. Stat. § 15.0415). Persons interested in pesticides may wish to consult that statute, but the rules are reasonable without a pesticide category. (See also, Pub. Ex. 42). Adoption of a pesticide category would be a substantial change.

115. The Proposed Mandatory Categories for Chemical Substances. CACWU made a lengthy and detailed presentation concerning the need for a mandatory chemical substances EAW and EIS category. Pub. Exs. 62 and 63. Adoption of CACWU's proposals would require governmental agencies to consider "quantitative risk assessments" of a proposed project. While quantitative risk assessment is the "only methodology available for estimating the magnitude of carcinogenic risks", use of this technique, even in the federal regulatory process, has its limitations:

> "Quantitative risk assessment seems to offer information that would be useful to regulators who must resolve this conflict. But because the biological mechanisms of carcinogenesis are so poorly understood, the quantitative risk assessment process is rife with sources of potential error. More importantly, in each case, neither the scientist nor the regulator can reliably estimate the likelihood of errors. They can only know that the errors are possibly enormous." Leape, Quantitative Risk Assessment in Regulation of Environmental Carcinogens, 4 Harv. Env. L. Rev., 86, 116 (1980).

CACWU's amendment is one approach for ensuring that policies on the presentation of risk assessments are not lost or forgotten in the regulatory decision-making process. But, this approach is simply not feasible at this time since most local governmental units lack the skills to address the issue of quantitative risk assessment to the degree of sophistication required by CACWU's amendment. Before CACWU's amendment could ever be adopted, more debate and study is needed by both governmental agencies and industry. These rules are reasonable without the amendment proposed by CACWU.

116. Section 3.040 B. A governmental unit may order preparation of a discretionary EAW for any project that does not exceed the mandatory EAW or EIS category if (A) the project may have the potential for significant environmental effects, and (B) the "primary purpose" of the project is not exempted pursuant to § 3.041. The MEQB Staff acknowledges that if an exemption category overlaps a mandatory EAW or EIS category, the most restrictive category should apply. Vol. IV, Tr. 133. That is, the mandatory category overrides the exemption category. Id.

While the SONR and this rule are silent as to this Staff interpretation, there are other more serious problems which make this rule illegal. This rule requires the determination of the "primary purpose" of a project by a governmental unit, which is a decision to be made without any defined standards or criteria. (See, the discussion in Findings 40 and 62). This rule can be made legal by adopting standards or criteria to guide a local governmental unit in determining what is the "primary purpose" of the project.

see CHE 4/1 "primary purpose" deleted. p. 59

117. Sections 3.043 A. and C. Under both these rules as proposed, the MEQB is given authority to decide (via a resolution) what permits may be exempted from the early notice rules. However, no standards or criteria are presented to guide the MEQB in its decision-making process. Thus, the rules are illegal. Some standards or criteria must be incorporated in both rules to indicate how the MEQB is to reach a determination to exempt certain permits from the early notice rules.

no change See CHE 4/1 re existing rule.

VII. EARLY NOTICE RULES: 6 MCAR §§ 3.042-3.048.

118. Section 3.044 A.1.a. and b. These proposed rules require publication in the EQB Monitor for the filling or dredging of ten or more acres of "public waters". Since these types of projects are subject to the environmental review process (§§ 3.038 Z. and 3.039 S.), "notice" would be provided in the EQB Monitor once an EAW is prepared (see, § 3.027 D.). Retention of these two early notice rules will result in duplicative notice requirements for these types of projects. Thus, these two rules are not needed and must be deleted, or some other method must be found to avoid duplication.

deleted P.67

119. Section 3.044 A.1.d. This rule requires notice for "[p]ermit to mine or lease, to prospect for iron ore, copper-nickel, or other materials (Minn. Stat. §§ 93.16, 93.335, 93.351)". The statutes cited in the rule require that notice be published for public sales of permits and leases to prospect for iron ore or other minerals on state-owned or administered mineral rights. It is unclear from this rule, in view of the statutes cited therein, whether notice of the public sale or notice of the actual granting of a permit or lease is to be published (or both). DNR stated that this was a problem and the cure could be to amend the rule to note that it is the notice of such sale that should be published in the EQB Monitor. This rule is lacking in clearness and is therefore unreasonable. DNR's proposal is one way to clarify this rule and thus make it reasonable. (Pub. Ex. 100).

deleted-rewritten P.67

120. Section 3.044 A.1.e. This rule requires publication in the EQB Monitor for "earth removal leases (Minn. Stat. § 92.50)." Under Minn. Stat. § 92.50, subd. 1, earth removal leases are required for removal of "sand, gravel, clay, rock, marl, peat, and black dirt. . . .".

DNR's preferred recommendation is to delete this rule since projects which involve "earth removal" from 40 acres in size are included in the mandatory EAW/EIS categories (§§ 3.038 K. and 3.039 H.). Notice would be published in the EQB Monitor once an EAW is prepared (see, § 3.027 D.). The mandatory EAW/EIS categories for non-metallic mineral mining covers peat and aggregate minerals (e.g., sand, gravel and rock), but not marl mining. Marl mining, which almost always takes place in lake basins, "would be addressed by the Wetlands and Protected Waters category area [§§ 3.038 Z. and 3.039 S.]." (SONR, p. 128). Notice for all earth removal lease activities would be provided in the environmental review process, and thus, there is no logical reason for duplicative notice. This rule is not needed and must be deleted (see also, Pub. Ex. 100 for additional reasons which support deletion of this rule).

deleted P.67

121. Section 3.044 A.1.h. Under this rule, "special local need registration for pesticides" must be published in the EQB Monitor. The current rules require EAW preparation for the application of restricted-use pesticides. SONR, p. 166-67. These proposed rules contain no EAW/EIS pesticide category. Requiring publication of the action of the Minnesota Department of Agriculture (MDA) to register certain pesticides "is proposed as a substitute process to allow the board and the public to become aware of the types of pesticides that may be used in future applications." SONR, supra.

The MDA proposes deletion of this rule since under their existing Pesticide Control Rules (3 MCAR § 1.0338), they are required to publish notification of restricted-use pesticide registrations in the EQB Monitor. Vol. V, Tr. 149-146. In the MDA's Pesticide Control Rules, notice is published in the EQB

Monitor, the State Register, and a press release is issued after the granting of a special local need registration. A governmental agency or any person has 30 days after publication in the State Register to file a petition with the Commissioner of the MDA objecting to the issuance of the registration. The Commissioner then may grant a contested case hearing for the purpose of determining whether to revoke, amend or uphold the registration. 3 MCAR § 1.0338 B.5.

Even though the MDA's rules require publication of the need registration in the EQB Monitor, this rule is still needed. As noted in the SONR at p. 166:

> "If agencies could make their permitting decisions immediately upon publication, the intent of early notice would be defeated; the publication would serve no purpose other than to inform the board and the public of an action that has already taken place. By providing a 30-day waiting period, the board and the interested public have an opportunity to participate in the decision-making process of an agency rather than adversarily approaching the agency after the fact."

This rule allows for public participation prior to rather than after the MDA has issued a need registration and "with minimal administrative burden or cost." MEQB Ex. 36, No. 21. This rule is reasonable as proposed.

122. Section 3.044 A.15. This rule grants unbridled discretion to the MEQB and is therefore illegal. The rule can be made legal by adopting standards and criteria to guide the MEQB in determining what other actions must be noticed.

123. Section 3.053 E. Under this rule, the MEQB, besides considering information provided by the proposer and the RGU, "may" consider "other reasonable information in making its determination." Without defining what this "other information" is or may be, the rule is arbitrary and illegal. The rule can be made legal by defining what other information the EQB will consider; or, limiting the information as that submitted by the RGU and the proposer.

VIII. THE SPECIAL RULES FOR CERTAIN LARGE ENERGY FACILITIES: 6 MCAR §§ 3.055-3.056.

124. Section 3.055 B.3.c. The environmental report on the certificate of need application for a large electric power generating plant must include, among other things, a "general evaluation, including the availability, estimated reliability, and economic, employment and environmental impacts, of the proposal and alternatives." The Minnesota Energy Agency (MEA) proposed an amendment to this rule to clarify that the types of analysis to be performed are only for those "reasonable alternative facilities" identified in § 3.055 B.3.b. Pub. Ex. 45; Vol. V, Tr. 166. It is not reasonable to require that the five types of analysis currently specified in this rule be performed for unreasonable alternatives. This rule is thus unreasonable but can be made reasonable by deleting "alternative" and inserting "reasonable alternative facilities identified in 3.b."

125. Section 3.055 B.4. The environmental report, under this rule, need not consider "site-differentiating factors." The language in this rule is permissive, standardless, and thus, illegal. This defect can be cured by either inserting mandatory language ("shall not") or adopting standards to determine when the environmental report will consider site-differentiating factors (such as "unless the site is known").

The rule is illegal for another reason. The rule does not define under what circumstances the environmental report must be as "exhaustive or detailed as an EIS." This defect can be cured by substituting "shall" for the first "need."

Furthermore, the rule is also unreasonable. The SONR notes that "[d]etailed information on alternative sites and alternative facility designs is not always available at the certificate of need stage due to the sequential nature of the regulatory process for these facilities" (p. 185). Requiring information on detailed facility designs, which this rule would do, is neither reasonable nor needed. This level of detail is not necessary to compare the environmental effects of different sizes, types, and in-service dates of alternative facilities considered at the certificate of need stage. And, given the limited time available for preparation of the environmental report, it is not reasonable to require evaluation of detailed facility designs. This rule can be made reasonable by either stating that information on detailed facility designs shall not be considered or adopting standards (such as "unless the design is known") to indicate when it should be considered in the environmental report.

126. Section 3.055 B.5. Upon completion of the draft environmental report, the report is circulated as provided in 6 MCAR § 3.031 E.3. Section 3.031 E.3. specifies the distribution requirements for draft EISs. Two provisions of that rule require distribution to "any governmental unit which has authority to permit or approve the proposed action" and to "a public library or public place in each county where the action will take place where the draft will be available for public review." Section 3.031 E.3.a. and .g. All governmental units with authority to permit or approve the proposed action may not be known before the facility site and detailed design are determined in later steps of the regulatory process. Also, the county where the action will take place will not be known before the siting decision is made. Therefore, this rule is unreasonable as proposed. The rule can be made reasonable by inserting at the end of the sentence the phrase "to the extent known."

127. References to the MEA should be changed to "DEPD", the Department of Energy, Planning and Development throughout the proposed rules. See, Minn. Stat. Ch. 116J (1981 Supp.).

128. Sections 3.055 C.3. and 3.056 C.3. The use of "permissive language" in these two rules would allow the MEQB to reconsider, in an EIS, the need for a High Voltage Transmission Line (HVTL) or Large Electric Power Generating Plants (LEPGP) and other issues determined by the Minnesota Energy Agency (MEA) under certain circumstances which are not defined in these rules. For the following reasons, MEQB reconsideration in an EIS of an MEA decision concerning need for an HVTL or LEPGP or other related matters is prohibited by the Minnesota Energy Act, Minn. Stat. Ch. 116 H. (1980) (hereinafter, the Energy Act) and is contrary to the policies of MEPA, Minn. Stat. Ch. 116D (1980).

The provisions in these proposed rules which would allow for reconsideration of MEA decisions in an EIS are in direct conflict with three statutory provisions of the Energy Act. First, MEA's enabling statute explicitly prohibits the MEQB from reconsidering the need for a HVTL or LEPGP and any other issues previously determined by the MEA in a subsequent EIS:

"The Agency [MEA] has sole authority and responsibility for the administration of sections 116H.01 to 116H.15. Other laws notwithstanding, the authority granted the agency shall supersede the authority given any other agency whenever overlapping, duplication or additional administrative or legal procedures might occur in the administration of sections 116H.01 to 116H.15." [Emphasis added]. Minn. Stat. § 116H.06 (1981 Supp.).

Section 116H.06 is a recognition that where a clear and unavoidable conflict in statutory authority exist, other laws, like MEPA, must give way to MEA jurisdiction. MEPA was not intended to repeal by implication this enabling statute or any other statute in Minn. Stat. Ch. 116H.

Second, all state agencies which are authorized to issue permits for siting, construction or operation of LEPGPs must "present their position regarding need and participate in the public hearing process prior to the issuance or denial of a certificate of need." Minn. Stat. § 116H.13, subd. 7 (1981 Supp.). Among the factors which the MEA director must consider in assessing need are the "policies, rules and regulations of other state and federal agencies and local governments." Minn. Stat. § 116H.13, subd. 3(8) (1981 Supp.). Given this comprehensive certificate of need process, there is absolutely no reason to again assess need in a subsequent EIS.

Finally, the Energy Act establishes the exclusive jurisdiction of MEA concerning the need, size and timing of an HVTL or LEPGP and the legally binding effect of such MEA determinations on other state agencies, including the MEQB, as follows:

"Issuance or denial of certificates of need shall be the sole and exclusive prerogative of the director and said determinations and certificates shall be binding upon other state departments and agencies, regional, county and local governments and special purpose government districts except as provided in sections 116C.01 to 116C.08, and 116D.04, subd. 9." [Emphasis added] Minn. Stat. § 116H.13, subd. 7 (1981 Supp.).

The citation to 116D.04, subd. 9, and to 116C.01-.08 is not to be construed as opening the door for the MEQB to reconsider in an EIS the need for an HVTL or a LEPGP and any other issues previously determined by the MEA. MEQB authority to review any agency decision under 116D.04, subd. 9, is extremely limited.[14]

To allow reconsideration in an EIS of the need for an HVTL or LEPGP or other issues determined by the MEA is also contrary to the 1980 MEPA amendments "to reduce paper work and delay through inter-governmental cooperation and the elimination of unnecessary duplication of environmental reviews." Minn. Stat. §§ 116D.04, subd. 5a(i) (1980). Reconsideration of need in the

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[14] Minn. Stat. § 116D.04, subd. 9 (1980) states as follows:

"Prior to the final decision upon any state project or action significantly affecting the environment or for which an environmental impact statement is required, or within ten days thereafter, the board may delay implementation of the action or project by notice to the agency or department and to interested parties. Thereafter, within 45 days of such notice, the board may reverse or modify the decisions or proposal where it finds, upon notice and hearing, that the action or project is inconsistent with the policy and standards of sections 116D.01 to 116D.06. Any aggrieved party may seek judicial review pursuant to chapter 15."

EIS process essentially renders the MEA certificate of need proceeding meaningless by subjecting it to second-guessing as to when any need decision will ever be final. These proposed rules require extensive environmental review by the MEA prior to a certificate of need decision and there is no need to rehash that again in an EIS.

Specifically, the MEQB proposed rules required the MEA to prepare an environmental report concerning any certificate of need application for an HVTL or LEPGP. Among the required contents of the environmental report are "a general analysis of the alternatives of no facility" and of "delayed construction of a facility." 6 MCAR §§ 3.055 B.3.d. and 3.056 B.3.d. The draft environmental report must be circulated and made available for public review and comment. All comments must be entered into the certificate of need hearing record. 6 MCAR § 3.055 B.7. Copies of the final environmental report are distributed. 6 MCAR § 3.055 B.10. The MEA Director cannot make a certificate of need decision until the final environmental report has been completed. 6 MCAR § 3.055 B.11. The proposed rules would then require the draft EIS to contain a summary of the environmental report and certificate of need decision. 6 MCAR §§ 3.055 C.3. (EIS at certificate of site compatibility stage) and 3.056 C.3. (EIS at route designation and construction permit stage).

The environmental report concerning need is performed during the certificate of need process where it informs the MEA Director, who has exclusive authority to determine need, of the environmental consequences of the decisional choices. Any subsequent environmental review by an agency legally bound by that decision would be duplicative and a waste of public funds.

The correct statement regarding when need should be considered is contained in the SONR at pp. 188-189 which states:

> "The information relating to need is most properly considered during the certificate of need process. If a party wishes to challenge that determination, the proper appeal is to district court."

The MEQB Staff's interpretation regarding the intent of these two proposed rules is consistent with the SONR. The Staff acknowledges that once the EIS process begins "and then subequent to that, the permitting process, that need issues would not be discussed." [Emphasis added] Vol. I, Tr. 207. However, the rule, as proposed, reflects neither the SONR nor the Staff's interpretation given at the hearing.

It is noteworthy that the MEQB staff, in asserting that the MEQB has authority to require consideration of need in an EIS after a certificate of need has been granted by the MEA, offered no specific statutory authority in support thereof. (MEQB Exs. 35, (Appendix G, p. 2), and 36 (Eller Memorandum, p. 2)).

For the MEQB to adopt 6 MCAR § 3.055 C.3. and 3.056 C.3., the permissive language must be deleted and mandatory language inserted therein as follows:

inserted p. 82

> § 3.055 C.3. ". . . The EIS shall not consider need for the facility and other issues determined by the MEA. The EIS need not contain detailed data which are pertinent to the specific condition of subsequent construction and operating permits and which may be reasonably obtained only after a specific site is designated."

p. 82 alternative language used - see CHE 4/1

and

§ 3.056 C.3. ". . . need for the facility and other issues determined by the MEA shall not be considered in the EIS."

The use of permissive language ("need not") in § 3.055 C.3. (see above), proposed by both NSP and the MEQB Staff (Pub. Ex. 91, Appendix A and MEQB Ex. 36, Eller Memorandum, p. 2), also renders the rule illegal. The rule can be made legal by adopting standards or criteria; or, substituting mandatory language ("shall not") therein.

129. Sections 3.055 B.12. and 3.055 C.11. The use of "may" in these rules renders them arbitrary and illegal. For example, under what circumstances may a supplemental EIS be required? These rules can be made legal by substituting "shall" for "may".

130. Section 3.056 A. This rule provides in part that "[n]o EAW need be prepared for any facilities subject to this rule." The use of permissive language ("need not") creates a vagueness problem and renders this rule illegal. For example, under what circumstances must an EAW be prepared? One way to make this rule legal is to adopt standards or criteria which set forth the circumstances in which an EAW must be prepared. Another way to make this rule reasonable is to delete the permissive language and insert mandatory language ("shall not").

131. Section 3.056 D. This proposed rule would require that, in the situation where construction of a HVTL would not require a certificate of need from the MEA, the EIS prepared in connection with the route selection process must consider the alternative of "no action". 6 MCAR § 3.056 D. The construction of an HVTL with a capacity of 200 kilovolts (kV) or more requires a construction permit from the EQB, but a certificate of need from the MEA is only required for the construction of a HVTL with a capacity of 200 kV or more and with more than 50 miles of its length in Minnesota or with a capacity of 300 kV or more with more than 25 miles of its length in Minnesota. Minn. Stat. §§ 116C.52, subd. 3, and 116H.02, subd. 5(b) (1980). The position of the MEQB Staff is that the MEQB has jurisdiction to determine need for an HVTL where no certificate of need is required, "when need is a critical issue and 'no build' is a prudent and feasible alternative." (MEQB Ex. 35, Eller Memorandum, pp. 3-4). NSP believes that the MEQB has no legal authority to adopt a rule requiring consideration of need in an EIS for an HVTL where no certificate of need is required. Further, NSP maintains that even if the MEQB has legal authority to consider issues of need when no certificate of need is required, this rule is nonetheless illegal because it contains no criteria or standards to determine when need must be considered in an EIS (i.e., when is need "a critical issue" or when is "no build a prudent and feasible alternative"?).

After reviewing the entire record, including all briefs filed therein, the Examiner finds that when construction of an HVTL does not require a certificate of need, the MEQB has no legal authority to refuse to designate a route or to determine the need for an HVTL. Therefore, the MEQB has no authority to consider the need for an HVTL in an EIS if the HVTL does not require a certificate of need. Even if the Board or others involved in this rulemaking process determine that the MEQB does have legal authority, § 3.056 D. is still illegal because it contains no criteria or standards which define when or how the issue of need for an HVTL will be considered. The reasoning set forth below is,

other than for slight modifications and deletions, quoted from NSP's Brief (Pub. Ex. 91). The Examiner agrees with NSP's reasoning and could not improve on the quality of the Brief by any redrafting.

An EIS is required when there is "potential for significant environmental effects resulting from any major governmental action." Minn. Stat. § 116D.04, subd. 2a (1981 Supp.). The phrase "governmental action" is defined to include a series of activities which require a decision by a governmental unit. Minn. Stat. § 116D.04, subd. 1a(d) (1981 Supp.). This definition requires that the governmental action must be within the governmental unit's jurisdiction or else it would be ultra vires and thus void. If there is no "governmental action", there is no need for an EIS. Thus, unless the MEQB has jurisdiction to consider the need issue, there is no purpose in considering that issue in an EIS.

Neither the Power Plant Siting Act (PPSA), Minn. Stat. §§ 116C.51-116C.69 (1980), the Energy Act, MEPA, nor the Minnesota Environmental Rights Act (MERA), Minn. Stat. Ch. 116B (1980), grant the MEQB any authority to refuse to designate a route or to consider the need for an HVTL.

The authority of the MEQB to regulate the construction of an HVTL is contained within the PPSA. The jurisdiction section of the PPSA states:

> "The Board is hereby given the authority to provide for route and site selection." Minn. Stat. § 116C.53, subd. 2 (1980).

The PPSA requires that if the MEQB accepts an application for an HVTL construction permit, then the MEQB has a mandatory duty to select one of the routes identified in the process and to issue the construction permit. Section 116C.57, subd. 2, provides in relevant part:

> "Pursuant to sections 116C.57 to 116C.60, the board shall study, and evaluate the type, design, routing, right-of-way preparation and facility construction of any route proposed in a utility's application and any other route the board deems necessary which was proposed in a manner consistent with the rules adopted by the board .... Within one year after the board's acceptance of a utility's application, the board shall decide in accordance with the criteria and standards specified in section 116C.55, subdivision 2, and the considerations specified in section 116C.57, subdivision 4, which proposed route is to be designated. The board may extend for just cause the time limitation for its decision for a period not to exceed 90 days. When the board designates a route, it shall issue a permit for the construction of a high voltage transmission line specifying the type, design, routing, right-of-way preparation and facility construction it deems necessary and with any other appropriate conditions. [Emphasis added].

The MEQB neither has discretion to reject all the routes proposed nor discretion to refuse to issue a construction permit.

As noted in Special Assistant Attorney General Doug Blomgren's Memorandum dated December 30, 1980 (see, Pub. Ex. 91, Appendix B, p. 2), when the Legislature amended the PPSA in 1977 to remove the "corridor" selection process, they also "removed the authority of the EQB to refuse to designate a transmission line route." Laws 1977, ch. 439, § 10. Further evidence of the MEQB's lack of authority to refuse to designate a route is that the MEQB has proposed bills in the Legislature, such as S.F. 868 introduced in 1981, which would amend the relevant portion of § 116C.57, subd. 4, to read "... the board

shall decide ... which proposed route, if any, is to be designated." (Pub. Ex. 91, Appendix C). Despite numerous changes in the PPSA since 1973, the Legislature has never adopted the "if any" amendment which would affirmatively grant the MEQB authority to refuse to designate a route.

The MEQB Staff asserts that the MEQB has jurisdiction to determine need based upon the policy section of the PPSA and upon a quotation from No Power Line (NPL) v. MEQB, 262 N.W.2d 312 (Minn. 1977); (MEQB Ex. 35, Eller Memorandum, pp. 4-5). First, the policy section of the PPSA states:

> "The legislature hereby declares it to be the policy of the state to locate large electric power facilities in an orderly manner compatible with environmental preservation and the efficient use of resources. In accordance with this policy the board shall choose locations that minimize adverse human and environmental impact while insuring continuing electric power system reliability and integrity and insuring that electric energy needs are met and fulfilled in an orderly and timely fashion." Minn. Stat. § 116C.53, subd. 1 (1980).

This can hardly be considered as an affirmative grant of authority when contrasted with the jurisdiction section of the PPSA, § 116C.53, subd. 2, supra, or with exclusive jurisdiction sections of the Energy Act, supra. If the legislature had intended to grant the MEQB any authority to determine need for an HVTL, there would be an explicit grant of authority in the jurisdiction section of the PPSA and an exception in the jurisdiction authority of the MEA. A more direct interpretation of the policy to fulfill electric needs in an orderly and timely fashion comes from an understanding of the regulation of HVTLs prior to enactment of the PPSA, which was that each affected county had to grant approval. The potential for delay and fragmentation in the former county-by-county approach was a motivating factor in enactment of the PPSA. NPL, supra at 321.

Second, the MEQB Staff asserts that the Court in NPL, supra at 321, recognized the MEQB's authority to determine need by stating:

> "By enacting the [Power Plant Siting Act], the legislature sought to insure that the future siting of power plants and transmisson lines would be carried out in an orderly fashion according to a rational design, rather than haphazardly, and possibly unnecessarily, at the whim of individual public utilities whose decisions might fail to consider or comport with the public interest." [Emphasis added.]

This sentence is irrelevant to the issue of whether the MEQB presently has authority to determine need for an HVTL because (1) the Court was interpreting the PPSA prior to the 1977 amendment, (2) such an interpretation would vitiate MEA's exclusive jurisdiction, and (3) the sentence is dicta in light of the facts and issues of the case. As discussed previously, the 1977 PPSA removed the authority of the MEQB to refuse to designate a route. The jurisdictional issue in NPL was whether the MEQB could accept jurisdiction over the routing and construction of an HVTL at the applicants' request, even though the applicants were previously exempted from the PPSA pursuant to a grandfather clause. The MEA had issued a certificate of need for the HVTL and the MEQB's alleged jurisdiction concerning need for the HVTL was not at issue. Therefore, the sentence is dicta and to interpret it as a recognition of MEQB jurisdiction concerning the need for an HVTL would vitiate the meaning of exclusive need jurisdiction of the MEA and the legally binding effect of certificate of need decisions on other state agencies.

As discussed previously, the Legislature granted the MEA exclusive jurisdiction over the issue of need for HVTLs. Minn. Stat. § 116H.06. Also, since its enactment in 1974, § 116H.05 has exempted certain short HVTLs from the certificate of need requirement. This exemption section was amended in 1975 and in 1977 to reduce the number of HVTLs which could be constructed without a certificate of need. At no time has the Legislature required a prior need determination for construction of all HVTLs, regardless of length. Obviously, had the Legislature determined that requiring a prior need determination for construction of all HVTLs, they could have easily eliminated the exemption, rather than enacting the 1975 and 1977 amendments.

The legislative exemption for certain short HVTLs from the MEA jurisdiction does not somehow implicitly vest the MEQB with jurisdiction to determine need. MEA jurisdiction concerning need is exclusive and nothing in the Energy Act authorizes the MEQB to make need determinations. The MEQB Staff refers to this exemption as a "loophole". (MEQB Ex. 35, Eller Memorandum, p. 5). If the MEQB disagrees with the exemption in Minn. Stat. § 116H. 05, subd. 5(b), they should present their position to the Legislature and request reconsideration of the exemption, rather than attempting to eliminate a statutory exception and expand the MEQB jurisdiction by administrative rule.

The MEQB Staff hypothetically asserts that the "loophole" would allow a utility to separate a proposed HVTL project into segments of length below the thresholds of Minn. Stat. § 116H.05, subd. 5(b), to avoid any review of need. (MEQB Ex. 35, Eller Memorandum, p. 5). This hypothetical assertion is contrary to economic reality, mandatory statutory responsibilities, and past MEA regulatory policy. First, a utility which attempted this tactic would incur much higher costs for multiple construction permit proceedings and time delays because the construction permit proceedings for each segment (e.g., a 15-18-month process) would have to be concluded prior to filing an application for the next segment. Second, each utility is required to file biennially and update annually a report of all HVTLs it intends to build in the next 15 years. Minn. Stat. § 116C.54 (1980). Therefore, to successfully accomplish the above tactic, a utility would have to consistently refuse to disclose its intentions for any segment for which a construction application has not been filed, an action subject to the penalties and enforcement provisions of Minn. Stat. § 116C.68 (1980).

Third, this hypothetical assertion is contrary to past MEA regulatory policy. In late 1978, NSP, UPA and CPA proposed to construct a 345-kV HVTL from Sherburne County Substation to Benton County Substation and United Power Association proposed a 230 kV HVTL from Benton County Substation to Milaca Substation. The length of neither of these HVTLs separately exceeded the jurisdiction thresholds of Minn. Stat. § 116H.05, subd. 5(b), but the combined lengths of alternative routes would exceed these thresholds. The MEA Director issued an order to show cause, conducted a public hearing, and issued an order concerning whether the two HVTLs should be considered as one and subject to MEA certificate of need jurisdiction. (Pub. Ex. 91, Appendix D). Thus, the MEA has examined proposed HVTLs, which separately would be exempt from the certificate of need requirement, to determine whether they should be considered as one project and subject to the certificate of need requirement. In absence of any evidence to the contrary, one must assume the MEA would not allow a

segmented HVTL proposal designed to avoid MEA jurisdiction. (See also, MEQB Ex. 35, Appendix H (Cupit Memo) p. 3 ("There is no clear evidence that utilities break up projects to avoid need certification.")).

The MEQB Staff further asserts that the legislative intent of exempting certain short HVTLs from the certificate of need requirement is that the expertise of MEA is not required for these short HVTLs. (MEQB Ex. 35, Eller Memorandum, p. 5). This assertion, which is unsubstantiated by legislative history, seems questionable in light of the MEQB's intention stated on page 4 of the memo to analyze need based on the standards specified in 6 MCAR § 2.0611 C., a MEA rule. It seems highly unlikely that the legislative intent was that MEA should establish need analysis expertise to be used only for long HVTLs and that the MEQB should make need determinations for short HVTLs based on exactly the same factors (i.e., the MEA rules).

The MEQB Staff presently contends that the MEQB has jurisdiction to determine need for the construction of a short HVTL which does not require a certificate of need based upon MERA and MEPA. This contention is contrary to MEQB interpretations in the past, has never been specifically decided by the Board of the MEQB or any court, and violates a rule of statutory construction.

First, prior to submission of the MEQB Staff Reply Brief in June, 1981 in NSP-TR-2, the Prairie Island-Eau Claire HVTL routing proceeding, legal counsel for the MEQB had consistently advised the MEQB Staff that the MEQB had no authority to consider the need for a short HVTL which does not require a certificate of need. This fact is acknowledged on page 2 of Mr. Robert Cupit's Memorandum dated December 18, 1981, and attached to the Staff's response. (MEQB Ex. 35, Appendix H). The Memorandum dated December 31, 1980, drafted by Mr. Doug Blomgren, Special Assistant Attorney General representing the MEQB Staff in NSP-TR-2 at that time, reflects the legal analysis underlying the former position. (Pub. Ex. 91, Appendix B). That position was drastically changed in the Reply brief of the MEQB Staff drafted by another member of the Attorney General's Office based upon "a more expansive reading of the pertinent statutes." (Pub Ex. 91, Appendix E, p. 4, footnote 2). The MEQB position in the Reply Brief is that the MEQB does have jurisdiction to determine need when no certificate of need is required, at least in those situations where need is a "critical issue" and "a reasonable area of inquiry by the MEQB." (Supra at p. 4). It should be noted that the Legislature made no relevant statutory changes in the five months between the Blomgren Memorandum and the Reply Brief of the MEQB Staff which would justify such an expansion of the MEQB jurisdiction.

Second, neither the MEQB nor any court has ever specifically determined that the MEQB has jurisdiction to determine need when no certificate of need is required. Although the memorandum accompanying the order of the Hearing Examiner denying posthearing Motions in NSP-TR-2 accepts the position of the MEQB Staff concerning need jurisdiction, the Board never specifically considered this issue because NSP withdrew its application when a decision by the Wisconsin Public Service Commission rendered the project moot.

Third, asserting that the MEQB has jurisdiction to determine the need for a short HVTL when no certificate of need is required violates the rule of statutory construction that all statutes concerning the same subject must be read in paria materia. The Minnesota Supreme Court has determined that MEPA

and MERA must be read in paria materia with the PPSA. NPL, supra, and PEER v. MEQB, 266 N.W.2d 858 (Minn. 1978), respectively. Because one of the purposes of the Energy Act is environmental protection (Minn. Stat. § 116H.01 (1980)), it is clear that the Energy Act must be read in paria materia with MEPA and MERA and that one must apply these four acts "so as to harmonize with each other and give full effect to all so far as this may reasonably be done." NPL v. MEQB, supra at 323, note 30.

The decision of the Hearing Examiner in NSP-TR-2 is based upon his interpretation of the applicability of MERA and MEPA to this issue, but does not consider the implications of such an interpretation on the explicit provisions of the PPSA and the Energy Act. However, to accept any construction of these four acts which would allow the MEQB to determine need for HVTL or to refuse to designate a route would render meaningless the explicit statutory provisions of (1) the Energy Act concerning the exclusive nature and legally binding effect of MEA's authority and of (2) the PPSA's mandatory duty to designate a route and to issue a construction permit. Such an interpretation would violate the doctrine of paria materia.

Therefore, the only permissible interpretation of these four statutes is that when the Legislature excluded certain short HVTLs from the certificate of need requirement, they determined that the "no build" alternative to such short HVTLs did not constitute a "feasible and prudent" alternative within MEPA and MERA or an "appropriate" alternative within § 116D.04, subd. 2a, of MEPA.[15]

Even if others determine that the MEQB has authority to refuse to designate all route alternatives and to determine the need for an HVTL, the MEQB has failed to sustain its burden of proof concerning the legality of the applicable proposed rule provisions because they contain no defined standards concerning when or how the issue of the need for an HVTL will be considered in an EIS.

As mentioned previously, the proposed rule requires that every EIS concerning an HVTL which does not require a certificate of need must consider the alternative of "no action". 6 MCAR § 3.056D. However, a subsequent statement of the MEQB's position states:

> "The MEQB does not express the opinion that the MEQB has jurisdiction to determine need in all situations where a MEA Certificate of Need is not required, but only when need is a critical issue and "no build" is a prudent and feasible alternative." (MEQB Ex. 35, Eller Memorandum, p. 4).

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[15] Instead of making precise legal arguments to support § 3.056 D., the MEQB Staff relies more on public policy considerations for including discussions of the "no build" alternative in the project EIS. Appendix H mentions that "[e]xempting utilities from need review creates dissatisfaction with the public who view the exemption as a loophole designed for the convenience of the State and the utilities; that the general public distrusts "utilities' objectives in building any bulk power line"; and that a provision for inclusion of the "no build" alternative in the project EIS "would greatly benefit public participation in the MEQB review process, provide for a more complete hearing record, and contribute to development of adequate EISs." [Cupit Memorandum, pp. 4-5]. While these may be good reasons to enact a law that authorizes the MEQB to determine need for these exempted HVTLs, they are insufficient to prove that the MEQB has such authority at this moment.

This subsequent statement does not define what standards or criteria the MEQB will examine to determine its jurisdiction (i.e., "when need is a critical issue and 'no build' is a prudent and feasible alternative"). Thus, there is a conflict and an ambiguity concerning when MEQB will consider the need for an HVTL in an EIS between the mandatory language of the proposed rule and the undefined discretionary language of the MEQB's subsequent statement.

Similarly, the proposed rule contains no criteria or standards concerning how the MEQB will consider the need issue. The MEQB Staff asserts that the MEQB could address the need issue based on the criteria and standards contained in the MEA rule, 6 MCAR § 2.0611 C. (MEQB 35, Eller Memorandum, p. 4). This assertion is contrary to the applicability section of the above-cited rule and contrary to the APA. The application of the rule which the MEQB Staff cites is limited to those HVTLs for which a certificate of need is required. 6 MCAR § 2.0603. The APA prohibits any agency from the adoption of any rule without a public hearing. Minn. Stat. § 15.0411, subd. 4 (1980). Obviously, the MEQB's adoption of the standards in 6 MCAR § 2.0611 C. (or any other standards) concerning when or how the issue of the need for an HVTL should be considered would constitute a "rule" within the meaning of Minn. Stat § 15.0411, subd. 3 (1980), and require adherence to APA procedures.

In addition, the total lack of standards concerning when or how the MEQB will assert jurisdiction concerning need is unlawful and renders the relevant portions of the proposed rule illegal. Sunray Dairy, supra; see, Finding 62.

In summary, the arguments above (taken essentially from NSP's brief) lead the Examiner to find and conclude that the MEQB has no authority in the PPSA, the Energy Act, MERA or MEPA to refuse to designate a route or to consider the need for an HVTL, when construction of an HVTL does not require a certificate of need. Thus, § 3.056 D. must be amended as indicated in Pub. Ex. No. 21 by deleting the last sentence ("The alternative of no action shall be considered."). Even if others later determine that the MEQB has authority to refuse to designate a route and to determine the need for an HVTL, this proposed rule is patently illegal because it contains no criteria or standards which define when or how the issue of need for an HVTL will be considered. In that case, the rule can only be made legal by adopting standards or criteria as explained above.

132. CACWU proposes amending 6 MCAR § 3.055 in its entirety so as to require an EIS, rather than an environmental report, at the certificate of need stage. Pub. Ex. 98. There are two separate and distinct reasons for rejecting this proposal.

First, there is an uncodified statute, 1976 Minn. Laws, Ch. 331, § 18, subd. 2, which states as follows:

> "It is the intent of the legislature that environmental impact statements shall not be prepared in conjunction with the certificate of need process defined in Minn. Stat. 1974, Section 116H.13, and the sums appropriated by this section shall not be expended for environmental reports of any kind."

The legal effect of this arcane section on these environmental rules is anything but clear. This uncodified law would seem to bar the preparation of an EIS in the Certificate of Need proceeding. However, CACWU argues that this law is no longer applicable because it was part of an appropriations law which has

since expired. While that argument has some merit, it ignores the general rule that when the language of any law is ambiguous and when an agency interpretation is one of long standing, deference is given to the Agency's interpretation. Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981); Mankato Citizens Tel. Co. v. Commissioner of Taxation, 145 N.W.2d 313 (1966); Minn. Stat. § 645.16(8) (1980). A strict interpretation of this law could arguably gut all of § 3.055 B. in its entirety, since appropriated monies are not to "be expended for environmental reports of any kind.". But, that interpetation clashes with Minn. Stat. § 116H.13, subd. 3(5) (1980) which requires the Director, when assessing need to evaluate "[s]ocially beneficial uses of the output of this facility, including its uses to protect or enhance environmental quality." The MEQB Staff's apparent sub silentio interpretation of this ambiguous law is that an environmental report is needed at the certificate of need stage, especially in view of the mandate of the Legislature prohibiting EIS preparation. In such a case, substantial deference is given to the interpretation by the Staff. Furthermore, the Examiner notes that this line-item rider has not been re-adopted in subsequent years. If the Legislature desires to express its intent, it should do so in a separate bill of clearly permanent effect.

Second, at best, CACWU's approach to this issue is only equally as reasonable as the approach of the MEQB. CACWU has failed to demonstrate that requiring an environmental report at the certificate of need stage is unreasonable. Moreover, this is a classic example that when reasonable minds differ, the Agency's determination will be affirmed so long as they have presented sufficient facts to support their position. Thomas Bros., supra; Rible, supra. (see also, Finding 95).

133. Section 3.056 B.3.e. The use of permissive language ("need not") renders this entire rule illegal. Criteria and standards must be adopted to eliminate the unbridled discretion in this rule. Another way to make this rule legal is to delete the permissive language and insert therein mandatory language ("shall not"). deleted P.84

134. Section 3.056 C.3. This rule states in part that the "[n]eed for the facility and other issues determined by the MEA need not be considered in the EIS." This rule is vague, arbitrary and illegal. For example, under what circumstances must the need and other issues determined by the MEA be considered in an EIS? The rule can be made legal by adopting standards or criteria; or, deleting the permissive language and inserting mandatory language there ("shall not").

IX. MISCELLANEOUS.

135. Comments were received from MICA, RNDC, League of Minnesota Cities, MACI, and others, expressing concern that these rules, if adopted, would place an onerous and unreasonable fiscal burden on local governmental units. Some of these comments suggested that adoption of these rules would result in expenditures of a magnitude requiring a "fiscal note" pursuant to Minn. Stat. § 15.0412, subd. 7 (1981 Supp.). With all due respect to these groups, they have offered nothing but fiscal speculation and misconception in an attempt to reject rules designed for enforcing the duty MEPA imposes upon governmental units. The Examiner's careful comparison of the current rules with these proposed rules reveals that the basic responsibilities of the RGU, relating to

the preparation and distribution of EAWs and EISs, have not changed substantially. Nor have there been fiscally significant shifts in what level of government will serve as the RGU. The major change contemplated by the Legislature is the shifting of responsibility from the MEQB to the local governmental units for most decisions made in environmental review. The MEQB's role in the entire environmental review process is extremely limited. There are other differences between the two sets of rules, but they are minor. (See, MEQB 37, pp. 2-4).

It is the considered opinion of the Staff "that the proposed rules will result in a net reduction in direct fiscal costs to governmental units when compared to the current rules." MEQB Ex. 37, p. 7. The Examiner's analysis of the fiscal impacts of the rule changes indicated that the Staff's opinion does predict the most probable outcome. While it is impossible to predict the fiscal impact of these rules, the Examiner is satisfied that the impact does not rise to the magnitude required to "trigger" the publication of a fiscal note.

136. In the SONR, reference is made at page 7 (and other places as well), that the SONR "will be used as the standard for interpreting the rules." That statement is essentially incorrect. The rules speak for themselves. If, in the future, there is an ambiguity as to the meaning of a rule, the SONR is one reference document which can be looked to for guidance and given some "weight". The SONR is not, itself, an "interpretative rule" or a grab-bag for criteria or standards not articulated in the rules. Rather, the SONR's function is to supply evidence supporting the need for and reasonableness of the proposed rules.

137. Persons or groups who do not find their particular comments addressed above should note that the Examiner has read and considered each and every suggestion in all 105 Public Exhibits and nearly 1,000 pages of transcript. Those comments not mentioned were either unpersuasive or equally as reasonable as the MEQB Staff's proposal (and therefore rejected), or were considered only editorial proposals.

138. There are other minor amendments proposed by the Staff, made solely for purposes of clarification or proper grammar, which the Examiner has not commented on. Such amendments are needed, reasonable and insubstantial.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

C O N C L U S I O N S

1. That the Minnesota Environmental Quality Board gave proper notice of the hearing in this matter.

2. That the Minnesota Environmental Quality Board has fulfilled the procedural requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980), and all other procedural requirements of law or rule.

3. That the Minnesota Environmental Quality Board has demonstrated its statutory authority to adopt the proposed rules and had fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 15.0412, subd. 4e, and 15.052, subd. 3(4)(i) and (ii) (1980), except as noted at Findings 51, 53, 55, 59, 60, 62, 63, 64, 65, 68, 69, 73, 74, 75, 77, 78, 84, 88, 89, 92, 93, 116, 117, 122, 123, 125, 128, 129, 130, 131, 133 and 134.

4. That the Minnesota Environmental Quality Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. § 15.0412, subd. 4c (1980), except as noted at Findings 23, 29, 30, 31, 38, 39, 40, 43, 46, 49, 53, 55, 56, 57, 58, 63, 69, 76, 81, 85, 86, 90, 118, 119, 120, 124, 125 and 126.

5. That the amendments and additions to the proposed rules which were suggested by the Minnesota Environmental Quality Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 15.0412, subd. 4d (1980), and 9 MCAR §§ 2.110 A. and 2.111 (1980 Ed.).

6. That the Hearing Examiner has suggested action to correct the defects cited in conclusions 3 and 4, as noted at Findings 23, 29, 30, 31, 38, 39, 40, 43, 46, 49, 51, 53, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 68, 69, 73, 74, 75, 76, 77, 78, 81, 84, 85, 86, 88, 89, 90, 92, 93, 116, 117, 118, 119, 120, 122, 123, 124, 125, 126, 128, 129, 130, 131, 133 and 134.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Hearing Examiner for his approval pursuant to Minn. Stat. § 15.0412, subd. 4d (1980).

8. That any Findings which might properly be termed Conclusions, and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a Finding or Conclusion of Need and Reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Minnesota Environmental Quality Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rulehearing record.

10. Although the Hearing Examiner has indicated his opinion regarding substantial change, the ultimate substantial decision on change is made by the Chief Hearing Examiner, pursuant to Minn. Stat. § 15.041 (1981 Supp.).

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this 29 day of March, 1982.

Kent B. Roberts

KENT B. ROBERTS
Hearing Examiner

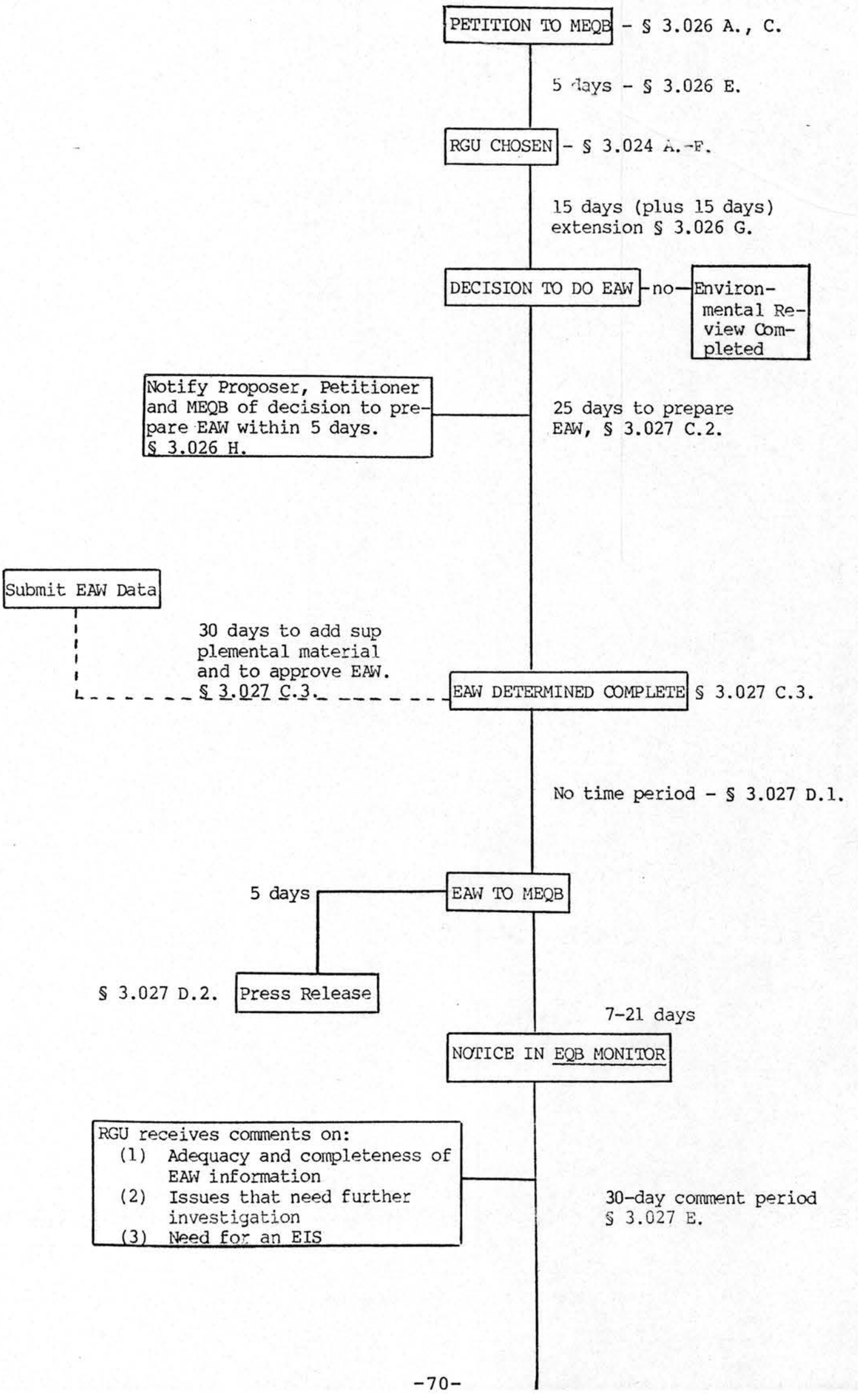
M E M O R A N D U M

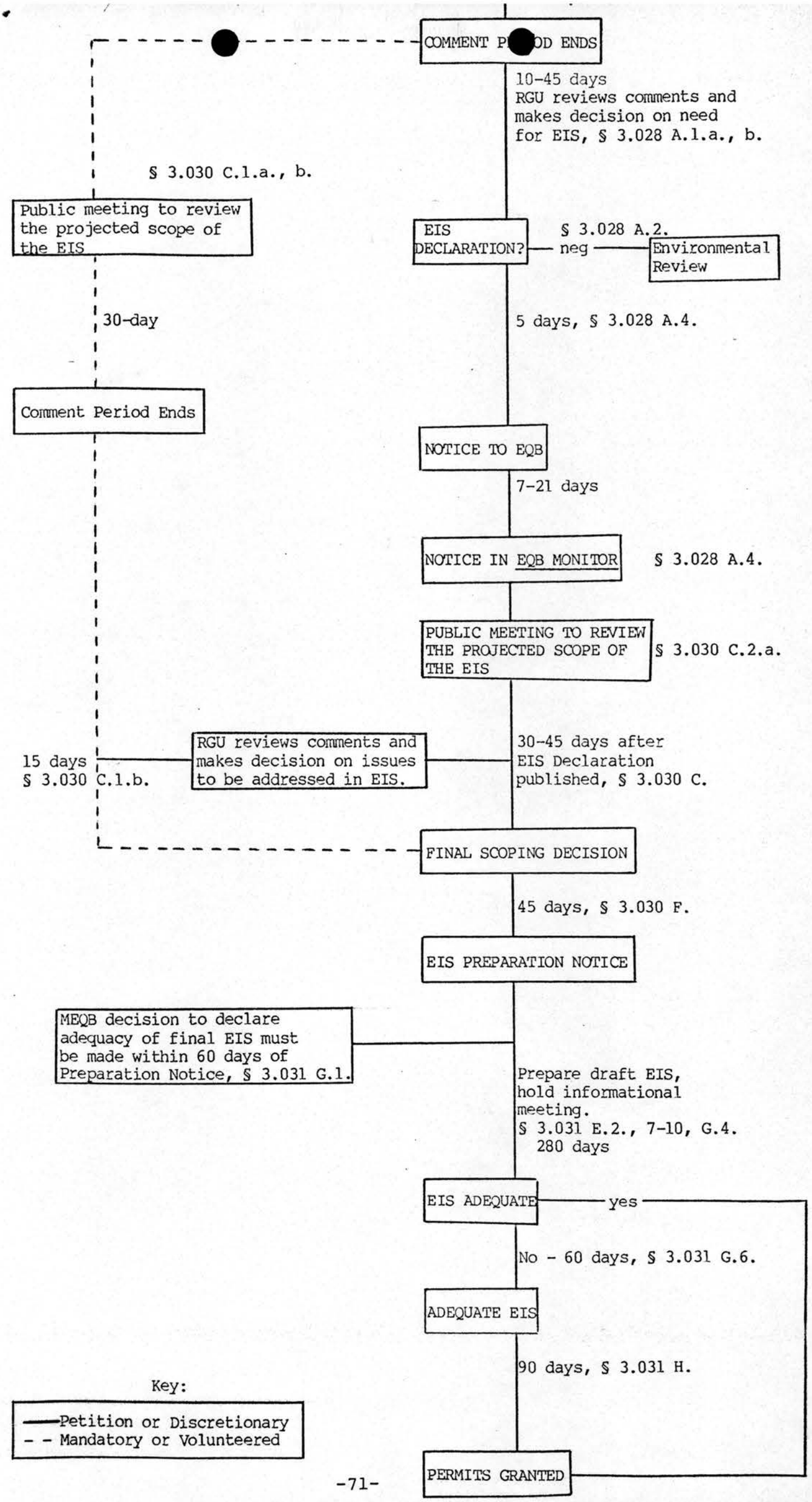
The MEQB Staff is to be commended for its conduct throughout this controversial and lengthy rulemaking proceeding. Of the comments entered into the record, the Staff attempted to respond to each and every concern. In so doing, a well-developed record was presented to the Hearing Examiner. This is a good example of how the rule-making process should work.

K.B.R.

APPENDIX A

ENVIRONMENTAL REVIEW PROCESS AS SET FORTH IN THE AMENDED RULES




COMMENT PERIOD ENDS
10-45 days
RGU reviews comments and makes decision on need for EIS, § 3.028 A.1.a., b.
§ 3.030 C.1.a., b.
Public meeting to review the projected scope of the EIS
EIS DECLARATION?
§ 3.028 A.2.
neg
Environmental Review
30-day
5 days, § 3.028 A.4.
Comment Period Ends
NOTICE TO EQB
7-21 days
NOTICE IN EQB MONITOR
§ 3.028 A.4.
PUBLIC MEETING TO REVIEW THE PROJECTED SCOPE OF THE EIS
§ 3.030 C.2.a.
15 days
§ 3.030 C.1.b.
RGU reviews comments and makes decision on issues to be addressed in EIS.
30-45 days after EIS Declaration published, § 3.030 C.
FINAL SCOPING DECISION
45 days, § 3.030 F.
EIS PREPARATION NOTICE
MEQB decision to declare adequacy of final EIS must be made within 60 days of Preparation Notice, § 3.031 G.1.
Prepare draft EIS, hold informational meeting.
§ 3.031 E.2., 7-10, G.4.
280 days
EIS ADEQUATE
yes
No - 60 days, § 3.031 G.6.
ADEQUATE EIS
90 days, § 3.031 H.
PERMITS GRANTED
Key:
Petition or Discretionary
Mandatory or Volunteered

EQB-82-001-KR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE MINNESOTA ENVIRONMENTAL QUALITY BOARD GOVERNING THE ENVIRONMENTAL REVIEW PROGRAM.

ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, hearings were held on the above-entitled rules on November 24, December 1, 2, 14, 15 and 21, 1981, before Hearing Examiner Kent B. Roberts in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of the Hearing Examiner was issued on March 29, 1982, following which the Chief Hearing Examiner issued an Order on April 1, 1982, which informed the EQB of changes required due to defects found in the rules; and

WHEREAS, the EQB issued its Findings of Fact, Conclusions and Order Adopting Rules and submitted them to the Chief Hearing Examiner for review on May 24, 1982; and

WHEREAS, the Chief Hearing Examiner issued a second Order on June 8, 1982, whereby the EQB was informed that not all defects had been corrected and that one modification to the rules constituted a substantial change in the rules; and

WHEREAS, on June 16, 1982, the EQB staff submitted proposed amended Findings of Fact, Conclusions and Order Adopting Rules to the Chief Hearing Examiner.

NOW, THEREFORE, having considered all of the files, records and proceedings herein, the Chief Hearing Examiner finds and concludes that if the EQB adopts the proposed Findings of Fact, Conclusions and Order Adopting Rules as submitted by the EQB staff, then the EQB will have corrected all of the defects previously found in the rules, that none of the modifications in the rules constitute substantial changes in the rules and that the EQB has complied with all substantive and procedural requirements of law and rule and that the EQB may proceed with its adoption of the rules by filing them with the Attorney General and the Revisor of Statutes without the necessity of obtaining advice and comment from the Legislative Commission to Review Administrative Rules.

Dated: June 17th, 1982.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE MINNESOTA ENVIRONMENTAL QUALITY BOARD GOVERNING THE ENVIRONMENTAL REVIEW PROGRAM.

ORDER OF THE CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to Minn. Stat. § 15.0412, subds. 4d and 4e, which provide that rules modified prior to final adoption other than as recommended by the Hearing Examiner must be reviewed by the Chief Hearing Examiner. They also provide that when defects in the rules have been found by the Hearing Examiner and approved by the Chief Hearing Examiner, the rules must be submitted to the Chief Hearing Examiner to determine whether or not the defects have been cured.

If a defect relates to the need for or reasonableness of the rule and it is determined that it has not been cured, the Environmental Quality Board (EQB) may not adopt the rule until the EQB has submitted the rule to the Legislative Commission to Review Administrative Rules (LCRAR) for the Commission's advice and comment. If the defect relates to the EQB's failure to meet any other requirements of Minn. Stat. § 15.0412, subds. 4-4f, the EQB shall not proceed to adopt the rules until the defects have been cured.

In the rules as now submitted, the EQB has made a great many changes in the rules, including some not recommended by the Hearing Examiner. In certain instances, where the Hearing Examiner and the Chief Hearing Examiner had found a failure to establish the need for or reasonableness of a particular rule, the EQB has requested, by its Findings of Fact, a reconsideration of the previous determination. In those instances, the Chief Hearing Examiner has consulted with the Hearing Examiner and except as discussed herein relating to Rule 6 MCAR § 3.028 E.3., we now find and conclude that the need for and reasonableness of the rules as submitted have been established, and the EQB need not submit those rules to the LCRAR for advice and comment.

Based upon a review of the files, records and proceedings herein, except as discussed below, the Chief Hearing Examiner finds and concludes that the defects in the rules have been cured and that the changes in the rules do not constitute "substantial" changes which would require withdrawal or modification of the rule or a reconvening of the hearing and that the EQB has complied with all other requirements imposed on the EQB by law or rule.

1. Rule 6 MCAR § 3.026 G.2. (Finding No. 51):

The EQB argues that this rule merely "tracks" the statutory language. While that may be true, Minn. Stat. § 15.0411, subd. 3 (1981 Supp.) defines "rule" as an agency statement which makes the law "specific". The use of the word "may" does not make the rule specific. To the contrary, it grants the Chairperson of the EQB absolute discretion in the granting or nongranting of the requested extension. Numerous prior rulings of the Attorney General on this question leave absolutely no room for doubt. The word "may" must be

deleted and the word "shall" must be inserted. The Findings of the EQB state: "It is the intent of the Board to allow the extension of time whenever the RGU requests an extension." Insertion of the word "shall" is not only legally required but carries out the stated intent of the EQB. This defect is a violation of a substantive provision of law which must be cured before the rules can be adopted.

changed to "shall" p. 17

2. Rule 6 MCAR § 3.028 A.1.b. (Finding No. 60):

The second sentence of this rule still contains the discretionary word "may". For the same reasons as discussed above for § 3.026 G.2., the word "shall" must be inserted before the rule can be adopted.

changed p. 20

3. Rule 6 MCAR § 3.028 E.3. (Finding No. 63):

A. The EQB has resolved the illegal discretion problem in this rule by deleting the words "may, at its option," and inserting the word "shall". That is all that was required by the Chief Hearing Examiner's finding of improper discretion. Instead of stopping at that point, the EQB has gone further and has deleted the standards which were found to be sufficient by the Chief Hearing Examiner. In their place, new language has been inserted which, according to the EQB's finding, "clarifies the intent of the original language". At best, the new language has added confusion to the rule.

The rule speaks to "projects" which are "related to a large existing or planned network". It then requires the RGU to treat the "present proposal as the total proposal". It appears that "project" and "proposal" are used interchangeably in the first part of the rule. The rule then allows the RGU to look beyond the present project/proposal when determining whether an EIS will be required, basing the determination "on the relationship of the present proposal to the total proposal". To this point, except for the finding of unreasonableness which will be discussed below, the rule is clear and the standardless discretion has been removed.

The last sentence of the rule as now written, however, adds to the confusion. Nothing contained in the record nor in the EQB's findings show where this language came from nor how it relates to the rule as proposed. A review of the Statement of Need and Reasonableness (SONR), the transcript of the hearing, and the written exhibits and comments fails to disclose any discussion of this language. The new language also goes far beyond the language of the sentence it is replacing. The language is not supported by the record, was not raised at the hearing in such a manner so as to invite public reaction, and results in a fundamentally different rule than was proposed. Thus the language is not reasonable and amounts to a substantial change in the rules which must, therefore, be withdrawn or a new hearing convened.

B. The Hearing Examiner found that the rule as proposed was unreasonable and that adoption of the amendment found in Public Exhibit No. 12 would cure this defect. That finding was approved and nothing contained in the recent submission persuades me to change the prior determination. Minn. Stat. § 15.0412 requires an agency to establish the need for and reasonableness of its proposed rule by making an affirmative presentation of facts at the hearing. The EQB's presentation of facts, limited as it is, is contained in the SONR. In two places in that statement at page 65, the EQB states that

phased actions (projects) are those actions (projects) where the need has been established and the primary purpose of environmental review is to resolve details regarding project design and construction or to develop a design with minimal environmental impact. The language of the SONR is clear and unambiguous. The rules must comport with the facts presented by the EQB in support of the rule. The EQB's "argument" in its findings is not persuasive. The words "which a governmental unit has determined is needed" must be added to the rule as proposed by Public Exhibit No. 12 in order to properly find that the EQB has established the reasonableness of the rule by an affirmative presentation of facts. If the EQB elects to maintain its position as expressed in its findings, this issue must be submitted to the LCRAR for its advice and comments.

added p.22

4. Rule 6 MCAR § 3.032 D. (Findings No. 82 - 84:

The EQB, pursuant to the authority granted to all state agencies in Minn. Stat. § 15.0412, subd. 1a, proposed a rule by which variances could be obtained. That statutory provision mandates that standards by which variances will be granted must be included in the rule. One standard which was proposed was "excessive and unusual economic hardship". However, this vague phrase was not defined which makes the rule non-specific, thus violating a substantive requirement of law. The Hearing Examiner stated that standards or criteria by which the phrase will be defined must be added or that the economic hardship variance must be deleted altogether, saying that either option "would be a substantial change". The Chief Hearing Examiner stated: "Standards or definitions can be added without requiring a new hearing as long as the basic thrust of the rule remains unchanged." The EQB has chosen to delete the economic hardship variance in its entirety rather than adding definitions.

Not deleted. standard added p.36

The action of the EQB constitutes a substantial change in the rules because the originally-published rules held out the representation to the public that a variance procedure would be part of the rules. To remove the variance procedure results in a rule fundamentally different from that contained in the Notice which was published in the State Register and mailed to all interested persons. This is a defect which must be cured before the rules can be adopted.

as Larry was saying

The EQB has two options. It can withdraw the rules and initiate the rulemaking process again with the variance section deleted or it can define the vague phrase is a manner which will not change the basic thrust of the rule. I cannot agree with the EQB's assertion in its findings "that the establishment of standards and criteria relating to economic hardship is meaningless for activities as far ranging as those addressed by these rules." If a definition would be meaningless, why was this standard proposed in the first place? Economic hardship is a term which all of us are becoming all too familiar with of late. Given the past performance and proven drafting ability of the EQB staff, I am confident that a definition can be drafted which will satisfy all of the substantive requirements imposed on the EQB in this rulemaking proceedings.

5. Rule 6 MCAR § 3.035 B. (Finding No. 89):

A substantive requirement of law imposed on all agencies in adopting rules is that it have statutory authority to adopt a rule. The Minnesota

Legislature has very [redacted]efully delineated specific aut[redacted]ity to the EQB to adopt a model ordinance which, if subsequently adopted by local units of government, can be utilized in lieu of the environmental impact statement process required by §§ 3.025 - 3.032. The statute (Minn. Stat. § 116D.04, subd. 5a) is clear and unambiguous. The EQB has no authority to adopt a rule allowing a local unit of government to do anything other than to adopt the model ordinance or to utilize these rules. The EQB, in its findings, has apparently misinterpreted the Hearing Examiner's finding, which I previously approved. The EQB may adopt a model ordinance, which it is doing in this proceeding. If a local governmental unit adopts the model ordinance, the EQB has nothing further to determine. Section 3.035 B., subparts 2 and 4, must be deleted and subpart 3 amended by deleting "and 2." before this section can be adopted.

"2" + "4" deleted "3" moved to "1"

6. Rule 6 MCAR § 3.036 (Finding No. 90):

In deleting proposed subpart A. and inserting subparts A.1 - 6 in newly-numbered subpart D., at D.2. the EQB has left the word "and" at the end of the subpart. The word must be deleted at D.2. It has been inserted at the end of subpart D.8. (This is obviously just an oversight by the EQB staff in redrafting which would probably have been noticed by the Revisor of Statutes upon final drafting.)

deleted/inserted p. 44

NOW, THEREFORE, prior to adopting these rules, the EQB shall correct the defects remaining in the rules as discussed herein except that the defect discussed at 3.B. may be submitted to the Legislative Commission to Review Administrative rules for the Commission's advice and comment. After correcting the defects required by this report, prior to submitting the rules to the Attorney General for review, the EQB shall return the rules to the Chief Hearing Examiner for a determination that the defects have been corrected.

Dated: June 8th, 1982.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

EQB-82-001-KR

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE MINNESOTA ENVIRONMENTAL QUALITY BOARD GOVERNING THE ENVIRONMENTAL REVIEW PROGRAM.

ORDER OF THE CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Stat. § 15.0412, subd. 4d (1980) which provides in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of section 15.0412, subdivisions 4 through 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change or of failure to comply with Minn. Stat. § 15.0412, subd. 4-4f (1980) or of failure to establish need for and reasonableness of the proposed rule, except as hereinafter noted.

1. Finding 30. The concept expressed by the Examiner is approved. However, the specific cure suggested is not approved The rule as proposed referred, in the definition of "wild and scenic rivers district" only to those areas designaed as such by the Commissioner of the Department of Natural Resources or Congress. To include the Mississippi River Headwaters Board as created by the 1981 Legislature within this definition would be inappropriate. Therefore, in order to cure this defect, the MEQB staff must include the Board and other rivers subject to similar control by the Legislature in the applicable categories in §§ 3.038 and 3.039, a change which it did not oppose during the hearing process.

2. Finding 38. A time limit for the designation of the propoer RGU is necessary. The Examiner stated that the defect could be cured by "selecting some time period for selecting an RGU". The finding is approved, but the time limit proposed must be reasonable. When selecting a time limit, the MEQB, in its findings, should state the basis for the time limit selected.

3. Finding 51. The Examiner's discussion of the use of the word "may" is correct when its use grants unfettered discretion to the agency without the inclusion of standards or criteria under which the discretion will be exercised. In § 3.026 G.1., adding the words "if needed" adds nothing to the rule. As stated, extensions would only occur if the "body" meets only on a periodic basis. That is a sufficient standard for this procedural requirement. Thus, the Examiner's finding for § 3.026 G.1. is not approved.

There is no standard within § 3.026 G.2. Seemingly, the EQB's chairperson has total discretion to grant or deny all other RGU's extension requests submitted for any reason at all. Its inclusion nullifies the mandatory 15-day requirement in the rule. The only way the defect can be corrected is by deletion of § 3.026 G.2. in its entirety. An alternative would be to change the "may" to "shall" and to include some standards, criteria or justifiable reason for granting the extension. The MEQB is cautioned that choosing the latter course of action could result in a substantial change in the rules which would require a new hearing. The safest way of proceeding would be to withdraw the section, adopt the rest of the rules, and propose an amendment at a later time, following a new notice and hearing or, to amend it using the noncontroversial rule adoption provisions contained in Minn. Stat. § 15.0412 (1981 Supp.).

changed to "shall" - see p.17. - see CHE 68

4. Finding 53. This finding is approved as it relates to allowing a proposer or its agent to prepare the EAW. To cure the defect, the words "or by the proposer or its agent" must be deleted. When it is deleted, the use of the word "may" does not grant discretion in that only the RGU or its staff or agent (which are really the RGU) can prepare the EAW. "Shall" is preferable but not necessary so long as the previously-quoted language is deleted.

deleted p.8

5. Finding 55. This finding is approved except that the defect may only be cured by adopting the amended language found in Public Exhibit #9.

OK p.18

6. Finding 60. As discussed above for Finding 51, the easiest and safest way to cure the defect described by the Examiner is to delete the last sentence. However, MEQB may insert standards for granting extensions subject to subsequent review by the Chief Hearing Examiner on the question of "substantial change".

7. Finding 62. The Examiner states that the adoption of criteria and standards "would be a substantial change". A determination on that question cannot be made until the criteria or standards proposed are drafted and submitted for review. Even though the presently listed criteria may not be "exhaustive", they are sufficiently specific to avoid illegality yet broad enough to vest some discretion in the RGU. Thus, the MEQB may choose to delte the last sentence in § 3.028 B. while leaving the criteria in § 3.028 C. or adding other criteria similar in nature to those already listed.

deleted, no sig change p.21

8. Finding 63. This finding is approved in that the adoption of the language in Public Exhibit 12 will cure one of the defects. The use of the discretionary word "some" in the rule is qualified by standards contained in the last two sentences and may thus be maintained. However, the MEQB must establish some standards by which the RGU will exercise its discretion in treating "the present proposal as the total proposal".

9. Finding 68. this finding is not approved. The standards by which the discretion will be exercised are listed and are sufficient.

proposed language is adopted p.25

10. Finding 84. The finding is approved but the determination of any new language being a "substantial change" cannot be made until the language is presented. Standards or definitions can be added without requiring a new hearing as long as the basic thrust of the rule remains unchanged. The MEQB is directed to rule 9 MCAR § 2.111 of the rules of the Office of Administrative Hearings for guidance on the question of what constitutes a "substantial change" which would require a new hearing.

standard added p. 36

11. Finding 92. The finding is not approved. Use of the word "shall" would mandate that a generic EIS be requested in every instance. The word "may" does not refer to whom the request can be made, but who may request the EQB for an order.

OK p. 43

12. Finding 116. This finding is approved. Additional ways of curing the defect would be to define the phrase "primary purpose" or to delete the phrase so that the rule would read: "The project is not exempted pursuant to 6 MCAR § 3.041."

13. Finding 117. This finding is not approved. The rules discussed in this finding are not new rules. In this proceeding, review is limited to a review of new rules or amendments to existing rules. The amendments in § 3.043 A. and C. do not create new authority in the EQB. Therefore, the Examiner is without jurisidiction to require the changes.

no change p. 66

14. Finding 122. The finding is not approved for the same reason discussed above for finding 117.

no change p. 68

15. Finding 123. This finding is not approved for the same reason discussed above for findings 117 and 122.

no change p. 77

16. Finding 128. This finding is approved. The defect created by the phrase "need not" may also be cured in § 3.055 C.3. by adding the words "unless a specific site has already been designated" at the end of the language quoted by the Examiner at the bottom of page 58 of his report.

OK p. 82

17. Finding 129. The defects in § 3.055 B.12. can be cured by restating the rule as follows: "A supplement to an environmental report shall be required if the tests expressed in 6 MCAR 3.031 I. for supplements to environmental impact statements are met and a Minn. Stat. § 116H.13 determination is pending before the MEA."

substantially so restated p. 81

The defect in § 3.055 C.11. can be cured by restating the rule as follows: "If required pursuant to 6 MCAR § 3.031 I., a supplement to an EIS shall be prepared."

so restated p. 83

18. Finding 133. In addition to replacing "need not" with "shall not", the second "need" must also be replaced by "shall".

so replaced p. 85

19. Finding 134. The Examiner's finding here is essentially duplicative of his finding 128. As stated at finding 128, the only way to cure the defect in this finding is by deleting the word "need" and inserting the word "shall". Listing of standards and criteria may remove the discretion problem in the rule but cannot resolve the statutory authority problem.

OK p. 85

In order to correct the defects enumerated by the Hearing Examiner and the Chief Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or Chief Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner and the Chief Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Examiner a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defect in regard to substantial change and the requirements of Minn. Stat. § 15.0412, subd. 4-4f (1980) have been corrected.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner and the Chief Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated: April 1, 1982.

DUANE R. HARVES
Chief Hearing Examiner

May 20, 1982

STATE OF MINNESOTA
BEFORE THE
ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed Rules Governing the Environmental Review Program

BOARD ACCEPTED FOR ADOPTION FINDINGS OF FACT, CONCLUSIONS AND ORDER ADOPTING RULES

The above captioned matter came on for hearing before Hearing Examiner Kent B. Roberts of the Minnesota Office of Administrative Hearings on November 24, December 1, 14, 15 and 21, 1981 in St. Paul, Minnesota and on December 2, 1981 in Duluth, Minnesota. The Report of the Hearing Examiner and Order of the Chief Hearing Examiner were received by the EQB on April 2, 1982. The Report and the Order were assigned Docket Number EQB-82-001-KR by the Office of Administrative Hearings.

The Board makes the following:

FINDINGS OF FACTS ON PROCEDURAL MATTERS

A. The Board incorporates the Report of the Hearing Examiner, Docket Number EQB-82-001-KR, as a part of these findings and conclusions except as specifically stated in these findings and conclusions. Number 1-138 in these findings and number 1-10 in these conclusions correspond to the numbering system and subject matter of the Report of the Hearing Examiner.

B. The Board incorporates the Order of the Chief Hearing Examiner, Docket Number EQB-82-001-KR, as a part of these findings and conclusions except as specifically stated in these findings and conclusions.

C. The Board incorporates the draft of the proposed rules dated May 20, 1982 as a part of these findings and conclusions. This draft incorporates amendments made pursuant to these findings and conclusions.

1-15. The Board accepts the Hearing Examiner's comments and findings.

FINDINGS OF FACT ON THE PROPOSED AMENDMENTS

16. Section 3.021 B. The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed.

17. Section 3.022 B "Action", "Activity", and "Governmental Action". The Board accepts the Hearing Examiner's discussion of the issue. The following amendments are consistent with the discussion and will eliminate the confusion and inconsistencies in the rules as proposed:

    a. Delete the definitions of "action" and "activity" from Section 3.022 B.

b. Amend the definition of "project" in Section 3.022 B. to read:

"Project" means a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. The determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving new projects.

c. Delete the terms "action" and "activity" from the text of the rules as proposed and insert the term "project". A listing of these specific amendments may be found in finding #138 and by referring to the interim draft of the rules dated May, 20 1982 which incorporates these findings.

Refer to April 20, 1982 draft for amended language.

18. Section 3.022 B. "Agricultural land". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

19. Section 3.022 B. "Approval". The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

20. Section 3.022 B. "Attached units". The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

21. Section 3.022 B. "Expansion". The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

22. Section 3.022 B. "Final approval" and "Final decision". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

23. Section 3.022 B. "Local governmental unit". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

24. Section 3.022 B. "Permanent conversion". The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

25. Section 3.022 B. "Scram mining". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

26. Section 3.022 B. "Permit". The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

27. Section 3.022 B. "Phased actions". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

28. Section 3.022 B. "Sociological effects". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

29. Section 3.022 B. "Wild and scenic rivers district". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language and to finding #30 for additional comments on this rule.

30. Section 3.022 B. "Wild and scenic rivers district." The Board accepts the Hearing Examiner's findings as modified by the Chief Hearing Examiner's Order #1. The Board finds the most reasonable amendment to cure the defect to be the addition of the definitions of "Minnesota River Project Riverbend area", "Project Riverbend plan", "Mississippi headwaters area" and "Mississippi headwaters plan" and to amend specific categories, as applicable. Categories affected by this finding are: Sections 3.038G. 2., M.2., O.3., O.4., R.2., Z.2., and AA.1.; Sections 3.039 J.2., K.2., K.3., L.2., and M.2., and Sections 3.041 I.1., I.3., K.1. and R. Refer to May 20, 1982 draft for amended language and to finding #29 for additional comments on this rule. p. 7, 9, 12

31. Section 3.022 B. "Wild and scenic rivers district ordinances". The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language. p. 12

32. Section 3.022 B. "Wilderness area". The Board accepts the Hearing Examiner's finding with regard to the specific proposal submitted at hearing, however, finds an alternative amendment addresses the issue and is needed and reasonable. The alternative amendment is incorporated directly into the mandatory category at 6 MCAR § 3.038 CC.

The Department of Natural Resources (DNR) has jurisdiction over wilderness areas designated pursuant to Minn. Stat. § 86A.05, subd. 6. In addition to wilderness areas designated by the State pursuant to Minnesota Law, there also can be designations of national wilderness areas within Minnesota by an Act of Congress, such as the Boundary Waters Canoe Area (BWCA).

There are over 280,000 acres of state owned land and water within the boundaries of the BWCA: approximately 121,000 acres of land and 160,000 acres of navigable waters. The balance of the surface of the one-million acre BWCA is almost exclusively federally owned. The state owns aproximately 27% of the minerals within the boundaries; the federal government owns approximately 44%; and private interest own approximately 29%. The state owned surface and mineral interests are scattered throughout the areas.

There is a substantial body of law applicable to the area: statutory, administrative, judicial, and treaty created. For example, 6 MCAR NR 1000 relates to regulation of the use of the surface of state lands and waters. The 1978 Act of Congress, Public Law 95-496, and associated regulations, constitute the most recent federal legal authorities relating to the area. Any action requiring a state permit, license, or lease may be regulated by existing law, and should be reviewed in connection with any proposed action. Examples of the state laws relating to such actions are described below.

Minnesota Statutes, Section 84.523, prohibits the leasing of state-owned or administered land for mineral exploration or mining or for peat harvesting purposes in the BWCA, except in a Congressionally declared national emergency which also has state legislative approval. The same section prohibits the issuance of any state permits, licenses, or leases to use any other state natural resource for any mineral exploration or mining operations in the BWCA, except under the same national emergency limitations. Therefore, if any application is filed with any state agency for any state authorization necessary to conduct a mineral exploration or mining operation or to harvest peat, at a time other than a national emergency, or without prior Congressional and Legislative action in a national emergency, the application should be rejected, no EAW is necessary, and no permit will be issued. This conclusion also applies whether the minerals or peat to which the permit or other authorizations are related are privately or federally owned. It should be noted that the 1978 federal BWCA act specifically recognizes in Section 15 that State regulations relating to motorized travel and water regulation may be "more stringent" than federal regulations. If a national emergency is declared by Congress, and the Commissioner is required to make a determination that exploitation of natural resources of the type found in the BWCA is a necessity, it may well be desirable for an EAW to be required as a part of the determination.

Minnesota Statutes, Section 110.13, relates to an area which includes the BWCA, and prohibits dam building and water flow and level manipulations without specific prior approval of the Legislature. Any application for state authorization for any such activity for which no prior legislative approval has been given must be rejected, and therefore no EAW is necessary. However, projects such as dam repairs or water appropriation which have to practical effect on water flow or level may entail permits or other authorizations.

Since DNR has authority to issue permits, leases and licenses for projects affecting state lands and waters within the boundaries of the BWCA, as demonstrated by the laws and regulations cited above, it is desirable to include these lands in the environmental review process. Therefore, 6 MCAR § 3.038 CC. is

amended to reflect the need for environmental review for these types of projects. Refer to May 20, 1982 draft for amended language.

33. General finding relating to significant "adverse" environmental effects. The Board accepts the Hearing Examiner's findings. Refer to May, 20, 1982 draft for amended language.

34. Section 3.023 D. The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language and to finding #'s 35, 36 and 37 for additional comments on this rule.

35. Section 3.023 D. The Board accepts the Hearing Examiner's findings. The rule is reasonable as amended pursuant to finding #34. See finding #'s 34, 36 and 37 for additional comments on this rule.

36. Section 3.023 D. The Board accepts the Hearing Examiner's findings. The rule is reasonable as amended pursuant to finding #34. See finding #'s 34, 35 and 37 for additional comments on this rule.

37. Section 3.023 D. The Board accepts the Hearing Examiner's findings. The rule is reasonable as amended pursuant to finding #34. See finding #'s 34, 35 and 36 for additional comments on this rule.

38. Sections 3.024 E.2. and F. The Board accepts the Hearing Examiner's discussion of the issue and the Chief Hearing Examiner's Order #2. The amendment presented in Public Exhibit #3 by NSP is reasonable as to the basis by which the time period commences (i.e., receipt of the data portion of the EAW), however, the time period should be limited to five days. The criteria for the selection of the RGU are straightforward and the consequences of the decision are relatively minor. The primary action necessitated is making a decision based on the information submitted. One week is adequate time to verify the information, if needed, and to make the decision. Refer to May 20, 1982 draft for amended language.

39. Sections 3.025 C.1., C.2., and C.3. The Board accepts the Hearing Examiner's discussion of the issue. The option of deleting the term "jurisdiction" is selected because:

a. "Jurisdiction" is subject to several interpretations (as stated in the Hearing Examiner's discussion) and is undefined,

b. The phrase "approval authority" adequately addresses the intended scope of "jurisdiction" and is defined,

c. Use of the term "jurisdiction" is redundant.

Refer to May 20, 1982 draft for amended language. See finding #40 for additional comments on this rule.

40. Sections 3.025 C.1. and C.2. The Board accepts the Hearing Examiner's discussion of the issue. The option of adopting the amendment presented in Public Exhibit #4 by NSP is accepted. This option increases the clarity of the rules and avoids the necessity of adding additional standards and definitions to the rules. Refer to May 20, 1982 draft for amended language. See finding #39 for additional comments on this rule.

41. Section 3.026 A. The Board accepts the Hearing Examiner's discussion of the issue. The option of leaving the rule as proposed is selected because the proposed amendment merely adds language to clarify an issue that already is reasonable and not in need of further clarification. The rule is reasonable as proposed.

42. Section 3.026 B. The Board accepts the Hearing Examiner's findings. The rule is reasonable as amended pursuant to finding #43. See finding #'s 43 and 44 for additional comments on this rule.

43. Section 3.026 B.4. The Board accepts the Hearing Examiner's discussion of the issue. The option of deleting the word "will" and inserting "may" is selected because that option makes the rule more readable. Refer to May 20, 1982 draft for amended language. See finding #'s 42 and 44 for additional comments on this rule.

44. Section 3.026 B.5. The Board accepts the Hearing Examiner's findings. The rule is reasonable as amended pursuant to finding #43. See finding #'s 42 and 43 for additional comments on this rule.

45. Section 3.026 D. The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

46. Section 3.026 E. The Board accepts the Hearing Examiner's findings. The option of adopting the amendment proposed in Public Exhibit #86 by SLUC is selected as the simplest method of clarifying the intent of this rule. Refer to May 20, 1982 draft for amended language. See finding # 47 for additional comments on this rule.

47. Section 3.026 E. The Board accepts the Hearing Examiner's findings. The option of adopting the amendment proposed in Public Exhibit #100 by the DNR is selected to increase the clarity of the rule. Refer to May 20, 1982 draft for amended language. See finding #46 for additional comments on this rule.

48. Section 3.026 F. and Section 3.028 A.3. The Board accepts the

Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language. See finding #49 for additional comments on Section 3.026 F.

49. Section 3.026 F. The Board accepts the Hearing Examiner's discussion of the issue. The Hearing Examiner presents three amendments to cure defects.

a. The Board accepts the first amendment. The amendment clarifies the intent of the proposed rule. This concept was originally included in the concept of "evidence....otherwise known to the RGU." It is the duty of the RGU to be receptive to all reliable information regardless of source.

b. The Board agrees with the discussion of the second amendment, however, finds a language change is not necessary.

1.) Use of the phrase "competing evidence" implies an adversarial context that should not be present at this stage of review. Use of quotation marks in the finding does not reflect a quotation from the language of the rules, but rather a colloquial interpretation of the effect of the language. This interpretation does not properly reflect the intended test. The appropriate test is more akin to "are all questions and answers regarding the environmental impacts of the project adequately presented." If so there is no need for further information--it's decision time. If not--the RGU should attempt to obtain the necessary information via the next step of review--the EAW.

2.) The amendment is not specific as to language changes that would be necessary to correct any defects. The language as proposed does not deny the RGU the opportunity to balance information nor does the language as proposed in any way constrain the RGU from properly using any information presented.

c. The Board disagrees with the third amendment. The 15 day time period is statutory [See Minn. Stat. § 116D.04 subd. 2a (c)]. Further, as discussed in b. above, the nature of the test to be applied does not rise to the level of a comprehensive fact finding analysis of the information.

Refer to May 20, 1982 draft for amended language. See finding #48 for additional comments on this rule.

50. Section 3.026 G. The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed. See finding #51 for additional comments on this rule.

51. Sections 3.026 G.1 and G.2. The Board disagrees with the Hearing Examiner's findings and with the Chief Hearing Examiner's Order #3. In analyzing the reasonableness of this rule, distinctions must be made among:

1. Discretion by the RGU in deciding to request an extension of time;

2. Discretion by the EQB chairperson in deciding whether to grant the request; and

3. The types of RGUs that may potentially request an extension.

The first consideration deals with discretion that is mandated by statute (See Minn. Stat. § 116D.04, subd. 2a (c)). To understand the intent of this descretion, reference must be made to the evolutionary process through which the statute evolved. The 1980 amendments were adopted largely in recognition of problems raised by industry relating to the efficiency of environmental review and by environmentalists relating to the effectiveness of environmental review. In developing compromise legislation to improve the efficiency and effectiveness of the process, RGUs were given greater responsibility for their decisions. In recognition of the added responsibility, the legislation was drafted in a manner to avoid unnecessary procedural requirements and to allow flexibility in implementation where possible. This is an example of a provision where the RGU is allowed discretion in deciding whether to request an extension. Flexibility is necessary to accommodate the intention of the statutory amendments. The language stated in Section 3.026 G.2. incorporates the "discretionary" statutory language.

The second consideration also deals with statutory discretion. The only standard placed on this determination by statute is that the RGU requests the extension. The Board's chairperson is given discretion in the application of a basic reasonableness standard as to whether to allow the extension. It is the intent of the Board to allow the extension of time whenever the RGU requests an extension. This is in keeping with the purpose of the amendments in delegating greater responsibility in decision making to the RGU. The Board is limited in applying the remedies proposed in the findings. To incorporate the word "shall" is directly contrary to the statutory language. To add further standards would place greater restrictions on the exercise of reasonable judgment by the RGU. The existing standard in the proposed rules of "upon request of the RGU" is reasonable and adequate. The record demonstrates no need for a more restrictive standard.

The third consideration merely serves to divide the field of RGUs that may potentially request an extension. The reason for

distinguishing two categories of RGUs (G.1. and G.2.) is to expedite the process for RGUs that meet on a monthly or periodic basis to avoid forcing them to schedule special meetings and to make a request to the EQB chairperson everytime the situation is encountered. The distinguishing standard does not serve to limit "discretion." The rule merely sets forth two different processes for the application of "discretion" based on the type of governing structure of the RGU.

The rule is reasonable as proposed. It fulfills the statutory intent, is in compliance with statutory language, and addresses the issue of need on record. See finding #50 for additional comments on this rule.

52. Section 3.026 H. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language.

53. Section 3.027 C.1. The Board accepts the Hearing Examiner's discussion of the issue and the Chief Hearing Examiner's Order # 4. In accepting this remedy, the Board adopts the amendments recommended in Public Exhibit #9 by NSP.

The language change also reflects the staff recommended amendment contained in EQB Exhibit #38 as modified by Order #4.

This language is added to increase clarity. Refer to May 20, 1982 draft for amended language. See finding #'s 54 and 55 for additional comments on this rule.

54. Section 3.027 C.2. The Board accepts the Hearing Examiner's discussion of the issue. The Board adopts the amendments recommended in Public Exhibit #9 by NSP. The Board finds the language recommended by the Hearing Examiner is not necessary because the concept is clearly addressed in the amendment adopted in finding #54 of these findings. Refer to May 20, 1982 draft for amended language. See finding #'s 53 and 55 for additional comments on this rule.

55. Section 3.027 C.3. The Board accepts the Hearing Examiner's discussion of the issue and the Chief Hearing Examiner's Order #5. The Board adopts a remedy in keeping with the intent of the amendment of Public Exhibit #9 by NSP, however, changing placement of a modifying phrase.

The amendment recommended by NSP is:

Section 3.027 C.3. ~~If the proposer or its agent prepares the EAW, whether voluntarily or pursuant to a mandatory category or RGU determination,~~ When an EAW is to be prepared, except pursuant to 6 MCAR § 3.026F., the proposer shall submit the completed data portion of the EAW to the RGU for its consideration and approval. The RGU shall have 30 days to add supplementary material, if necessary, and to approve the EAW.

The RGU shall be responsible for the completeness and accuracy of all information, ~~and for decisions or determinations contained in the EAW~~.

Pursuant to NSP's amendment, this rule would say that if an EAW is being prepared pursuant to a petition, the proposer does not have to supply the data for the EAW. This could place the RGU in the ridiculous position of having to complete the EAW but not having access to the information necessary to complete it.

We believe the intent of the amendment was to have the phrase "except pursuant to 6 MCAR § 3.026 F." modify the time provision. The amendment adopted incorporates this concept. The rule as amended requires the proposer to supply the data portions of the EAW to the RGU and the RGU to prepare the EAW. The time allotment for the RGU to prepare the EAW depends on the reason for preparation of the EAW.

Refer to May 20, 1982 draft for amended language. See finding #'s 53 and 54 for additional comments on this rule.

56. Section 3.027 D.1. The Board accepts the Hearing Examiner's discussion of the issue, however, finds that a five day time period is more reasonable than the three day time period proposed by NSP. This finding is made in recognition of local governmental units without paid staff that may be placed in the position of approving an EAW at a night council meeting and then forced to complete the task of distributing the EAW within three days. The five day time period translates to seven calendar days and places less pressure on these governmental units.

Refer to May 20, 1982 draft for amended language. See finding #'s 57 and 58 for additional comments on this rule.

57. Section 3.027 D.1. The Board accepts the Hearing Examiner's findings.

Refer to May 20, 1982 draft for amended language. See finding #'s 56 and 58 for additional comments on this rule.

58. Section 3.027 D.2. The Board disagrees with the Hearing Examiner's findings. The Hearing Examiner correctly states the legal requirements for procedural due process. He further notes that the legal requirements do not require legal advertisement. The basis of his argument lies in "significant policy reasons" presented by NSP in Public Exhibit #99, page 5. Reference to that exhibit demonstrates that NSP does not present any policy reasons but merely refers to the policy reasons stated in the Statement of Need and Reasonableness (SONR). The basic policies presented in the SONR were to:

1. Keep costs at a minimum.

2. Insure local notice.
3. Establish definite dates to measure time deadlines.

The SONR discusses at length the merits of each publication method with regard to these three criteria and concludes that the legal notice adds nothing to the notice process except much greater cost. This conclusion is not challenged. Rather, the justification is proposed that since it's the proposer that will pay the cost, the cost consideration loses its merit. The Board disagrees.

Further, NSP misrepresents the rationale stated in the SONR for selecting the press release options. The rationale stated in the SONR for rejecting legal notice requirements was the "it has the disadvantages of being very expensive to the RGU and, while available locally, legal notices are seldom read even at the local level." In otherwords--it would greatly increase costs without adding to any of the basic policy reasons for notice.

In building to the rationale for accepting NSP's recommenation, the Hearing Examiner relies heavily on the fact that the Sierra Club, National Audubon Society and Northern Sun Alliance also questioned the adequacy of the notice. While this is true, the bases for the questions and the remedies advocated by these groups are far different from those of NSP. The remedy proposed by the Hearing Examiner does nothing to resolve the policy considerations presented by the other organizations.

NSP's comments of record indicate its base concern is reoccurrence of notice issues similar to those of the Wilmarth case. [In Re Wilmarth Line of the CU Project, 299 N.W. 2d 731 (Minn. 1980)] Appendix B of MEQB Exhibit #35 fully discusses the inappropriateness of this case to this issue. The Hearing Examiner failed to reference this discussion in his analysis of the issue. The Court in Wilmarth did not rely on constitutional grounds to rule inadequate notice. The Courts decision was based on failure of proper notice pursuant to specific administrative rule. While the Board concurs that certain projects may require increased notice because of multijurisdictional considerations similar to those of the Wilmarth case, this does not warrant the imposition of unreasonable and unjustified notice requirements upon all projects subject to environmental review. It is, rather, the function of this rule making process to determine what form of notice is reasonable. There is nothing in these rules that would preclude an RGU (or the proposer) from pursuing more extensive notice in unique cases to cover potential notice challenges. The Board finds, however, that it is not to impose extensive notice requirements on all projects merely because it may be desirable for a few.

The Board further finds that the Hearing Examiner's finding with respect to this rule is inconsistent with the reasonable-

ness standard he presents on page 45 of the findings. To be reasonable, the rule must:

1. Be consistent with the law.
2. Not be arbitrary.
3. Be based on a rational exercise of the agency's judgment.

These criteria have been met. The rule is reasonable as presented. Additional language has been added to clarify the option of publishing additional notice in unique cases. Refer to May 20, 1982 draft for amended language. See finding #'s 56 and 57 for additional comments relating to this rule.

59. Section 3.027 E.3. The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

60. Section 3.028 A.1.b. The Board disagrees with the Hearing Examiner's findings and the Chief Hearing Examiner's Order #6. Changes have been incorporated to make the language in Section 3.028 A.1.b. expressly state the prior implied standard. A more comprehensive discussion parallels the discussion presented pursuant to finding #51.

In analyzing the reasonableness of this rule, distinctions must be made among:

1. Discretion by the RGU in deciding to request an extension of time;

2. Discretion by the EQB chairperson in deciding whether to grant the request; and

3. The types of RGUs that may potentially request an extension.

The first consideration deals with discretion that is mandated by statute (See Minn. Stat. § 116D.04, subd. 2a (b)). Refer to the discussion presented in finding #51.

The second consideration also deals with statutory discretion. Refer to the discussion presented in finding #51. For the purpose of clarifying the rule, the statutory standard "upon the request of the RGU" has been added. Again, the record demonstrates no need for a more restrictive standard.

The third consideration serves to divide the field of RGUs that may potentially request an extension. The reason for distinguishing the categories of RGUs (A.1.a. and A.1.b.) is to expedite the process. The distinguishing standard does not serve to limit "discretion." The rule merely sets forth two different processes for the application of "discretion" based on the type of governing structure of the RGU. Refer to the discussion presented in finding #51.

Refer to May 20, 1982 draft for amended language. The rule is reasonable as amended. It fulfills the statutory intent, is in compliance with statutory language, and addresses the issue of need on record.

61. Section 3.028 B. The Board accepts the Hearing Examiner's discussion of the issue. The option of inserting major was rejected because the word would add nothing to the rules and merely serve as a historical marker related to an outdated test based on obsolete statutory language. This would only serve to confuse the reader. At some point obsolete language must be dropped. The Board finds it is most rational to delete the term in conjunction with the presentation of the new rules to the public to facilitate public education as to the proper test.

The rule is reasonable as proposed. It should be noted that the concept of this finding is incorporated throughout the rules. The specific issue of whether the word "major" should be inserted is relevant whenever the phrase "significant environmental effects" is used in these rules.

62. Section 3.028 C. The Board accepts the Hearing Examiner's discussion of the issue and the Chief Hearing Examiner's Order #7. The Board has chosen the option of deleting the last sentence in Section 3.028 B. The deletion increases clarity of the criteria. The Board concurs with the Chief Hearing Examiner's order that the criteria are "sufficiently specific to avoid illegality yet broad enough to vest some discretion in the RGU." Refer to May 20, 1982 draft for amended language.

63. Section 3.028 E.3. The Board disagrees with the Hearing Examiner's finding and the Chief Hearing Examiner's Order #8. The Chief Hearing Examiner implies the determination as to phasing is two separate decisions for which separate standards are required. In reality there is one decision with multiple options. The Board finds alternative standards and criteria to be reasonable. The language adopted clarifies the intent of the original language and eliminates excessive discretion within the rule.

The language proposed by NSP does not address the issues of discretion and standards. NSP's language merely serves to restrict the field of potential projects to which the concept of phasing applies. Further, this language could be interpreted to preclude proper environmental review on projects for which no formal need determination is made.

The word "need" as used in the SONR has the "generic" meaning given via English usage and Webster--i.e., "a condition or situation in which something necessary or desirable is required

or wanted". It does not connote a governmental decision prior to the analysis of environmental impacts. While this argument may appear to dwell in semantics, the implications are potentially devastating. These rules are written to apply to a broad spectrum of potential projects--many of which may be phased--but relatively few of which have any relationship to utilities. The NSP amendment would allow application of phased review to only large energy projects.

The Board amendment removes the problem of excessive discretion and applies a standard that allows flexibility in application to fit the entire spectrum of potential projects. Refer to May 20, 1982 draft for amended language.

64. Section 3.029 A. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language.

65. Section 3.030 D.1. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language. See finding #66 for additional comments relating to this rule.

66. Section 3.030 D.2. The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed. See finding #65 for additional comments relating to this rule.

67. Section 3.030 E.1. The Board accepts the Hearing Examiner's findings. The option of no amendment is selected because the rule is clear as written. The amendment would merely add language with no added substance and would not increase clarity. The rule is reasonable as proposed. See finding #'s 68 and 69 for additional comments relating to this rule.

68. Section 3.030 E.2. The Board disagrees with the Hearing Examiner's findings and accepts the Chief Hearing Examiner's Order #9. The rule is reasonable as proposed. See finding #'s 67 and 69 for additional comments relating to this rule.

69. Section 3.030 E.3. (formerly Section 3.030 E.5.) The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language. See finding #'s 67 and 68 for additional language relating to this rule.

70. Section 3.031 B. The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

71. Section 3.031 D. The Board accepts the Hearing Examiner's findings. The rule is reasonable as proposed.

72. Sections 3.031 E.2., 8., and 9. The Board accepts the Hearing Examiner's findings. The rule is reasonable as amended pursuant to finding #'s 73 and 74. See finding #'s 73 and 74 for additional comments on this rule.

73. Section 3.031 E.9. The Board disagrees with the Hearing Examiner's findings. The Hearing Examiner misinterprets the intent of the rule. The purpose of the rule is to provide guidance to interested persons as to when they should submit comments. For proper consideration they should be submitted during the comment period. It is not the intent to preclude submission of comments at other times. This would exceed EQB authority. The authority of the EQB extends only to how comments are to be considered pursuant to these rules.

To clarify the proper interpretation, the rule was amended to focus on the "submission" of the comments rather than the "receipt" of the comments. Refer to May 20, 1982 draft for amended language. See finding #'s 72 and 74 for additional comments on this rule.

74. Section 3.031 E.10. The Board disagrees with the Hearing Examiner's findings. With respect to proper consideration of comments, there are two realms of consideration:

a. How comments are considered pursuant to the procedures of these rules; and

b. How comments are considered in light of the overall responsibility of the RGU to act in accord with its jurisdictional authority and responsibility and in accord with common law.

These rules extend only to the first consideration. In other words, if substantive comments are received outside the comment period, the RGU is not bound to act on the comments pursuant to the process established by these rules. However, the RGU will be responsible for making permit decisions which it must make based on all information known, including information outside the environmental review process. If an RGU ignores information contained in the comments, it may be liable for breach of its ministerial duties independent of these rules.

To clarify the proper interpretation of this rule, Section 3.031 E.10. was amended by deleting the second sentence. The effect of this amendment is to mandate proper consideration of comments submitted within the comment period and to avoid ambiguity regarding the RGU's proper treatment of comments submitted outside the context of these rules. These amendments remove the defects noted in the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language. See findings #'s 72 and 73 for additional comments on this rule.

75. Section 3.031 F.1. The Board accepts the Hearing Examiner's discussion of the issue. The option of adopting the amendment #26 in Public Exhibit #86 as proposed by SLUC has been selected as the simplest alternative to clarify the defect. Refer to May 20, 1982 draft for amended language.

76. Section 3.031 G.1.a.-e. The Board accepts the Hearing Examiner's discussion of the issue. A modified version of the option proposed by the Hearing Examiner is adopted because it corrects the defect and maintains the intent of the rule. Refer to May 20, 1982 draft for amended language. See finding #'s 77, 78 and 79 for additional comments on this rule.

77. Section 3.031 G.4. The Board accepts the Hearing Examiner's discussion of the issue. The Board adopts the amendment proposed in Public Exhibit #13 by NSP to correct the defect. Refer to May 20, 1982 draft for amended language. See finding #'s 76, 78 and 79 for additional comments on this rule.

78. Section 3.031 G.5.c. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language. See finding #'s 76, 77 and 79 for additional comments on this rule.

79. Section 3.031 G.5.a. The Board accepts the Hearing Examiner's discussion of the issue. The rule as amended clarifies the role of the EIS in providing information relevant to the scoped issues. Refer to May 20, 1982 draft for amended language.

See finding #'s 76, 77 and 78 for additional comments on this rule.

80. Section 3.031 H.2. The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed.

81. Section 3.031 I. The Board accepts the Hearing Examiner's discussion of the issue. In selecting an amendment to cure the defect, the Board finds the 120 day time limit proposed by NSP is unduly restrictive. It must be noted that approximately 45-60 days of this time period will be spent obtaining public input as to the adequacy of the supplement. This would leave approximately 60-75 days for the RGU to obtain consultants and perform the substantive work in preparation of the document. While the Board agrees that the scope of the supplement will be reduced (i.e., restricted as to those aspects of the initial scope that were not adequately addressed in the original EIS), it is likely that the issues will require substantial investigations. A narrowing of the field of issues does not necessarily lessen the time required to investigate the individual issues. A more reasonable estimate of the necessary time would be 180 days. This would allow approximately 120-135 days for consultant selection and document preparation.

This time period is framed in the same statutory framework, relating to commencement of the time period and criteria for extending the time period, applied to the preparation of the original EIS. Refer to May 20, 1982 draft for amended language.

82. Section 3.032 D. The Board accepts the Hearing Examiner's findings. See finding #'s 83 and 84 for additional comments on this rule.

83. Section 3.032 D.5.b.(1). The Board accepts the Hearing Examiner's findings. See finding #'s 82 and 84 for additional comments on this rule.

84. Section 3.032 D.5.b.(1). The Board accepts the Hearing Examiner's findings and the Chief Hearing Examiner's Order #10. The option selected to cure the defect is to delete the entire Section 3.032 D. This amendment incorporates the option of the Hearing Examiner to delete the "economic hardship variance." However, once that option is accepted the only provision for a variance is for "serious threat to public health and safety". These situations are adequately addressed as emergency actions. Emergency action procedures set forth at Section 3.032 E. provide a more timely process for addressing these situations.

The issue of whether this is, in fact, a substantial change must be made by the Hearing Examiner's office. The Board finds that the establishment of standards and criteria relating to economic hardship is meaningless for activities as far ranging as those addressed by these rules. Any standards and criteria proposed would of necessity be subject to discretion equal to the base "reasonable standard" that would have been imposed by the rules as proposed. Absent specific legislative intent to the contrary, the Board finds it is most reasonable to withdraw the variance provision. Refer to May 20, 1982 draft for deleted language. See finding #'s 82 and 83 for additional comments on this rule.

85. Section 3.033 A. The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

86. Section 3.033 E.3. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language.

87. Section 3.034 A. and B. The Board accepts the Hearing Examiner's finding. The rule is reasonable as amended pursuant to finding #'s 88 and 139. See finding #'s 88 and 139 for additional comments relating to Section 3.034 A.

88. Section 3.034 A. The Board accepts the Hearing Examiner's discussion of the issue. Refer to May 20, 1982 draft for amended language. See finding #'s 87 and 139 for additional comments relating to this rule. The rule has been redrafted to incorporate the recommended remedy of the Hearing Examiner.

89. Section 3.035 A. and B. The Board agrees with the Hearing Examiner's discussion of the limits to the EQB's authority, however, disagrees with the Hearing Examiner's proposed remedy.

The interpretation of this rule was addressed on record. This rule is not intended to confer authority on the EQB to veto local ordinances. Such action would be clearly beyond legal authority. The authority of the EQB extends only to the approval of a local ordinance as a substitute form of environmental review. The amendment clarifies the intent of the rule. Refer to May 20, 1982 draft for amended language.

90. Section 3.036 D. (formerly Section 3.036 A.1.-6.). The Board agrees with the Hearing Examiner's discussion of the issue. The Board finds a slight variation of the Hearing Examiner's proposed cure to be most reasonable. Proposed rule Section 3.036 A. has been deleted and the concepts have been rephrased and inserted in new Section 3.036 D. This amendment more accurately reflects the proper criteria for generic review. Refer to May 20, 1982 draft for amended language.

91. Section 3.036 A. (formerly Section 3.036 B.). The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed.

92. Section 3.036 B. (formerly Section 3.036 C.). The Board disagrees with the Hearing Examiner's finding and accepts the Chief Hearing Examiner's Order #11. The rule is reasonable as proposed.

93. Section 3.036 F. (formerly Section 3.036 G.). The Board accepts the Hearing Examiner's findings. Refer to May 20, 1982 draft for amended language.

94-95. The Board accepts the Hearing Examiner's comments and findings.

96-100. Section 3.038 A. and Section 3.039 A. Nuclear fuels and nuclear waste. The Board accepts the Hearing Examiner's findings. These rules are reasonable as amended at Section 3.039 A.1. pursuant to finding #100. Refer to May 20, 1982 draft for amended language.

101-103. Sections 3.038 J., Section 3.039 G. and Section 3.041 G. Metallic mineral mining and processing. The Board accepts the Hearing Examiner's findings. These rules are reasonable as proposed.

104. Sections 3.038 K., Section 3.039 H. and Section 3.041 G. Nonmetallic mineral mining. The Board accepts the Hearing Examiner's finding. These rules are reasonable as proposed.

105. Section 3.038 M., Section 3.039 J. and Section 3.041 I. Industrial/commercial/institutional facilities. The Board accepts the Hearing Examiner's finding. The rules are reasonable as proposed.

106. Section 3.038 N. Air pollution. The Board accepts the Hearing

Examiner's finding. The rules are reasonable as proposed.

107. Section 3.038 R., Section 3.039 M., and Section 3.041 K. Residential development. The Board accepts the Hearing Examiner's finding. The rules are reasonable as proposed.

108. Section 3.038 U., Section 3.039 O, and Section 3.041 M. Highway Projects. The Board accepts the Hearing Examiner's finding. The rules are reasonable as proposed.

109. Section 3.038 W., Section 3.039 Q. and Section 3.041 N. Water appropriation and impoundments. The Board accepts the Hearing Examiner's finding. The rules are reasonable as proposed.

110. Section 3.038 Y. and Sections 3.041 M.5. and P. Stream diversion. The Board accepts the Hearing Examiner's finding. Reference to 6 MCAR § 3.041 M.5. was unintentionally omitted as a crossreference within the rules. This exemption should be included in category 6 MCAR § 3.08 Y. to increase the clarity of the rules. This amendment is within the scope of the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language.

111. Section 3.038 Z. and Section 3.039 S. Wetlands and protected waters. The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed.

112. Section 3.038 AA. and Section 3.041 Q. Agriculture and forestry. The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed.

113. Section 3.038 BB. and Section 3.041 R. Animal feedlots. The Board accepts the Hearing Examiner's finding. The rules are reasonable as proposed.

114-115. The Board accepts the Hearing Examiner's comments and findings.

116. Section 3.040 B. The Board accepts the Hearing Examiner's finding and the Chief Hearing Examiner's Order #12. The Board finds the option suggested in Order #12 to be the most reasonable cure for the defect. The meaning of the rule is clear without the phrase "primary purpose". Refer to May 20, 1982 draft for amended language.

117. Section 3.043 A. and C. The Board disagrees with the Hearing Examiner's findings and accepts the Chief Hearing Examiner's Order #13. The rules are reasonable as proposed.

118. Section 3.044 A.1.a. and b. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for deleted language. See finding #'s 119, 120, 121 and 122 for additional comments on this rule.

119. Section 3.044 A.1.d. The Board accepts the Hearing Examiner's

finding. The option of adopting the amendment proposed in Public Exhibit #100 by the DNR is selected as the most direct method of clarifying this rule. Refer to May 20, 1982 draft for amended language. See finding #'s 118, 120, 121 and 122 for aditional comments on this rule.

120. Section 3.044 A.1.e. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for deleted language. See finding #'s 118, 119, 121 and 122 for additional comments on this rule.

121. Section 3.044 A.1.h. The Board accepts the Hearing Examiner's finding. The rule is reasonable as proposed. See finding #'s 118, 119, 120 and 122 for additional comments on this rule.

122. Section 3.044 A.15. The Board disagrees with the Hearing Examiner's findings and accepts the Chief Hearing Examiner's Order # 14. The rule is reasonable as proposed. See finding #'s 118, 119, 120 and 121 for additional comments on this rule.

123. Section 3.053 E. The Board disagrees with the Hearing Examiner's finding and accepts the Chief Hearing Examiner's Order #15. The rule is reasonable as proposed.

124. Section 3.055 B.3.c. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language. See finding #"s 125, 126, 129 and 132 for additional comments on this rule.

125. Section 3.055 B.4. The Board accepts the Hearing Examiner's finding. The amendment adopted eliminates the permissive language and provides standards to define when site-differentiating factors should be considered in the environmental report. Refer to May 20, 1982 draft for amended language. See finding #'s 124, 126, 129 and 132 for additional comments on this rule.

126. Section 3.055 B.5. The Board accepts the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language. See finding #'s 124, 125, 129 and 132 for additional comments on this rule.

127. General finding relating to references to the Minnesota Energy Agency. The Board accepts the Hearing Examiner's finding. This finding is consistent with agency reorganization as of March 1, 1982 in which the MEA became a division of the DEPD. This finding applies throughout the text of the rules wherever the acronym MEA previously occurred. Refer to May 20, 1982 draft for amended language.

128. Section 3.055 C.3. and Section 3.056 C.3. The Board accepts the Hearing Examiner's findings and the Chief Hearing Examiner's Order #16. The amended rule adopts the recommen-

dations of both the finding and the order. The amended rule clarifies the issue of consideration of need and establishes standards relating to the development of site specific data. Refer to May 20, 1982 draft for amended language. See finding #'s 129, 132 and 134 for additional comments on these rules.

129. Section 3.055 B.12 and 3.055 C.11. The Board accepts the Hearing Examiner's finding and the Chief Hearing Examiner's Order #17. The Board finds the language proposed in the order more clearly states the intent of the rule and chooses that language to cure the defect. Refer to May 20, 1982 draft for amended language. See finding #'s 124, 125, 126, 128 and 132 for additional comments on these rules.

130. Section 3.056 A. The Board accepts the Hearing Examiner's finding. The Board finds the option of deleting the word "need" and inserting "shall" to be the most concise and clear option for curing the defect. This option is reasonable because the purposes of the EAW are adequately fulfilled by other environmental review documents. It should be noted this finding also should apply to Section 3.055 A. The same option is applied to cure the defect in that rule. Refer to May 20, 1982 draft for amended language.

131. Section 3.056 D. The Board accepts with the Hearing Examiner's finding. Refer to May 20, 1982 draft for amended language.

132. Section 3.055. The Board accepts the Hearing Examiner's finding. The rule is reasonable as amended pursuant to finding #'s 124, 125, 126, 128 and 129. See finding #'s 124, 125, 126, 128 and 129 for additional comments on this rule.

133. Section 3.056 B.3.e. The Board accepts the Hearing Examiner's finding. The Board finds that a preferable alternative to the cure recommended in the Chief Hearing Examiner's Order #18 is to add standards limiting when detailed site specific information can be considered in the EIS. The amendment adopted is consistent with the option chosen in finding #128. Refer to May 20, 1982 draft for amended language.

134. Section 3.056 C.3. The Board accepts the Hearing Examiner's finding and the Chief Hearing Examiner's Order #19. The amendments necessary to cure the defect were adopted pursuant to finding #128. The amendments incorporate the recommendations of both the finding and the order. The amended rule clarifies the issue of consideration of need and establishes standards relating to the development of site specific data. Refer to May 20, 1982 draft for amended language. See finding #128 for additional comments on this rule.

135-137. General comments. The Board accepts the Hearing Examiner's findings.

138. The Board accepts the Hearings Examiner's findings. These minor amendments are listed below according to the "type" of amendment. Amendment types a.-g. are nonspecific editorial changes of a minor nature and may refer to differing language changes at various locations in the rules. Amendment types h.-n. are specific editorial changes of a minor nature which refer to the one type of language change that may occur at several locations in the rules.

a. Editorial change - punctuation error.

b. Editorial change - minor amendment to clarify the meaning of the rule.

c. Editorial change - minor amendment necessary because previous language was in error.

d. Editorial change - deletion of language that was unnecessary or redundant.

e. Editorial change - addition of language that is necessary to clarify because its frame of reference occurs elsewhere in the rules.

f. Editorial change - content of two or more subparagraphs merged and restructured to increase clarify.

g. Editorial change - renumbering of sections or deletion of language necessary because of change in other sections.

h. The phrase "government approvals" was changed to "government decisions" at all points of reference in the rules. This change was made because the frame of reference includes the option of denying approval. The word decision more accurately reflects the options of approval and denial.

i. The phase "alternate environmental review" was changed to "substitute environmental review" at all points of reference in the rules. This change was made because of public confusion relating to the use of the word "alternate". "Alternative environmental review" has specific statutory meaning and people were confusing that concept with "alternate environmental review" - i.e., they were not distinguishing between "alternative" and "alternate". Therefore the word "alternate" was replaced with "substitute".

j. The word approval (as used relating to approval of an EAW) was qualified by adding "for distribution". This amendment was made to clarify public misunderstanding of the consequences of approval of an EAW. Approval of an EAW by

the RGU means the information is accurate and adequate and the document is ready for public review. It does not connote any decision by the RGU as to whether or not an EIS is necessary or whether or not the project should be permitted.

k. The words "or deny" were deleted when used in the context of prohibiting permit decisions until completion of environmental review documents. There are many reasons why a permit could be denied. If the governmental unit knows they will deny the permit regardless of the consequences of environmental review, there is no need to delay the denial. Such delay will only increase costs to the parties.

l. The term "EIS" was replaced with "environmental documents" when used in the context of federal and state cooperation relating to environmental review. This change was made because there may be documents that could be prepared other than EISs that could fulfill the function of environmental review. Restricting the language to EISs does not fulfill the statutory intent for cooperation to the greatest extent possible.

m. At various locations in the rules, reference is made to a time period or period of review commencing with issuance of the decision. The intent of the provision was to start the time periods with notice of the decision. These provisions have been clarified by adding the phrase "after publication in the EQB Monitor". This provides a fixed date to commence the time period and clarifies the intent of the rule.

n. Mandatory category 6 MCAR § 3.038 0.4 was amended to conform to changes in the implementation of hazardous waste legislation by the PCA. The amended language facilitates more effective implementation of this rule. The justification of this amendment is on record. The amendment was regarded as a minor change and was not opposed in the hearing record.

o. Mandatory categories 6 MCAR § 3.038 Q. 1. and 2. were amended to qualify the term "wastewater treatment facility" by the addition of the modifying phase "municipal or domestic". This change was made to clarify the intent of the category. The justification previously presented on record encompasses the concept, however, the rule did not expressly state the fact that the categories applied only to municipal or domestic facilities. The PCA requested this amendment to clarify the rule. The amendment was regarded as a minor change and was not approved in the hearing record.

139. Section 3.034 A. 7. (ADDITIONAL FINDING) This rule as presented to hearing failed to incorporate a provision requiring the RGU to respond to timely substantive comments submitted pursuant to alternative review. It is a fundamental concept of environmental review that substantive public comment must be addressed prior to final government action. The Board finds the amended language clarifies the intention that alternative review processes must also provide for adequate response to timely substantive comments. The amended language conforms to the statutory requirement that alternative review "utilize similar procedures" as an EIS. See finding #'s 87 and 88 for additional comments relating to this rule. Refer to May 20, 1982 draft for amended language.

140. Section 3.055 B. 7 and 8. (ADDITIONAL FINDING) This rule as presented to hearing failed to incorporate a provision for the DEPD to respond to timely substantive comments on environmental reports for LEPGPs and HVTLs. It is a fundamental concept of environmental review that substantive public comment must be addressed prior to final government action. The Board finds the amended language clarifies the intention that environmental reports, as alternative forms of environmental review, must also provide for adequate response to timely substantive comments. The amended language conforms to the statutory requirement that alternative review "utilize similar procedures" as an EIS. Refer to May 20, 1982 draft for amended language.

CONCLUSIONS

1-2. The Board accepts the Hearing Examiner's conclusions.

3. The Board rejects the Hearing Examiner's conclusion. The Minnesota Environmental Quality Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 15.0412, subd. 4e, and 15.052, subd. 3 (4)(i)and (ii) (1980).

4. The Board rejects the Hearing Examiner's conclusion. The Minnesota Environmental Quality Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. § 15.0412, subd. 4c (1980).

5. The Board accepts the Hearing Examiner's conclusion.

6. The Board accepts the Hearing Examiner's conclusion. The Board has taken action to correct defects cited in the Hearing Examiner's findings. The actions taken by the Board are consistent with the actions recommended by the Hearing Examiner,

except as noted at findings 32, 51, 58, 60, 63, 68, 73, 74, 92, 117, 122 and 123 and at additional findings 139 and 140.

7. The Board accepts the Hearing Examiner's conclusion. The Board accepts the Chief Hearing Examiner's Orders resulting from this conclusion. The Board has taken action consistent with the Chief Hearing Examiner's Orders, except as noted at findings 51, 60 and 63.

8-10. The Board accepts the Hearing Examiner's conclusions.

ORDER OF ADOPTION

The Minnesota Environmental Quality Board (MEQB) authorizes adoption of the proposed amendments to Rules Relating to the Environmental Review Program, as rules reasonable and necessary to carry out its responsibilities pursuant to Minn. Stat. Ch. 116D (1980). The MEQB authorizes the Chairperson of the Board to submit to the Chief Hearing Examiner those amendments that the Board has modified in a manner other than that recommended by the Hearing Examiner and the Chief Hearing Examiner. The MEQB authorizes the Chairperson of the Board to submit to the Legislative Commission to Review Administrative Rules (LCRAR), for advice and comment, those amendments that the Chief Hearing Examiner has determined need and reasonableness not to have been demonstrated and that do not follow the recommendations of the Chief Hearing Examiner. The MEQB authorizes the Chairperson of the Board to sign the Order Of Adoption of the proposed amendments to Rules Relating to the Environmental Review Program if the Chief Hearing Examiner and the LCRAR determine that no further modifications of the rules are required.

Dated this 20 day of May, 1982.

ROBERT BENNER, CHAIRPERSON
ENVIRONMENTAL QUALITY BOARD

CERTIFICATE OF ENVIRONMENTAL QUALITY BOARD'S

AUTHORIZING RESOLUTION

I, GARY BOTZEK, do hereby certify that I am a member and the Chairperson of the Environmental Quality Board, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Environmental Quality Board duly and properly called and held on the 16th day of July, 1981, that a quorum was present at said meeting, that a majority of those present voted for the resolution and that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

WHEREAS, the 1980 Minnesota Legislature amended the Minnesota Environmental Policy Act (Minn. Stat. Ch. 116D.04) and directed the Board to promulgate rules governing the State's Environmental Review Process in conformity with those amendments; and

WHEREAS, the legislature directed that the rule promulgation be in conformity with the rulemaking provisions of the Administrative Procedures Act (Minn. Stat. Ch. 15);

NOW, THEREFORE, BE IT RESOLVED THAT:

1. A public hearing on the proposed rules governing the State's Environmental Review Process incorporating the 1980 amendments to the Minnesota Environmental Policy Act is endorsed.

2. The public hearing is to be held pursuant to the Administrative Procedures Act.

3. The chairman of the Environmental Quality Board is authorized to perform any and all acts incidental thereto, including but without being limited to, signing an Order for Hearing and Notice of Hearing.

4. Board member agencies and citizen members of the Board reserve the right to testify on the proposed rules at the public hearing.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 12th day of July, 1982.

Gary Botzek

Gary Botzek, Chairperson
Environmental Quality Board

Attestation:

R P Braun

Richard Braun, Commissioner
Department of Transportation
Member, Environmental Quality Board

CERTIFICATE OF ENVIRONMENTAL QUALITY BOARD'S

RESOLUTION ADOPTING RULES

I, GARY BOTZEK, do hereby certify that I am a member and the Chairperson of the Environmental Quality Board, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Environmental Quality Board, duly and properly called and held on the 23rd day of June, 1982, that a quorum was present at said meeting, that a majority of those present voted for the resolution, and that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

WHEREAS, the 1980 Minnesota Legislature amended the Minnesota Environmental Policy Act (Minn. Stat. ch. 116D.04) and directed the Board to promulgate rules governing the State's Environmental Review Process in conformity with those amendments; and

WHEREAS, the legislature directed that the rule promulgation be in conformity with the rulemaking provisions of the Administrative Procedures Act (Minn. Stat. ch. 15); and

WHEREAS, at its May 20, 1982 meeting, the Board accepted the Report of the Hearing Examiner and the Order of the Chief Hearing Examiner, as modified by EQB staff proposed findings of fact and conclusions dated April 20, 1982, and as amended by the Board at its May 20, 1982 meeting, and accepted the Order of Adoption, as stated in EQB staff memo dated May 13, 1982; and

WHEREAS, the Chief Hearing Examiner has reviewed the Board accepted Findings of Fact, Conclusions and Order and has issued an ORDER OF THE CHIEF HEARING EXAMINER dated June 8, 1982;

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The ORDER OF THE CHIEF HEARING EXAMINER, as modified by EQB Staff Proposed Amendment to Board Accepted For Adoption Findings of Fact, Conclusions And Order Adopting Rules Dated May 20, 1982 is accepted.

2. The ORDER OF THE CHIEF HEARING EXAMINER dated June 17, 1982 is accepted.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 12th day of July, 1982.

Gary Botzek

Gary Botzek, Chairperson
Environmental Quality Board

Attestation: R P Braun

Richard Braun, Commissioner
Department of Transportation
Member, Environmental Quality Board

CERTIFICATE OF ENVIRONMENTAL QUALITY BOARD'S

RESOLUTION ADOPTING RULES

I, GARY BOTZEK, do hereby certify that I am a member and the Chairperson of the Environmental Quality Board, a board duly authorized under the laws of the State of Minnesota, and that the following is a true, complete, and correct copy of a resolution adopted at a meeting of the Environmental Quality Board, duly and properly called and held on the 20th day of May, 1982, that a quorum was present at said meeting, that a majority of those present voted for the resolution, and that said resolution is set forth in the minutes of said meeting and has not been rescinded or modified.

WHEREAS, the 1980 Minnesota Legislature amended the Minnesota Environmental Policy Act (Minn. Stat. ch. 116D.04) and directed the Board to promulgate rules governing the state's Environmental Review Process in conformity with those amendments; and

WHEREAS, the legislature directed that the rule promulgation be in conformity with the rulemaking provisions of the Administrative Procedures Act (Minn. Stat. ch. 15);

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Report of the Hearing Examiner and the Order of the Chief Hearing Examiner, as modified by staff proposed findings of fact and conclusions dated April 20, 1982, and also as amended by the Board at its May 20, 1982 meeting is accepted.

2. The Order of Adoption is accepted as follows:

   The Minnesota Environmental Quality Board (MEQB) authorizes adoption of the proposed amendments to Rules Relating to the Environmental Review Program, as rules reasonable and necessary to carry out its responsibilities pursuant to Minn. Stat. Ch. 116D (1980). The MEQB authorizes the Chairperson of the Board to submit to the Chief Hearing Examiner those amendments that the Board has modified in a manner other than that recommended by the Hearing Examiner and the Chief Hearing Examiner. The MEQB authorizes the Chairperson of the Board to submit to the Legislative Commission to Review Administrative Rules (LCRAR), for advice and comment, those amendments that the Chief Hearing Examiner has determined need and reasonableness not to have been demonstrated and that do not follow the recommendations of the Chief Hearing Examiner.

The MEQB authorizes the Chairperson of the Board to sign the Order Of Adoption of the proposed amendments to Rules Relating to the Environmental Review Program if the Chief Hearing Examiner and the LCRAR determine that no further modifications of the rules are required.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 12th day of July, 1982.

Gary Botzek

Gary Botzek, Chairperson
Environmental Quality Board

Attestation:

R. Braun

Richard Braun, Commissioner
Department of Transportation
Member, Environmental Quality Board

MEQB Ex 11

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OCT 28 1981
ADMINISTRATIVE HEARINGS

The Statement of Need and Reasonableness
for
Minnesota Environmental Quality Board
Proposed Environmental Review Program Rules

This Statement of Need and Reasonableness will utilize the following format for a paragraph-by-paragraph discussion of the proposed rules:

I. Authority

II. History of Environmental Review in Minnesota

III. 1980 Amendments to the Minnesota Environmental Policy Act

IV. Rule Drafting Process in Preparation of these Proposed Rules

V. Substantive Discussion of the Proposed Rules

A. Introduction to the Rules

1. Introduction to Chapter

a. Introduction to Section

(1) Statement of Rule as proposed
(2) Discussion of Proposed Rule including:

(a) An explanation of the origin of the provision;

(b) Explanation of how the provision differs from the existing rule, if applicable;

(c) Statement of the need for this provision;

(d) Statement relating to reasonableness of the provision, including a discussion of alternative methods of addressing the need;

(e) Brief discussion of any public comment or controversy relating to the provision, if applicable.

VI. Information on Procedures for Providing Comment

NOTE: Definitions and abbreviations used in the proposed rules are incorporated in this Statement of Need and Reasonableness.

I. AUTHORITY

These rules are proposed to implement the 1980 amendments to the Minnesota Environmental Policy Act, Minn. Stat. ch. 116D. Existing rules 6 MCAR § 3.021 through 3.032 are deleted in their entirety and are replaced by proposed rules 6 MCAR §§ 3.021 through 3.041. Existing rules 6 MCAR §§ 3.033 through 3.047 are amended to become 6 MCAR §§ 3.042 through 3.054. These sections contain minor revisions as indicated. Rules 6 MCAR §§ 3.055 and 3.056 replace the existing rule 6 MCAR § 3.025 G.

Specific authority to promulgate rules relating to the Environmental Review Program is granted under Minn. Stat. § 116D.04, subd. 5 (a) and Minn. Stat. § 116D.045. General rule-making authority is given the Environmental Quality Board in Minn. Stat. § 116C.04 and Minn. Stat. Chap. 116D.

II. HISTORY OF ENVIRONMENTAL REVIEW IN MINNESOTA

The concept of environmental review was spawned in the late 1960s with the developing environmental conscience. Its purpose was to implement environmental protection as a matter of public policy and to utilize the Environmental Impact Statement (EIS) as a planning tool in the decision-making process. Environmental review does not of itself make decisions: rather it provides necessary information to governmental units which they can utilize to make environmentally sensitive decisions in the best interests of the public. It has a further purpose in allowing the public to participate in decisions that affect them. The intent is to prevent environmental degradation by wise and informed decisions.

Minnesota's Environmental Review Program was established by the Minnesota Environmental Policy Act (MEPA) of 1973. Companion legislation, found at Minn. Stat. ch. 116C, established the Minnesota Environmental Quality Board (EQB). Rules implementing the process were promulgated in 1974 and remained in effect until 1977. Under the initial process all decision-making authority was centralized in the EQB. The EQB decided on a case-by-case basis which projects were major actions with the potential for significant environmental effects.

In 1977 the Environmental Review Program Rules were amended to incorporate recommendations based on the history of the first three years of the program. The most significant change was the decentralization of the process by allowing local and state agencies to assume more authority in decisions on the need for EISs for proposed projects under their jurisdiction. The agency that had the most approval authority over a project was required to prepare an Environmental Assessment Worksheet (EAW) to determine whether the project warranted an EIS. Decisions made by the responsible agencies were subject to review and reversal by the EQB. These rules are currently in effect for the Environmental Review Program and are referred to throughout this Statement as the "current rules".

During the 1979-80 legislative session, the EQB, a business group, and an environmental group submitted proposals to the legislature for revisions to MEPA. The EQB staff was given these three proposals and told to work out a compromise. The staff drew elements from each of the three proposals, the new Council on Environmental Quality regulations, and existing processes in other states, and developed compromise legislation. This draft legislation was submitted to the legislature and served as the basis for amendments to MEPA which became law on April 3, 1980.

III. 1980 AMENDMENTS TO THE MINNESOTA ENVIRONMENTAL POLICY ACT

The main elements of the amended MEPA include:

1. Further decentralization of decision-making authority to allow local units of government and permitting state agencies to make final administrative decisions regarding the need for and adequacy of

environmental review. The EQB retains the authority to make rules governing the environmental review process, however, the EQB may intervene only at specified times during the process. Local and state agency administrative decisions may no longer be appealed to the EQB. Appeals must be filed directly in district court.

2. Establishment of specific thresholds for projects and impacts that will automatically require preparation of an EAW or EIS to assure greater predictability in the process. Categories of projects which are exempt from environmental review were also required.

3. Establishment of strict time limits for the preparation and review of environmental documents.

4. Encouragement of citizen participation early in the process of environmental review to promote a non-adversarial process. The agency responsible for preparing the EAW must submit the EAW for a 30 day public review and comment period. The final decision on the need for an EIS is not made until after public comment has been received.

5. Establishment of a relaxed process of citizen initiation of environmental review to enable citizen involvement early in the process to promote non-adversarial interaction on controversial projects.

6. Provision for flexible content requirements for EISs. An early and open scoping process is established as the first step in EIS preparation. Through this process, only the relevant issues are analyzed in the EIS. This provides for a shorter, more timely and less expensive document that is more relevant and useable for decision makers.

7. Provision for alternative forms of environmental review. The intent is to allow environmental review to proceed in the most timely, cost effective manner as long as the alternative process meets base criteria.

IV. RULE DRAFTING PROCESS IN PREPARATION OF THESE PROPOSED RULES

On April 7, 1980, a Notice of Intent to Solicit Outside Opinion and Information concerning the revisions to the rules relating to the Environmental Review Program was published in the State Register. EQB staff began soliciting comments from the public and from governmental units and prepared a working draft of the proposed rules to implement the new legislation. This draft was submitted to a task force for review and comment. The task force consisted of representatives from industry, state government, local units of government, environmental groups, and persons knowledgeable with the history and purpose of the environmental review in Minnesota. Task force meetings were held throughout the summer and fall of 1980. The product of the task force was released as a public draft on December 19, 1980.

Throughout the drafting process, from April 1980 through July 1981, numerous meetings and discussions were held with individuals, state agency personnel, and interest groups. It should be noted that not all comments were incorporated. The rules as proposed represent a balance of comments and recommendations received.

The December 19 draft was mailed to all cities and counties in the state, as well as persons on the State Planning Agency interested persons list. A series of public meetings were held across the state in January 1981 to obtain comments on the December 19 draft. These comments were incorporated into a second public draft which was released on March 19, 1981.

At its April 1981 board meeting, the EQB established a special committee of board members to conduct further public meetings for comment on the March draft. A series of three public meetings were held in May and June to receive comments on the mandatory categories, the review process and the fiscal impacts of the proposed rules. Comments received as a result of these meetings were incorporated into a third public

draft which was approved for hearing at the July 1981 EQB meeting. Copies of all comments received pursuant to the public review processes are available for review at the EQB Office.

V. SUBSTANTIVE DISCUSSION OF THE PROPOSED RULES

Introduction to the Rules:

These rules were written and organized in an attempt to make them as readable and useable as possible for the general public. This effort is especially important with the decentralization of the decision-making process and the important role of citizen involvement. To further facilitate public understanding of the rules when adopted, EQB staff will prepare a "Guide to the Rules" which will explain the intent of the rules and provide instructions and suggestions relating to their implementation. In addition, EQB staff will conduct public information and training sessions after the rules are formally promulgated and will be available to provide technical assistance on an "as needed" basis. This Statement of Need and Reasonableness will be used as the standard for interpreting the rules.

Introduction to Chapter 11: Authority, Purpose, Definitions, Responsibilities.

An attempt was made to write these rules as a self contained unit to enable more effective use by the public. The intent of this chapter is to provide a basic framework of reference for the later more substantive portions of the rules. Earlier drafts of this chapter contained additional language of an informative or advisory nature. This language was deleted from the final draft and will be included in the "Guide to the Rules." The primary reasons for deleting these materials from the rules were to curtail the length of the rules and to minimize ambiguities resulting from potential misinterpretation of advisory information. After reading this chapter, the reader should gain a basic familiarity with the goals of environmental review and the responsibilities of various parties that may be interested in a given activity.

Introduction to 6 MCAR § 3.021: Authority, purpose and objectives.

This rule is basically introductory in nature. It is provided for the purpose of setting the stage and tone for the rest of the rules. Comments relating to misinterpretation or misapplication of legislative intent and alternative interpretations of the role of environmental review are relevant to this rule.

The need for a rule of this nature was demonstrated through the public review process. Although environmental review rules have been in effect for eight years, much of the public is unaware of their existence or misinformed as to their purpose. The "Guide to the Rules" will go substantially further in explaining the purpose of environmental review.

6 MCAR § 3.021 A. Authority.

> These rules are issued by the Minnesota Environmental Quality Board under authority granted in Minn. Stat. Ch. 116D to implement the environmental review procedures established by the Minnesota Environmental Policy Act.

DISCUSSION: This paragraph is an abbreviated version of 6 MCAR § 3.021 A. of the current rules. Nonsubstantive language was deleted.

It is not essential that the authority for promulgating rules be contained in the rules, however, it is included in this rule for the purpose of directing the reader to the proper statute.

6 MCAR § 3.021 B. Application.

> These rules apply to all governmental actions. These rules shall apply to actions for which environmental review has not been ini-

tiated prior to the effective date of these rules. For any action for which environmental review has been initiated by submission of a citizens petition, environmental assessment worksheet, environmental impact statement preparation notice, or environmental impact statement to the Environmental Quality Board prior to the effective date of these rules, all governmental approvals that may be required for that action shall be acted upon in accord with the prior rules.

DISCUSSION: This paragraph is new. It was added for the purpose of clarifying to the public what types of projects may be subjected to environmental review procedures. The need for a definitive statement relating to the proper application of current or proposed rules for potential projects was voiced via the public participation process in drafting these rules.

The definition of governmental action is statutory. To understand the application of this paragraph, one should refer to the definition of governmental action as well as the definition of activity. Putting the two definitions together, these rules apply to all forms of projects for which some form of government approval is required. This could include projects that are proposed by government agencies; projects for which a government permit is required; projects which are in part financed by the government; or projects that are in some way regulated or approved by a unit of government. The activity subject to environmental review is any phase of the project still subject to a governmental action.

In understanding the applicability of these rules to governmental actions one should refer to the basic purpose of environmental review. Environmental review does not in and of itself approve or deny proposed projects. The purpose of environmental review is to provide necessary information to enable governmental units to make informed decisions regarding environmentally sensitive projects. The purpose of the environmental documents used in environmental review is to present the information in a clear, concise manner as an aid in making informed governmental decisions and for public review of those decisions. If there are no governmental decisions to be made, these rules do not apply.

The remainder of the paragraph is an attempt to clarify the situation regarding projects for which governmental consideration and approval may overlap the effective dates of the current rules and the proposed rules. This provision is needed because the rules as proposed are significantly different from the current rules and definitive phase-in language is needed to minimize confusion. This provision states that the current rules will apply for any activity for which environmental review has been initiated prior to the effective date of the proposed rules. This allows proposers or citizens to file environmental documents prior to the effective date of the proposed rules should they wish a project be reviewed under the procedures set forth in the current rules. If proposers desire their project to be reviewed under the proposed rules, they should wait until the effective date of these rules before filing environmental review documents.

Potential problems that may be incurred in specific cases are offset by the need for a definitive phase-in date for the proposed rules. It is anticipated that phase-in problems can be minimized by advising potential proposers of the differences between the current rules and the proposed rules prior to the effective date of the phase-in.

The principle area of controversy of this application is for projects scheduled to receive governmental approvals near the effective date of these rules. This is especially of concern if the project does not fall within a mandatory category of the existing rules, but does fall within a mandatory category of the proposed rules. For such actions, it may be in the best interests of the proposer to initiate environmental review under the current rules. Proposers should take note that:

1. The projected effective date of the proposed rules, assuming no major problems, would be approximately April 1, 1982.

2. The preparation and review of an EAW pursuant to a mandatory EAW category could result in a 30-45 day time delay.

3. The preparation and review of an EIS pursuant to a mandatory EIS category could result in a six to nine month delay.

4. The procedures for considering citizen petitions are substantially expedited in the proposed rules.

Earlier drafts of the proposed rules included examples of situations in which these rules do not apply. That information was duplicative of language in the exemption section of the rules. The information was deleted from this paragraph but is retained at 6 MCAR § 3.041 A.

6 MCAR § 3.031 C. Purpose.

The Minnesota Environmental Policy Act recognizes that the restoration and maintenance of environmental quality is critically important to our welfare. The act also recognizes that human activity has a profound and often adverse impact on the environment.

A first step in achieving a more harmonious relationship between human activity and the environment is understanding the impact which a proposed action will have on the environment. The purpose of these rules is to aid in providing that understanding through the preparation and public review of environmental documents.

Environmental documents under these rules shall contain information which addresses the significant environmental issues of a proposed action. This information shall be available to governmental units and citizens early in the decision making process.

Environmental documents prepared under these rules shall not be used to justify an action, nor shall indications of adverse environmental effects necessarily require that an action be disapproved. Environmental documents shall be used as guides in issuing, amending, and denying permits and carrying out other responsibilities of governmental units to avoid or minimize adverse environmental effects and to restore and enhance environmental quality.

DISCUSSION: This paragraph is an elaboration of 6 MCAR § 3.021 B. of the current rules. It represents an attempt to concisely summarize the purpose clause of Minn. Stat. ch. 116D and to briefly outline the function of environmental documents in fulfilling that purpose.

This paragraph is of an introductory nature. It is included to provide an overall context of the rules for the reader. This paragraph is needed to make the rules a self-contained unit. Further advisory language will be included in the "Guide to the Rules."

6 MCAR § 3.021 D. Objectives.

The process created by these rules is designed to:

1. Provide useable information to the action's proposer, governmental decision makers and the public concerning the primary environmental effects of a proposed action.

2. Provide the public with systematic access to decision makers, which will help to maintain public awareness of environmental concerns and encourage accountability in public and private decision making.

3. Delegate authority and responsibility for environmental review to the governmental unit most closely involved in the action.

4. Reduce delay and uncertainty in the environmental review process.

5. Eliminate duplication.

DISCUSSION: This paragraph is new. This paragraph was added for the purpose of offering to the public an overview of the intent of the 1980 amendments to the Environmental Policy Act. This section summarizes the considerations of the legislature in deciding to amend the act. A more complete discussion of the main elements of the new legislation is provided in Section III, "1980 Amendments to the Minnesota Environmental Policy Act", of this Statement of Need and Reasonableness.

This paragraph is included to provide a base standard for the reader to evaluate the effectiveness and intent of the rules in meeting the legislative directive.

Introduction to 6 MCAR § 3.022. Abbreviations and Definitions.

This rule corresponds to 6 MCAR § 3.022 of the current rules. A paragraph containing the meanings for acronyms used in the rules has been added to assist the reader. The current rules define the meaning of the acronym at the point of first usage.

The list of definitions has been expanded from the list of definitions in the current rules. The purpose of a more comprehensive list is to assist the reader in the proper interpretation of the rules. Accepted definitions in common usage were used whenever possible. Definitions are provided in full if the definition does not appear elsewhere in state or federal statutes or regulations. For those terms defined in existing state or federal statutes or regulations, the citation to the definition is provided. In those cases the complete definition is not repeated in an effort to minimize the length of the rules and avoid duplicative printing costs. Complete definitions are provided in this Statement of Need and Reasonableness and will be incorporated in the "Guide to the Rules."

Abbreviations and definitions are not numbered or lettered but rather arranged alphabetically. This was done to minimize the number of printing changes that would be necessitated in the event of the addition or deletion of an acronym or term.

The discussion relating to definitions is subdivided and presented as a phrase-by-phrase discussion. This is done to facilitate reading of this statement. The discussion provides only a justification of the abbreviation or definition used. The justification of the concept and substantive use of the term is included in the discussion at the point of use in the rules.

6 MCAR § 3.022 A. Abbreviations.

"CFR" means Code of Federal Regulations.

"DNR" means Department of Natural Resources.

"DOT" means Department of Transportation.

"EAW" means environmental assessment worksheet.

"EIS" means environmental impact statement.

"EQB" means Environmental Quality Board.

"HVTL" means high voltage transmission line.

"LEPGP" means large electric power generating plant.

"MCAR" means Minnesota Code of Agency Rules.

"MEA" means Minnesota Energy Agency.

"MHD" means Minnesota Department of Health.

"PCA" means Pollution Control Agency.

"RGU" means responsible governmental unit.

"USC" means United States Code.

DISCUSSION: This paragraph contains the complete spelling for abbreviations of terms used repeatedly throughout the rules. Abbreviations are provided for the purpose of shortening the written text of the rules. Abbreviations used are standard abbreviations used by state and federal agencies except for the abbreviation "RGU". This is a new acronym meaning "responsible governmental unit," it replaces the term "responsible agency" as used in the current rules.

6 MCAR § 3.022 B. Definitions.

"Action" means governmental action.

DISCUSSION: This definition is a part of a three-way definition that includes the terms: action, activity, and governmental action. These three definitions should be read in reference to each other. This definition represents a change in the use of the term as compared to the current rules. This change was necessitated by the legislative changes. A complete discussion of the reasons for making these definitional changes is found in the discussions relating to activity and governmental action. The term "action" is used in these rules as an abbreviated means of referring to governmental action.

"Activity" means the whole of a project which will cause physical manipulation of the environment, directly or indirectly. The determination of whether an action requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the action.

DISCUSSION: This definition is identical to the definition of action in the current rules with one exception. I.e., the later part of the definition in the current rules lists examples of actions that are not included within the intent of the definition. This portion of the definition was deleted from the definition of "activity" and placed at 6 MCAR § 3.041 Y. as "Governmental Action" categorical exemptions to the rules.

The change in terminology from "action" to "activity" is necessitated by changes in the legislation. Prior legislation did not include a definition of governmental action. The 1980 amendments added the definition of governmental action that is incorporated into these rules. This legislative definition uses the term "activity" in the same context that the term "action" is used in the current rules.

The essence of the definition is that the whole project is included. If any part of a project results in the physical manipulation of the environment, the whole project is subject to environmental review. This interpretation is necessary to prevent piecemealing of projects and potential approval of projects based on prior jeopardy as opposed to the merits of the project.

The definition requires the physical manipulation of the environment either directly or indirectly. This is a very broad concept in that virtually all projects will result in physical manipulation in some manner. The intent of this constraint, however, is to prevent abuse of the environmental review process by using it as a sham for objections based solely upon sociological or economic concerns. Although these concerns are valid and must be addressed in environmental documents, in and of themselves they are not sufficient to trigger the environmental review process.

This definition must be read in concert with the definition of governmental action. I.e., even though a proposed project meets the definition of activity, it would not be subject to environmental review unless some form of governmental approval is required.

An alternative definition of activity was considered, but rejected as a result of meetings with state agencies. In the alternative definition, plans, policies and programs were included. The alternative definition is more in line with the definition of activity as used by other states and as used in the National Environmental Policy Act. According to the alternative definition, once plans, policies and programs have reached the stage of a concrete proposal they would be subject to environmental review. The alternative definition follows the rationale that environmental review should be done when decisions are being made rather than at the level of actual project implementation. This definition was rejected because of comment by governmental units indicating that if this definition were to be followed they would be forced to engage in environmental review in the preliminary stages of development of plans and policies, programs, thus incurring significant increases in costs and time delays.

"Agricultural land" means land which is or has been devoted to the production for sale of livestock, dairy animals, dairy products, poultry and poultry products, fur bearing animals, horticultural and nursery stock, fruit, vegetables, forage, grains, or bees and apiary products within the last five years. Wetlands, naturally vegetated lands and woodlands contiguous to or surrounded by agricultural land shall be considered agricultural lands if under the same ownership and management during the period of agricultural use.

DISCUSSION: This definition is patterned after the definition found in the Minnesota Agricultural Property Tax Law, Minn. Stat. § 273.111, subd. 6, Part 22. This definition was selected at the request of the Department of Agriculture for the purpose of promoting greater uniformity in definition of existing state legislation. This definition is needed because of the addition of mandatory categories relating to the permanent conversion of agricultural lands.

Marginal lands frequently are used for agricultural purposes in exceptional years. Such use creates ambiguity as to whether the land should be classified as natural or agricultural. This definition clarifies that ambiguity by placing a five year limit on classifying land as agricultural. The definition is intended to be broad because of the broad spectrum of agricultural interests in the state. Wetlands, naturally vegetated lands and woodlands that serve as a part of the total farm management are included in the definition because they may have the potential for becoming agricultural lands in the future and because such lands serve a function in the management of the total farm property.

The following alternative definition was considered: "Agricultural land means land which has been cropped for agricultural purposes within the last five years." This alternative language was rejected at the request of the Department of Agriculture in favor of the proposed language. The proposed language was considered to have greater clarity, to be more consistent with other statutory language and to be more protective of the state's agricultural land resources.

"Animal units" has the meaning given in 6 MCAR § 4.8051 B. 4.

DISCUSSION: Animal confinement facilities are regulated by the Pollution Control Agency pursuant to 6 MCAR § 4.8051. The definition used in those regulations is utilized in these rules to promote uniformity. The current rules do not have a mandatory category relating to animal confinement facilities. The proposed rules contain a mandatory EAW category at 6 MCAR § 3.038 BB. The term is also used in an exemption category at 6 MCAR § 3.041 R. This definition was added to refer the reader to the proper source if the reader is not familiar with the PCA regulations relating to animal confinement facilities.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at 6 MCAR § 4.8051 B. 4., an animal unit is:

> "A unit of measure used to compare differences in the production of animal manures that employs as a standard the amount of manure produced on a regular basis by a slaughter steer or heifer. For purposes of this rule, the following equivalents shall apply:
>
> | ANIMAL | UNIT |
> |---|---|
> | one mature dairy cow | 1.4 animal unit |
> | one slaughter steer or heifer | 1.0 animal unit |
> | one horse | 1.0 animal unit |
> | one swine over 55 pounds | .4 animal unit |
> | one duck | .2 animal unit |
> | one sheep | .1 animal unit |
> | one swine under 55 pounds | .05 animal unit |
> | one turkey | .018 animal unit |
> | one chicken | .01 animal unit |
>
> For animals not listed above, the number of animal units shall be defined as the average weight of the animal divided by 1,000 lbs."

"Approval" means a decision by a unit of government to issue a permit or to otherwise authorize the commencement of a proposed activity.

DISCUSSION: This definition was developed by EQB staff and modified through the public meeting process. The term "approval" is used, as opposed to permit or authorize, in an effort to have a single word to indicate that government action which would allow the commencement of a proposed activity.

The definition differs from the definition in the current rules. The proposed definition specifically refers to that point at which the decision is made. The current definition allows vagueness in interpretation by referring to the review of a proposed action and the issuance of a permit. Review occurs prior to approval and issuance of a permit occurs after the actual approval. The term as used in the proposed rules refers to that point in the consideration of the project at which the governmental unit decision becomes finalized. This definition is proposed as a means of more accurately defining a critical point of governmental action.

"Attached units" means in groups of four or more, each unit of which shares one or more common wall with another unit. Developments consisting of both attached and unattached units shall be considered as an unattached unit development.

DISCUSSION: This definition was developed by the EQB staff as a result of discussions at public meetings in regard to the residential categories of these rules. This term is used in the mandatory categories at 6 MCAR §§ 3.038 R. 1. and 2. and 6 MCAR §§ 3.039 M. 1. and 2. The current rules did not distinguish between attached and unattached units in the residential development categories.

Justification for the inclusion of an attached vs. unattached differential is incorporated in the justification for the category. This definition is included because there is no standard definition relating to attached housing units and the rules will require clarity for implementation.

Four or more units was selected as the threshold for "attachment" because it was regarded as being a common minimal threshold for most multiple residence developments. Duplexes and triplexes were excluded because the impacts are more closely aligned to single family

residences and because single family residences are commonly converted to duplexes or triplexes upon change of ownership or family situation. The common wall criteria was selected as being evidence of attachment. Common wall is to be interpreted as including above and below units.

Residential developments frequently include both attached unit housing and unattached unit housing. An infinite number of combination of attached and unattached units is possible. The alternative of developing a "formula" approach for assessing a percentage of units attached vs. unattached was considered and rejected because it would be speculative and would unnecessarily complicate the rules. The proposed approach, i.e., treating all developments with a combination of attached and unattached units as unattached units, allows the RGU greater flexibility in project-by-project analysis of the impacts.

"Biomass sources" means animal waste and all forms of vegetation, natural and cultivated.

DISCUSSION: This definition was developed by EQB staff and modified through the public meeting process. The term is used in the mandatory categories at 6 MCAR § 3.038 D. 1. and 6 MCAR § 3.039 D. 1. The current rules do not contain mandatory categories relating to fuel conversion facilities and therefore, do not contain this definition.

The definition is intended to be broad in scope. Technology for fuel conversion facilities is at an early stage of development and many possible forms of plant life and animal waste could potentially be used for the production of fuel. The alternative of developing a specific category for each potential type of fuel conversion facility was considered and rejected. It was considered to be a more simple and comprehensive approach to have a single category with a broad scope and allow the RGU to determine the scope of the analysis on a case-by-case basis.

"Class I dam" has the meaning given in 6 MCAR § 1.5031.

DISCUSSION: Dams are regulated by the Department of Natural Resources pursuant to 6 MCAR § 1.5030 et.seq. The definition used in those regulations is utilized in the proposed rules to promote uniformity. The current rules do not have a mandatory category relating to dam construction. The proposed rules contain a mandatory EIS category for the construction of Class I dams at 6 MCAR § 3.039 Q. This definition was added to refer the reader to the proper source if the reader is not familiar with DNR regulations relating to dam construction.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As stated in 6 MCAR § 1.5031, Class I dams are "those dams where failure, misoperation, or other occurences or conditions would probably result in a loss of life or serious hazard, or damage to: health, main highways, high-value industrial or commercial properties, major public utilities or serious direct, or indirect, economic loss to the public."

"Class II dam" has the meaning given in 6 MCAR § 1.5031.

DISCUSSION: Dams are regulated by the Department of Natural Resources pursuant to 6 MCAR § 1.5030 et.seq. The definition used in those regulations is utilized in the proposed rules to promote uniformity. The current rules do not have a mandatory category relating to dam construction. The proposed rules contain a mandatory EAW category for the construction of Class II dams at 6 MCAR § 3.038 W. 3. This definition was added to refer the reader to the proper source if the reader is not familiar with DNR regulations relating to dam construction.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As stated in 6 MCAR § 1.5031, Class II dams are "those dams where failure, misoperation, or other

occurrences or conditions would probably result in possible health hazard or probable loss of high-value property, damage to secondary highways, railroads or other public utilities or limited direct, or indirect, economic loss to the public."

"Collector roadway" means a road that provides access to minor arterial roadways from local streets and adjacent land uses.

DISCUSSION: This definition was recommended by the Department of Transportation as a means of consolidating the numerous definitions of collector roadway in use across the state. The term is used in the mandatory categories at 6 MCAR § 3.038 U. 1. The term is not used in the current rules' mandatory categories relating to highways.

It is the intent of this definition to apply to roadways of a size between arterial capacity and local streets. Collector roadways are typically four lanes in width and serve as a means of access to major areas of development.

"Construction" means any activity that directly alters the environment. It includes preparation of land or fabrication of facilities. It does not include surveying or mapping.

DISCUSSION: This definition was derived from the definition of construction used in the environmental review regulations of the State of California. The term is used in the current rules but is not defined therein. This definition was added as an attempt to clarify the scope of the term as used in the proposed rules. The need for such definition was indicated by questions from the public in the implementation of the current rules.

The term as used in the proposed rules refers to those facets of the proposed activity that physically alter or affect the environment including processes prior to the main stages of construction. This definition is needed because all phases of a development which alter the environment have the potential to affect the environment. It does not include measurements or analyses needed to properly develop the construction plan if they do not physically alter the environment.

"Cumulative impact" means the impact on the environment that results from the incremental effects of the action in addition to other past, present, and reasonably foreseeable future actions regardless of what person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

DISCUSSION: This definition is an adaptation of the Council on Environmental Quality definition found at 40 CFR § 1508.7. The term is used in the current rules but is not defined therein. This definition was added to help explain the concept to persons not familiar with environmental review processes.

The term is used with regard to those cases where environmental review is more properly based on the summation of the impacts of individual projects as opposed to the impact of projects each taken individually.

"Days" means that in computing any period of time prescribed or allowed in these rules, the day of the event from which the designated period of time begins shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is 15 days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

DISCUSSION: This definition was taken from the current rules. A clear definition of the term is needed because of the emphasis on

establishing definitive time guidelines for environmental review processes. This definition is consistent with the Office of Hearing Examiner's definition.

"Disposal facility" has the meaning given in Minn. Stat. § 115A.03, subd. 10.

DISCUSSION: Hazardous waste disposal facilities are regulated by the Pollution Control Agency pursuant to 6 MCAR § 4.9001 et. seq. Solid waste disposal facilities are regulated by the PCA pursuant to 6 MCAR SW 1 et. seq. The statutory definition is utilized to promote uniformity. The current rules do not have a mandatory category relating to hazardous waste disposal facilities. The current rules refer to disposal facilities for solid waste as sanitary landfills. Regulation of these categories of projects have undergone major legislative changes since the promulgation of the current rules. The proposed rules use the term in mandatory categories at 6 MCAR §§ 3.038 O. 1. and P. 1., 2., and 5. and 6 MCAR §§ 3.039 K. 1. and 2. and L. 1., 2. and 4. This definition was added to refer the reader to the proper source if the reader is not familiar with hazardous waste and solid waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115A.03, subd. 10, a disposal facility means "a waste facility permitted by the agency (PCA) that is designed or operated for the purpose of disposing of waste on or in the land."

"EIS actual cost" means the total of all allowable expenditures incurred by the RGU and the proposer in preparing and distributing the EIS.

DISCUSSION: This definition was taken from the current rules. The term is used in the same context as the current rules and the rules in which the term is used have not been substantively changed. The 1980 amendments to MEPA did not alter the statutory language relating to the assessment of EIS preparation costs. This definition has been accepted as workable in the implementation of the current rules.

"EIS assessed cost" means that portion of the EIS estimated cost paid by the proposer in the form of a cash payment to the EQB or to the RGU for the collection and analysis of technical data incorporated in the EIS.

DISCUSSION: This definition was taken from the current rules. The term is used in the same context as the current rules and the rules in which the term is used have not been substantively changed. The 1980 amendments to MEPA did not alter the statutory language relating to the assessment of EIS preparation costs. This definition has been accepted as workable in the implementation of the current rules.

"EIS estimated cost" means the total of all expenditures of the RGU and the proposer anticipated to be necessary for the preparation and distribution of the EIS.

DISCUSSION: This definition was taken from the current rules. The term is used in the same context as the current rules and the rules in which the term is used have not been substantively changed. The 1980 amendments to MEPA did not alter the statutory language relating to the assessment of EIS preparation costs. This definition has been accepted as workable in the implementation of the current rules.

"Emergency" means a sudden, unexpected occurrence, natural or manmade, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes fire, flood, windstorms, riot, accident, or sabotage.

DISCUSSION: This definition was derived from the definition of emergency used in the environmental review regulations of the State of California. The term emergency is used in the current rules but is not defined. The proposed rules establish two processes that may be used for excluding proposed activities from the prohibition on final actions and decisions till completion of environmental review. These processes are the variance procedure at 6 MCAR § 3.032 D. and the emergency procedure at 6 MCAR § 3.032 E. This definition is provided to delineate those circumstances for which emergency action is justified.

This is intended as a restrictive definition to be used only in cases of imminent danger to health or property. The restrictive context for use is necessitated by the lack of public notice requirement prior to implementation of the emergency ruling.

"Environment" means the physical conditions existing in the area which may be affected by a proposed action. It includes land, air, water, minerals, flora, fauna, ambient noise, energy resources, and manmade objects or natural features of historic, geologic or aesthetic significance.

DISCUSSION: This definition was taken from the current rules. The term is used in the same context as the current rules. This definition has been accepted as workable in the implementation of the current rules.

This definition is intended to distinquish between the physical components of the environment and the sociological aspects of the environment. These rules apply only to those actions which entail direct or indirect physical manipulation of the environment.

"Environmental assessment worksheet" or EAW means a brief document which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed action or to initiate the scoping process for an EIS."

DISCUSSION: This definition is taken from the Minnesota Environmental Policy Act at Minn. Stat. § 116D.04 subd. 1a (b). The term is used frequently in its abbreviated form in the rules. The definition is provided as an aid for readers not familiar with environmental review.

"Environmental document" means EAW, draft EIS, final EIS, alternate review document, and other environmental analysis documents.

DISCUSSION: This definition is taken from the rules currently in effect. This term is used in the same context as the current rules. This definition has been accepted as workable in the implementation of the current rules.

This term is used as a generic term to refer to all forms of documents used for environmental analysis and review. The generic term is used in the rules when the context of the reference could be to any of several forms of informational documents produced for purposes of environmental review. Use of the generic term saves space and improves readability of the rules.

"Environmental impact statement" or EIS means a detailed written statement as required by Minn. Stat. § 116D.04, subd. 2 (a).

DISCUSSION: This term is defined by use in the Environmental Policy Act at Minn. Stat. § 116D.04 subd. 2b. The term was used but not defined in the current rules. The term is used frequently in its abbreviated form in the proposed rules. It is used in the same context as in the current rules. This definition is provided as an aid for readers not familiar with environmental review.

Minn. Stat. § 116.D.04, subd. 2a states: "Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit.

The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action."

"Expansion" means an extension of the capability of a facility to produce or operate beyond its existing capacity. It excludes repairs or renovations which do not increase the capacity of the facility.

DISCUSSION: This definition was added as a result of comments at public meetings as an attempt to clarify types of activities that may cause a project to fall within a mandatory category. The term is used but not defined in the current rules. This definition is intended to distinguish between maintenance and repair-type activities relating to facilities as opposed to substantive additions to the capacity of the facilities operation. This definition is of concern for types of activities of highly controversial nature in which any modification of the facilities operation may render the activity subject to public opposition.

"Final approval" means the last action of a governmental unit necessary to authorize the commencement of an activity.

DISCUSSION: This definition was added as a result of public comment received at public meetings as an attempt to establish a definite point at which governmental action on a project is complete so that a specific end time is established beyond which no petitions may be accepted. The term is used but not defined in the current rules. Final approval occurs at the point when the last discretionary action of all governmental units with jurisdiction takes place. Beyond that point in time there is no purpose to the gathering of additional information as such information will not be able to affect any governmental decision.

"Final decision" means the determination to grant or deny a permit, or to approve or not approve an action.

DISCUSSION: The term final decision is added as a result of public comment for the purpose of clarifying that point in the decision making process of each governmental action at which time the governmental unit makes an irrevocable decision regarding that action. There will be a final decision made on every governmental action whereas the term final approval refers only to that final action regarding the final authorization necessary to begin the activity. The term is used but not defined in the current rules.

"First class city" has the meaning given in Minn. Stat. § 410.01.

DISCUSSION: The proposed rules contain mandatory category thresholds relating to industrial, commercial, institutional and residential developments geared to the size of city in which they are proposed. The current rules do not have differential thresholds based on city size. To promote uniformity, the classification system for cities as set forth in Minn. Stat. ch. 410 was used. This definition was added to refer the reader to the proper source.

The complete definition is not reprinted in the rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As stated at Minn. Stat. § 410.01, first class cities are "those having more than 100,000 inhabitants provided that once a city has been defined to be of the first class, it shall not be reclassified unless its population decreases by 25% from the Census figures which last qualified the city for inclusion in the class."

"Flood plain" has the meaning given in 6 MCAR NR 85 (c).

DISCUSSION: Flood plain areas are regulated by the Department of Natural Resources pursuant to 6 MCAR NR 85, entitled "Statewide Standards and Criteria for Management of Flood Plain Areas of Minnesota". The definition used in those regulations is utilized to promote uniformity. The current rules use this term but do not define it. This definition was added to refer the reader to the proper source if the reader is not familiar with DNR regulations relating to flood plains. This term is used in the proposed rules in the mandatory categories at 6 MCAR §§ 3.038 M. 2., O. 3. and 4., R. 2. and Z. 2.; 6 MCAR §§ 3.039 J. 2., K. 2. and 3., L. 2. and M. 2.; and 6 MCAR §§ 3.041 I. 1. and 3., K. 1. and R.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined in 6 MCAR NR 85 (c), "flood plain means the areas adjoining a watercourse which has been or hereafter may be covered by the regional flood". As defined in 6 MCAR NR 85 (c), "regional flood means a flood which is representative of large floods known to have occurred generally in Minnesota and reasonably characteristic of what can be expected to occur on an average frequency in the magnitude of the 100 year reoccurrence interval". The procedure for delineating the actual floodplain area is set forth at 6 MCAR NR 87 (c).

"Flood plain ordinance, state approved" means a local governmental unit flood plain management ordinance which meets the provisions of Minn. Stat. § 104.04 and has been approved by the Commissioner of the DNR pursuant to 6 MCAR NR 85.

DISCUSSION: Flood plain areas are regulated by the Department of Natural Resources pursuant to 6 MCAR NR 85, entitled "Statewide Standards and Criteria for Management of Flood Plain Areas of Minnesota." These regulations were written pursuant to Minn. Stat. ch. 104, the Flood Plain Management Act. The standards and procedures set forth in the statute and the regulations are utilized to promote uniformity. The current rules do not distinguish between areas that have state approved flood plain ordinances and those that do not. This definition is added to refer the reader to the proper source if the reader is not familiar with the statute and DNR regulations relating to flood plains. This term is used in the proposed rules in the mandatory categories at 6 MCAR §§ 3.038 M. 2. and R. 2. and 6 MCAR §§ 3.039 J. 2. and M. 2.

Complete definitions and standards are not reprinted in these rules in an effort to save space and printing costs. Complete definitions and an explanation of the statutory standards will be included in the "Guide to the Rules." Minn. Stat. § 104.04 subd. 1 states "local governmental units shall adopt, administer, and enforce flood plain management ordinances, which shall include but not be limited to the delineation of flood plains and floodways, the preservation of the capacity of the flood plain to carry and discharge regional floods, the minimization of flood hazards, and the regulation of the use of land in the flood plain. The ordinances shall be based on adequate technical data and competent engineering advice and shall be consistent with local and regional comprehensive planning." Flood plain management ordinances adopted after June 30, 1970 must be approved by the Commissioner of the DNR. In 6 MCAR NR 85 technical standards are provided for guidance to local units in developing their ordinance.

"Fourth class city" has the meaning given in Minn. Stat. § 410.01.

DISCUSSION: The proposed rules contain mandatory category thresholds relating to industrial, commercial, institutional and residential developments geared to the size of city in which they are proposed. These categories are found at 6 MCAR §§ 3.038 M. and R. and 6 MCAR §§ 3.039 J. and M. The current rules do not have differential thresholds based on city size. To promote uniformity, the classification system for cities as set forth in Minn. Stat. ch. 410 was used. This definition was added to refer the reader to the proper source.

The complete definition is not reprinted in the rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As stated at Minn. Stat. § 410.01, fourth class cities are "those having not more than 10,000 inhabitants."

"Governmental action" means activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated or approved by governmental units, including the federal government.

DISCUSSION: This definition is taken from the Minnesota Environmental Policy Act at Minn. Stat. § 116.04 subd. 1a (d). The term is used in the rules in this form and also used in an indirect manner through use of the term "action". This definition differs from the definition of governmental action given in the current rules. The definition is provided to clarify to the reader that only those activities for which some form of governmental approval must be given are subject to environmental review. This definition should be read in conjunction with the definitions of action and activity.

"Governmental unit" means any state agency and any general or special purpose unit of government in the state, including watershed districts organized under Minn. Stat. Ch. 112, counties, towns, cities, port authorities, housing authorities, and the Metropolitan Council, but not including courts, school districts, and regional development commissions.

DISCUSSION: This definition is taken from the Minnesota Environmental Policy Act at Minn. Stat. § 116.04 subd. 1a (e). The term is used frequently in the proposed rules in the generic context of referring to all types of government that may have authority to approve proposed activities. The term is used in the proposed rules in the same context as the term "public agency" is used in the current rules. This definition is provided to clarify to the reader the spectrum of government agencies that may be involved in implementing these rules.

"Gross floor space" means the total square footage of all floors but does not include parking lots or approach areas.

DISCUSSION: This definition was developed by EQB staff as a means of measuring the size of facilities subject to the industrial, commercial and institutional development mandatory categories. The term is used at 6 MCAR § 3..038 M. 1., 6 MCAR § 3.039 J. 1. and 6 MCAR § 3.041 I. 1. and 2. The current rules refer to this concept as "commercial or retail floor space" or "industrial floor space." The term is used to clarify to the reader the distinction between the floor space of a facility and the ground area that a facility occupies. This definition should be read in conjunction with the definition of ground area.

The rationale of this definition is that the greater the square footage of the facility the greater the activity generated by the facility and the more likely the possibility of adverse environmental impact due to increased human activity. The term gross floor space is intended to include the functional operating square footage of the facility. This would include production areas, storage areas, and office areas.

"Ground area" means the total surface area of land that would be converted to an impervious surface by the proposed activity. It includes the structures, parking lots, approaches, service facilities, appurtenant structures, and recreational facilities.

DISCUSSION: This term was developed by EQB staff as a means of measuring the amount of ground surface area that will be permanently altered by construction of industrial, commercial and institutional facilities. The term is used at 6 MCAR § 3.038 M. 2. and 6 MCAR § 3.039 J. 2. The current rules refer to this concept as ground space but do not define the term. This definition is provided to clarify to the reader the distinction between the floor space of a facility and the ground area that the facility occupies. This definition should be read in conjunction with the definition of gross floor space.

The impacts relating to the creation of an impervious surface are primarily related to surface water runoff. As a result, this term is used only in conjuction with facilities located in a shoreland area, delineated flood plain area or wild and scenic rivers district.

"Hazardous waste" has the meaning given in Minn. Stat. § 116.06, subd. 13.

DISCUSSION: Hazardous waste and hazardous waste facilities are regulated by the Pollution Control Agency pursuant to 6 MCAR § 4.9001 et. seq. This definition is used at the request of the PCA to promote uniformity. The current rules do not have mandatory categories relating to hazardous waste. The proposed rules use the term in mandatory categories at 6 MCAR § 3.038 O. and 6 MCAR § 3.039 K. This definition is added to refer the reader to the proper source if the reader is not familiar with hazardous waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 116.06, subd. 13, hazardous waste means "any refuse or discarded material or combinations of refuse or discarded materials in solid, semi-solid, liquid, or gaseous form which cannot be handled by routine waste management techniques because they pose a substantial present or potential hazard to human health or other living organisms because of their chemical, biological, or physical properties. Categories of hazardous waste materials include, but are not limited to: explosives, flammables, oxidizers, poisons, irritants, and corrosives. Hazardous waste does not include sewage sludge and source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended."

"High voltage transmission line" or HVTL has the meaning given in 6 MCAR § 3.072 E.

DISCUSSION: High voltage transmission lines are currently regulated by the Minnesota Energy Agency in relation to certificate of need proceedings and the Environmental Quality Board in relation to route designation. The definition from 6 MCAR § 3.072 E. is used at the request of these regulatory agencies to promote uniformity. The current rules incorporate the concept but do not use the term per se. The proposed rules use the term at 6 MCAR § 3.039 E. and at 6 MCAR § 3.056. This definition was added to refer the reader to a more proper source relating to the regulation of HVTL's.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at 6 MCAR § 3.072 E., a high voltage transmission line means "a conductor of electric energy and associated facilities designed for and capable of operation at a minimal voltage of 200 kilovolts or more. Associated facilties shall include, but not be limited to, insulators, towers, switching yards, substations and terminals."

"Highway safety improvement project" means a project designed to improve safety of highway locations which have been identified as hazardous or potentially hazardous. Projects in this category include the removal, relocation, remodeling, or shielding of roadside hazards; installation or replacement of traffic signals; and the geometric correction of identified high accident locations requiring the acquisition of minimal amounts of right-of-way.

DISCUSSION: This definition was requested by the Department of Transportation to promote uniformity with federal regulations relating to highway construction. This term is used in an exemption category at 6 MCAR § 3.041 M. 1. The current rules do not have an exemption for highway safety improvement projects.

It is the intent of the rules to exclude minor highway maintenance and improvement projects that have minor environmental impacts

from environmental review to avoid unnecessary delays. The intent of this definition is to clarify for the reader those projects that are considered to be minor.

"Large electric power generating plant" or LEPGP has the meaning given in 6 MCAR § 3.072 G.

DISCUSSION: Large electric power generating plants are currently regulated by the Minnesota Energy Agency in relation to certificate of need proceedings; the Environmental Quality Board in relation to siting; and by the Pollution Control Agency in relation to preparation of environmental documents for required permits. The definition from 6 MCAR § 3.072 G. is used at the request of these regulatory agencies to promote uniformity. The current rules incorporate this concept but do not use this term per se. The proposed rules use the term at 6 MCAR § 3.039 B. and at 6 MCAR § 3.055. This definition was added to refer the reader to a more proper source relating to the regulation of LEPGP's.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at 6 MCAR § 3.072 G. a large energy power generating plant means "electric power generating equipment and associated facilities designed for or capable of operating at a capacity of 50 megawatts or more."

"Local governmental unit" means any unit of government other than the state or a state agency or the federal government or a federal agency. It includes organized watershed districts, counties, towns, cities, port authorities, housing authorities, and the Metropolitan Council. It does not include courts, school districts, and regional development commissions.

DISCUSSION: This definition is derived from the statutory definition of governmental unit found at Minn. Stat. § 116D.04, subd. 1a (e). This term is used in the rules in reference to units of government at a level below the state. The term is used in the proposed rules in the same context as the term "local agency" is used in the current rules. This definition is provided to clarify to the reader those local agencies that may be responsible for the implementation of these rules.

"Marina" has the meaning given in 6 MCAR § 1.5020 D.

DISCUSSION: Marinas are regulated by the Department of Natural Resources pursuant to 6 MCAR § 1.5020 et. seq. This definition is utilized at the request of the DNR to promote uniformity. The current rules use the term but do not contain a definition of the term. The proposed rules use the term in mandatory categories at 6 MCAR § 3.038 X., 6 MCAR § 3.039 R. and 6 MCAR § 3.041. O. This definition was added to refer the reader to the proper source if the reader is not familiar with DNR regulations relating to public waters.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at 6 MCAR § 1.5020 D., marina means "either an inland or offshore area for the concentrated mooring of five or more watercraft wherein facilities are provided for any or all of the following ancillary services: boat storage, fueling, launching, mechanical repairs, sanitary pumpout and restaurant services."

"Mineral deposit evaluation" has the meaning given in Minn. Stat. § 156.071, subd. 9 (d).

DISCUSSION: Metallic mineral mining is regulated by the Department of Natural Resources. This definition is used at the request of the DNR to promote uniformity. The current rules do not use this term. The proposed rules use the term in mandatory categories at 6 MCAR § 3.038 I. 1. and 6 MCAR § 3.039 G. 1. This definition is added to refer the reader to the proper source if the reader is not familiar with legislation relating to exploration for metallic minerals.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 156A.071, subd. 9 (d), mineral deposit evaluation means "examining an area to determine the quality and quantity of minerals, excluding exploratory boring but ~~not~~ including obtaining a bulk sample, by such means as excavating, trenching, constructing shafts, ramps, tunnels, pits, and producing refuse and other associated activities. Mineral deposit evaluation shall not include activities intended, by themselves, for commercial exploitation of the ore body."

"Mitigation" means:

a. Avoiding impacts altogether by not taking a certain action or parts of an action; or

b. Minimizing impacts by limiting the degree of magnitude of the action and its implementation; or

c. Rectifying impacts by repairing, rehabilitating, or restoring the affected environment; or

d. Reducing or eliminating impacts over time by preservation and maintenance operations during the life of the action; or

e. Compensating for impacts by replacing or providing substitute resources or environments.

DISCUSSION: This definition was derived from the Council of Environmental Quality regulations, 40 CFR § 1508.20. The current rules use the term but do not define it. The term is used in procedural portions of the proposed rules.

This definition was derived for the purpose of delineating potential types of mitigatory measures that may be considered by governmental units. This definition was added to provide increased definition for units of government that may be assuming new responsibilities via these rules.

"Mixed municipal solid waste" has the meaning given in Minn. Stat. § 115A.03, subd. 21.

DISCUSSION: Solid waste and solid waste facilities are regulated by the Pollution Control Agency pursuant to 6 MCAR SW 1 et. seq. This definition is used at the request of the PCA to promote uniformity. The current rules refer to this concept as "waste fill" but do not define the term. The proposed rules use the term in mandatory categories at 6 MCAR § 3.038 P. and 6 MCAR § 3.039 L. This definition is added to refer the reader to the proper source if the reader is not familiar with solid waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115A.03, subd. 21, mixed municipal solid waste means "garbage, refuse and other solid waste from residential, commercial, industrial, and community activities which is generated and collected in aggregate, but does not include auto hulks, street sweepings, ash, construction debris, mining waste, sludges, tree and agricultural wastes, tires, and other materials collected, processed, and disposed of as separate waste streams."

"Natural watercourse" has the meaning given in Minn. Stat. § 105.37, subd. 10.

DISCUSSION: Natural watercourses are regulated by the Department of Natural Resources pursuant to 6 MCAR § 1.5020 et. seq. This statutory definition is used at the request of the DNR to promote uniformity. The current rules do not use this term. The proposed rules use the term at

6 MCAR § 3.038 Y. This definition is added to refer the reader to the proper source if the reader is not familiar with the regulation of public waters and natural watercourses.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 105.37, subd. 10, natural watercourse means "any natural channel which has definable beds and banks capable of conducting confined runoff from adjacent lands."

"Negative declaration" means a written statement by the RGU that a proposed action does not require the preparation of an EIS.

DISCUSSION: This definition was taken from the current rules. The term is used in the same context in the proposed rules. This definition has been accepted as workable in the current rules. This term is used in the text of the rules as an abbreviated mechanism for stating that a decision has been reached by the responsible governmental unit that an activity is not likely to result in significant adverse environmental effects and therefore an EIS will not be required for that activity.

"Open space land use" means a use particularly oriented to and using the outdoor character of an area including agriculture, campgrounds, parks and recreation areas.

DISCUSSION: This definition was developed by EQB staff as a means of reference to those types of land uses in which the essential character of the physical features of the land has not been substantially altered. The term is used at 6 MCAR § 3.038 AA. 3. The current rules do not refer to this concept. The term is needed as a means of distinguishing those types of land uses that are considered to have lesser adverse long range environmental effects. The definition focuses on land uses in which the land could readily be converted back to its original natural state. This definition should be contrasted to the definition of permanent conversion.

"Permanent conversion" means a change in use of agricultural, naturally vegetated, or forest lands that impairs the ability to convert the land back to its agricultural, natural, or forest capacity in the future. It does not include changes in management practices, such as conversion to parklands, open space, or natural areas.

DISCUSSION: This definition was developed by EQB staff as a means of reference to those types of land uses in which the essential character of the physical features of the land has been substantially altered. The term is used at 6 MCAR § 3.038 AA. 4. The current rules do not refer to this concept. The term is needed as a means of distinguishing those types of land uses that are considered to have adverse long range impacts on the natural character of the land. The definition focuses on land uses in which the land is rendered incapable of being reconverted to its original natural state. Land that is converted to a residential area or industrial or commercial development or to use as a highway or other transportation facility is regarded as being permanently converted. Permanent conversion does not apply to the conversion of a natural area to an agricultural area or to changes in types of agricultural crops on an agricultural area. This definition should be contrasted to the definition of open space land use.

"Permit" means a permit, lease, license, certificate, or other entitlement for use or permission to act that may be granted or issued by a governmental unit or the commitment to issue or the issuance of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, by a governmental unit.

DISCUSSION: This definition was derived from the New York statutes relating to environmental review at NY Stat. § 617.2 (u). This term is used in the current rules but is not defined. The term is used in the same context in the proposed rules. This definition is needed to

establish the proper context in which the reader should regard the term when used in the rules. The scope of the definition is intended to be broad. The term applies to all forms of government approvals which may be required prior to commencement of a proposed activity. The term is used as a generic means of referring to all types of actions that are subject to these rules.

"Person" means any natural person, any state, municipality, or other governmental unit or political subdivision or other agency or instrumentality, any public or private corporation, any partnership, firm, association, or other organization, any receiver, trustee, assignee, agent, or other legal representative of the foregoing, and any other entity.

DISCUSSION: This definition is derived from the Minnesota Environmental Rights Act at Minn. Stat. § 116B.02, subd. 2. This definition is different from the definition in the current rules; however, the definitions are essentially equal and the terms are used in the same context in both sets of rules. This definition is needed to establish the proper context in which the reader should regard the term when used in the rules. The scope of the definition is intended to be broad. The term is used in a generic context to refer to all individuals and organizations that are subject to these rules including Tom and Chaos.

"Phased action" means two or more activities to be undertaken by the same proposer which a RGU determines:

a. Will have environmental effects on the same geographic area;

b. Are substantially certain to be undertaken sequentially over a limited period of time; and

c. Collectively have the potential to have significant adverse environmental effects.

DISCUSSION: This definition was developed through the public meeting process for the purpose of clarifying for local units of government what types of activities are most properly viewed as separate proposals and what types are most properly viewed as part of the same proposal. The term is used but not defined in the current rules. The term is used in the same context in the procedural portions of the proposed rules.

The key elements to this definition are: 1) that the activities are undertaken by the same proposer, 2) that the activities affect the same geographic area, and 3) that the impacts of the activities on the area are to be viewed collectively. The question has arisen as to the length of the period of time applicable to phased activities. Suggestions were made that a definitive period of time be established. These suggestions range from three to ten years. Because of the variability of the types of projects affected by these rules, it is considered more reasonable not to define a specific period of time. This in essence means that the responsible governmental unit will decide what the applicable period of time should be on a case-by-case basis.

"Positive declaration" means a written statement by the RGU that a proposed action requires the preparation of an EIS.

DISCUSSION: This definition was developed by EQB staff as the counterpart for the term "negative declaration". This term is used but not defined in the current rules. This term is used in the same context in the proposed rules. This term is used in the text of the proposed rules as an abbreviated means of referring to an action taken by the responsible governmental unit indicating they have come to a decision that a proposed action has the potential for significant environmental effects and that an EIS will be required to be prepared for that activity.

"Potentially permanent" means a dwelling for human habitation that is permanently affixed to the ground or commonly used as a place of residence. It includes houses, seasonal and year round cabins, and mobile homes.

DISCUSSION: This definition was developed by EQB staff in response to questions relating to residential developments during the implementation of the current rules. The term is not used in the current rules. This term is used in the mandatory categories of the proposed rules at 6 MCAR § 3.038 R. and 6 MCAR § 3.039 M. Questions have arisen regarding whether seasonal cabins and mobile homes are properly considered residential units. It has been the established position of the EQB that they are residential units. This definition is added to clarify that position for the reader of the proposed rules. This definition should be contrasted to the definition of "recreational development."

"Preparation notice" means a written notice issued by the RGU stating that an EIS will be prepared for a proposed action.

DISCUSSION: This definition was developed by EQB staff to clarify use of the term in the procedural portions of the proposed rules. This term is used but not defined in the current rules. It is used in the same context in the proposed rules as an abbreviated method of referring to the official public notification by an RGU that an EIS will be prepared for a project it has reviewed.

"Processing", as used in 6 MCAR §§ 3.038 O. 2. and 3. and 3.039 K. 3., has the meaning given in Minn. Stat. § 115A.03, subd. 25.

DISCUSSION: This term has a specific meaning when used in conjunction with hazardous waste mandatory categories. The Pollution Control Agency has regulatory authority over hazardous waste and hazardous waste facilities pursuant to 6 MCAR § 4.9001 et. seq. The statutory definition was requested by the PCA to promote uniformity. The current rules do not have mandatory categories relating to hazardous waste. The proposed rules use the term in mandatory categories at 6 MCAR §§ 3.038 O. 2. and 3. and 6 MCAR § 3.039 K. 3. This definition is added to refer the reader to the proper source if the reader is not familiar with hazardous waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115A.03, subd. 25, processing means "the treatment of waste after collection but before disposal. Processing includes but is not limited to reduction, storage, separation, exchange, resource recovery, physical, chemical, or biological modification, and transfer from one waste facility to another."

"Project estimated cost" means the total of all allowable expenditures of the proposer anticipated to be necessary for the implementation of an action.

DISCUSSION: This definition is taken from the current rules. This term is used in the proposed rules in the same context as in the current rules. The chapter in which the term is used (chapter 15 of the current rules and chapter 17 of the proposed rules) has not been substantively changed. This definition has been accepted as workable in the current rules. It is provided to establish clarity to the reader as to the proper assessment of costs relating to EIS preparation. This definition should be read in conjunction with the definitions of "EIS estimated cost", "EIS assessed cost", and "EIS actual cost."

"Proposer" means the private person or governmental unit that proposes to undertake or to direct others to undertake an action.

DISCUSSION: This definition was derived from the current rules. This term is used in the proposed rules in the same context as in the current rules. This definition has been accepted as workable in the current rules and is provided to clarify to the reader that the proposer of an action may be a governmental unit functioning in the capacity either of itself initiating a proposal or of coordinating a proposal for other persons.

"Protected waters" has the meaning given public waters in Minn. Stat. § 105.37, subd. 14.

DISCUSSION: Public waters are regulated by the Department of Natural Resources pursuant to 6 MCAR § 1.5020 et. seq. This statutory definition is used at the request of the DNR to promote uniformity. The current rules do not use the terms "public waters" or "protected waters." The proposed rules use the term "protected waters" in mandatory categories at 6 MCAR § 3.038 Z. and 6 MCAR § 3.039 S. The term "protected waters" is used in place of "public waters" because recent legislative activity indicates a preference for the term protected as opposed to public as being more reflective of the state's interest in those water bodies. This definition is added to refer the reader to the proper source if the reader is not familiar with the regulation of public waters.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 105.37, subd. 14, public waters "includes and shall be limited to the following waters of the state:

(a) All water basins assigned a shoreland management classification by the commissioner pursuant to section 105.485, except wetlands less than 80 acres in size which are classified as natural environment lakes;

(b) All waters of the state which have been finally determined to be public waters or navigable waters by a court of competent jurisdiction;

(c) All meandered lakes, except for those which have been legally drained;

(d) All waterbasins previously designated by the commissioner for management for a specific purpose such as trout lakes and game lakes pursuant to applicable laws;

(e) All waterbasins designated as scientific and natural areas pursuant to section 84.033;

(f) All waterbasins located within and totally surrounded by publicly owned lands;

(g) All waterbasins where the state of Minnesota or the federal government holds title to any of the beds or shores, unless the owner declares that the water is not necessary for the purposes of the public ownership;

(h) All waterbasins where there is a publicly owned and controlled access which is intended to provide for public access to the water basin; and

(i) All natural and altered natural watercourses with a total drainage area greater than two square miles, except that trout streams officially designated by the commissioner shall be public waters regardless of the size of their drainage area.

The public character of water shall not be determined exclusively by the proprietorship of the underlying, overlying, or surrounding land or by whether it is a body or stream of water which was navigable in fact or susceptible of being used as a highway for commerce at the time this state was admitted to the union.

For the purposes of statutes other than sections 105.37, 105.38 and 105.391, the term "public waters" shall include "wetlands" unless the statute expressly states otherwise."

"Protected wetland" has the meaning given wetland in Minn. Stat. § 105.37, subd. 15.

DISCUSSION: Wetlands are regulated by the Department of Natural Resources pursuant to 6 MCAR § 1.5020 et. seq. This statutory definition is used at the request of the DNR to promote uniformity. The

current rules use the term "wetland" in the same context as the proposed rules use the term "wetland." The current rules do not refer to the concept of "protected wetland." The current rules restrict the definition of wetland within the context of the mandatory category in which the term is used. The proposed rules use the term "protected wetland" in mandatory categories at 6 MCAR § 3.038 Z. and 6 MCAR § 3.039 S.

The term "protected wetland" is used in the proposed rules because the term "wetland" is also used in a more generic context. The term "protected wetland" is used to refer to those wetlands for which the state has statutory authority to protect. The definitions of "protected wetland" and "wetland" should be contrasted to each other. The definitions were added to the rules to clarify for the reader the context in which the respective terms are used and to refer the reader to the proper source if the reader is not familiar with the regulation of wetlands.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 105.37, subd. 15, wetland "includes, and shall be limited to all type 3, 4, and 5 wetlands, as defined in U.S. Fish and Wildlife Service Circular No. 39 (1971 edition), not included within the definition of public waters, which are ten or more acres in size in unincorporated areas or 2-1/2 or more acres in incorporated areas."

Recreational development" means facilities for temporary residence while in pursuit of leisure activities. Recreational development includes, but is not limited to recreational vehicle parks, rental or owned campgrounds, and condominium campgrounds.

DISCUSSION: This definition was developed by EQB staff in response to questions relating to residential and recreational developments during the implementation of the current rules. The concept is termed "recreational facilities" in the current rules but is not defined. This term is used in the proposed rules at 6 MCAR § 3.038 S. Questions have arisen regarding the proper classification of condominium campgrounds, recreational vehicle parks and mobile home parks. This definition reflects the established position the EQB has taken in the past regarding those facilities. This definition should be contrasted to the definition of "potentially permanent."

"Related action" means two or more actions that will affect the same geographic area which a RGU determines:

a. Are planned to occur or will occur at the same time; or

b. Are of a nature that one of the actions will induce the other action.

DISCUSSION: This definition was derived from the current rules and modified through the public meeting process for the purpose of clarifying for local units of government what types of activities are most properly viewed in a cumulative context. The term is used in the same context in the proposed rules as in the current rules but has been simplified and made slightly more restrictive.

The key elements of this definition are 1) that two or more actions affect the same geographic area, 2) that they occur at approximately the same time, and 3) that the actions in some way have the effect of inducement upon one another. It should be noted that related actions do not necessarily have to be proposed by the same person nor do related actions necessarily have to be of the same type of activity.

"Resource recovery" has the meaning given in Minn. Stat. § 115A.03, subd. 27.

DISCUSSION: The Pollution Control Agency has jurisdiction over resource recovery and resource recovery facilities. This statutory definition was requested by the PCA to promote uniformity. The current rules do

not use the term "resource recovery". The proposed rules use the term in mandatory categories at 6 MCAR § 3.038 P. 4. and 6 MCAR § 3.039 L. 4. in the context of "resource recovery facility." This definition is added to refer the reader to the proper source if the reader is not familiar with solid waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115A.03, subd. 27, resource recovery "means the reclamation for sale or reuse of materials, substances, energy, or other products contained within or derived from waste." This definition should be read in conjunction with the definition for "resource recovery facility".

"Resource recovery facility" has the meaning given in Minn. Stat. § 115A.03, subd. 28.

DISCUSSION: The Pollution Control Agency has jurisdiction over resource recovery facilities. This statutory definition was requested by the PCA to promote uniformity. The current rules do not use the term. The proposed rules use the term in mandatory categories at 6 MCAR § 3.038 P. 4. and 6 MCAR § 3.039 L. 4. This definition is added to refer the reader to the proper source if the reader is not familiar with solid waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115A.03, subd. 28, resource recovery facility "means a waste facility established and used primarily for waste recovery." This definition should be read in conjunction with the definition for "resource recovery."

"Responsible governmental unit" or RGU means the governmental unit which is responsible for preparation and review of environmental documents.

DISCUSSION: This definition is derived from the definition of responsible agency in the current rules. This term is used in the proposed rules in the same context as "responsible agency" is used in the current rules. The abbreviated form of this term is used in the proposed rules as an abbreviated method of reference to the governmental unit which has the primary responsibilities for environmental review on any given action.

"Scientific and natural area" means an outdoor recreation system unit designated pursuant to Minn. Stat. § 86A.05, subd. 5.

DISCUSSION: The Department of Natural Resources has jurisdiction over scientific and natural areas. This statutory definition was requested by the DNR to promote uniformity. The current rules do not use the term "scientific and natural area". The proposed rules use the term at 6 MCAR § 3.038 CC. This definition makes only those areas that have been specifically designated as scientific and natural areas subject to these rules. The procedures by which an area may be so designated are set forth in Minn. Stat. ch. 86A.

The complete set of criteria for designation are not reprinted in these rules in an effort to save space and printing costs. The complete set of criteria will be included in the "Guide to the Rules." The criteria set forth at Minn. Stat. § 86A.05, subd. 5. (b) state:

"No unit shall be authorized as a scientific and natural area unless its proposed location substantially satisfies the following criteria:

1. Embraces natural features of exceptional scientific and educational value, including but not limited to any of the following:

a. natural formations or features which significantly illustrate geological processes;

b. significant fossil evidence of the development of life on earth;

c. an undisturbed plant community maintaining itself under prevailing natural conditions typical of Minnesota;

d. an ecological community significantly illustrating the process of succession and restoration to natural condition following disruptive change;

e. a habitat supporting a vanishing, rare, endangered, or restricted species of plant or animal;

f. a relict flora or fauna persisting from an earlier period; or

g. a seasonal haven for concentrations of birds and animals, or a vantage point for observing concentrated populations, such as a constricted migration route; and

2. Embraces an area large enough to permit effective research or education functions and to preserve the inherent natural values of the area.

The purpose of a scientific and natural area is to protect and perpetuate in an undisturbed natural state those natural features which possess exceptional scientific or educational value."

"Second class city" has the meaning given in Minn. Stat. § 410.01.

DISCUSSION: The proposed rules contain mandatory category thresholds relating to industrial, commercial, institutional, and residential developments geared to the size of city in which they are proposed. These categories are found at 6 MCAR §§ 3.038 M. and R. and 6 MCAR §§ 3.039 J. and M. The current rules do not have differential thresholds based on city size. To promote uniformity, the classification system for cities as set forth in Minn. Stat. ch. 410 was used. This definition was added to refer the reader to the proper source.

The complete definition is not reprinted in the rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As stated in Minn. Stat. § 410.01, second class cities are "those having more than 20,000 and not more than 100,000 inhabitants."

"Sewer system" means a piping or conveyance system that conveys wastewater to a wastewater treatment plant.

DISCUSSION: The Pollution Control Agency has regulatory authority over sewage systems. A sewage system may be viewed as being composed of 1) the conveyance system (sewer system) that conducts wastewater to a central facility, and 2) the central facility (wastewater treatment facility) that purifies the wastewater. This definition was requested by the PCA to help clarify for the reader the distinction between "sewage system", "sewer system" and "wastewater treatment facility". The term "sewer system" is used at 6 MCAR § 3.038 Q.

"Sewered area" means an area:

a. That is serviced by a wastewater treatment facility or a publicly 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.

DISCUSSION: This definition was developed through the public meeting process for the purpose of distinguishing between areas where waste water is collected and treated by a central treatment facility from areas where waste water is run into separate or individual septic systems. The current rules contain mandatory categories using this term but do not define the term. As implemented under the current rules, this "sewered area" was construed only as an area serviced by a municipal waste water treatment facility. The proposed definition broadens the concept to include some centralized septic systems and developments within the Metropolitan Urban Service Area. This term is used in mandatory categories at 6 MCAR § 3.038 R. 1, 6 MCAR § 3.039 M. 1. and 6 MCAR § 3.041 K. 1.

The underlying concept of this definition is that areas serviced by a centralized sewage system tend to have a lesser environmental impact than residential development containing individual septic systems. In its most common application a sewered area is typically serviced by a municipal waste water treatment facility. However, it is becoming increasingly common to have large residential developments serviced by a non-municipal facility designed to treat the waste water of that development. These facilities are commonly constructed by the developer and at a later time turned over to the management and operation of the residents of the development or of the local governmental unit. It is the intent of this definition to include such developments within the umbrella of waste water treatment facilities. This definition, however, does not include individualized septic systems or septic systems servicing small clusters of residential units within the development, nor does this definition include systems managed privately. It is likely, given the thresholds of the categories as proposed, that projects of this nature will not be subject to mandatory environmental review; however, they would be subject to discretionary environmental review on a project-by-project basis.

The second area of inclusion regarding the definition of sewered areas relates to residential developments within the metropolitan service area boundaries. This boundary is commonly called the MUSA line. The MUSA line was developed by the Metropolitan Council and is defined in the Development Framework of the Metropolitan Council. The MUSA line in essence delineates those areas of the seven-county metropolitan area in which development is likely and advisable for the future years. Areas within the MUSA line are designated for sewer service prior to 1995.

"Shoreland" has the meaning given in 6 MCAR Cons. 70.

DISCUSSION: Shoreland areas are regulated by the Department of Natural Resources pursuant to 6 MCAR Cons. 70 for unincorporated areas and 6 MCAR NR 82 for incorporated areas. This definition was requested by the DNR to promote uniformity. The current rules use this term but do not define it. This definition was added to refer the reader to the proper source if the reader is not familiar with DNR regulations relating to shorelands. This term is used in the proposed rules in the mandatory categories at 6 MCAR §§ 3.038 M. 2., O. 3. and 4., R. 2. and Z. 2.; 6 MCAR §§ 3.039 J. 2., K. 2., and 3., L. 2. and M. 2.; and 6 MCAR §§ 3.041 I. 1. and 3., K. 1. and R.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at 6 MCAR Cons. 70 (d), shoreland means "land located within the following distances from public waters:

1. One thousand feet from the ordinary high water level of a lake, pond, or flowage; and

2. Three hundred feet from a river or stream, or the landward extent of a floodplain designated by ordinance on such a river or stream, whichever is greater.

The practical limits of shoreland may be less than the statutory limits whenever the waters involved are bounded by natural topographic divides which extend landward from the waters or lesser distances and when approved by the Commissioner of the DNR."

"Shoreland ordinance, state approved" means a local governmental unit shoreland management ordinance which meets the provisions of Minn. Stat. § 105.485 and has been approved by the Commissioner of the DNR pursuant to 6 MCAR Cons. 70 or 6 MCAR NR 82.

DISCUSSION: Shoreland areas are regulated by the Department of Natural Resources pursuant to 6 MCAR Cons. 70, entitled "Statewide Standards and Criteria for Management of Shoreland Areas of Minnesota", for unincorporated areas and 6 MCAR NR 82, entitled "Standards and Criteria for the Management of Municipal Shoreland Areas of Minnesota", for incorporated areas. The statutory authority is set forth in Minn. Stat. 105.485. The standards and procedures set forth in the statute and the regulations are utilized to promote uniformity. The current rules do not distinguish between areas that have state approved shoreland ordinances and those that do not. This term is used in the proposed rules in the mandatory categories at 6 MCAR §§ 3.038 M. 2. and R. 2. and 6 MCAR §§ 3.039 J. 2. and M. 2. This definition is added to refer the reader to the proper source if the reader is not familiar with the statute and DNR regulations relating to shorelands.

Complete definitions and standards are not reprinted in these rules in an effort to save space and printing costs. Complete definitions and an explanation of the statutory standards will be included in the "Guide to the Rules." Minn. Stat. § 105.485, subd. 3. requires the commissioner of the DNR to promulgate "model standards and criteria for the subdivision, use, and development of shoreland in unincorporated areas, including but not limited to the following:

1. the area of a lot and length of water frontage suitable for a building site;

2. placement of structures in relation to shorelines and roads;

3. the placement and construction of sanitary and waste disposal facilities;

4. designation of types of land uses;

5. changes in bottom contours of adjacent public waters;

6. preservation of natural shorelands through the restriction of land uses;

7. variances from the minimum standards and criteria; and

8. a model ordinance."

All counties in Minnesota have adopted shoreland ordinances pursuant to 6 MCAR Cons. 70. Approximately 35 percent of Minnesota municipalities have adopted shoreland ordinances pursuant to 6 MCAR NR 82. Technical standards are provided in the respective regulations for guidance to local units in developing their ordinances. This term is used in these rules to provide a different threshold for local units of government that have complied with the statutory provisions and the regulations of the DNR. The basic rationale for the differential threshold is that, if local units of government have complied with the criteria and environmental protection measures are in effect, environmental review is less necessary than for areas in which these ordinances are not in effect.

"Sociological effects" means effects, resulting from an action, which impact the social institutions, social groupings, or systems of a community. It includes effects upon groups of individuals, families, or households. It does not include effects limited to single individuals, single families, or single households.

DISCUSSION: This definition was developed by EQB staff and modified by the public meeting process to clarify for the reader the intent of the phrase as used in the proposed rules and to assist the reader in distinguishing this term from "environmental effects." This term is used but not defined in the current rules. This term is used in the same context in the proposed rules as in the current rules. the environmental review process is triggered by environmental effects, i.e., effects on the environment from activities that cause direct physical impacts on the environment. However, once the environmental review provisions are triggered, all aspects of the activity are reviewed to identify the activity's impacts. This includes sociological effects, economic effects, and environmental effects.

"Solid waste" has the meaning given in Minn. Stat. § 116.06, subd. 10.

DISCUSSION: Solid waste and solid waste facilities are regulated by the Pollution Control Agency. This statutory definition is used at the request of the PCA to promote uniformity. The current rules have mandatory categories relating to solid waste but use different terminology. The proposed categories and terminology are designed to be more consistent with recent solid waste legislation. This term is used in mandatory categories at 6 MCAR § 3.038 P. and 6 MCAR § 3.039 L. This definition is added to refer the reader to the proper source if the reader is not familiar with the regulation of solid waste.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 116.06, subd. 10, solid waste means "garbage, refuse, sludge from a water supply treatment plant or air contaminant treatment facility, and other discarded waste materials and sludges, in solid, semi-solid, liquid, or contained gaseous form, resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include hazardous waste; animal waste used as fertilizer; earthen fill, boulders, rock; sewage sludge; solid or dissolved material in domestic sewage or other common pollutants in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents or discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended, dissolved materials in irrigation return flows; or source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended."

"State trail corridor" means an outdoor recreation system unit designated pursuant to Minn. Stat. § 86A.05, subd. 4.

DISCUSSION: The Department of Natural Resources has jurisdiction over state trail corridors. This statutory definition was requested by the DNR to promote uniformity. The current rules do not use the term "state trail corridor". The proposed rules use the term at 6 MCAR § 3.038 CC. This definition makes only those areas that have been specifically designated as state trail corridors subject to these rules. The procedures by which an area may be so designated are set forth in Minn. Stat. ch. 86A.

The complete set of criteria for designation are not printed in these rules in an effort to save space and printing costs. The complete set of criteria will be included in the "Guide to the Rules." The criteria set forth at Minn. Stat. § 86A.05, subd. 4. (b) state: "No unit shall be authorized as a state trail unless its proposed location substantially satisfies the following criteria:

1. Permits travel in an appropriate manner along a route which provides at least one of the following recreational opportunites:

a. travel along a route which connects areas or points of natural, scientific, cultural, and historic interest;

b. travel through an area which possesses outstanding scenic beauty;

c. travel over a route designed to enhance and utilize the unique qualities of a particular manner of travel in harmony with the natural environment;

d. travel along a route which is historically significant as a route of migration, commerce, or communication;

e. travel between units of the state outdoor recreation system or the national trail system; and

2. Utilizes, to the greatest extent possible consistent with the purposes of this subdivision, public lands, rights-of-way, and the like; and

3. Provides maximum potential for the appreciation, conservation, and enjoyment of significant scenic, historical, natural, or cultural qualities of the areas through which the trail may pass; and

4. Takes into consideration predicted public demand and future use."

The purpose of a state trail corridor is "to provide a recreational travel route which connects units of the outdoor recreation system or the national trail system, provides access to or passage through other areas which have significant scenic, historic, scientific, or recreational qualities or reestablishes or permits travel along an historically prominent travel route or which provides commuter transportation."

"Storage", as used in 6 MCAR § 3.038 0.4., has the meaning given in 40 CFR 260.20 (66).

DISCUSSION: This term has a specific meaning when used in conjunction with hazardous waste mandatory categories. The Pollution Control Agency has regulatory authority over hazardous waste and hazardous waste storage facilities pursuant to 6 MCAR § 4.9001 et. seq. This definition was requested by the PCA to promote uniformity. The current rules do not have mandatory categories relating to hazardous waste. The proposed rules use this term in the mandatory category at 6 MCAR § 3.038 0. 4. This definition is added to refer the reader to the proper source if the reader is not familiar with hazardous waste regulation.

The complete definition is not reprinted in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at 40 CFR 260.10, storage means "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere."

"Third class city" has the meaning given in Minn. Stat. § 410.01.

DISCUSSION: The proposed rules contain mandatory category thresholds relating to industrial, commercial, institutional, and residential developments geared to the size of city in which they are proposed. These categories are found at 6 MCAR §§ 3.038 M. and R. and 6 MCAR §§ 3.039 J. and M. The current rules do not have differential thresholds based on city size. To promote uniformity, the classification system for cities as set forth in Minn. Stat. ch. 410 was used. This definition was added to refer the reader to the proper source.

The complete definition is not reprinted in the rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As stated in Minn. Stat. § 410.01, third class cities are "those having more than 10,000 and not more than 20,000 inhabitants."

"Tiering" means incorporating by reference the discussion of an issue from a broader or more general EIS. An example of tiering is the incorporation of a program or policy statement into a subsequent environmental document of a more narrow scope, such as a site-specific EIS.

DISCUSSION: This definition is derived from the Council on Environmental Quality definition found at 40 CFR § 1508.28. The current rules do not use this term. The proposed rules use this term at 6 MCAR § 3.036 H.

The concept of tiering represents a major change in the environmental review process. The concept of tiering is based on the development of comprehensive documents relating to an issue and the later use of these documents for project specific use. The process of tiering or incorporating by reference from the broad document to later project specific documents results in a more thorough analysis of potential impacts of a project while eliminating much of the cost and volume of environmental documents and making them more readable and more useable.

"Transfer station" has the meaning given in Minn. Stat. § 115A.03, subd. 33.

DISCUSSION: The Pollution Control Agency has jurisdiction over transfer stations and solid waste facilities. This statutory definition was requested by the PCA to promote uniformity. The current rules do not use this term. The proposed rules use this term at 6 MCAR § 3.038 P. 3. This definition is added to refer the reader to the proper source if the reader is not familiar with solid waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115A.03, subd. 33, transfer station means "an intermediate waste facility in which waste collected from any source is temporarily deposited to await transportation to another waste facility."

"Waste" has the meaning given in Minn. Stat. § 115A.03, subd. 34.

DISCUSSION: The Pollution Control Agency has jurisdiction over waste and waste facilities. The PCA has recommended inclusion of this definition. The current rules use but do not define this term. The proposed rules use this term in mandatory categories at 6 MCAR §§ 3.038 O. and P. and 6 MCAR §§ 3.039 K. and L. Use of the term in the proposed rules reflects increased definition in accord with recent legislation. This definition is added to refer the reader to the proper source if the reader is not familiar with solid waste and hazardous waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115.03, subd. 34, waste means "solid waste, sewage sludge, and hazardous waste."

"Waste facility" has the meaning given in Minn. Stat. § 115A.03, subd. 35.

DISCUSSION: The Pollution Control Agency has jurisdiction over waste and waste facilities. The PCA has recommended inclusion of this definition. The current rules do not use this term. The proposed rules use this term in mandatory categories at 6 MCAR §§ 3.038 O. and P. and 6 MCAR §§ 3.039 K. and L. Use of the term in the proposed rules reflects increased definition in accord with recent legislation. This definition is added to refer the reader to the proper source if the reader is not familiar with solid waste and hazardous waste legislation.

The complete definition is not reprinted in these rules in an effort to save space and printing costs. The complete definition will be included in the "Guide to the Rules." As defined at Minn. Stat. § 115.03, subd. 35, waste facility means, "all property, real or personal, including negative and positive easements and water and air rights, which is or may be needed or useful for the processing or disposal of waste, except property for the collection of the waste and the property used primarily for the manufacture of scrap metal or paper. Waste facility includes but is not limited to, transfer stations, processing facilities, and disposal sites and facilities."

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

DISCUSSION: The Pollution Control Agency has jurisdiction over sewage systems. A sewage system may be viewed as being composed of 1) the conveyance system (sewer system) that conducts waste water to the central facility, and 2) the central facility (wastewater treatment facility) that purifies the waste water. This definition was requested by the PCA to help clarify for the reader the distinction between "sewage system", "sewer system" and "wastewater treatment facility". This definition should be read in conjunction with the definition of "sewer system". The term "wastewater treatment facility" is used at 6 MCAR § 3.038 Q.

It should be noted that, in most cases subject to these rules, waste water is treated by a municipally owned and operated facility. Certain large industrial or residential developments may, however, build treatment facilities specifically for that development. These facilities are subject to PCA regulation and are included within this definition.

"Wetland" has the meaning given in U. S. Fish and Wildlife Service Circular No. 39 (1971 edition).

DISCUSSION: The Department of Natural Resources has jurisdiction over public waters and certain protected wetlands pursuant to 6 MCAR § 1.5020 et. seq. This definition is used at the request of the DNR because the source has been used in the past and most local authorities are familiar with its use. The current rules use this term and define it within the mandatory category in which it is used. The proposed rules use the term in the same context. This term is used in the proposed rules at 6 MCAR § 3.038 Z. 2.

The term "wetland" as used in these rules should be distinguished from the term "protected wetland". "Wetland" is used in a generic context to refer to all wetland areas in the state of types 1-8. The wording of the mandatory category then restricts the application of the generic term. "Protected wetland" refers only to those wetlands over which the DNR has jurisdiction. The definitions were added to clarify to the reader the context in which the respective terms are used and to refer the reader to the proper source if the reader is not familiar with the classification and regulation of wetlands.

U.S. Fish and Wildlife Service Circular No. 39 is a standard reference relating to the classification of wetlands. All fresh water and salt water wetlands of the United States are classified into 20 basic types. Types 1-8 are found in Minnesota. This classification system is the simplest and easiest to use by the general public. Complete definitions of wetland types are not included but are incorporated by reference into the rules.

"Wild and scenic rivers district" means a river, or a segment of the river, and its adjacent lands that possesses outstanding scenic, recreational, natural, historical, scientific, or similar values and has been designated by the Commissioner of the DNR for inclusion within the Minnesota Wild and Scenic Rivers system pursuant to Minn. Stat. §§ 104.31 - 40 or by Congress for inclusion within the National Wild and Scenic Rivers System pursuant to 16 USC 1274 et seq.

DISCUSSION: The Department of Natural Resources has jurisdiction over wild and scenic rivers pursuant to Minn. Stat. § 104.31 et. seq. The DNR has requested this definition. This term is not used in the current rules. The proposed rules use this term in mandatory categories at 6 MCAR §§ 3.038 O. 3. and 4., R. 2. and Z. 2; 6 MCAR §§ 3.039 J. 2., K. 2. and 3., L. 2 and M. 2; and 6 MCAR §§ 3.041 I. 1. and 3., K. 1., and R.

A river and adjacent lands may be designated as a wild and scenic rivers district by either a state or federal process. The federal process involves specific designation by Congress for inclusion within

the National Wild and Scenic Rivers System. This process is delineated at 16 U.S.C. 1274. A river and adjacent lands may also be designated as a wild and scenic rivers district by the Commissioner of the DNR. The process of designating a river for inclusion in the Minnesota Wild and Scenic Rivers System is set forth in Minn. Stat. §§ 104.31 - 40.

Minn. Stat. § 104.33, subd. 1, states the criteria for inclusion as "the whole or a segment of any river and its adjacent lands in this state that possesses outstanding scenic, recreational, natural, historical, scientific, or similar values shall be eligible for inclusion within the Minnesota Wild and Scenic Rivers system. "River" means a flowing body of water such as a stream or a segment or tributary thereof, and may include lakes through which the river or stream flows." Minn. Stat. § 104.33, subd. 2. (a) defines wild rivers as "those rivers that exist in a free-flowing state, with excellent water quality, and with adjacent lands that are essentially primitive. "Free-flowing" means existing in natural condition without significant artificial modification such as impoundment, diversion, or straightening. The existence, however, of low dams, diversion works or other minor structures at the time any river is proposed for inclusion shall not automatically bar its inclusion as a wild, scenic, or recreational river." Minn. Stat. § 104.33, subd. 2. (b) defines scenic rivers as "those rivers that exist in a free-flowing state and with adjacent lands that are largely undeveloped."

"Wild and scenic rivers district ordinances, state approved" means a local governmental unit ordinance implementing the state management plan for the district. The ordinance must be approved by the Commissioner of the DNR pursuant to 6 MCAR NR 81.

DISCUSSION: Wild and scenic rivers districts are regulated by the Department of Natural Resources pursuant to 6 MCAR NR 78. The DNR has requested this definition. The current rules do not use this term. It is used in the proposed rules in mandatory categories at 6 MCAR §§ 3.038 M. 2. and R. 2. and 6 MCAR §§ 3.039 J. 2 and M. 2. This definition is added to refer the reader to the proper source if the reader is not familiar with DNR regulations relating to wild and scenic rivers districts.

The complete set of standards and procedures as set forth in 6 MCAR NR 78 are not included in these rules but are incorporated by reference.

Units of government that have complied with the provisions of 6 MCAR NR 78 and have had their ordinances approved by the commissioner are presumed to have incorporated environmental protection measures.

"Wilderness area" means an outdoor recreation system unit designated pursuant to Minn. Stat. § 86A.05, subd. 6.

DISCUSSION: The Department of Natural Resources has jurisdiction over wilderness areas. This statutory definition was requested by the DNR to promote uniformity. The current rules do not use the term "wilderness area". The proposed rules use it at 6 MCAR § 3.038 CC. This definition makes only those areas that have been specifically designated as wilderness areas subject to these rules. The procedures by which an area may be so designated are set forth in Minn. Stat. ch. 86A.

The complete set of criteria for designation are not printed in these rules in an effort to save space and printing costs. The complete set of criteria will be included in the "Guide to the Rules." The criteria set forth at Minn. Stat. § 86A.05, subd. 6. (b) state: "No unit shall be authorized as a state wilderness area unless its proposed location substantially satisfies the following criteria: Appears to have been primarily affected by the forces of nature, with the evidence of man being substantially unnoticeable or where the evidence of man may be eliminated by restoration." The purpose of a wilderness area is "to preserve, in a natural wild and undeveloped condition, areas which offer outstanding opportunities for solitude and primitive types of outdoor recreation."

Introduction to 6 MCAR § 3.023 General Responsibilities

This rule is introductory in nature. It is placed before the substantive procedural portions of the rules as an introductory outline of the primary responsibilities of parties affected by these rules. This section originally included cites to the relevant portions of the rules where the responsibilities were substantively presented. The cites and additional advisory language were deleted because of public comment that the rules were too long. The current rules have a more extensive general responsibilities rule that functions as an introduction to later substantive rules in addition to incorporating substantive provisions.

Alternative language to this rule, that incorporates references to later substantive portions, may be reviewed by consulting the March 19, 1981 public draft. The alternative of deleting this rule in its entirety was also considered but rejected in the belief that this rule serves an educational function to the reader and promotes continuity within the complete set of rules.

6 MCAR § 3.023 A. EQB.

> The EQB shall monitor the effectiveness of these rules and shall take appropriate measures to modify and improve the effectiveness of the rules. The EQB shall assist governmental units and interested persons in understanding and implementing these rules.

DISCUSSION: This paragraph is included for the purpose of helping the reader understand the change in the role of the EQB in the implementation of these rules. The EQB no longer functions as an appeal board for projects subject to these rules. The EQB retains the responsibility of monitoring the rules and the responsibility of assisting other governmental units in understanding and implementing the rules. The EQB retains limited authority to intervene as per 6 MCAR § 3.031 G. 1. and retains the authority to order an EAW for actions that may have the potential for significant environmental effects as per 6 MCAR § 3.025 C. 3. The EQB is assigned responsibilities in regard to RGU designation for petitions at 6 MCAR § 3.026 and for cases in which it is not apparent which governmental unit is most properly the RGU at 6 MCAR § 3.024. The EQB is responsible for necessary approvals of substitute forms of environmental review such as generic EISs (6 MCAR § 3.036), alternative review (6 MCAR § 3.034), and model ordinances (6 MCAR § 3.035). Concerns have been expressed as to the role of the EQB after adoption of these rules and as to whether the EQB will provide assistance to local units of government in implementing the rules. This rule incorporates a statement that the EQB will offer technical assistance as a part of its continuing responsibility under these rules.

6 MCAR § 3.023 B. RGUs.

> RGUs shall be responsible for verifying the accuracy of environmental documents and complying with environmental review processes in a timely manner.

DISCUSSION: This paragraph is included to outline the RGUs responsibilities for the reader. The primary responsibilities of the RGU include:

1. Reviewing petitions and determining the need for an EAW (6 MCAR § 3.026 F.);
2. Preparing or verifying the information contained in an EAW (6 MCAR § 3.027);
3. Determining the need for an EIS (6 MCAR § 3.028);
4. Coordination of the EIS scoping process (6 MCAR § 3.030);
5. Preparing or verifying the information contained in an EIS (6 MCAR § 3.031); and

6. Determining the adequacy of an EIS (6 MCAR § 3.031 G.).

Earlier drafts of these proposed rules contained additional language in regard to:

1. The RGU's ability to delegate certain responsibilities to staff or consultants. This language was deleted to shorten the rules and because of misinterpretations regarding the extent to which responsibilities can be delegated, i.e., the RGU cannot delegate its decision-making authority to consultants.

2. The RGU's ability to assess costs incurred in the environmental review process to the proposer. This language was deleted to shorten the rules and because most governmental units involved in the preparation of environmental documents were aware of their powers in this respect. The main concern was expressed by governmental units not familiar with environmental review and not likely to be involved as a RGU.

3. The RGU's responsibility to expedite the process to comply with the time guidelines of these rules. This language was deleted to shorten the rules. Recommendations in regard to timely implementation will be incorporated in the" Guide to the Rules".

6 MCAR § 3.023 C. Governmental units, private individuals, citizen groups, and business concerns.

When environmental review documents are required on an action, the proposer of the action and any other person shall supply any data reasonably requested by the RGU which he has in his possession or to which he has reasonable access.

DISCUSSION: This paragraph is included to advise all persons of their rights and responsibilities under these rules. The primary portions of the rules of relevance to all persons include:

1. The right to submit a petition requesting environmental review on an action (6 MCAR § 3.026);

2. The right to participate in the review of an EAW (6 MCAR § 3.027);

3. The right to participate in the EIS scoping process (6 MCAR § 3.030);

4. The right to review and comment on draft EISs (6 MCAR § 3.031 E.); and

5. The right to review and comment on the adequacy of final EISs (6 MCAR § 3.031 G.).

In addition, governmental units with jurisdiction over projects subject to environmental review have a responsibility to issue permits in a timely manner (6MCAR § 3.031 H.) and to use the information provided via the environmental review process for making permit decisions in the best interests of the public.

6 MCAR § 3.023 D. Appeal of final decisions.

Decisions by a RGU on the need for an EAW, the need for an EIS, and the adequacy of an EIS are final decisions and may be reviewed by a declaratory judgment action in the district court of the county where the proposed action, or any part thereof, would be undertaken. Judicial review shall be initiated within 30 days after the RGU makes the decision.

DISCUSSION: This paragraph is included for the purpose of clearly delineating to the reader the fact that the EQB no longer serves as an appeal board for local decisions. This paragraph is based on the statutory language found at Minn. Stat. § 116D.04, subd. 10. This paragraph references three points at which the decisions by the RGU are final and would lead either to the termination of environmental review or to the next phase of environmental review. These decisions are:

1. The decision as to whether or not an environmental assessment worksheet will be required for an activity. This decision may be based on review pursuant to a citizen petition or upon an independent assessment of the likelihood of environmental impact of an activity otherwise brought to the attention of the RGU. This decision would result in either:

   a. the preparation of an EAW, or

   b. the dismissal of the activity as not bearing sufficient evidence of the likelihood of the potential for significant environmental effects.

2. The decision on the need for preparation of an EIS. This decision is made upon completion of review of the EAW. This decision would result in either:

   a. a positive declaration (a decision that the project has the potential for significant environmental effects and therefore an EIS will be prepared), or

   b. a negative declaration (a decision that the activity does not have the potential for significant environmental effects and therefore no EIS need by prepared).

3. The adequacy of the final EIS. This decision consists of either:

   a. a determination that the final EIS adequately addresses the relevant issues of the activity as scoped, or

   b. a determination that additional information is required to properly assess potential environmental effects of the proposed activity.

This appeal provision of the proposed rules is substantially different from the appeal provision of the current rules. Under the current rules if the person disagrees with the final decision of the responsible agency, the proper appeal is either a petition or a challenge to the EQB. The EQB then holds an informational meeting or a contested case hearing for the purpose of obtaining information in regard to the merits of the appeal or challenge. Based on the information obtained from this hearing, the EQB may then either uphold or overturn the decision of the responsible agency. If the aggrieved party continues to disagree with the decision, the decision of the EQB may then be appealed to district court.

The effect of this provision is to eliminate the intermediate appeal body, i.e., the EQB, from the appeal process. This will result in significant time and financial savings.

Introduction to 6 MCAR § 3.024 RGU selection procedures. The following procedures shall be used in determining the RGU for the preparation of an EAW:

The purpose of this rule is to clarify how a RGU is selected for projects subject to environmental review. The current rules refer to the concept of "RGU" as "Responsible Agency". The current rules contain a similar paragraph outlining procedures for determining the proper Responsible Agency for a given project. Through implementation of the

current rules, proper designation of the Responsible Agency became an issue in only one project. The proposed rules transfer more responsibility to local governmental units and it is now more likely that the proposer will seek guidance from the local unit. This rule was added for the purpose of assisting local units in finding which unit of government should be designated as the RGU.

Prompt designation of the RGU and the assumption of responsibilities by the RGU is essential for implementation of these rules in accord with the time guidelines established by the legislature. This rule is intended to clarify designation procedures for governmental units and proposers. Comments relating to ambiguities in these procedures and potential problems that may not be readily resolved by application of these procedures are relevant to this rule.

6 MCAR § 3.024 A.

For any activity listed in 6 MCAR §§ 3.038 or 3.039, the governmental unit listed in parentheses shall be the RGU.

DISCUSSION: This paragraph is included to clarify to the reader that, for activities which fall under specific categories in the mandatory category section, the RGU for that activity is designated within the context of these rules. That designation is made in parentheses following that category. If the RGU is a state agency, the specific agency is listed. In a few instances, more than one state agency could be the RGU. In those cases the determination is made by following the steps of paragraphs B-F of this rule. If the RGU is a local governmental unit, the designation will be "(local)". In these cases the actual determination of which local governmental unit will be RGU is made by following the steps of paragraphs B-F of this rule.

This method of designation of RGUs is the same as the method of designation of Responsible Agency under the current rules. In the current rules, however, the explanation of the significance of the parenthetical agency is also contained immediately prior to the listing of the categories. The alternative of repeating this information in the proposed rules immediately prior to the listing of the categories, i.e., in the introductory heading to 6 MCAR § 3.038 and 6 MCAR § 3.039, was considered. This alternative was rejected because the information was duplicative and because it appeared that through use of the current rules most persons understood the meaning of the parenthetical enclosure.

It should be noted that if, by application of this provision, the government unit designated is for any reason inappropriate, a different governmental unit may be designated as per paragraphs E. and F. of this rule.

6 MCAR § 3.024 B.

If a governmental unit orders an EAW pursuant to 6 MCAR § 3.025 C. 1., that governmental unit shall be designated as the RGU.

DISCUSSION: This paragraph is included to clarify to the reader, pursuant to the process set forth at 6 MCAR § 3.025 C. 1., any governmental unit with jurisdiction over an activity may order an EAW to be prepared for that activity if it decides that environmental review on the proposed activity is warrented. If a governmental unit orders an EAW pursuant to this section, this section identifies that governmental unit as the RGU responsible for its preparation.

The current rules do not have an explicit provision corresponding to this paragraph, Rather, the current rules rely on provisions similar to those set forth in paragraph E. of this rule. The proposed language expands this concept to state that if any governmental unit with jurisdiction over a proposed activity decides it has inadequate information to properly assess the potential for significant environmental effects, it may order an EAW and be the RGU for that EAW.

This provision is in keeping with the basic purpose of environmental review, i.e., to assure that all governmental decisions are made with full knowledge of potential environmental impacts.

It should be noted that if, by application of this provision, the government unit designated is for any reason inappropriate, a different governmental unit may be designated as per paragraphs E. and F. of this rule.

6 MCAR § 3.024 C.

If an EAW is ordered in response to a petition, the RGU that was designated by the EQB to act on the petition shall be responsible for the preparation of the EAW.

DISCUSSION: This paragraph is included to clarify for the reader the RGU designation procedures for citizen petitions submitted pursuant to Minn. Stat. § 116D.04 subd. 2a (e). The current rules contain no corresponding provision because under the current rules a citizen petition is filed for the purpose of requesting an EIS as opposed to an EAW. Under the current rules, the EQB makes all decisions relating to citizen petitions.

The procedures of the proposed rules differ substantially from the current rules in that, under the proposed rules, the citizen petition is filed to request an EAW. Decisions on the merits of the petition are made by the RGU. To establish a workable procedure for citizens, these rules require citizens to submit their petitions to the EQB. This is to avoid uncertainty and delays in establishing the identity of the proper RGU. The EQB verifies the format of the petition and determines which governmental unit is most capable of deciding the substantive merit of the petition pursuant to paragraph E. of this rule. The RGU will be selected on the basis of the type and location of the project and the permits or approvals required. This will be a routine staff function of the EQB as opposed to a formal Board action.

The RGU designated by the EQB to consider the petition shall remain the RGU responsible for the preparation of the EAW if an EAW is later ordered by the RGU. If the RGU disagrees with its designation as RGU for that activity, its proper method of appeal is defined in paragraphs E. and F. of this rule. Controversy relating to this process is discussed in conjunction with the substantive portion of these rules.

6 MCAR § 3.024 D.

If the EQB orders an EAW pursuant to 6 MCAR § 3.025 C. 3., the EQB shall, at the same time, designate the RGU for that EAW.

DISCUSSION: This paragraph was added to clarify for the reader that the EQB retains the authority to order preparation of an EAW pursuant to Minn. Stat. § 116D.04 subd. 2a (d). The EQB has the same authority under the current rules; however, the current rules do not expressly state that the EQB designates the RGU when it so orders an EAW. In practice, this same procedure would have been followed. This language is added to delineate that situation more clearly.

The EQB may under this provision designate itself as the RGU.

This provision is included as a catch-all provision. This type of provision is necessary because it is impossible to anticipate all types of projects, issues, or controversies that may arise in the future. It is anticipated that this rule will seldom, if ever, apply.

6 MCAR § 3.024 E.

For any activity where the RGU is not listed in 6 MCAR §§ 3.038 or 3.039 or which falls into more than one category in 6 MCAR §§ 3.038 or 3.039, or for which the RGU is in question, the RGU shall be determined as follows:

1. When a single governmental unit proposes to carry out or has sole jurisdiction to approve an action, it shall be the RGU.

2. When two or more governmental units propose to carry out or have jurisdiction to approve an action, the RGU shall be the governmental unit with the greatest responsibility for supervising or approving the action as a whole. Where it is not clear which governmental unit has the greatest responsibility for supervising or approving an action or where there is a dispute about which governmental unit has the greatest responsibility for supervising or approving an action, the governmental units shall either:

   a. By agreement, designate which unit shall be the RGU; or

   b. Submit the question to the EQB, which shall designate the RGU based on a consideration of which governmental unit has the greatest responsibility for supervising or approving the action or has the expertise that may be relevant for the environmental review.

DISCUSSION: This paragraph is included to clarify for the reader that for activities for which these rules do not make explicit provision, the RGU may be determined by the governmental units with jurisdiction over the activity. The current rules contain similar language. The proposed language incorporates additional guidance for the selection of RGU in subparagraph 2. This guidance was requested by governmental units during the public comment period as a means of establishing a standard.

The initial test for the standard is to designate RGU responsibilities to that governmental unit that has the greatest responsibility for approving the action. This test is in keeping with the basic purpose of environmental review, i.e., to serve as a means of supplying adequate information for a governmental unit to make its decision.

In cases for which designation is not clear by application of the initial test, the governmental units involved may designate the unit most appropriate or submit the question to the EQB. The standard for the EQB to use in designation of a RGU is set forth at subparagraph 2. b. In accord with that standard, the EQB shall designate either the governmental unit which it determines has the greatest responsibility or the governmental unit that has the greatest expertise in the preparation of environmental documents relating to that type of action.

The most likely situations where this paragraph may arise would include cases where a new type of activity is proposed that was not anticipated by these rules and thus not listed in the mandatory categories section and cases in which the project is located in more than one jurisdiction. This paragraph could also be used for situations in which more than one mandatory category applies and more than one agency is designated as RGU. This paragraph could also apply to the situation where a governmental unit disagrees with its designation as RGU pursuant to one of the preceding paragraphs of this rule.

6 MCAR § 3.024 F.

Notwithstanding paragraphs A-E of this rule, the EQB may designate a different RGU for the preparation of an EAW if the EQB determines the designee has greater expertise in analyzing the potential impacts of the action.

DISCUSSION: This paragraph is included as a catch-all paragraph to cover unusual situations where for some reason it is apparent the best interests of environmental review dictate that a governmental unit other than the RGU as defined by this rule should be responsible for review of an activity. The current rules have a similar provision. Under this provision, the EQB could intervene to designate the RGU at the request of affected governmental units, the proposer or citizens, or at the

EQB's own initiation. This rule is needed to lend predictability to all phases of the process. This rule establishes a procedure in the event controversy relating to RGU designation arises.

Proper designation of a RGU became an issue only once during the implementation of the current rules. In that case, designation of the RGU was achieved without action by the Board.

Introduction to Chapter Twelve: Environmental Assessment Worksheet.

The intent of this chapter is to set forth the procedural rules relating to the preparation and review of the EAW. This chapter is intended to be a self contained unit for processes relating to the determination of need for an EAW, preparation and distribution of that EAW, and completion of final action relating to that EAW. The EAW is the basic environmental review document. The EAW will be the most commonly used environmental document under these rules. Therefore, the rules contained within this chapter are the most important procedural rules for governmental units to understand. Rules contained within this chapter delineate the EAW process from the designation of activities for which EAWs will be prepared through the final action taken with reference to the EAW. For the majority of local governmental units involved with environmental review, this chapter will be the only procedural portion of these rules with which they will ever become involved. The provisions in this chapter are the most essential provisions for a governmental unit to understand in being able to fulfill its responsibilities for environmental review.

Introduction to 6 MCAR § 3.025 Actions Requiring an EAW.

This rule is placed at the beginning of the chapter for the purpose of clarifying to the governmental unit the purpose of an EAW and the situations under which an EAW may be prepared. The role of the EAW in the proposed rules has been expanded beyond the purpose entailed in the current rules and the processes by which an EAW may be ordered have been changed in relation to the petition process. This rule is provided to concisely identify the situations under which an EAW may be ordered.

The net effect of this rule is to allow all governmental units with authority to order EAWs under the current rules to retain that authority. The major change reflected in this rule relates to changes in the petition process to require petitions for EAWs rather than EISs. The justification for this change is addressed more fully in the discussion relating to 6 MCAR § 3.026.

Additional changes are being implemented in conjunction with these rules that will have the net effect of making the EAW a less burdensome document for preparation and review. The primary changes include: 1) Simplification of style and format; 2) Specific time guidelines relating to review; 3) An abbreviated appeal process; 4) Earlier involvement of interested parties; and 5) Increased procedural definition.

6 MCAR § 3.025 A. Purpose of an EAW

The EAW is a brief document prepared in worksheet format which is designed to rapidly assess the environmental effects which may be associated with a proposed action. The EAW serves primarily the following purposes:

1. Aid in the determination of whether an EIS is needed for a proposed action; and

2. Serve as a basis to begin the scoping process for an EIS.

DISCUSSION: This paragraph is introductory in nature and serves to capsulize the uses of the EAW as delineated in later substantive portions of this chapter. The current rules do not contain a comparable paragraph. This paragraph was added because the role of the EAW has been modified and the processes by which an EAW may be ordered have been

changed in the proposed rules. This paragraph was written in a format that stresses the dual function of an EAW. The scoping function is new to the Minnesota environmental review process.

This paragraph delineates the intent of these rules to maintain the EAW as a brief document in outline format. The basic role of the EAW is as a public disclosure document to inform the public of anticipated developmental activities which may be of concern to them and to assist government agencies in determining whether the project may have the potential for significant environmental effects. With this in mind, it is the intent of these rules to maintain the EAW as an easily reviewable document through which the reader may rapidly assess potential environmental effects that may arise because of the proposed activity.

The initial purpose of an EAW is relevant to activities for which it is not known at the proposal stage whether or not an EIS will be prepared for the activity. Upon notification of the proposal, it is the responsibility of the public to voice concerns relating to potential impacts. This purpose terminates in a decision by the RGU that either 1) the activity has the potential for significant environmental effects and an EIS will be prepared, or 2) the activity does not have the potential for significant environmental effects and no EIS will be prepared. This introductory statement of purpose relates to processes delineated at 6 MCAR §§ 3.027 and 3.028.

The second purpose of an EAW is relevant to activities for which it has been determined that an EIS will be prepared. This situation would arise in either of two situations: 1) When the proposed activity falls within a mandatory EIS category or is voluntarily being prepared by the proposer, or 2) When, pursuant to the review of the EAW, it has been determined by the RGU that an EIS shall be prepared for the proposed activity, i.e., the EIS is being prepared because of a discretionary action on the part of the RGU. The current rules are silent on the concept of scoping. This purpose terminates in a scoping decision that delineates the issues to be addressed in the EIS. This introductory statement relates to the substantive process delineated at 6 MCAR § 3.030.

Controversy has arisen as to whether the EAW is the most appropriate document to serve as the scoping document. The justification for this use is included within the justification for 6 MCAR § 3.030 B.

6 MCAR § 3.025 B. Mandatory EAW Categories.

> An EAW shall be prepared for any activity that meets or exceeds the thresholds of any of the EAW categories listed in 6 MCAR § 3.038 or any of the EIS categories listed in 6 MCAR § 3.039.

DISCUSSION: This paragraph identifies those situations in which it is known by the proposer at the onset that an EAW must be prepared for the activity proposed. This paragraph outlines the fact that EAWs must be prepared for any proposed activities that meet or exceed the thresholds of either an EAW or EIS category. The current rules do not contain an introductory statement of this nature.

The need for the preparation of an EAW in both situations is justified by reference to the two basic purposes served by the EAW as mentioned in the preceeding paragraph. If an activity meets the threshold of an EIS category an EAW is required to serve only as a scoping document for the EIS that is to be prepared. If the proposed activity meets or exceeds the threshold of the EAW category but does not meet the threshold of the EIS category the EAW will serve both purposes delineated in the paragraph above. That is, the EAW will first serve as a public disclosure document to assist the RGU in making the determination of whether the EIS will be required and the EAW then is used as the basis for the scoping process if an EIS is required.

6 MCAR § 3.025. C. Discretionary EAWs.

An EAW shall be prepared:

1. When a governmental unit, with jurisdiction or approval authority over the proposed action, determines that, because of the nature or location of a proposed action, the action may have the potential for significant adverse environmental effects.

2. When a governmental unit, with jurisdiction or approval authority over a proposed action, determines, pursuant to the petition process set forth in 6 MCAR § 3.026, that, because of the nature or location of a proposed action, the action may have the potential for significant adverse environmental effects.

3. Whenever the EQB determines that, because of the nature or location of a proposed action, the action may have the potential for significant adverse environmental effects.

DISCUSSION: This paragraph set forth those situations in which an EAW will be prepared as a result of a discretionary decision on the part of the RGU or the EQB. This paragraph is included to outline those situations for the reader.

Subparagraph one relates to 6 MCAR § 3.024 B. This paragraph is included to delineate the situation in which the governmental unit with jurisdiction over a proposed activity makes a determination on their own initiation that the activity warrants the preparation of an EAW. This situation is likely to arise in instances where the governmental unit feels it has inadequate information to make an informed decision relating to the environmental effects of approving the activity. A governmental unit ordering an EAW pursuant to this paragraph will be designated as the RGU for that EAW. If, however, because of the nature of the activity a different governmental unit is clearly a more proper RGU, a different RGU may be designated pursuant to 6 MCAR § 3.024 E.2. This provision is identical in effect to the current rules.

Placing this broad discretionary authority in the hands of units of government with jurisdiction over a project is needed to promote environmental review with a minimum of procedural complication. The purpose of environmental review is to present adequate information to units of government making decisions relating to proposed activities. If that unit of government feels it does not have adequate information on which to base its decision, it should be free to obtain that information with a minimum of procedural detail.

Subparagraph two is included to delineate the situation where a proposed activity is brought to the attention of the unit of government via a citizen petition. The process by which citizens may petition units of government to review proposed activities is set forth in 6 MCAR § 3.026.

This procedure is substantially different from procedures relating to citizen petitions in the current rules. Under the current rules citizens were permitted to petition for an EIS via submission of the petition to the EQB. Under the procedures established by the amended legislation and implemented through these proposed rules, citizens are now permitted to petition directly to the RGU for the preparation of an EAW. The effect of this change is to bring citizen involvement into the process at an earlier stage and at a stage that entails less consequence for the proposer of the action. This provision allows activities to be brought to the attention of the RGUs with a minimum of procedural delays and cost to the petitioners or to the proposer of the activity.

Subparagraph three implements Minn. Stat. § 116D.04 subd. 2a (d) which authorizes the EQB to order the preparation of an EAW for activities that may have the potential for significant adverse environmental effects and for which an EAW has not been ordered by the governmental unit with the jurisdiction or approval authority. This paragraph was inserted as a back-up provision to cover unusual situations in which controversial activities would not be subjected to environmental review via other processes. This provision is identical in effect to the current rules.

The most likely situation which may call for the implementation of this rule would be under situations where new and unusal projects are being proposed for which existing state and local regulatory schemes have not been developed. A possible additional application would be in the situation where a local unit of government with jurisdiction is not taking proper control for the gathering of required information for an activity. It should be noted, however, that this secondary application would be very limited in that these rules provide for an established process through which these activities can be brought to the attention of a RGU. If the RGU fails to take responsible action providing for environmental review over the activity, the proper method of appeal is through district court and not to the EQB. Therefore, this provision would be utilized only in situations in which no definitive action was taken by the RGU.

This provision has received criticism as being an unnecessary retention of authority of the EQB. However, it has been retained in the belief that it is necessary to fulfill the overall responsibilities of the EQB as delineated in Minn. Stat. chs. 116C and 116D.

Introduction to 6 MCAR § 3.026 Petition Process

The petition process proposed in this rule is significantly different from the petition process under the current rules. The differences contained in this rule are the result of expressed statutory language and legislative history supporting the provisions contained herein.

To summarize the current rule - under the current rule concerned citizens may submit a petition containing the signatures of 500 persons to the EQB to request the preparation of an EIS on a project. It should be noted that there are no age or residency requirements for those signatures. It should also be noted that the petition is submitted to the EQB, and the EQB makes the determination of the validity of that petition. Moreover, this petition is a demand for the preparation of an EIS, not, as in the case of the proposed rules, an EAW.

The effect of this provision in the current rules has been that citizen petitions have created costly delays to project proposers often with little benefit to the signers of the petition or to identifying environmental effects of a proposed project. By requiring a petition at the EIS stage the effect was to delay citizen involvement until it was apparent that all other channels of action had been exhausted. This meant that by the time of the petition the parties to the action had become polarized with firm opinions as to the merits of the action. Under the proposed rules the petition is submitted at the EAW stage. That is, a petition is submitted to the RGU and the RGU decides whether an EAW should be prepared to get further information on the proposed activity. This change is intended to encourage the proposer, RGU, citizens, and other governmental units with jurisdiction to discuss differences in the early stage of project design. Consequences of the RGU's decision to order the preparation of an EAW are minimal in terms of cost and time delays as opposed to the current process.

Under the current rules the petition was submitted to the EQB. Upon submission of a petition to the EQB, a public meeting or hearing was ordered to allow all parties to present information. The cost of the public meeting was born by the taxpayer. Additional costs were incurred by the proposer, citizens submitting the petition, and local units of government participating in the action. Additional time delays

were incurred by noticing the public meeting or hearing, processing the record of the public meeting or hearing, and reaching a determination based upon that record. The process has forced the EQB into a quasi-judicial role of receiving an appeal from a prior governmental decision.

Under the rules as proposed the petition is submitted at an early stage directly to the RGU responsible for making the decision on the need for an EAW. If as a result of the RGU's consideration of that petition it is decided that no EAW need be prepared, the proper appeal for the citizens bringing the decision is directly to district court. This avoids the time delays and additional costs of intermediary hearing proceedings before the EQB. Further, resolution of the issue is at the final stage in contrast to the current process whereby the EQB determination is still appealable to the district court. Such appeal involves the proposer, local units of government, citizens, RGUs and the EQB in the additional cost and time delays of a court action.

Under the current rules the 500 signatures required for the petition was an arbitrary decision established in the statute. No age or residency requirements are required. The number of signatures required on the petition did not act as a deterrent to petitions. The fact that there were no age or residency requirements did not result in a substantial portion of the signatures being submitted by either non-residents or minors. In its consideration of the 1980 Amendments to the Environmental Policy Act the legislature specifically considered and rejected the concept of having age and residency requirements. In addition, the issue of numbers required for the petition was specifically addressed. The number 25 is designated at Minn. Stat. § 116D.04 subd. 2a (c). This number was chosen as being indicative of the fact that several persons had a concern about a proposed project, yet was not considered to be burdensome upon interested parties. The legislature considered numbers ranging from 1 person to 500 persons and settled on the number of 25 as being a reasonable number to insure proper functioning of the process.

It should be noted that time schedules used in this rule are maximum time periods. There are no provisions in 6 MCAR § 3.026, regarding decisions relating to a petition or the EAW preparation time, which preclude an RGU from operating in a more time efficient manner. An attempt was made to develop a definitive process to allow legitimate citizen concerns to be brought to the attention of the RGU and to provide a definitive time schedule to enable prompt resolution of these concerns by governmental units.

6 MCAR § 3.026 A. Petition.

Any person may request the preparation of an EAW on an action by filing a petition that contains the signatures and mailing addresses of at least 25 individuals.

DISCUSSION: This paragraph summarizes the above discussion relating to the right of concerned persons to initiate environmental review on projects. This paragraph delineates the statutory number requirement of 25 and is silent on the issue of age and residency. It should be noted that this paragraph contains the requirement for signatures as well as the mailing address of the petitioners. That requirement, also in the current rules, is incorporated to lessen the possibilities for forgery or fictitious names upon the petition and to provide an opportunity to contact all the petitioners should the need arise. Statutory authority for this paragraph is found at Minn. Stat. § 116D.04 subd. 2a (c).

6 MCAR § 3.026 B. Content.

The petition shall also include:

1. A description of the action;

2. The proposer of the action;

3. The name, address and phone number of the representative of the petitioners;

4. A brief description of the potential adverse environmental effects which will result from the action; and

5. Material evidence indicating that, because of the nature or location of the proposed action, there may be potential for significant adverse environmental effects.

DISCUSSION: This paragraph is included for the purpose of setting forth the proper contents of the petition to assure a uniform standard and to assure the inclusion of adequate information to enable prompt action by the RGU upon the petitions as submitted. This paragraph is similar in effect to the content requirements of the current rules. The major difference relates to the material evidence requirement stated in subparagraph 5.

Subparagraph one contains the requirement for the petition to contain a description of the proposed action to enable the RGU to adequately determine the subject of the petition. This description may be by name or title of the proposal or it may be by physical description of the action. This need not be a detailed description but should be sufficiently definitive to avoid ambiguity. The physical location should be contained in the description. This requirement is identical to the current rules.

Subparagraph two requires the petition to contain the name of the proposer of the action. The requirement is included for the purpose of avoiding ambiguity and to help assure that the proposer is informed of the controversy as early as possible. This requirement is identical to the current rules.

Subparagraph three requires the petition to contain the name, address and phone number of the representative of the petitioners. This requirement is included to assist the RGU in promptly contacting or notifying the petitioners of any action taken on the petition. It also relieves the RGU of the responsibility of notifying all persons signing the petition. This requirement is identical to the current rules.

Subparagraph four is included for the purpose of identifying those environmental impacts that are of primary concern to the persons signing the petition. This information is necessary for the RGU to adequately evaluate the potential merits of the petition. The applicable standard to accept or deny the petition is a demonstration that the action may have the potential for significant environmental effects. Because of this standard it is necessary that the petitioners define the environmental effects they anticipate will result from the action. This description is not intended to be an all inclusive listing, nor is it intended to limit the issues to be discussed relating to the project. The intent is solely to demonstrate that there may be potential adverse environmental effects. This requirement is similar to the current rules.

Subparagraph five is included because of a change in the statutory language requiring that citizen petitions contain material evidence demonstrating that, because of the nature or location of a proposed action, there may be potential for significant environmental effects. Minn. Stat. § 116D.04 subd. 2a (c) requires the material evidence provision as a safeguard against the submission of frivolous petitions. This provision requirement should not be a comprehensive analysis of scientific evidence demonstrating potential adverse effects. Rather, the intent is to require a good faith presentation by the petitioners demonstrating a reasonable persons standard that significant adverse environmental effects may result from the proposed action. The determination of whether the material evidence meets that good faith demonstration is made by the RGU. The phrase "material evidence" is not included in the current rules; however, a similar requirement is incorporated. The function of the material evidence provision is to bring legitimate concerns to the attention of the governmental unit. It

is the responsibility of the governmental unit to appropriately consider these concerns in a manner that reflects the best interests of the public. If detailed information toward that end is required, it is the duty of the proposer and the governmental unit to obtain it.

6 MCAR § 3.026 C. Filing of Petition.

The petition shall be filed with the EQB for a determination of the RGU.

DISCUSSION: This procedure is required by Minn. Stat. § 116D.04 subd. 2a (c). This paragraph is included to clarify for the reader the filing procedures for a citizen petition. Under the current rules the petition for an EIS is filed with the EQB. Under the proposed rules, whereby the petition is evaluated by the RGU, the preparers of the petition may be confused as to who the proper RGU should be for a particular action. This provision was therefore included to provide a standard means of filing petitions. All petitions are to be submitted to the EQB. The EQB in turn will evaluate the petition to determine which unit of government is most properly the RGU pursuant to the RGU selection procedures delineated at 6 MCAR § 3.024. This provides a simplified standard process and places the burden of determining of the RGU upon the EQB.

Concerns have been expressed via the public meeting process that time delays would result by submission to the EQB. This provision was retained, however, because designation of the RGU is a minor task that can be performed within hours of receipt of the petition and because the chance of error or controversy in designation would be much greater if left to the discretion of the petitioners.

6 MCAR § 3.026 D. Notice to Proposer.

The petitioners shall notify the action's proposer in writing at the time they file a petition with the EQB.

DISCUSSION: This provision was added because of concerns expressed by developers that a citizen petition may inadvertantly be misplaced, resulting in time delays for the proposer. The intent of this provision is to allow the proposer to become involved early in the process to attempt to resolve concerns of the petitioners and to provide required information to the RGU making the decision. This in turn enables the RGU to resolve the issue as to whether an EAW should be prepared on the activity in a timely manner. The current rules do not contain a notification provision for citizen petitions.

Citizen groups have provided comment that it is unfair to place them in a position of potential harassment. They have suggested the alternative that the EQB notify the proposer at the time of designation of RGU. This is a potential alternative; however, it was not incorporated because the harassment argument did not appear to be justified by the prior history of the rules and because it was considered advisable to encourage direct contact between parties early in the proceedings.

6 MCAR § 3.026 E. Determination of RGU.

The EQB's chairperson or designee shall determine whether the petition complies with the requirements of 6 MCAR §§ 3.026 A. and B. 1., 2., and 3. If the petition complies, the chairperson or designee shall designate a RGU and forward the petition to the RGU within five days of receipt of the petition.

DISCUSSION: This paragraph was included for the purpose of clearly delineating the EQB's responsibilities upon receipt of a petition. This paragraph states that, upon receipt of a petition, the EQB shall determine whether it complies with the requirements of having the signatures and addresses of 25 individuals; a description of the action; an identification of the proposer of the action; and a name, address, and phone number of a representative of the petitioners. If the petition complies with those four requirements and presents information on the environmental impacts and material evidence requirements, it is deemed adequate

for the purposes of the EQB. The EQB is then required to make a determination of which unit of government is most properly the RGU pursuant to the selection procedures at 6 MCAR § 3.024. The EQB shall then designate that unit of government as the RGU. The EQB shall submit the petition to that RGU within five days of its receipt. The five day requirement was added to the paragraph in response to concerns that the petition may inadvertently become lost or fail to be acted upon by the EQB. This is a maximum time period. It is likely that this task will be accomplished within one day of receipt.

This process of evaluation of the petition will be a non-substantive evaluation to determine whether it contains the regulatory requirements in form as opposed to substance. Substantive portions of the petition (that is, the description of the potential adverse environmental effects and a listing of material evidence of the potential for significant adverse environmental effects) are to be evaluated by the RGU.

Designation of the RGU by the EQB may be challenged pursuant to 6 MCAR § 3.024 E. Responsibility of designating the appropriate RGU was assigned to the EQB because of the EQB's central position in being aware of the regulatory requirements of other state agencies and its frequent contact with local units of government.

6 MCAR § 3.026 F. EAW Decision.

The RGU shall order the preparation of an EAW if the evidence presented by the petitioners or otherwise known to the RGU demonstrates that, because of the nature or location of the proposed action, the action may have the potential for significant adverse environmental effects. The RGU shall deny the petition if the evidence presented in the petition and otherwise known to the RGU fails to demonstrate the action may have the potential for significant adverse environmental effects. The RGU shall maintain, either as a separate document or contained within the records of the RGU, a record of its decision on the need for an EAW.

DISCUSSION: This paragraph is included for the purpose of setting forth the standard for the RGU to use in the determination of the adequacy of the evidence pertaining to the potential for adverse environmental effects. This standard is set forth at Minn. Stat. § 116D.04 subd. 2a (c). The decision and action by the RGU is a final decision and if the aggrieved party desires to appeal this decision the proper method of appeal is to the district court in the district where the activity is to take place. The appeal process is set forth at Minn. Stat. § 116D.04 subd. 10.

This paragraph also requires the RGU to maintain a record of its decision documenting why it determined an EAW was or was not required. The record may be maintained as part of other records relating to the proposed activity or it may be a separate document whichever method the RGU determines is most efficient. The purpose of this record is to demonstrate that the concerns of both parties were listened to and a decision was made based on the merits of the record. The alternative of deletion of the requirement of a record of decision was recommended by state agencies as being unnecessary paperwork. This alternative was rejected in the belief that the public has a right to be informed of the basis for decisions affecting their interests.

6 MCAR § 3.026 G. Timing

The RGU has 15 days from the date of the receipt of the petition to decide on the need for an EAW.

1. If the decision must be made by a board, council, or other similar body whch meets only on a periodic basis, the time period may be extended by the RGU for an additional 15 days.

2. For all other RGUs, the EQB's chairperson may extend the 15 day period by not more than 15 additional days upon request of the RGU.

DISCUSSION: The basis for this paragraph is statutory as per Minn. Stat. § 116D.04 subd. 2a (c). This paragraph is inserted to insure that the RGU takes prompt action on a petition to minimize the potential cost and time delays generated by the petitions. By reference to the definition of days at 6 MCAR § 3.022 B., it should be noted that the fifteen day period allows the RGU three weeks to act upon the petition from the date it is received by the RGU.

Subparagraph one is added to cover situations where decisions on the need for an EAW pursuant to submission of a citizen petition are made by the governing body of a unit of government which meets infrequently. For example, many smaller units of government meet on a monthly basis. This paragraph allows the RGU to extend the original 15 day period by an additional 15 days to accommodate its regular meeting schedule. This provision provides that an additional three week period prior to taking action upon an EAW.

Subparagraph two was added to the timing provision to accommodate situations in which an RGU may not be able to comply with the 15 day time period. In such instances the RGU may request an extension of up to 15 additional days time from the EQB's chairperson. This provides for an additional three week period to make the decision as to the need for an EAW. Approval of the EQB's chairperson is required to emphasize that the extension provision should be requested only in cases of real need and deadlines should be treated seriously.

6 MCAR § 3.026 H. Notice of Decision.

> The RGU shall promptly notify, in writing, the proposer and the petitioner's representative of its decision. If the decision is to order the preparation of an EAW, the EAW must be prepared within 25 working days of the date of that decision, unless an extension of time is agreed upon by the proposer and the RGU.

DISCUSSION: This provision was added for the purpose of having a definitive statement from the RGU to designate when the proposer is free to recommence the action after a petition has been submitted. The current rules have a significantly different petition process and do not have a specific provision for notifying the parties.

This paragraph further provides a set time period for the RGU to complete the EAW. The 25 working day time period stated in this rule was reached through discussion and comment pursuant to public meetings on these rules. Comments regarding a workable period of time ranged from 15 days to 60 days from the date of decision. It should be noted that, pursuant to the definition of days, a 15 day time period is three weeks, 25 working day time period is five weeks and a 60 day time period is approximately nine weeks. An additional provision in this paragraph states that this time period may be extended on mutual agreement by the proposer and the RGU. The proposer and the RGU are the main parties normally affected by stringent time requirements. Comments received by potential proposers expressed a preference for stringent time schedules, while potential RGUs indicated a preference for more flexible time schedules.

Introduction to 6 MCAR § 3.027 EAW Preparation and Distribution Process

This rule is presented as a definitive outline for RGUs and proposers as to the proper content of an EAW and the proper procedures to be used in preparing and distributing the EAW. The process contained in this rule is not significantly different from the process in the current rules. An attempt was made to rewrite the process in a self contained and more definitive format. Major changes have been made in the EAW and the timing of the decision on need for an EIS.

The major changes in the proposed EAW preparation and distribution process, as compared to the current process, relate to the EAW form and the timing of the EIS decision. The change in format being proposed and the deletion of detailed questions relating to potential impacts is projected to result in substantial savings in preparation

costs and a more functional document because of its increased value as a public disclosure document. A greater willingness for governmental units to prepare EAWs is also expected.

The major change in the timing of the decision of need for an EIS is designed to place governmental units in a better position to make decisions. Under the current rules, governmental units were placed in the position of deciding on the need for an EIS before all sides of the issue were made public. Under the proposed process all comments are received and considered prior to the decision. This is designed to obtain as much relevant information as possible before a decision is reached and to promote a less adversarial role for the governmental unit in which decisions can be made based on the merits of the information.

6 MCAR § 3.027 A. EAW Content

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

1. Activity identification including project name, project proposer, and project location;

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

3. Activity description including a description 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;

4. Resource protection measures that have been incorporated into the project design;

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

6. 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.

DISCUSSION: This paragraph identifies the major areas of information that are required to be presented in the EAW. This list of EAW content requirements is not exhaustive. Additional information may be included at the option of the proposer or of the RGU. In certain situations it may be advisable to include additional information, especially if it is felt that the information may help resolve questions that are expected to arise in relation to the proposed activity. Supplementary information may be attached in whatever format the RGU considers most practical and understandable, including copies of permit or project design information previously prepared. It should be noted that the proposed content requirements are more flexible than the content requirements of the current rules. Changes were made in language to allow the RGU more versatility in developing a more relevant and more useable document. The EAW form is not included in the rule making process to allow the EQB the flexibility to update the form as the need arises.

Subparagraph one requires the EAW to contain a definitive description of the project by project name, project proposer, and project location. This information should be sufficiently detailed to enable the reader of the EAW to readily identify the project and the area that will be impacted by the proposed activity. The current rules also require this information.

Subparagraph two requires the EAW to contain information regarding the RGU and the proper contact person at the RGU which an interested person may contact for additional information. This subparagraph also mandates that the EAW operate as a self-contained docu-

ment by providing instructions for concerned persons to submit comments relating to the proposed activity or to otherwise become involved in the environmental review process. This information is necessary to expedite the review process by allowing prompt and efficient public involvement.

The current rules contain two procedural requirements that have been deleted.

1. Reason for preparation - this was deleted because it was not deemed necessary information for the EQB to effectively manage the program and it was not relevant to information required to assess potential impacts of the activity;

2. Finding of negative declaration or positive declaration - this was deleted because the proposed process is different. In the proposed process this determination is not made until after all comments have been reviewed. The RGU then makes the determination based upon the total information available.

Subparagraph three is included for the purpose of obtaining the definitive description of the proposed activity to enable the reader of the EAW to adequately assess potential concerns relating to the proposed activity and the natural resources that may be impacted by the project. For this to occur it will be necessary for the reader of the EAW to obtain a description of the size and scope of the project as well as the method of construction to be used in its development. Requirements include the listing of known impacts of the proposed activity and a description of the area of the proposed activity. An accurate area description is essential because the significance of environmental effects is frequently dependent upon the nature and location of an activity.

This content requirement is significantly different from that in the current rules. The primary difference involves the deletion of specific impact categories for the assessment of potential environmental impacts. These were deleted because under the current rules they were not deemed effective in accomplishing their intent.

1. A long check-off type listing of potential impact categories added length, frustration and cost to completion of the EAW form;

2. The information generated from these questions was still non-specific and of little value; and

3. The information was typically generated by proposers and did not reflect full disclosure of potential areas of impact.

As a result, a more flexible approach to the EAW form was developed. Emphasis is placed upon project description and location. Based upon this information, the burden of projection of potential impacts will be placed upon the reviewer of the EAW and the RGU. While at first glance this appears to be an onerous burden, in effect the same burden resulted under the current format. The proposed process merely removes the necessity of refutation of a stated assessment of no impact. The proposed format allows for a more open forum for questions relating to impacts. In addition, practically speaking, the EAW seldom generates surprises regarding potential impacts. Reviewers of the EAW are familiar with types of impacts typically associated with activities of various categories.

The draft of the proposed EAW format reflects this more open and abbreviated approach. The "Guide to the Rules" will contain suggestions for inclusion of supplementary information in cases where additional information is necessary and available or where it is known that a particular type of impact is likely to be of concern.

Subparagraph four requires a description of resource protection measures that the proposer has incorporated into the proposed project. Resource protection measures are intended to include project design characteristics that will tend to alleviate potential adverse environmental effects of the proposed activity. This content requirement is

included for the purpose of allowing the proposer to state what measures have been incorporated into the project design to alleviate adverse effects and to encourage the proposer to give prior consideration to methods of alleviating adverse environmental effects.

The current rules require information on the "mitigation of adverse environmental effects." The language in the proposed rules is deliberately changed to reflect the difference between mitigation measures and designed resource protection measures. "Resource protection measures incorporated into the design" are measures the proposer proposes as an attempt to minimize impacts. "Mitigation measures" more properly refers to measures that have been agreed to as a result of negotiations with governmental units or other interested parties pursuant to obtaining necessary approvals.

Subparagraph five is included for the purpose of identifying known impacts and issues of concern to the proposed activity. The experience of the environmental review program demonstrates that early identification of potential impacts and issues leads to more timely and cost effective resolution of problems. It is anticipated that the identification of these issues and the explanation of how complete information will be gathered and utilized to minimize impacts will alleviate citizen concerns that significant issues may in fact be ignored by the RGU or the developer. A discussion of major issues is also needed for scoping if an EIS is ordered for the activity. This information is required in the current rules in the more veiled context of a discussion of specific types of impacts. This altered format is proposed to promote a more open discussion and potential resolution of the issues.

Subparagraph six mandates that all known forms of government approval or review are to be listed on the EAW form. This requirement is included for the purpose of advising the reader of the EAW as to whether anticipated environmental effects will be reviewed and regulated by a governmental unit with jurisdiction over various aspects of the proposed activity. If it is known that conditions will be placed on the proposed activity by a government agency, the conditions should be stated in the EAW. Early discussion and information regarding resource protection measures and mitigatory measures are essential for a knowledgeable discussion of the potential adverse environmental effects. This provision recognizes the fact that certain projects may have several tiers of regulation each relating to different types of impacts. By informing interested parties of the protection measures under consideration, those parties are more likely to direct comments and suggestions to the most effective regulatory source.

The current rules require information relating to other governmental permits required. This proposed rule requires additional information relating to government financing, status of applications and known conditions. The information required in this subparagraph takes on added significance in relation to the scoping process of the proposed rules. The scoping decision must include a listing of known permits for which information will be gathered concurrently with the EIS process.

6 MCAR § 3.027 B. EAW Form.

1. The EQB shall develop an EAW form to be used by the RGU.

2. The EQB may approve the use of an alternative EAW form if a RGU demonstrates the alternative form will better accommodate the RGU's function or better address a particular type of action and the alternative form will provide more complete, more accurate, or more relevant information.

3. The EAW form shall be assessed by the EQB periodically and may be altered by the EQB to improve the effectiveness of the document.

DISCUSSION: This paragraph presents a brief discussion of the responsibilities for the development of the EAW form and procedures by which the EAW form may be altered to better present information relating to

proposed activities. This paragraph is necessary to delineate the responsibilities of the EQB and the RGU in terms of development of an EAW form. The intent is to provide for a flexible content requirement for the EAW form. At public meetings conducted pursuant to preparation of these proposed rules the issue was raised as to whether the EAW form should be subjected to hearing and should become part of these rules. It was decided that, in the interests of a more flexible and more useable form, the EAW form should not become a part of the rules. This allows the EQB the flexibility to modify the form if it is apparent that it is inadequate and it also allows more flexible use of alternative forms for types of projects which an RGU feels require unique information.

The EAW form currently being used is a twelve page document. Substantial comment has been received as to how the EAW form could be modified to lessen preparation time and costs and yet retain information necessary for public review. Drafts of possible new forms have been circulated to the public for comment. The current working draft of the EAW form is a four page document; copies of the EAW form used in conjunction with the current rules and copies of the draft proposed EAW form are available from the EQB office.

Subparagraph one designates the EQB as having primary responsibility in the development of the EAW form to be used in conjuction with these rules. The EQB was designated as the lead agency for development of the form because of the EQB's responsibilities in the implementation of the environmental review program and because of the EQB's central role in working with state agencies and other units of government. The current rules also designate the EQB as having primary responsibility for development of the EAW form.

Subparagraph two was added in recognition of fact that for certain types of projects a standard form may not be the best format for all reviewing all types of projects requiring the preparation of an EAW. The language in this subparagraph is intentionally permissive to allow the RGU greater flexibility in developing a form that will better address a particular type of activity. If a RGU feels an alternative form will better address a particular type of activity the RGU may submit the alternative form to the EQB for approval. The EQB will evaluate the form using the standard content requirements as established at 6 MCAR § 3.027 A. and determine whether the alternative form is preferable to the standard form.

It is expected that this provision would be used only in situations where a RGU is placed in a position of having to prepare many EAWs for a particular class of activity. In light of the abbreviated format of the proposed EAW, it would appear that the development of an alternative EAW form would not be practicable for the RGU unless many EAWs are being prepared or unless the RGU has an existing form it regards as preferable. Use of the standard form does not preclude the addition of information to supplement the questions on the standard form.

The current rules do not contain a provision that would allow EQB approval of alternative EAW forms.

Subparagraph three was added to provide the EQB with flexibility of modifying the form in the event that it becomes apparent that a new form would be preferable. This provision allows the EQB to modify the form without the necessity of having formal rule making hearings as long as the EQB complies with the content requirements delineated at 6 MCAR § 3.027 A. The current rules also allow the EQB to modify the EAW form as needed.

6 MCAR § 3.027 C. Preparation of an EAW.

1. The EAW shall be prepared as early as practicable in the development of the action.

2. The EAW may be prepared by the RGU, its staff or agent, or by the proposer or its agent.

3. If the proposer or its agent prepares the EAW, whether voluntarily or pursuant to a mandatory category or RGU determination, the proposer shall submit the completed data portions of the EAW to the RGU for its consideration and approval. The RGU shall have 30 days to add supplementary material, if necessary, and to approve the EAW. The RGU shall be responsible for the completeness and accuracy of all information and for decisions or determinations contained in the EAW.

DISCUSSION: This paragraph is added to assist in clarifying the responsibilities of the proposer, the RGU, and the EQB for the preparation of an EAW. The responsibilities are the same as those in the current rules; however, this proposed language provides a more explicit statement of those responsibilities.

Subparagraph one states that it is in the best interests of the interested parties that the EAW be prepared as early as possible in the development of the proposed activity. The early preparation of the EAW will facilitate prompt environmental review, as well as the involvement of all interested parties at an early stage in the development of the proposal. This should aid in the development of the most desirable proposal in the least adversarial context. This language is taken from the current rules.

Subparagraph two is added for the purpose of clarifying to units of government their proper role in the preparation of an EAW. In conjunction with this subparagraph it should be noted that it is the duty of the RGU to verify the accuracy of the EAW and the information contained in the EAW. With this in mind it is of no consequence as to who actually compiles the information and prepares the document. Through the past history of the rules it is most frequently the case that the proposer or an agent of the proposer will prepare the actual EAW document in consultation with the RGU. In situations where the RGU has the full time aid of a professional staff it may be that the staff will actually prepare the document in consultation with the proposer. An additional scenario is the situation where the local unit of government hires a consultant for the purpose of preparing an EAW. The choice typically depends on the complexity of the information needed and the degree to which the various parties are familiar with the environmental review processes. This provision is the same as under the current rules.

Subparagraph three is added for the purpose of delineating a starting time deadline for the environmental review process. Concerns were expressed by proposers over situations where the RGU may have strong reservations relating to a proposed activity. The RGU may intentionally delay preparation of the EAW thus forcing substantial time delays upon the proposer. This subparagraph is included to cover that possibility, however unlikely. In these situations the proposer has the option of submitting an EAW to the RGU for its consideration. This then starts a 30-day time period in which the RGU may review the information, adding to it if necessary, and bring the EAW to a final adequate form necessary for its decision of the need for an EIS.

It is the RGU's responsibility to verify that the information contained in the EAW is complete and accurate to the best of its knowledge. Information contained within the EAW need be only information that is available at the time of the proposal, as opposed to information that must be derived from data collection or research. If additional data collection or research is needed prior to final approval of a proposed activity, it is the function of the environmental review process to identify that information for inclusion in future documents.

6 MCAR § 3.027 D. Publication and distribution of an EAW.

1. The RGU shall provide one copy of the EAW to the EQB staff. This copy shall serve as notification to the EQB staff to publish the notice of availability of the EAW in the EQB Montitor. At the time of submission of the EAW to the EQB staff, the RGU shall also submit one copy of the EAW to:

   a. Each member of the EQB:

   b. The proposer of the action;

   c. The U.S. Corps of Engineers;

   d. The U.S. Environmental Protection Agency;

   e. The U.S. Fish and Wildlife Service;

   f. The State Historical Society;

   g. The Environmental Conservation Library;

   h. The Legislative Reference Library;

   i. The Regional Development Commission and Regional Development Library for the region of the project site;

   j. Any local governmental unit within which the action will take place; and

   k. Any other person upon written request.

2. Within five days of the date of submission of the EAW to the EQB staff, the RGU shall provide a press release, containing notice of the availability of the EAW for public review, to at least one newspaper of general circulation within the area where the action is proposed. The press release shall include the name and location of the action, a brief description of the activity, the location(s) at which copies of the EAW are available for review, the date the comment period expires, and the procedures for commenting.

3. The EQB staff shall maintain an official EAW distribution list containing the names and addresses of agencies designated to receive EAWs.

DISCUSSION: This paragraph is included pursuant to Minn. Stat. § 116D.04 subd. 2a (b) for the purpose of standardizing the procedures for notifying the public and interested governmental units of proposed activities requiring EAWs. The current rules do not contain an explicit distribution list but require the EQB to develop and maintain one. The list is included in the proposed rules to promote the concept of the rules being a self contained unit.

Subparagraph one lists the state agencies and members of the public that are to receive copies of the EAW. The intent of this paragraph is to include all persons that have interest in proposed activities requiring an EAW without being unnecessarily burdensome upon the RGU. For environmental review to function properly, it is necessary that interested parties be notified promptly and be encouraged to submit prompt comment in relation to proposed activities.

Minn. Stat. 116D.04, subd. 8, requires the Board to establish a procedure for early notice to the public of natural resource management and development permit applications and other state actions having significant environmental effects. Pursuant to this statutory requirement, the EQB publishes the EQB Monitor on a bi-weekly basis. This document serves as the official publication of the EQB relating to the environmental review program. Persons interested in monitoring the environmental review program or in receiving notification relating to

activities with the potential for significant adverse environmental affects should receive this publication. The subparagraph provides that the RGU must submit one copy of the EAW to the EQB staff. Upon receipt of this notification of the EAW the EQB staff will publish notice of availability in the Monitor. This serves as a standardized, no-cost mode of notice to the public of projects that may have the potential for significant adverse environmental effects.

In addition to the copy submitted to the EQB staff, the RGU is required to submit one copy of the EAW to each member of the EQB. The EQB is composed of representatives from each of the six major state agencies with jurisdiction relating to natural resources and environmental protection. These state agencies include: the Department of Natural Resources, Pollution Control Agency, Department of Health, Department of Transportation, Department of Agriculture, and the Department of Energy, Planning and Development. In addition to these state agencies the EQB has five citizen members and a representative of the Governor's Office. Therefore, pursuant to this requirement, twelve copies of the EAW are submitted to members of the EQB.

The copy of the EAW submitted to the agency representatives on the Board serves as notice to that agency of the proposed activity. Each agency is the responsible for review and comment on that EAW within the realm of the agency jurisdiction. Copies are required to be sent to the remaining members of the EQB to apprise them of projects subject to environmental review and to enable them to better perform their responsibilities regarding the implementation of the environmental review program. This distribution requirement is included in the distribution list developed pursuant to the current rules.

A copy of the EAW is required to be submitted to the proposer of the activity. This requirement is made for the purpose of apprising the proposer of the progress of the environmetal review process. This distribution requirement is not included in the distribution list developed pursuant to the current rules.

Copies of the EAW are required to be sent to three federal agencies. The United States Corps of Engineers has jursidiction for activities involving placement of fill in navigable waters and in regard to activities impacting the course, current or cross-section of navigable waters of the United States. The Corps of Engineer's St. Paul Office has requested to be included on the mailing list for copies of the EAW to better enable them to be apprised of potential activities that may fall within their jurisdiction. The United States Environmental Protection Agency has responsiblilities relating to a variety of potential resource impacts. The EPA Chicago Office has requested they be included on the mailing list to receive notification of proposed activities that may have the potential for significant adverse environmental effects. The United States Fish and Wildlife Service has resources in the State of Minnesota. The Fish and Wildlife Service Office at St. Paul, Minnesota has requested to be placed on the mailing list to receive copies of the EAWs relating to activities that may have the potential for significant adverse effect upon those resources. The distribution list developed pursuant to the current rules requires notification of the Corps of Engineers as the only federal agency.

The Minnesota State Historical Society has the responsibility of commenting upon activities that may potentially impact the state's historical resources. The State Historical Society has been included on the distribution list for an EAW for the purpose of facilitating their review of EAWs prepared pursuant to environmental review. The Historical Society is included in the distribution list of the current rules.

The Environmental Conservation Library of Minnesota at the Minneapolis Public Library and the Legislative Reference Library at the State Capitol have been designated as the central depositories for environmental review documents. These two libraries are included on the list for the purpose of maintaining the central file of all environmen-

tal review documents and for the purpose of providing a central reference point for interested persons to have access to environmental documents produced in the State of Minnesota. Both libraries are included in the distribution list developed pursuant to the current rules.

The Regional Development Commission and the Regional Development Library for the region in which the proposed activity will take place are included for the purpose of having a central depository in the area of the proposed activity. The State of Minnesota is divided into 13 regional development commissions and each RDC has a central library within the area of its jurisdiction. This distribution requirement is included in the distribution list developed pursuant to the current rules.

Local units of government with jurisdiction over the area where the proposed activity will take place are included on the EAW distribution list to facilitate local coordination and comment by local units of government impacted by the proposed activity. This distribution requirement is included in the distribution list developed pursuant to the current rules.

In addition to the requirements for the EAW distribution list it is required that a copy be furnished to any interested person upon written request for the EAW to the RGU. This requirement is included for the purpose of facilitating the legislative intent of allowing the public to comment on activities with the potential for significant adverse environmental effects.

Subparagraph two is included for the purpose of providing added notice to persons in the area where the proposed activity will take place. This notice is provided in the form of a press release to at least one newspaper of general circulation in that area. Local notice is provided in the form of a press release as opposed to legal notice because minimal costs are incurred by providing the information in press release form whereas costs to the RGU may be substantial if they are required to pay for printing of a legal notice.

Three possible forms of notice to the public were considered in relation to the requirements for publication and distribution of the EAW. The first, the EQB Monitor was selected for its low cost to the RGU, and the reliability of its publication in serving as a definitive date from which time schedules can be measured. The EQB Monitor has the disadvantage of having limited availability locally and being seldom if ever read on a local basis. The second form of publication considered and selected was that of the news release in a local newspaper. This form of publication has the advantage of being of very low cost to the RGU, being readily available at the local level and of being commonly read at the local level. This form of publication, however, has the disadvantage of being unreliable in the sense that the newspaper is not required to print the news release nor does the RGU have any control over when it would in fact be printed. Therefore, time deadlines are not easily definable with this method of publication. A third alternative for publication was considered but rejected. This alternative was legal notice in the local newspaper. This form of notice has the advantages of being reliable in having a definitive date from which time schedules can be gauged and of being available locally. However, it has the disadvantages of being very expensive to the RGU and, while available locally, legal notices are seldom read even at the local level. Therefore, the alternatives of the news release in the local paper and the EQB Montior publication were selected to minimize costs to the local unit of government while still maintaining a strong likelihood of obtaining local notice and establishing definable dates from which time deadlines for environmental review can be measured.

The requirements for the content of the press release were kept at a minimum requiring only that information necessary to enable the reader to identify the proposed activity and to know the time deadlines and proper procedures for obtaining further information.

The current rules require publication of EIS preparation notices and negative declaration notices.

Subparagraph three is included to place the responsibility for the maintenance of the EAW distribution list in the hands of a definable agency. The EQB was selected because of its central role and responsibilities in the environmental review program and because of its contact with other state agencies and local units of government. An official and easily accessible distribution list is necessary to assure proper notice of all interested agencies and to prevent errors, time delays, and unnecessarily duplicative work on the part of the RGUs. The current rules contain an identical provision.

6 MCAR § 3.027 E. Comment period.

1. A 30 day period for review and comment on the EAW shall begin the day the EAW availability notice is published in the EQB Monitor.

2. Written comments shall be submitted to the RGU during the 30 day review period. The comments shall address the accuracy and completeness of the material contained within the EAW, potential impacts that may warrant further investigation before the action is commenced, and the need for an EIS on the proposed action.

3. The RGU may hold one or more public meetings to gather comments on the EAW. Reasonable public notice of the meetings shall be given prior to the meetings. All meetings shall be open to the public.

DISCUSSION: This paragraph is included for the purpose of defining the period of time during which interested persons may become involved in providing comment on proposed activities. The 30 day comment period is statutory. Statutory authority for this provision is found at Minn. Stat. § 116D.04 subd. 2a (b). The 30 day comment period is the same as the review period in the current rules.

Subparagraph one defines the 30 day comment period and designates the starting date for the time deadline as commencing when the notice of availability is published in the EQB Monitor. The EQB Monitor was selected as the publication from which to measure this comment period because it is a readily definable publication with an established publication date and schedule allowing for a definitive date from which to measure the time period. The date of publication in the Monitor was used as the reference date for challenging EAWs in the current rules.

Subparagraph two is included for the purpose of defining the proper place for submission of comments. The RGU is responsible for receiving and responding to any comments received on the proposed activity. The second sentence of the subparagraph is to provide direction to the reader as to those substantive aspects of the EAW and of the proposed activity that are subject to public comment. It is these aspects of the proposed activity that are the most crucial in regard to the assessment of the potential need for futher study. Comments that fail to address the potential for adverse environmental effects do not require response by the RGU.

This provision is not contained in the current rules because this aspect of the process is new. Under the current rules, either a negative or positive declaration was issued at the time the EAW was approved by the RGU. If a person disagreed with the declaration, the proper procedure was to challenge that declaration by appeal to the EQB. Under the proposed rules, the declaration is not made until after all public comments are received. The declaration is made on the basis of the comments and other information available. This delay in the actual decision promotes a less adversarial process. If a person believes the RGU's decision is inconsistent with the record, the proper appeal is to district court.

Subparagraph three is included for the purpose of bringing to the attention of the RGU the point that if substantial controversy is expected on a proposed activity it may be in the public interest to hold one or more public meetings to assure the complete information is brought out concerning the proposed activity. The RGU may minimize additional responsibilities for public notice by providing public notice of the meeting at the same time notice of availability of the EAW is made. This notice would then be published in the EQB Monitor as well as in the press release of the local newspaper. The current rules do not contain language of this nature; however, in some controversial cases the parties have been advised to proceed according to this process.

Introduction to 6 MCAR § 3.028 Decision on Need for EIS.

An EIS shall be ordered for actions which have the potential for significant adverse environmental effects.

DISCUSSION: This rule is provided for the purpose of establishing a set procedure for the RGU to follow in assessing comments recieved on the EAW during the EAW comment period and making the determination of whether the proposed activity has the potential for significant adverse environmental effects. Although the standards and criteria guiding the decision have not changed significantly, the context in which the decision is made has been altered substantially.

Under the current rules, the responsible agency made the decision, as to whether an EIS would be prepared for an activity, prior to release of the EAW. That decision was contained as a negative or a positive declaration in the EAW. If a party disagreed with the decision, their only recourse was to challenge the decision. The 30 day comment period functioned as a review period during which time the interested parties could decide if they wished to challenge the decision. Challenge could be made by a member agency of the EQB, a public agency with jurisdiction, by a representative of 500 petitioners or in the case of a positive declaration by the project proposer. If a challenge was filed, the EQB made the determination as to whether the original decision was justified or whether the challenge should be upheld. A public hearing or informational meeting was held to facilitate the EQB in making the determination. The determination of the EQB was sbject to court challenge.

The most significant changes relating to the process of deciding the need for an EIS are: 1) the shifting of the time of the decision to a point after comments have been submitted; 2) the deletion of the double test in the determination of the need for an EIS; and 3) the elimination of the EQB as an intermediary appeal body for challenges to decisions on the need for an EIS. The intended effect of these changes is to promote a more timely and effective process. A primary benefit of the proposed process is expected to be the promotion of a less adversarial setting in making decisions relating to environmental review.

Under the proposed rules, the EAW is released without a determination as to the need for an EIS. The 30 day comment period functions as an opportunity for interested parties to provide comments as to whether an EIS is needed. At the end of the 30 day comment period the RGU considers all comments and other information and makes either a negative or a positive declaration as to the need for an EIS. A public hearing or informational meeting is optional for the RGU If an interested party wishes to challenge the declaration, the proper procedure is to bring the issue before the district court in the district where the activity is proposed.

This change has the effect of making the RGU directly responsible for its decisions. It is, therefore, essential that this rule be understood by local governments. The "Guide to the Rules" will contain a more graphic and more easily reviewable summary of this rule.

6 MCAR § 3.028 A. Decision-making Process

1. The decision on the need for an EIS shall be made in compliance with one of the following time schedules:

   a. If the decision is to be made by a board, council, or other similar body which meets only on a periodic basis, the decision shall be made at the body's first meeting more than ten days after the close of the review period or at a special meeting but, in either case, no later than 30 days after the close of the review period.

   b. For all other RGUs the decision shall be made no later than 15 days after the close of the 30 day review period. This 15 day period may be extended by the EQB's chairperson by no more than 15 additional days.

2. 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, if applicable, on the information gathered during the EAW process and the comments received on the EAW.

3. The RGU shall maintain a record supporting its decision. This record shall either be a separately prepared document or contained within the records of the governmental unit. If measures will be incorporated in the action which will mitigate the adverse environmental impacts of the action, the determination of the need for an EIS should be based on the impacts of the action with the application of the mitigation measures.

4. The RGU's decision shall be provided to all persons on the EAW distribution list pursuant to 6 MCAR § 3.027 D., to all persons and governmental units that commented in writing during the 30 day review period, and to any person upon written request. Upon notification, the EQB staff shall publish the RGU's decision in the EQB Monitor. If the decision is a positive declaration the RGU shall also indicate in the decision the date, time and place of the scoping review meeting.

DISCUSSION: The purpose of this paragraph is to establish a set time period for compliance in deciding on the need for an EIS and to establish procedural guidelines relating to that decision. The statutory basis for this paragraph is found at Minn. Stat. § 116D.04 subd. 2a (b). The statute imposes strict time deadlines on the RGU in arriving at a decision regarding the need for an EIS. The statute dictates that this decision shall be made within 15 days after the close of the comment period. The statute allows this 15 day period to be extended by an additional 15 days upon request of the RGU and approval by the chairperson of the EQB.

Subparagraph one is included for the purpose of clearly defining the statutory time schedules. In presenting these time schedules this subparagraph is broken into two basic situations, 1) where a decision is made by a regulatory body of the governmental unit, and 2) where the governmental unit has a definable person that will be responsible for making this decision.

If the decision must be made by a regulatory body that meets only on a periodic basis, the time allowed is the statutory maximum of 30 days after the close of the review period. A mandatory 10 day waiting period is included to allow the governmental unit proper time for reviewing and considering comments recieved in relation to the proposed activity. Therefore, this provision states that the decision shall be made at a meeting of the body between 10 and 30 days after the close of the review period. The 10 day waiting period provides an opportunity for the governmental unit to discuss comments provided and to resolve misunderstandings and misinformation. This waiting period also serves as a disincentive for prejudgment of the merits of the

activity. The full 30 day time period is allowed for these regulatory bodies at the request of representatives of cities and counties. For these governmental units, meetings are typically scheduled on a monthly basis. By restricting the time to 15 days, the effect of the rule would either be to necessitate a special meeting or to force the body to request a time extension for every EAW.

For other RGUs where decision-makers are available on a continual basis, as with most state agencies, the time schedule more closely follows that delineated by the statute. The decision must be made by these RGUs within 15 days after the close of the review period. For the RGU to extend this 15 day period they must request and recieve the extension from the EQB's chairperson on a case-by-case basis.

Subparagraph two is added for the purpose of defining the nature of the RGU's decision and the proper contents of that decision. The RGU's decision shall be in the form of either 1) a positive declaration requiring an EIS or, 2) a negative declaration that an EIS need not be prepared for the proposed activity. If the RGU issues a positive declaration, it shall include the proposed scope for the EIS. This proposed scope should be based upon the information gathered in the EAW process and upon the concerns of the RGU that caused them to issue the positive declaration. This proposed scope will be subject to modification at the formal scoping meeting to be held pursuant to 6 MCAR § 3.030. If the RGU's decision is a negative declaration, the reasons for that decision should be reflected in the record of decision supporting the decision. This provision is substantially different from the current rules because the current rules did not mandate a formal scoping process. The proposed rules also add the requirement of a record of decision for governmental units. The basis of that record of decision should be reflected in the RGU's decision as a measure of accountability to the public.

Subparagraph three requires the RGU to prepare a record of its decision indicating how the information presented in the comment period was used in arriving at its decision. The paragraph places no requirements as to the form of the record. The form may be at the discretion of the RGU, i.e. incorporated within existing documents or included as a separately prepared document, whichever the RGU determines to be most effective. The purpose of this record is to provide interested persons with the evidence that their information was in fact considered and also information as to how it was considered in terms of arriving at the decision. The last sentence of this paragraph states that known mitigatory measures or resource protection measures incorporated into the design of the project, which will lessen the adverse environmental effects of the action, should be considered in determining the need for an EIS. The consideration of these measures should be reflected in the record of the RGU's decision. The purpose for the inclusion of the mitigatory measures and resource protection measures in the decision is that the decision should be based on the actual impact anticipated from the project as proposed.

The current rules do not formally require a record of decision; however, most local governmental units have indicated it is a part of their normal procedures in being accountable to the public and documenting their actions in case of challenge. Comment has been received from some state agencies indicating that formally requiring a record of decision will entail increased cost and paperwork. The consideration of mitigatory measures in making a decision was required under the current rules also.

Subparagraph four is included to assure proper public notification of the RGU's decision. To assure notification of all interested persons this subparagraph requires notification to be sent to all persons that recieve copies of the EAW pursuant to the EAW distribution list and to all persons who have indicated their concerns regarding the proposed activity either by submission of comments or otherwise by submitting a request to be informed of future proceedings on the proposed activity. The EQB staff is one of the parties included on the EAW distribution list and therefore will recieve notice of the RGU's

decision. Upon receipt of this notification the EQB staff shall publish notice of the RGU's decision in the EQB Monitor. Such publication will serve as notification to marginally interested persons of the nature of the RGU's decision.

If the decision is a positive declaration, the RGU will also have the responsibility of setting up a formal scoping meeting to determine the scope of the EIS on the proposed activity. Notice of this scoping meeting shall be provided concurrently with the notice of a positive declaration. This notice requirement fulfills the requirement of notice for the scoping meeting pursuant to 6 MCAR § 3.030 C. 2. a.

Under the current rules, the EAW itself served as notification of the responsible agency's decision. If the decision was a negative declaration and it was not challenged, no further notice was required. In other cases, notice was required to be published in the EQB Monitor. The change in the proposed rules necessitates more definite notice. Prompt notice is especially necessary in light of the added time restrictions on the process. The current rules have no required scoping process and, therefore, did not include notification requirements relating to scoping.

6 MCAR § 3.028 B. Standard.

> In deciding whether an action has the potential for significant adverse environmental effects the RGU shall compare the impacts which may be reasonably expected to occur from the action with the criteria in this rule. The criteria are not exhaustive but are considered indicators of the impact of the action on the environment.

DISCUSSION: This paragraph is included for the purpose of providing guidance to the RGU relating to the proper standard to be applied in making its decision on the need for an EIS for the proposed activity. This standard states that the criteria listed at 6 MCAR § 3.028 C. shall be compared to the expected environmental effects from the proposed action. It should be noted that these expected effects are those effects after the mitigatory or resource protection measures have been incorporated into the proposed activity. Criteria listed for comparison are not presented as a comprehensive listing of all potential environmental effects that may be anticipated; they are presented as a guide to considerations of adverse environmental effects that are typically associated with activities subject to environmental review.

The use of this standard represents a substantial change from the current rules. The current rules outline a dual test: 1) a determination of whether the action is major; and 2) a determination of whether the action has the potential for significant environmental effects. In practice, this standard has been applied in conflicting and controversial ways.

The singular test concept is consistent with the National Environmental Policy Act, 43USC § 4331 et. seq. and with other states' legislation. In essence, the singular test approach states that if an activity has the potential for significant environmental effects it is by definition a major action.

The EQB has stated its preference for use of the singular test in the proposed rules as being a more direct approach and more in keeping with the legislative declaration of state environmental policy. This interpretation is also consistent with the decentralization of responsibility for the implementation of the environmental review program. The test of whether a project is major is more subjective than the test for significant environmental effects. Implementation of the test of whether a project is major would be likely to vary considerably among local and state agencies.

6 MCAR § 3.028 C. Criteria.

> In deciding whether an action has the potential for significant adverse environmental effects, the following factors shall be considered:

1. Type, extent, and reversability of environmental effects;

2. Cumulative potential effects of related or anticipated future actions;

3. The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and

4. The extent to which environmental effects can be anticipated and controlled as a result of other environmental studies undertaken by public agencies or the project proposer, or of EISs previously prepared on similar actions.

DISCUSSION: This paragraph presents a listing of the factors to be considered in determining the potential for significance of the environmental effects. This listing is taken from the current rules.

Earlier drafts of the proposed rules contained a more comprehensive listing of potential types of environmental effects that should be considered by the RGU. The more comprehensive list had been in response to local governmental unit requests for increased guidance as to what type of considerations constituted environmental effects. The more comprehensive listing was rejected because of state agency concerns that the listing would entail a detailed and extensive record of decision for every EAW prepared. Language from the current rules was therefore substituted and the "Guide to the Rules" will incorporate information to serve as needed guidance for the local governmental units.

Subparagraph one requires an RGU to consider specific types of environmental effects likely to result from a proposed activity. This consideration should be by impact type and intensity, as well as the ability to mitigate that type of effect and the ability of the ecosystem to rehabilitate itself. The alternative listing was primarily an elaboration of this subparagraph. It consisted of examples of specific categories of environmental effects that are likely to become issues.

In addition to the environmental impacts expected to result directly from a proposed activity in subparagraph two, the RGU is required to make an assessment of how it relates to other activities. Certain types of environmental impacts may be properly assessed only when viewed in conjunction with the impacts of other proximate or related activities. For a more complete understanding of the intent of this criteria, definitions of cumulative effects, phased actions, and related actions should be considered.

Subparagraph three takes into consideration additional regulatory activities by other governmental units. Mitigation measures ordered pursuant to other methods of regulation should be considered when determining the potential significance of environmental effects.

Subparagraph four relates back to the original purpose of environmental review. The purpose of environmental review is to provide adequate environmental information so the RGU can make informed decisions on the approval of proposed activities. If the information has already been gathered in some other form such that the information is available to the RGU without the preparation of an EIS there is no need to compile the information into an additional EIS form.

6 MCAR § 3.028 D. Related Actions.

When two or more actions are related actions, they shall be considered as a single action and their cumulative potential effects on the environment shall be considered in determining whether an EIS is required.

DISCUSSION: This paragraph was added for the purpose of providing guidance to the RGU for proper consideration of related actions. The term related actions is defined at 6 MCAR § 3.022 B. If the proposed activity is properly regarded as a related action, impacts of that acti-

vity should be considered in conjunction with the impacts of other related activities. For these activities, it is the cumulative effect of these impacts that is to be considered in the determination of the need for the EIS.

The effect of this paragraph is substantially different from the paragraph relating to related actions under the current rules. The definition of related actions in the current rules is a more lengthy definition and entails a triple test to be applied in regard to activities that may be considered as related actions: 1) they are of a similar type, are planned or will occur at the same time, and will affect the same geographic area; or 2) they are interdependent and would not be undertaken if subsequent stages or segments would not also occur; or 3) it can be determined that one of the actions will induce other actions of the same type or affecting the same geographic area.

The proposed definition embodies the intent of the first and third test of the definition as it appears in the current rules. The second test from the current rules was deleted in the belief that the test more properly applies to activities regarded as phased actions. The remainder of the language in the current rules in the paragraph on related actions is permissive language or language that does not substantively add to the rules as proposed. The proposed language is presented as a simplified and more concise manner of stating essentially the same content while clarifying the scope of the term related actions.

6 MCAR § 3.028 E. Phased Actions.

1. Phased actions shall be considered a single action for determination of need for an EIS.

2. In certain phased actions it will not be possible to adequately address all the phases at the time of the initial EIS. In those cases a supplemental EIS shall be completed prior to approval and construction of each subsequent phase. The supplemental EIS shall address the impacts associated with the particular phase that were not addressed in the initial EIS.

3. For proposed actions such as highways, streets, pipelines, utility lines, or systems where the proposed action is related to a large existing or planned network, the RGU may, at its option, treat the present proposal as the total proposal, or select only some of the future elements for present consideration in the threshold determination and EIS. These selections shall be logical in relation to the design of the total system or network. They shall not be made merely to divide a large system into exempted segments.

DISCUSSION: This paragraph is included for the purpose of advising the RGU of the proper method of assessing environmental effects of activities that may be regarded as phased. The term "phased action" is defined at 6 MCAR § 3.022 B. Essential elements of the phased action definition are that the activities are being proposed by the same proposer, will affect the same geographic area, and will take place in a definable period of time. A definitive period of time is not stated in the definition and rather left to the RGU to be interpreted on a project-by-project basis. Periods of time may vary depending upon the nature of the proposed activity. If the activity is regarded by the RGU as a phased action the cumulative effect of each phase of the action is to be considered in the determination of the need for an EIS.

Subparagraph one delineates the fact that phased actions are to be considered as single actions in the determination of need for an EIS. This approach is needed for complex activities to prevent what is known as "piecemealing". Any project, regardless of complexity, could potentially be broken down into segments such that no segment in itself would have significant environmental effects. However, the importance of the environmental impact is in relation to the project in total.

Subparagraph two is included to cover the situation of a project that may take place over an extended period of time or over an extended geographic area. An example of an activity that may fall within this subparagraph would be the construction of a major highway that may be phased in over several years. For these types of activities it may be impossible to adequately address the environmental effects of the entire project at the initial phase of the development. In these situations it is frequently the case that certain segments of the project may be developed prior to the development of the final proposal for later segments.

It should be noted that, in the situation of complex projects where the initial decision is essentially a "go/no go" decision, these activities should not be regarded as phased activities. Phased actions are more properly those actions where the need has been established initially and the primary purpose of environmental review is to resolve details regarding project design and construction.

Subparagraph three is included for the purpose of adding permissive language to allow the RGU greater flexibility in its treatment of environmental review on complicated or extended projects. It should be noted that this language applies to activities where a need has been established and the purpose of environmental review is to develop a design with minimal environmental impact.

Treatment of phased actions in the proposed rules is not significantly different from the manner of treatment under the current rules. The proposed rules, however, attempt to distinguish more clearly between phased activities and related actions and to delineate procedures for them more clearly.

Introduction to Chapter Thirteen: Environmental Impact Statement.

Chapter 13 is organized to include all portions of the rules relevant to the preparation, distribution and completion of an EIS. The procedures set forth in this chapter are detailed and important; however, in practice they will be applied to only a limited number of cases. It is not likely that the average local governmental unit will ever have occasion to implement the procedures set forth in this chapter. It will be an EQB staff function to assist local governmental units on a case-by-case basis to understand and implement these rules as the need arises.

Introduction to 6 MCAR § 3.029 Actions Requiring an EIS.

This rule is provided as an introductory summary of those situations in which it is possible that an EIS may be prepared. This rule serves the purpose of summarizing other more substantive portions of the rules to lessen the possibility of the reader overlooking a more substantive portion. It is projected that a relatively small number of EISs will be prepared in Minnesota in any given year pursuant to these rules.

6 MCAR § 3.029 A. Purpose of an EIS.

> The purpose of an EIS is to provide information for governmental units, the proposer of the action, and other persons to evaluate proposed actions which have the potential for significant adverse environmental effects, to consider alternatives to the proposed actions, and to institute methods for reducing adverse environmental effects.

DISCUSSION: This paragraph was incorporated into the rules at this point to identify for the reader the purpose of the processes to be followed. This paragraph was included to make the rules more understandable. The current rules do not contain a purpose paragraph of this nature.

6 MCAR § 3.029 B. Mandatory EIS Categories.

An EIS shall be prepared for any activity that meets or exceeds the thresholds of any of the EIS categories listed in 6 MCAR § 3.039.

DISCUSSION: This paragraph is included to point out to the reader that, if a proposed activity exceeds the thresholds of the mandatory categories for EISs as set forth in 6 MCAR § 3.039, it will automatically require the preparation of an EIS. The current rules did not contain mandatory category thresholds for EISs. Under the current rules a project specific determination was required for an EIS to be prepared. The requirement for the establishment of mandatory EIS categories in the proposed rules is statutory. This requirement is found at Minn. Stat. § 116D.04 subd. 2a (a). The intent of this legislative requirement is to make the environmental review process more predictable and to expedite environmental review by moving directly into the EIS preparation stages and by avoiding lengthy challenges to the need for an EIS.

6 MCAR § 3.029 C. Discretionary EISs.

An EIS shall be prepared:

1. When the RGU determines that, based on the EAW and any comments or additional information recieved during the EAW comment period, the proposed action has the potential for significant adverse environmental effects; or

2. When the RGU and proposer of the action agree that an EIS should be prepared.

DISCUSSION: This paragraph is included to delineate additional situations in which the preparation of an EIS is optional.

The purpose of subparagraph one is to point out that when, pursuant to the procedures set forth in Chapter 12, the RGU has made a determination that an EIS is necessary on the proposed project, the procedures set forth in Chapter 13 will apply to the preparation of that EIS. The subparagraph is included for the purpose of adding to the readability and continuity of the rules. This situation is likely to be the most common scenario for the preparation of an EIS.

Subparagraph two is added to delineate those situations where the RGU and the proposer discuss the proposed activity beforehand and mutually agree that an EIS should be prepared. This amounts to a voluntary EIS on the action on the part of the proposer. It should be noted that if a voluntary EIS is being prepared, an EAW still must be prepared for the activity. This situation is delineated as a separate situation from 6 MCAR § 3.029 C.1. because in the case of a voluntary EIS it is known prior to the preparation of the EAW that the EIS will be prepared and as a result a different time schedule will be in effect for the procedures to be followed in preparing the EIS. The time schedule to be followed in this situaion would be the same time schedule as the RGU would follow had the activity fallen within a mandatory EIS category. This time schedule, as it relates to the scoping period, is set forth at 6 MCAR § 3.030 C.1.

Introduction to 6 MCAR § 3.030 EIS Scoping Process

This rule is set forward as the initial procedure to be followed in the preparation of an EIS. This rule represents one of the major additions to the amended Environmental Policy Act. While the current rules do not prohibit the scoping of an EIS, a scoping process is not mandatory nor are there formal procedures to be followed for the purpose of scoping. The Environmental Policy Act as amended requires the EQB to set forth a formal scoping process to be followed prior to the actual preparation of an EIS. Legislative authority for this rule is found at Minn. Stat. § 116D.04 subd. 2a (e).

This rule has been designed in an effort to carry the RGU from the decision to prepare an EIS through to the actual commencement of EIS preparation. The process outlined is new to the State of Minnesota but has been demonstrated to be effective in accomplishing its objectives in other jurisdictions. The basic process outlined in this rule was patterned after the scoping process in the Council on Environmental Quality regulations and the State of Massachusetts scoping process.

6 MCAR § 3.030 A. Purpose.

The scoping process shall be used before the preparation of an EIS to reduce the scope and bulk of an EIS, identify only those issues relevant to the proposed action, define the form, level of detail, content, alternatives, time table for preparation, and preparers of the EIS, and to determine the permits for which information will be developed concurrently with the EIS.

DISCUSSION: This paragraph is incorporated at the beginning of the scoping process to identify for the reader the basic purpose of scoping. A formal scoping process has been initiated in the National Environmental Policy Act and has developed a record demonstrating its effectiveness in reducing the size and cost of an EIS and increasing EIS usefullness by making it a more relevant and less cumbersome document.The effectiveness of the process is highly dependent upon early open involvement of all interested parties.

6 MCAR § 3.030 B. EAW as Scoping Document.

All projects requiring an EIS must have an EAW filed with the RGU. The EAW shall be the basis for the scoping process.

1. For actions which fall within a mandatory EIS category or if a voluntary EIS is planned, the EAW will be used solely as a scoping document.

2. If the need for an EIS has not been determined the EAW will have two functions:

   a. To identify the need for preparing an EIS pursuant to 6 MCAR § 3.028; and

   b. To initiate discussion concerning the scope of the EIS if an EIS is ordered pursuant to 6 MCAR § 3.028.

DISCUSSION: This paragraph is somewhat repetitious of 6 MCAR § 3.025 A.; however, this language was inserted to reemphasize the role of the EAW in relation to the EIS. Comments received during the public meeting process indicated some confusion relating to the dual role of the EAW.

Subparagraph one notes that, if it is known at the onset that an EIS will be prepared, whether pursuant to mandatory category or voluntarily by the proposer, an EAW must still be prepared. In this situation, however, the EAW functions solely as a scoping document and as a result, the comment period and time for scoping decisions will be abbreviated.

Subparagraph two relates to activities for which it previously has not been determined whether or not an EIS will be prepared. In these situations, the EAW serves first as the basis for deciding the need for an EIS, and secondly (if it is decided that an EIS will be prepared) as the scoping document.

The alternative of having a different type of document, instead of the EAW, for the purpose of scoping for mandatory or voluntary EISs was considered but rejected. This alternative was proposed by representatives from industry as a means of speeding up the process. Upon analysis, however, it will be noted that the primary time delay is the public comment period. A second document would still encounter a need for a similar comment period. The scoping period as proposed represents a minimum of 30 and a maximum of 45 days for the scoping decision.

Alternative proposals did not reduce this time period sufficiently to warrant the confusion of adding an additional document. The EAW form as proposed provides sufficient flexibility to incorporate additional information relevant to the scoping meeting.

6 MCAR § 3.030 C. Scoping Period.

1. If the EIS is being prepared pursuant to 6 MCAR §§ 3.029 B. or C.2., the following schedule applies:

   a. The 30 day scoping period will begin when the notice of the availability of the EAW is published in accord with 6 MCAR § 3.027 D.1. This notice shall include the time, place and date of the scoping meeting.

   b. The RGU shall provide the opportunity for at least one scoping meeting during the scoping period. This meeting shall be held not less than 15 days after publication of the notice of availability of the EAW. Notice of the time, place and date of the scoping meeting shall be published in the EQB Monitor and a press release shall be provided to a newspaper of general circulation in the area where the action is proposed. All meetings shall be open to the public.

   c. A final scoping decision shall be issued within 15 days after the close of the 30 day scoping period.

2. If the EIS is being prepared pursuant to 6 MCAR § 3.029 C. 1., the following schedule applies:

   a. At least 10 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, and a press release shall be provided to a newspaper of general circulation in the area where the action is proposed. All meetings shall be open to the public.

   b. Within 30 days after the positive declaration is issued, 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 issued.

DISCUSSION: This paragraph distinguishes the applicable scoping periods that apply depending upon the reason for preparation of the EIS.

Subparagraph one relates to EISs being prepared pursuant to a mandatory EIS category or voluntarily by the proposer. In these situations the EAW comment period serves as the scoping period. Interested persons have 30 days to provide comments relating to the potential scope of the EIS.

For the scoping process to function properly, it is necessary to bring interested persons together to discuss issues raised by the proposed project. To expedite the scoping process, provision is made to conduct this meeting during the scoping period. The 15 day waiting period is necessary to allow members of the public an opportunity to receive notice and consider issues to be raised at the meeting. It should be noted that, by virtue of the definition of days, 15 days means three weeks. Therefore, the scoping meeting must be held betwen 21 and 30 days after publication of notice of availability of the EAW. Publication requirements are the same as for an EAW prepared for projects for which a determination of need for an EIS has not been made,

i.e. in the EQB Monitor and in form of a press release to the local newspaper.

A 15 day period after close of the comment period is allowed for the RGU to make its decision regarding the scope of the EIS. It should be noted that, by virtue of the definition of days, 15 days means approximately three weeks. This time period has been criticized by state agencies as being too short and by industry representatives as being too long. It must be noted that this represents a maximum time period. In noncontroversial cases it should be possible to issue the decision in a much shorter time period.

Subparagraph two relates to EISs being prepared pursuant to a determination of need by the RGU based on comments and information gathered during the EAW comment period. In these cases, comments received during the comment period become a part of the record to determine the scope of the EIS and an additional period of time is required to conduct a public meeting to obtain comments relating to the scope.

The scoping period is the time period between publication of notice of the positive declaration and the date of the scoping meeting. The RGU may extend the comment period beyond the date of the scoping meeting as long as it complies with the overall time constraints of the process. As set forth in these proposed rules, the scoping period extends from date of publication of the positive declaration in the EQB Monitor to the date of the scoping meeting, which must be ten days to 20 days after publication of the positive declaration in the EQB Monitor. It should be noted that, by virtue of the definition of days, ten days means approximately two weeks. Therefore, in reality, the scoping period would be a minimum of 14 days and a maximum of 20 days.

Notice requirements for the scoping meeting are the same as the notice requirements pursuant to subparagraph one, i.e. publication in the EQB Monitor and a press release to the local newspaper. To meet the intent of this requirement, notice of the time, date and place of the scoping meeting should be included along with the statement of proposed scope in the notice of the positive declaration.

To comply with the legislative intent of having definitive time deadlines, subparagraph 2b sets a deadline for the RGU to make its final scoping decision. This provision again distingishes between RGUs that have internal staff with authority to make the decision and RGUs which must make the decision by action of a board or council. If the decision is to be made by internal staff, the RGU has 30 days from issuance of the positive declaration to make the decision. Comparing this to the time requirements for the scoping meeting, this means that the RGU has from ten to 16 days following the scoping meeting to issue its final scoping decision. If the decision is to be made by action of a board or council, a 15 day extension is provided to allow the board or council to make the decision at its regularly scheduled meeting, provided it is within 45 days of the issuance of the positive declaration. This time extension must be provided to accommodate monthly board meetings which may not conveniently fall within the initial 15 day period.

Needless to say, the time schedules set forth in these rules are tricky. The necessity of establishing rigid time schedules is in keeping with the legislative intent. An attempt has been made to cover all possible gaps in the schedule with a maximum time period for compliance. Comments in support of time constraints at all steps of the process have been received from representatives of industry. An effort will be made to make the time guidelines as understandable as possible in the "Guide of the Rules."

6 MCAR § 3.030 D. Procedure for Scoping.

1. Written comments suggesting issues for scoping or commenting on the EAW may be filed with the RGU during the scoping period. Interested persons may attend the scoping meeting to exercise their right to comment.

2. Governmental units and other persons shall be responsible for participating in the scoping process within the time limits and in the manner prescribed in these rules.

DISCUSSION: This paragraph is inserted to provide explicit direction for interested persons and governmental units to become involved in the scoping process. Language contained herein is somewhat permissive and the intent is implicit in other provisions. This language was added, however, as an effort to emphasize the importance of public involvement at the scoping stage. For scoping to be effective, issues must be raised prior to the scoping decision. The scoping process is relatively new and little case law has developed regarding the relative rights to challenge the adequacy of an EIS because of failure to address an issue outside the spectrum of the scoping decision. It is the opinion of EQB staff, however, that the rights of interested persons are best protected by introducing the issue into the scoping process to establish a record of consideration of the issue.

6 MCAR § 3.030 E. Scoping Decision.

1. The scoping decision shall contain at least the following:

   a. The issues to be addressed in the EIS:

   b. Time limits for preparation, if they are shorter than those allowed by these rules;

   c. Identification of the permits for which information will be gathered concurrently with EIS preparation;

   d. Identification of the permits for which a record of decision will be required; and

   e. Alternatives which will be addressed in the EIS.

2. The form of an EIS may be changed during scoping if circumstances indicate the need or appropriateness of an alternative form.

3. The scoping decision shall identify potential impact areas resulting from the action itself and from related actions which shall be addressed in the EIS.

4. The issues identified in scoping shall include studies requiring compilation of existing information and the development of new data if the new data can be generated within a reasonable amount of time and the costs of obtaining it are not excessive.

5. After the scoping decision is made, the RGU may not amend the decision without the agreement of the proposer unless substantial changes are made in the proposed action or substantial new information arises relating to the proposed action. 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.

DISCUSSION: This paragraph is included to provide guidance to the RGU as to the proper contents of the scoping decision.

Subparagraph one identifies the scoping contents that will substantively limit the contents of the EIS.

Issues that may contribute to the potential for significant environmental effects should be specifically enumerated as well as the depth to which that issue will be investigated. Although not required by the rules, issues that were considered but rejected should be listed as a means of informing the public and establishing a record in the event of future challenges.

These rules establish specific time deadlines for the preparation of an EIS. If the parties agree to a different time schedule, this schedule should be noted in the scoping decision to facilitate proper public input.

Minn. Stat. 116D.04 subd. 3a places a time restriction upon issuance of permits for which information was gathered concurrently with EIS preparation. This statutory requirement is incorporated in these rules at 6 MCAR § 3.031 H. To facilitate this requirement and to prevent later challenges, the applicable permits should be identified at the scoping stage. It should be noted that the EAW content requirements at 6 MCAR § 3.027 A.6. require a listing of all known permits in the EAW. This identification, therefore, involves a review of that listing to determine which of those permits will require similar information to the information gathered during the preparation of the EIS.

These rules require each permitting agency to prepare a record of its decision relating to permits on projects for which an EIS has been prepared. This requirement is found at 6 MCAR § 3.031 H.2. Comment has been received from state agencies that, if applied literally, this could be a large and unproductive burden. Projects requiring EISs are typically large complex projects which may involve many relatively minor permits or approvals that are largely pro forma. To require a record to be prepared on each of these decisions would serve only to increase paperwork. It is, therefore, provided that those key discretionary decisions, which relate to the feasibility of a project, be identified at the scoping stage. Governmental units must then justify their decision on that permit based on the information presented in the EIS.

A similar issue arises in relation to alternatives. Applied literally, thousands of alternatives may be developed for any specific proposal. The intent of this content requirement is for the RGU to establish which alternatives are definable and substantively different from other alternatives. The no construction alternative should be addressed in every case.

Subparagraph two recognizes the fact that the EIS format established at 6 MCAR § 3.031 B.2. may not be the most appropriate format in all cases. This allows the RGU discretion to alter the format if it is deemed appropriate. It should be noted, however, that the EIS format presented in these rules represents a basic model and the core information required should not be deleted without substantial reason supporting the deletion.

Subparagraph three makes reference to the requirement to consider impacts resulting from other actions that may be induced by the proposed activity. In these situations it is the cumulative impact that is the actual concern. The extent to which other actions are to be considered related actions should be delineated in the scoping decision.

Subparagraph four refers to the distinction between original data and existing information. In general, an EIS is 1) limited to information that has already been documented, or 2) to original data collection that can be completed within the time period of EIS preparation at reasonable cost to the proposer, or 3) to original data collection that is limited primarily to the proposed project. This subparagraph requires the delineation in the scoping decision of the scope and extent of information to be gathered.

Subparagraph five is included at the request of developers as a check on RGUs arbitrarally and unilaterally altering the scope of the EIS. The provision allows for the RGU to unilaterally alter the scope if substantial new information comes to light or if the proposer alters the proposal in a manner that may substantially alter the impacts of the proposed action. Barring either of those two conditions, the consent of the proposer is required to alter the scope of the EIS. The alterantive of requiring the consent of parties in opposition to the proposal was considered and rejected. Reasons for rejection included the impracticality of identifying one representive of the opposing parties and the

possibility of stalemating the basic purpose of the EIS. In consideration of the rights of the public to be promptly informed of an alteration in scope, notification in the EQB Monitor of an amendment to a scoping decision was added. It must be noted that if opposing parties disagree with the EIS content, they have the opportunity to present their views at the draft EIS meeting and again at the decision of adequacy of the final EIS.

6 MCAR § 3.030 F. EIS Preparation Notice.

An EIS preparation notice shall be published within 45 days after the scoping decision is issued. 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 action will occur. The notice shall contain a summary of the scoping decision.

DISCUSSION: This paragraph is added for the purpose of establishing a specific time deadline by which the RGU must begin prepartion of the EIS. This paragraph allows the RGU 45 days after it decides upon the scope of the EIS to locate consultants and establish a schedule for completion of the EIS. The 45 day time schedule has been criticized by state agencies as being inadequate to allow for the open consultant selection process required of state governmental units. Comments recieved from private consultants and developers indicate they believe the time allotment is adequate.

The date of publication of the EIS preparation notice is an important date as it commences the time allotted for preparation of an EIS to determination of adequacy of the EIS.

The EIS preparation notice requirements are consistent with other notice requirements of these rules, i.e. publication in the EQB Monitor and a press release to the local newspaper. The publication date in the Monitor is the official date for commencement of the time period allowed for EIS preparation. It should be noted that, pursuant to Minn. Stat. § 116D.04 subd. 2a (e), the EIS preparation notice must contain a summary of the final scoping decision. This is the only public notice requirement for the final scoping decision. The alternative of adding an additional notice requirement immediately after the final scoping decision is made was considered and rejected. It was determined that parties seriously interested in the scoping decision will be involved enough to request the decision as soon as it is made. The final scoping decision is not regarded as a final decision. This decision may be modified by the RGU as per 6 MCAR § 3.030 E. 4. If a party chooses to challenge the final scoping decision, the proper form of appeal is a court challenge of the adequacy of the final EIS.

6 MCAR § 3.030 G. Consultant Selection.

The RGU shall be responsible for expediting the selection of consultants for the preparation of the EIS.

DISCUSSION: This paragraph is included in compliance with Minn. Stat. § 116D.04 subd. 5a (j). This paragraph is incorporated for the purpose of placing the RGU on alert that the rigid time guidelines necessitate early selection of consultants. The alternative of establishing a set procedure for RGUs to follow in the consultant selection process was considered and rejected. That alternative was rejected because of the broad diversity in RGU capabilities relating to EIS preparation, diversity in internal restrictions on selection of consultants, and regional differences that may affect the feasibility of the procedures. The proposed procedure was selected because it allows each RGU to function within its own constraints. The "Guide to the Rules" will contain suggestions that may assist RGUs on a case-by-case basis.

Introduction to 6 MCAR §3.031 EIS preparation and distribution process.

This rule incorporates the basic procedures required in the actual preparation, distribution and review of an EIS. The procedures

set forth in this rule are not significantly different from the EIS procedures of the current rules. The procedures have been restructured in an effort to consolidate relevant provisions; and certain measures have been expanded upon in an effort to highlight provisions that may expedite the process or make review more efficient.

This rule is presented to establish some of the more substantive and complicated requirements of the environmental review program. An attempt was made to make the process as readable as possible, however, space constraints preclude use of a commonly readable format with equal content. The need of a very readable format is somewhat mitigated by the fact that it is not likely the average governmental unit will be directly involved in the preparation of an EIS. It is more likely that governmental units so involved will have professional staff on line. A more flexible explanatory format will be used in the "Guide to the Rules" and EQB staff will be available for assistance in implementation of these provisions.

6 MCAR § 3.031 A. Interdisciplinary preparation.

An EIS shall be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts. The RGU may request that another governmental unit help in the completion of the EIS. Governmental units shall provide any unprivileged data or information, to which it has reasonable access, concerning the subjects to be discussed and shall assist in the preparation of environmental documents on any action for which it has special expertise or access to information.

DISCUSSION: This paragraph is included as introductory language relating to preparation of the EIS. The language is intended to promote cooperation between governmental units and areas of specialization within governmental units. Mandatory language is included relating to freedom of access to data under the control of a governmental unit that is required to facilitate preparation of the EIS.

6MCAR § 3.031 B. Content.

1. Writing. An EIS shall be written in plain and objective language.

2. Format. An RGU shall use a format for an EIS that will encourage good analysis and clear presentation of the proposed action including alternatives to the action. The standard format shall be:

   a. Cover sheet. The cover sheet shall include:

      (1) The RGU;

      (2) The title of the proposed action that is the subject of the statement and, if appropriate, the titles of related actions, together with each county or other jurisdictions, if applicable, where the action is located;

      (3) The name, address, and telephone number of the person at the RGU who can supply further information;

      (4) A designation of the statement as a draft, final or supplement;

      (5) A one paragraph abstract of the EIS; and

      (6) If appropriate, the date of the public meeting on the draft EIS and the date following the meeting by which comments on the draft EIS must be received by the RGU.

b. Summary. The summary shall stress the major findings, areas of controversy, and the issues to be resolved including the choice among alternatives.

c. Table of contents.

d. List of preparers. This list shall include the names, together with their qualifications, of the persons who were primarily responsible for preparing the EIS or significant background papers.

e. Project description. The proposed action shall be described with no more detail than is absolutely necessary to allow the public to identify the purpose of the action, its size, scope, environmental setting, geographic location, and the anticipated phases of development.

f. Governmental approvals. This section shall contain a comprehensive listing of all known governmental permits and approvals required for the proposed action including identification of the governmental unit which is responsible for each permit or approval. In addition, those permits for which all necessary information has been gathered and presented with the IES shall be identified.

g. Alternatives. Based on the analysis of the proposed action's impacts, the alternatives section shall compare the environmental impacts of the proposal with any other reasonable alternatives to the proposed action. Reasonable alternatives may include locational considerations, design modifications including site layout, magnitude of the action, and consideration of alternatives means by which the purpose of the action could be met. Alternatives that were considered but eliminated shall be discussed briefly and the reasons for their elimination shall be stated. The alternative of no action shall be address.

h. Environmental, economic, employment and sociological impacts. For the proposed action and each major alternative there shall be a thorough but succinct discussion of any direct or indirect, adverse or beneficial effect generated. The discussion shall concentrate on those issues considered to be significant as identified by the scoping process. Data and analyses shall be commensurate with the importance of the impact, with less important material summarized, consolidated or simply referenced. The EIS shall identify and briefly discuss any major differences of opinion concerning impacts of the proposed action and the effects the action may have on the environment.

i. Mitigation measures. This action shall identify those measures that could reasonably eliminate or minimize any adverse environmental, economic, employment or sociological effects of the proposed action.

j. Appendix. If a RGU prepares an appendix to an EIS the appendix shall include, when applicable;

(1) Material prepared in connection with the EIS, as distinct from material which is not so prepared and which is incorporated by reference;

(2) Material which substantiates any analysis fundamental to the EIS; and

(3) Permit information that was developed and gathered concurrently with the preparation of the EIS. The information may be presented on the permitting

agency's permit application forms. The appendix may reference information for the permit included in the EIS text or the information may be included within the appendix, as appropriate. If the permit information cannot conveniently be incorporated into the EIS, the EIS may simply indicate the location where the permit information may be reviewed.

DISCUSSION: This paragraph is presented for the purpose of outlining the basic information required in an EIS. It should be noted that, pursuant to 6 MCAR § 3.030 E.2., the format of the EIS may be changed during scoping. However, the content requirements of this paragraph represent the base components necessary to fulfill the function of an EIS. These components should not be deleted without adequate reason.

Subparagraph one delineates the intent of these rules to produce a more useable document. In keeping with this intent, the EIS should be written in a manner condusive to understanding by the persons responsible for implementing decisions based on its content. Further, the EIS should be written in a manner that factually presents basic data. The purpose of an EIS is not to justify construction of a project nor to prove that a proposed project will have significant adverse environmental effects. Decisions on the merit of the project should be made by the decision makers responsible for governmental approvals and not by the preparers of the EIS.

Subparagraph two outlines a standard suggested format. This format may be reordered or altered if such change will augment the purpose of an EIS.

The initial format requirement is for a cover sheet that provides basic procedural and informational data relating to the EIS. The cover sheet format is derived from the recommended format in the Council on Environmental Quality regulations. The purpose of the cover sheet is to facilitate proper identification of the project and parties and to provide accurate and concise information for persons interested in providing comment on the EIS. The current rules do not require this information in an organized manner.

The requirement for a summary of the EIS at the beginning of the document and the recommended content of the summary is derived frm the Council on Environmental Quality regulations. The purpose of this requirement is to facilitate a fast overview of the findings of the EIS. The current rules contain a similar requirement.

The table of contents requirement was inserted at the request of state agencies for the purpose of assisting in locating information relevant to agency jurisdiction. Neither the Council on Environmental Quality regulations or the current regulations contain an explicit requirement for a table of contents.

The requirement for the list of preparers is derived from the council on Environmental Quality regulations. The purpose of the requirement is to allow the reviewer to assess the qualifications of the preparers and to facilitate direct consultation with them if the reviewer has questions relating to content of the EIS. The current rules did not contain this requirement. This requirement was questioned by state agencies as being potentially in violation of state statute restricting identification of authorship on state publications.

The project description requirement was derived from a similar requirement in the current rules. The purpose of this requirement is to include a definitive and concise statement as to the size, scope, and location of the project as well as relevant information relating to construction of the project. The description should be as brief as possible. The intent of this requirement is to allow concentration in the EIS on the substantive impacts of the project and not to devote needless paper to an explicit description of the project.

The requirement to list known government permits and approvals required for the activity was derived from a similar requirement in the current rules. This information is necessary to adequately assess the potential for mitigation and the relative abilities of the governmental units to regulate the activity. It should be noted that the identification of permits for which information was gathered is required. Interested persons should use the information contained within the EIS as the basis for commenting directly on the feasability of issuance of permits and approvals. It should further be noted that these permit decisions, pursuant to Minnesota Statute § 116D.04 subd. 3A and 6 MCAR § 3.031 H., must be issued within 90 days of the determination of adequacy of the final EIS.

The alternatives requirement was derived from the Council on Environmental Quality regulations and from the current rules. The comparison of alternatives, including the no action alternative, and their environmental effects is essential to decision making in the best interest of the public. This requirement extends to all reasonable alternatives. Economic considerations are a factor in determining whether an alternative is reasonable, but are not to be regarded as the sole criteria. Alternatives should be organized into a clear format and presented in comparative form to provide a basis for the decision maker's choice. Alternatives may be prioritized by the proposer or governmental units with jurisdiction if the reasons for the priorities are given.

The requirement to address the direct and indirect environmental, economic, employment and sociological impacts is derived from the Council on Environmental Quality regulations, from the current rules and from the MEPA at Minn. Stat. § 116.D.04 subd. 2a. It should be noted that for a project to become subject to these rules, some measure of environmental impact must be demonstrated. However, once that threshold is demonstrated, the full realm of environmental, economic, employment and sociological impacts -direct and indirect - must be addressed. The extent to which these impacts are addressed should be delineated through the scoping process. These impacts should be discussed in the short range and long range impact context. It should be noted that, in controversial cases, a part of the controversy frequently stems from differences of opinion or opinions based on factual information that is currently incomplete. In such cases, the EIS should state those differences and the relative status of different thought relating to the issues.

The requirement to address mitigation measures is derived from the Council on Environmental Quality regulations and from the current rules. This requirement is necessary to fully address the feasability of alternatives and the likely impact of the project as constructed. It should be noted that these rules distinguish between resource protection measures incorporated into the design of the project and mitigation measures. Mitigation measures are properly those measures which have been ordered or negotiated pursuant to the regulatory authority of a governmental unit. Resource protection measures may include measures proposed by the proposer to enhance the economic value of the project. While the benefits of these measures must be assessed in the determination of environmental impacts, they should not be regarded as negotiated concessions by the proposer.

The appendix content provision is derived from the Council on Environmental Quality regulations. This provision is permissive and not mandatory. It should be read in conjunction with 6 MCAR § 3.031 C. These rules contain a substantially more permissive incorporation by reference provision when compared to the current rules. Any form of supplementary or documentary information may be appendixed or incorporated by reference if it is reasonably accessible. In general, appendices are likely to include information prepared for the activity in question, whereas material incorporated by reference is more likely to be information prepared independently of the activity in question but relevant to it. It is anticipated that a primary content of the appendix will be government agency permit application forms that contain information specifically relevant to issues under the jurisdiction of

the agency. Inclusion of such information will assist in compliance with the requirements of Minn. Stat. § 116D.04 subd. 3a and 6 MCAR § 3.031 H.

6 MCAR § 3.031 C. Incorporation by reference.

A RGU shall incorporate material into an EIS by reference when the effect will be to reduce bulk without impeding governmental and public review of the action. The incorporated material shall be cited in the EIS, and its content shall be briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by interested persons within the time allowed for comment.

DISCUSSION: This paragraph is derived from the Council on Environmental Quality regulations. This paragraph is incorporated for the purpose of reducing the bulk and cost of preparation of EISs. Materials incorporated by reference must be cited properly to insure the ability of interested parties to locate the document. The relevant content and its interpretation by the preparer must be summarized. This requirement establishes a frame of reference for the reviewer to either agree or disagree with the use of the document. Materials incorporated by reference must be reasonably available for public reference. Although not required specifically, it is advisable that the RGU verify that copies of incorporated materials are available at the libraries designated pursuant to the EIS distribution list at 6 MCAR § 3.031 E. 3.

6 MCAR § 3.031 D. Incomplete or unavailable information.

When a RGU is evaluating significant adverse affects on the environment in an EIS and there is scientific uncertainty or gaps in relevant information, the RGU shall make clear that the information is lacking. If the information relevant to adverse impacts essential to a reasoned choice among alternatives is not known and the cost of obtaining it is excessive, or the information cannot be obtained within the time periods specified in 6 MCAR § 3.031 G. 4., or the information relevant to adverse impact is important to the decision and the means to obtain it are beyond the state of the art, the RGU shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. The EIS shall, in these circumstances, include a worst case analysis and an indication of the probability or improbability of its occurrence.

DISCUSSION: This paragraph is derived from the Council on Environmental Quality regulations. It is included to clarify the proper treatment of impacts for which the significance is unclear because of disagreement between credible sources or because of lack of information. In these cases, the proper role of the EIS is to delinate the spectrum of disagreement, the respective merits of each interpretation, and the likely consequences that would result under each respective interpretation. If there is clearly a lack of information and that information is essential to enable a responsible governmental decision and the information cannot be obtained, a worst case analysis must be used. It should be noted that, in general, the information that is contained in an EIS is information that is already available, or that can be obtained at a reasonable cost within a reasonable time, or that is primarily relevant to the particular activity in question.

6 MCAR § 3.031 E. Draft EIS.

1. A draft EIS shall be prepared in accord with the scope decided upon in the scoping process. The draft statement shall satisfy to the fullest extent possible the requirements of 6 MCAR § 3.031 B.

2. When the draft EIS is completed, The RGU shall make the draft EIS available for public review and comment and shall hold an informational meeting in the county where the action is proposed.

3. The entire draft EIS with appendices shall be provided to:

   a. Any governmental unit which has authority to permit or approve the proposed action;

   b. The proposer of the action;

   c. The EQB and EQB staff;

   d. The Environmental Conservation Library;

   e. The Legislative Reference Library;

   f. The Regional Development Commission and Regional Development Library;

   g. A public library or public place in each county where the action will take place where the draft will be available for public review; and

   h. To the extent possible, to any person requesting the entire EIS;

4. The summary of the draft EIS shall be provided to:

   a. All members of the EAW distribution list that do not receive the entire draft EIS;

   b. Any person that submitted substantive comments on the EAW that does not receive the entire draft EIS; and

   c. Any person requesting the summary.

5. The copy provided to the EQB staff shall serve as notification to publish notice of availability of the draft EIS in the EQB Monitor.

6. The RGU shall supply a press release to at least one newspaper of general circulation within the area where the action is proposed.

7. The notice of availability in the EQB Monitor and the press release shall contain notice of the date, time, and place of the informational meeting, notice of the location of the copy of the draft EIS available for public review, and notice of the date of termination of the comment period.

8. The informational meeting must be held not less that 15 days after publication of the notice of availability in the EQB Monitor. A typewritten or audio-recorded transcript of the meeting shall be made.

9. The record shall remain open for public comment not less than ten days after the last date of the informational meeting. Written comments of the draft EIS may be received any time during the comment period.

10. The RGU shall respond to the timely substantive comments received on the draft EIS and prepare the final EIS. Late comments need not be considered in preparation of the final EIS.

DISCUSSION: This paragraph was added for the purpose of providing increased definition for the RGU relating to the distribution and review of the draft EIS. This paragraph represents an increase in definition over the language contained in the current rules. The change in language and increase in definition is proposed by EQB staff in an attempt to deal with misunderstandings and questions that have been

developed during the implementation of the current rules. Procedures contained within this paragraph incorporate only minor differences from the current rules.

Subparagraph one is presented to outline the standard to be used in gauging the adequacy of the content of the EIS. The base content requirements set forth in 6 MCAR § 3.031 B. should be applied to those issues that have been designated as significant pursuant to the scoping process. This standard is different from the standard of the current rules because of the inclusion of the scoping requirement in the proposed rules.

Subparagraph two outlines the requirement for public involvement at the local level. The copy of the draft EIS must be made available at a public library or other suitable public facility in the county as provided in the distribution requirements set forth in subparagraph three. Additional requirements relating to the informational meeting are set forth in subparagraphs seven, eight, nine and ten. The current rules contain similar requirements for local availability of the draft EIS and for a local informational meeting. This procedure has been effective in the past as a means of obtaining public comment on the EIS and of facilitating public disclosure.

Subparagraph three lists those persons that must receive complete copies of the draft EIS. Under the current rules the EQB is required to develop and maintain a distribution list of those persons that must receive copies of the draft EIS. That list is not a part of the current rules. The total number of persons mandated by the EQB distribution list is approximately 35. Under the proposed rules the list is incorporated within the rules. The total number of persons mandated by the proposed list is approximately 20. The EQB will continue to maintain an address list for these persons.

All government units with jurisdiction must receive a copy of the draft EIS. This is in keeping with the requirement of these rules that the information contained in the EIS be used in arriving at a decision of whether or not to approve the project.

A copy of the draft EIS is required to be submitted to the proposer of the action to assure that the proposer is kept up to date on the environmental review process.

Copies of the draft EIS must be forwarded to all members of the EQB and EQB staff. This requirement is in keeping with the EQB's statutory duty to monitor the environmental review program. The copy submitted to EQB staff fulfills the notification requirement for the EQB Monitor as noted in subparagraph five.

The Environmental Conservation Library, located in the Minneapolis Public Library, and the Legislative Reference Library, located in the Capitol complex, have been designated as central repositories for all environmental review documents for Minnesota. Pursuant to this designation, a copy of the draft EIS must be submitted to these libraries.

The State of Minnesota is divided into 13 Regional Development Commissions or "RDCs". Each RDC has a regional office and a Regional library. Submission of a copy of the draft EIS to the RDC and the library provides a means of local notification and accessability. RDC staff is also frequently called upon to assist in coordinating or providing information relating to environmental review.

Local notification and local accessability of the draft EIS is provided mainly by making the document available for public review at a public library or other suitable public place in the county where the activity is to be located. In addition interested persons may request copies of the entire draft EIS.

Under the current rules, an EIS was typically an extensive document that entailed rather expensive distribution costs. Under the proposed rules it is anticipated that the EIS will be a shorter, more useable document. If this end is achieved, the EIS should be a less expensive document and hopefully more available for dissemination to the public.

Subparagraph four requires a summary of the draft to be submitted to those persons that are less likely to be directly concerned about the activity but who may retain an interest in the EIS. By submitting a summary of the draft to these persons, they are placed on notice that, if it appears necessary for them to review the entire draft EIS, they should contact the RGU for the copy. A comparison of the EAW distribution list and the distribution list for the entire draft EIS shows that the only persons for which it is mandated within this rules to receive copies of the summary are the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency and the Minnesota Historical Society. Other persons may be mandated by these rules if they submit substantive comments or request copies of the summary.

Subparagraph five notes that the copy of the draft EIS submitted to EQB staff serves as notice to EQB staff to publish notice of availability of the draft EIS in the EQB Monitor. This provision eliminates the necessity of a separate notification requirement. This notice provision is the same under the current rules.

Subparagraph six delineates the requirement that the RGU provide a press release, relating to the notice of availability and informational meeting, to a local newspaper. This requirement is for the purpose of facilitating local comment on the proposed activity. The current rules have a similar publication requirement.

Subparagraph seven outlines the content requirements for the notice of availability as published in the EQB Monitor and the local newspaper. This subparagraph is included to assure that uniform and adequate information be made available to interested persons. This content requirement is more comprehensive and more specific than the content requirement of the notice pursuant to the current rules.

Subparagraph eight establishes a time requirement for the scheduling of the informational meeting. The 15 day lag is provided to assure adequate time for interested persons to schedule their time, review the draft EIS, and prepare comments relating to the draft EIS. It should be noted that the 15 day time requirement is in reality approximately 21 actual days when viewed in light of the definition of days. The 21 actual days corresponds to 20 actual days as provided under the current rules. A requirement for transcription or recording of the proceedings is included to facilitate review by interested persons that were unable to attend the meeting.

Subparagraph nine provides for an open comment period after the informational meeting to allow interested persons to revise or add comments to the record in light of comments made at the meeting. This ten day extension of the comment period corresponds to a 20 day extension of the comment period as mandated pursuant to the current rules. A shorter extension is necessary because of tighter time constraints imposed on the process by the legislature. It should be noted, however, that the ten day extension is in reality approximately 14 actual days when viewed in light of the definition of days.

Subparagraph ten mandates that the RGU be responsive to substantive comments on the draft EIS in the preparation of the final EIS. If the substantive comments do not necessitate substantial change in the EIS, the comments together with the responses may be circulated with the draft EIS as the final EIS. If, however, the comments necessitate substantial changes in the draft EIS, the text must be rewritten and the necessary changes incorporated into the text of the EIS. This requirement was not included in the current rules; however, it reflects EQB policy in implementation of the current rules. The requirement to

submit comments on time is intended to place equal pressure on all interested parties in fulfilling the legislative intent for a more timely process. The language is permissive, i.e., the RGU may treat late comments as substantive comments at their discretion. The current rules contain no express language in relation to late comments.

6 MCAR § 3.031 F. Final EIS.

1. The final EIS shall respond to the timely substantive comments on the draft. The RGU shall discuss at appropriate points in the final EIS any responsible opposing views which were not adequately discussed in the draft EIS and shall indicate the RGU's reponse to the views.

2. If only minor changes in the draft EIS are suggested in the comments on the draft, the written comments and the responses may be attached to the draft or bound as a separate volume and circulated as the final EIS. If other than minor changes are required, the draft text shall be rewritten so that necessary changes in the text are incorporated in the appropriate places.

3. The RGU shall provide copies of the final EIS to:

   a. All persons receiving copies of the entire draft EIS pursuant to 6 MCAR § 3.031 E. 3.;

   b. Any person who submitted substantive comments on the draft EIS; and

   c. To the extent possible, to any person requesting the final EIS.

4. The copy provided to the EQB staff shall serve as notification to publish notice of availability of the final EIS in the EQB Monitor.

5. The RGU shall supply a press release to at least one newspaper of general circulation within the area where the action is proposed.

6. The notice of availability in the EQB Monitor and the press release shall contain notice of the location of the copy of the final EIS available for public review and notice of the opportunity for public comment on the adequacy of the final EIS.

DISCUSSION: This paragraph was added for the purpose of providing increased definition for the RGU relating to the distribution and review of the final EIS. This paragraph represents an increase in definition over the language contained in the current rules. The change in language and increase in definition is proposed by EQB staff in an attempt to deal with misunderstandings and questions that have developed during the implementation of the current rules. Procedures contained within this paragraph incorporate only minor differences from the current rules.

Subparagraph one is a reiteration and elaboration of 6 MCAR § 3.031 E. 10. It is added to improve continuity in the rules. This subparagraph restates that comments relating to the draft EIS that are timely and substantive must be addressed in the final EIS. Other comments may be addressed at the RGUs option. The manner in which they are to be addressed is outlined in subparagraph two.

Subparagraph two requires the final EIS to be a total rewrite of the draft EIS if the timely substantive comments necesitate significant changes in information contained in the draft EIS. This is necessay to facilitate review of the final EIS. If only minor changes are required as a result of the timely substantive comments on the draft EIS, these comments and responses may be attached to the draft EIS as an appendix and circulated as a final EIs. This allows savings of time and

expense on projects for which a quality draft EIS has been prepared and serves as an incentive for producing quality draft EISs. This requirement was not included in the current rules.

Subparagraph three lists those persons that must receive a copy of the final EIS. Under the current rules the EQB is required to develop and maintain a distribution list of those persons that must receive copies of the final EIS. That list is not a part of the current rules. The total number of persons mandated by the EQB distribution list is approximately 35. Under the proposed rules this list is incorporated within the rules. The total number of persons mandated by the proposed list is approximately 20. The EQB will continue to maintain a list of addresses for these persons.

Subparagraph three incorporates all persons on the distribution list who receive copies of the entire draft EIS. This list incorporates persons closely involved with the project and persons with responsibilites relating to the implementation of the state environmental review program. Justification for the inclusion of these persons is incorporated in the justification relating to 6 MCAR § 3.031 E.3.

This subparagraph also mandates the submission of a copy of the final EIS to those persons that submitted substantive comments on the draft EIS. Submission of substantive comments is deemed to indicate sufficient interest in the activity to warrant receipt of the final EIS to facilitate review of the RGU's response to the comments. Other persons expressing an interest in reviewing a copy of the final EIS should be supplied with a copy within reasonable constraints. Public review of the final EIS is needed to enable public input relating to the determination of adequacy of the final EIS.

Subparagraph four notes that the copy of the final EIS submitted to the EQB staff, pursuant to the distribution requirements of subparagraph three, serves as notice to EQB staff to publish notice of availability of the final EIS in the EQB Monitor. This provision eliminates the necessity of a separate notification requirement. This notice provision is the same under the current rules.

Subparagraph five delineates the requirement that the RGU provide a press release, relating to the notice of availability of the final EIS and the opportunity to comment on its adequacy, to a local newspaper. This requirement is for the purpose of facilitating local comment on the proposed activity. The current rules have a similar publication requirement.

Subparagraph six outlines the content requirements for the notice of availability as published in the EQB Monitor and the local newpaper. This subparagraph is included to assure that uniform and adequate information be made available to interested persons. This content requirement is similar to the content requirement of the notice pursuant to the current rules.

6 MCAR § 3.031 G. Determination of Adequacy.

1. The RGU shall make the determination of adequacy on the final EIS unless notified by the EQB, within 60 days after publication of the preparation notice in the EQB Monitor, that the EQB will make the determination. In making the decision to intervene in the determination of adequacy, the EQB shall consider:

   a. A request for intervention by the RGU;

   b. A request for intervention by the proposer of the action;

   c. A request for intervention by interested parties;

   d. The ability of the RGU to address complex issues of the EIS; and

e. Whether the action is multi-jurisdictional.

2. Interested persons may submit written comments on the adequacy of the final EIS to the RGU or the EQB, if applicable, at any time prior to the final determination of adequacy.

3. The determination of adequacy of the final EIS shall be made at least ten days after publication in the EQB Monitor of the notice of availability of the final EIS.

4. The determination of adequacy of the final EIS shall be made within 280 days after the preparation notice was published in the EQB Monitor unless the time is extended by consent of the parties or by the Governor for good cause.

5. The final EIS shall be determined adequate if it:

a. Addresses the issues raised in scoping so that all questions for which information can be reasonably obtained have been answered;

b. Provides responses to the substantive comments received during the draft EIS review concerning issues raised in scoping; and

c. Was prepared in substantial compliance with the procedures of the act and these rules.

6. If the RGU or the EQB determines that the EIS is inadequate, the RGU shall have 60 days in which to prepare an adequate EIS. The revised EIS shall be circulated in accord with 6 MCAR § 3.031 F. 3.

7. The RGU shall notify all persons receiving copies of the final EIS pursuant to 6 MCAR § 3.031 F. 3. of its adequacy decision within five days of the adequacy decision. Public notice of the decision shall be published in the EQB Monitor.

DISCUSSION: This paragraph is included to provide guidance to the RGU relating to the procedures and standards to be used in making the decision on the adequacy of the final EIS. This paragraph incorporates several significant legislative changes and, therefore, significant changes to the current rules. It also incorporates an increase in definition of the process when compared to the current rules. The change in structure and increase in definition is proposed in an attempt to deal with misunderstandings and questions that have developed during the implementation of the current rules. These changes are further necessitated by the fact that the responsibility for making the decisions on the adequacy of the final EIS has shifted from the EQB to the RGU as a result of the legislative changes. Therefore, clear standards and processes are necessary for uniform implementation of these rules.

Subparagraph one is included to comply with Minn. Stat. § 116D.04 subd. 2a (g). This represents a significant change from the current rules. Under the current rules, the EQB makes all determinations on the adequacy of final EISs. This change is incorporated as a part of the legislative intent to shift responsibility for the implementation of these rules to the unit of government most responsible for the regulation of an activity. The standards for consideration of EQB intervention are included in response to public comment reflecting the fear that the EQB would intervene in all EIS determinations. EQB intervention is most likely to occur only when a documented request for intervention is received. It is anticipated that a request for intervention may be submitted by the RGU in cases where the decision may be extremely controversial locally or where the RGU feels that technical issues are beyond the ability of the RGU to analyze effectively. A request for intervention may also be submitted by the proposer in cases where the RGU is clearly antagonistic to a proposed project and the proposer feels the RGU will not provide an objective appraisal of the

potential impacts or in cases where local opposition to a project may provide undue political influence on the determination. A request for intervention may also be submitted by interested parties in cases where the RGU is clearly in favor of a proposed project and the interested parties feel the RGU will not provide an objective appraisal of the potential impacts or in cases where political influence may have an impact on the determination.

In addition to requests for intervention, the EQB shall consider the abilities of an RGU to effectively analyze the final EIS and projected impacts. There should be some measure of difficulty in the analysis to prevent the use of the EQB merely as a scapegoat for politically sensitive decisions. In addition, multi-jurisdictional cases are more likely to be subjected to EQB intervention. If several governmental units are involved, it is more likely that there will be legitimate differences of opinion on the relative impacts and merits of the activity. If the ultimate decision rests with only the RGU, it is more likely that the EQB will deny intervention and leave complete decision making authority with that unit of government.

Subparagraph two is incorporated to allow all interested persons the right to submit comments relating to the adequacy of the final EIS. If the RGU is making the decision, comments should be submitted directly to it. If the EQB is making the decision, comments should be submitted to the EQB. Under the current rules, interested persons are allowed to submit comments relating to the adequacy of the final EIS.

Subparagraph three is included to provide a waiting period before the determination of adequacy can be made. The purpose of the waiting period is to give interested parties an opportunity to obtain and review the final EIS. It is also a means of discouraging prejudgement of the final EIS by the RGU. The waiting period is limited to ten days because a longer time period would make it difficult for the RGU to comply with the overall statutory time constraints. It should be noted that in reality ten days is approximately 14 days when viewed in light of the definition of days.

Subparagraph four is included to comply with Minn. Stat. § 116D.04 subd. 2a (g). This represents a significant change from the current rules. The 280 day statutory time period is measured from the date of publication of notice of its preparation to the date of its adequacy determination. At the time of notice of publication the RGU should have its consultants and preparation schedule established to enable prompt commencement of prepartion. The publication date in the EQB Monitor was selected to enable a predictable date and because publication is free to the RGU. The current rules contain similar publication requirements. The RGU must make an adequacy determination prior to the expiration of the 280 day time clock. This may be either a determination that the EIS is adequate or that the EIS is inadequate. If the EIS is determined adequate, government units have 90 days to make required permit decisions relating to the project, if the information for those permits was gathered concurrently with the information for the EIS pursuant to the scoping process and as noted in discussions relating to 6 MCAR § 3.030 E. 3. c. and 6 MCAR § 3.031 H. If the EIS is determined to be inadequate, the RGU has 60 days in which to correct the inadequacies as noted in the discussion relating to subparagraph six. Provision is provided for unusual cases in which compliance with this schedule is impossible. The legislative intent is to keep this as a rigid time constraint; therefore, the consent of the governor or mutual consent of the affected parties, i.e., the proposer and the RGU, is required. No standard is provided for the governor's decision.

Subparagraph five sets the standard for the adequacy determination by the RGU. The proposed standard is an elaboration upon the standard set forth in the current rules and reflects changes in the legislation relating to scoping. The base standard relates to the requirement that proper procedures, as established by Minn. Stat. ch. 116D and these rules, were followed in the preparation of the EIS and that the issues raised in the scoping process were adequately addressed - including adequate responses to public questions relating to those

issues. There is an element of subjectiveness in each of these standards relating to the determination. It should be noted, however, that the essence of the determination is whether the issue has been addressed adequately for an informed decision to be made relating to the actual governmental permits in question - as opposed to whether the issue has been addressed to its full academic depth.

Subparagraph six delineates the requirement that EISs, that have been determined to be inadequate, must be revised to an adequate status within 60 days of the decision of inadequacy. The revised final EIS must be redistributed for public review and comment in the same manner as was required for the original final EIS. Under the current rules, the inadequate EIS must be revised within approximately 51 actual days and interested parties have approximately 21 actual days to comment. The proposed rules combine the two periods. To comply with the proposed rules, the revised EIS must be completed in approximately 45 actual days to allow approximately 14 actual days for public review and comment. The time schedules suggested to enable the RGU to comply with the more stringent legislative time deadlines will be clearly delineated in the "Guide to the Rules."

Subparagraph seven delineates a notification requirement for all adequacy decisions by the RGU. The current rules contain a requirement to notify all persons receiving the final EIS with no time guidelines but do not require publication in the EQB Monitor. In practice, such notice is published in the EQB Monitor as a policy matter. Notification under the proposed rules is important because parties aggrieved by the decision have 30 days from the date of the decision in which to appeal the decision to district court. Therefore, the requirement of notification within five days is included.

6 MCAR § 3.031 H. Permit decision in cases requiring an EIS.

1. Within 90 days after the determination of adequacy of a final EIS, final decisions shall be made by the appropriate governmental units on those permits which were identified as required in the scoping process and for which information was developed concurrently with the preparation of the EIS. The 90 day period may be extended with the consent of the permit applicant or where a longer period is required by federal law or state statute.

2. At the time of its permit decision, for those permits which were identified during the scoping process as requiring a record of decision, each permitting unit of government shall prepare a concise public record of how it considered the EIS in its decision. That record shall be supplied to the EQB for the purpose of monitoring the effectiveness of the process created by these rules and to any other person requesting such information. The record may be integrated into any other record prepared by the permitting unit of government.

3. The RGU or other governmental unit shall, upon request, inform commenting governmental units and interested parties on the progress in carrying out mitigation measures which the commenting governmental units have proposed and which were adopted by the RGU making the decision.

DISCUSSION: This paragraph is included to delineate the statutory requirements of Minn. Stat. § 116D.04 subd. 3a and to assure proper use of the EIS in permit decisions relating to projects for which an EIS has been prepared.

Subparagraph one is essentially a paraphrasing of the statutory language. The current rules did not have a time restriction relating to the issuance of permits. This represents a significant change from the current rules. The intent of this change is to make the entire regulatory process predictable and to recognize that the preparation of an EIS and the permit decisions are interdependent stages of reviewing a project.

Subparagraph two is included to delineate the statutory requirements relating to the permit decision as established in Minn. Stat. § 116D.04 subd. 3a. During the scoping process, those permits that are relevant to the issues scoped in the EIS are identified. For these permits a record of decision must be prepared indicating how the information from the EIS was used in arriving at the decision. This statutory requirement is designed to foster government accountability in decision making. No formal requirements are established relating to the form in which the record must be made, however, a copy of the record must be forwarded to the EQB to facilitate the EQB's statutory monitoring duties. It is likely that this record may also be requested by parties aggrieved by the decision. This record would also be functional in establishing a court record in the event of challenge to the permit decision. The current rules contained no formal requirements relating to a record of decision.

Subparagraph three was included to establish a requirement of government responsibility in assuring that mitigation measures ordered as a result of information gathered pursuant to the EIS process, are in fact carried out. The current rules do not contain an express requirement of this nature.

6 MCAR § 3.031 I. Supplemental EIS.

1. A RGU shall prepare a supplement to a final EIS whenever the RGU determines that:

   a. Substantial changes have been made in the proposed action that affect the potential significant adverse environmental effects of the action; or

   b. There are substantial new information or new circumstances that significantly affect the potential environmental effects from the proposed action which have not been considered in the final EIS or that significantly affect the availability of prudent and feasible alternatives with lesser environmental effects.

2. A supplement to an existing EIS shall be utilized in lieu of a new EIS for expansions of existing projects for which an EIS has been prepared if the RGU determines that a supplement can adequately address the environmental impacts of the project.

3. A RGU shall prepare, circulate, and file a supplemental EIS in the same manner as draft and final EISs unless alternative procedures are approved by the EQB.

DISCUSSION: This paragraph is added to delineate for the RGU the proper course of action in cases where an EIS has been prepared and determined adequate and information later comes to light that alters the basis for that adequacy decision. The current rules contain brief language relating to this type of situation. This language is expanded in the proposed rules to allow for increased direction for the RGU.

Subparagraph one establishes the two situations in which a supplemental EIS may be necessary. In the first situation a project may be altered in scope such that the potential for significant adverse effects may be changed to a degree that it may cause a governmental unit with jurisdiction to reasess a revocable decision or to require additional information prior to making a decision yet outstanding. In the second situation, the possibility of new information or new relevant circumstances is delineated. This situation may be more likely to occur under the proposed rules in light of the more stringent time deadlines for gathering information.

Subparagraph two notes that, in the event that a situation arises which requires additional information, the original EIS should be used as a basis for expansion of existing information to adequately address the new requirements. This allows for a more timely and cost effective means of obtaining needed information.

Subparagraph three incorporates the procedural and substantive requirements relating to the EIS process as a requirement for the supplemental EIS. If the RGU determines that an alternative process is desirable, it may request EQB approval of an alternative process on a case-by-case basis. This represents a potential relaxation of the procedural requirements on a case-by-case basis. Such relaxation may be desirable to avoid undue time delays to obtain additional information and increase the likelihood of the RGU being willing to pursue needed information.

Introduction to 6 MCAR § 3.032 Prohibition on final action and decisions.

This rule is added to clarify the fact that no governmental approvals may be issued while environmental review is proceeding and to provide specific guidelines as to when exceptions to that basic rule are possible. The basic rule of no construction or approval until after environmental review has been completed is the same as under the current rules. The provisions contained within this rule are written to allow flexability in unusual situations. This rule is not intended for common application. It is not a procedure to avoid environmental review. The current rules had provision for exceptions in cases of emergency and, to a limited degree, provision for a variance within the EIS preparation notice; the current rules did not, however, provide guidance or a set procedure for issuance of a variance. Exceptions to the current rule were dealt with on a case-by-case basis. Increased definition is desirable to insure compliance with the Administrative Procedures Act.

6 MCAR § 3.032 A.

> On any action for which a petition for an EAW is filed or an EAW is required or ordered under these rules, no final governmental decision to grant or deny a permit or other approval required, or to commence the action shall be made until either a petition has been dismissed, a negative declaration has been issued, or a determination of adequacy of the EIS has been made.

DISCUSSION: This paragraph sets forth the basic rule relating to the prohibition of governmental decisions until after the environmental review proceedings have been terminated. The three basic arenas of environmental review that culminate in a final decision -after which decisions may be made or construction may commence - are the petition, the EAW, and the EIS.

If a petition has been received relating to the project, all further actions relating to the project must wait until the RGU makes its decision. That decision will be either:

1.) that the activity may have the potential for significant environmental effects, and an EAW must be prepared for the activity; or

2.) that the activity does not have the potential for significant environmental effects and the petition is dismissed. In the first case, further action still may not proceed until after a final decision has been made on the EAW. In the second case, governmental action and/or permitted construction may proceed. The RGU has a basic 15 day maximum time period in which to act on the petition. See the discussion relating to 6 MCAR § 3.026 for further information relating to the petition process.

If an EAW has been ordered on a project, all further actions relating to the project must wait until the RGU makes its decision on the EAW. That decision will be either:

1.) that the activity has the potential for significant environmental effects, and an EIS must be prepared for the activity; or

2.) that the activity does not have the potential for significant environmental effects and no EIS need be prepared.

In the first case, further action still may not proceed until after a final decision has been made on the EIS. In the second case, governmental action and/or permitted construction may proceed. The RGU has a 45 day maximum time period in which to act on the EAW. See the discussion relating to 6 MCAR §§ 3.027 and 3.028 for further information relating to the EAW process.

If an EIS has been ordered on a project, all further actions relating to the project must wait until the RGU makes its decision on the adequacy of the EIS. That decision will be either:

1.) that the final EIS is inadequate; or

2.) that the final EIS is adequate.

In the first case, further action still may not proceed until after the EIS has been revised to adequate form. The RGU has 60 days in which to make the final EIS adequate. In the second case, governmental action and/or permitted construction may proceed. The RGU has a 280 day maximum time limit from publication of notice of preparation of an EIS in which it must make its adequacy decision. See the discussion relating to 6 MCAR §§ 3.030 and 3.031 for further information relating to the EIS process.

This rule relating to the prohibition of governmental decisions and construction until after the environmental review proceedings have been terminated is the same under the current rules. The environmental review process has changed, however. The purpose of this rule is to insure that all necessary information relating to the activity is considered prior to final decisions which would allow the project to proceed.

6 MCAR § 3.032 B.

> Except for projects under 6 MCAR §§ 3.032 D. or E., for any action for which an EIS is required, no final governmental decision to grant or deny a permit or other approval required, or to commence the action shall be made until the RGU or the EQB has determined the final EIS is adequate. Where public hearings are required by law to precede issuance of a permit, public hearings shall not be held until after filing of a draft EIS.

DISCUSSION: This paragraph is added to further clarify the prohibition during preparation of the EIS. Most pressure to allow some form of approval or some form of construction is likely to surface during EIS preparation because this is typically a rather long time period. This paragraph also notes the potential for exemption from the basic rule for unusual cases via either a variance or emergency action.

Some permits have legal requirements for a public hearing prior to issuance. This paragraph contains the further restriction that these public hearings cannot be held until after the draft EIS is available. The purpose of this requirement is to facilitate the availability of complete information at the time of the public hearing. This restriction does not preclude the scheduling of additional and/or optional public hearings. This provision is the same under the current rules.

6 MCAR § 3.032 C.

> No physical construction shall occur for any project subject to review under these rules until a petition has been dismissed, a negative declaration has been issued, or until the final EIS has been determined adequate by the RGU or the EQB, unless the action is an emergency under 6 MCAR § 3.032 E. or a variance is granted under 6 MCAR § 3.032 D. The EQB's statutory authority to halt actions or impose other temporary relief is in no way limited by this rule.

DISCUSSION: This paragraph notes that certain limited construction may be permitted in unusual cases via the variance or emergency action provisions. The last sentence of this paragraph is added to note that these rules do not take precedence over statutory authority granted to the EQB.

6 MCAR § 3.032 D. Variance.

Construction may begin on an activity if the proposer applies for and is granted a variance from the provisions of 6 MCAR § 3.032 C. A variance for certain governmental approvals to be granted prior to completion of the environmental review process may also be requested.

1. A variance may be requested at any time after the commencement of the 30 day review period following the filing of an EAW.

2. The proposer shall submit an application for a variance to the EQB together with:

   a. A detailed explanation of the construction proposed to be undertaken or the governmental approvals to be granted;

   b. The anticipated environmental effects of undertaking the proposed construction or granting the governmental approvals;

   c. The reversibility of the anticipated environmental effects;

   d. The reasons necessitating the variance; and

   e. A statement describing how approval would affect subsequent approvals needed for the action and how approval would affect the purpose of environmental review.

3. The EQB's chairperson shall publish a notice of the variance application in the EQB Monitor within 15 days after receipt of the application.

4. The EQB's chairperson shall issue a press release to at least one newspaper of general circulation in the area where the action is proposed. The notice and press release shall summarize the reasons given for the variance application and specify that comments on whether a variance should be granted must be submitted to the EQB within 20 days after the date of publication in the EQB Monitor.

5. At its first meeting more than ten days after the commment period expires, the EQB shall grant or deny the variance. A variance shall be granted if:

   a. The RGU consents to such a variance, and

   b. On the basis of the variance application and the comments, construction is necessary in order to:

      (1) Avoid excessive and unusual economic hardship; or

      (2) Avoid a serious threat to public health or safety.

6. The EQB shall set forth in writing its reasons for granting or denying each request.

7. Only the construction or governmental approvals necessary to avoid the consequences listed above shall be undertaken or granted.

DISCUSSION: This paragraph provides a variance procedure to allow limited necessary construction on an activity prior to completion of environmental review. This variance procedure may also cover necessary governmental approvals if such approvals are necessary to allow the construction. The current rules have a limited provision relating to a variance for limited construction during preparation of an EIS. Notice of variance under the current rules is incorporated into the notice of preparation of the EIS. Beyond that limited provision, no guidance is provided and requests for a variance were dealt with on a case-by-case basis.

The Administrative Procedures Act, Minn. Stat. § 15.0412 subd. 1a, states that before an agency may grant a variance, it must promulgate rules setting forth procedures and standards by which variances shall be granted and denied. This provision became effective August 1, 1981. It is therefore necessary that the proposed rules incorporate increased definition relating to those procedures and standards.

The inclusion of a variance provision is controversial. Participants in the legislative negotiations and drafting meetings that led to the statutory amendments note the issue of a variance was discussed but no provision for a variance was incorporated into the statute. The record, however, shows no specific language or action intended to preclude incorporation of a variance procedure. In short, the statute and the actual legislative record were silent on the issue. This paragraph is proposed because of the restrictions on variances imposed by the Administrative Procedures Act. The choices essentially are:

1.) No variance procedure - in which case the only exceptions to these rules would be pursuant to the emergency action provision, or

2.) Inclusion of a variance procedure to enable activities to be dealt with on a case-by-case basis.

The EQB is proposing the second approach. Comments have been received ranging from requests for deletion of this provision, because of a lack of legislative intent, to relaxation of the standards to facilitate easier application of the provision.

Subparagraph one defines a starting time after which variance requests may be filed with the EQB. The starting time used is the filing of the EAW with the EQB for publication in the EQB Monitor. It should be noted that this excludes the option of filing a variance in relation to a petition. This exclusion has minimal impact because:

1.) The maximum time for action by the RGU on the petition is 15 days. It would be fruitless to add a procedure to the 15 day period considering there are no minimum time requirements. I.e., rather than go through the variance procedure, it is more advantageous for the RGU to resolve the petition.

2.) The proposer may, at his option, submit an EAW to the RGU at any time following a petition and then request the variance.

Subparagraph two outlines the content requirements for the variance application. These requirements are provided to comply with the procedural definition requirements of the Administrative Procedures Act and to establish a uniform standard of comparison for the EQB.

For the EQB to adequately evaluate the application, the proposer must define the extent of the construction proposed and how it relates to the total proposal. The proposer should note which, if any, of the government approvals will also require a variance. It should be noted that this relates only to a variance from the environmental review process. If variances from governmental permits or approvals are required, separate application must be made for them to the governmental unit responsible for issuing the approval. The application should also describe the extent of environmental impacts that would be generated if the variance is granted. It should be noted that if environmental

review has been initiated -whether by petition or filing of an EAW - there will be some indication in the record as to the nature of the primary environmental impacts of concern. The applicant should be especially responsive to those concerns.

One of the major concerns, relating to the issuance of a variance, is that such issuance constitutes recognition of the fact that the project will be approved regardless of whether significant environmental effects will occur. This concern may be accentuated if the construction allowed would place the proposer in a position of having a vested right that may force subsequent approval. As a result of these concerns, the applicant for variance should specifically state which of the anticipated impacts may be reversed - i.e., removed and the environment returned to its original state. In addition, the applicant should indicate the extent to which approval of the variance may force subsequent approvals relating to the activity by other government units.

The application must also explicitly state why the variance is needed. Subparagraph five delineates the factors the EQB may consider in deciding whether or not to grant the request.

The EQB is the agency designated as the recipient of and decision maker for all variance requests. The Administrative Procedures Act does not allow delegation of the authority to grant variances.

Subparagraph three establishes the notice requirement in the EQB Monitor for variance applications. The publication date in the Monitor is used as the date of reference for the comment period relating to the application. The Monitor is published on a biweekly basis. A 15 day lag time is needed to cover the possibility of receipt of the application just after submission to printing. This could entail a maximum 13 day working day delay prior to mailing of the Monitor. The minimum delay would be three working days.

Subparagraph four requires submission of a press release to a local newspaper to facilitate local involvement in the consideration of the application. Requirements are placed on the content of the press release to assure adequate information is supplied to interested parties. Twenty days are allowed for persons to submit comments. The publication date in the Monitor is used as the date for measuring this comment period because it is the most readily definable date. Twenty days was selected as a reasonable compromise in allowing opportunity for public comment with minimal delay for the proposer. In cases of extreme need, the standard for emergency action is available pursuant to 6 MCAR § 3.032 E.

Subparagraph five establishes a time frame for the EQB to make a decision relating to the variance. Ten working days is allowed for the EQB to review comments and information relevant to the variance. This provision requires the board to make the decision at its next meeting - this would most likely be the next monthly meeting; however, a special meeting may be called. EQB meetings are held monthly on the third Thursday of the month.

A major constraint upon the EQB's decision is that the RGU must also consent to the variance. I.e., the EQB cannot override RGU opposition to allowing the variance from environmental review. This provision is necessary because the RGU is responsible for environmental review and the intent of this provision is to have the EQB work closely with the RGU in arriving at a decision - even though the actual decision on the variance is issued by the EQB.

The basic standard to be applied as to whether the variance is issued is a "strict necessity" standard. Economic hardship may meet that standard in itself, however, the hardship must be excessive and unusual. Merely requesting a variance to make the project a better financial investment does not meet this standard. This test would usually be applied in cases where external factors interfere with the proposer's ability to deal with the environmental review and public notice procedures. A serious threat to public health or safety may also

meet this standard. It should be noted that if the threat to public health or safety is imminent, the proposer should request approval for a limited work authorization via the emergency action provision. The decision as to whether the request meets these standards should be based upon information contained in the application in response to the requirements of 6 MCAR § 3.032 D. 2., as well as information gathered pursuant to the comment and review periods.

Subparagraph six requires the EQB to provide written documentation of its reasons for its decision. This is required by Minn. Stat. § 15.0412 subd. 1a and is in keeping with the intent of these rules to establish accountability to the public for decisions made pursuant to environmental review. Aggrieved parties may appeal the EQB decision to district court.

Subparagraph seven clarifies that any variance issued pursuant to this rule shall be limited to only that construction and those approvals that are necessary to avoid the consequences that establish the need for the variance. This is not an exemption from environmental review or from governmental approval. It is merely a means of avoiding serious harm while those processes are being pursued.

6 MCAR § 3.032 E. Emergency Action.

> In the rare situation when immediate action by a governmental unit or a person is essential to avoid or eliminate an imminent threat to the public health or safety or a serious threat to natural resources, a proposed action may be undertaken without the environmental review which would otherwise be required by these rules. The governmental unit or person must demonstrate to the EQB's chairperson, either orally or in writing, that immediate action is essential and must receive authorization from the EQB's chairperson to proceed. Authorization to proceed shall be limited to those actions necessary to control the immediate impacts of the emergency. Other actions remain subject to review under these rules.

DISCUSSION: This paragraph is included to provide a mechanism for dealing with unique situations in which there is an imminent threat to public health or safety or to natural resources that requires prompt action to prevent. In these cases the proposer of the action merely has to document to the EQB chairperson that such action is necessary. The EQB's chairperson may, in these cases, immediately authorize the action. This provision is intended for use only in situations in which the threat is immediate. Economic considerations alone are not sufficient to meet this standard. In situations in which time is not a major factor, the public review process established in the variance procedure should be utilized. This provision is similar to the emergency action provision in the current rules.

Introduction to 6 MCAR § 3.033 Review of state actions or projects.

This rule is added to comply with Minn. Stat. § 116D.04 subd. 9. Statutory authority is granted via that provision for the EQB to intervene to reverse or modify state agency decisions. The EQB has the responsibility to assure that state agencies comply with the intent of Minn. Stat. ch. 116D in utilizing the information generated via the environmental review process in their decisions relating to activities subject to environmental review. This rule establishes a formal procedure by which those decision may be reviewed. Although this statutory language has been in effect since 1973, prior versions of these rules did not contain language implementing this provision. One attempt has been made in the history of the rules to challenge an agency decision pursuant to this provision. That attempt resulted in a negotiated settlement, thus this provision has never been utilized to its potential. Although it is not anticipated that this provision will be used to any degree in the future, this rule was added to provide increased structure in the event a party so wishes to challenge an agency decision.

6 MCAR § 3.033 A. Applicability.

This rule applies to any project wholly or partially conducted by a state agency if an EIS or a generic EIS has been prepared for that project.

DISCUSSION: This paragraph is added to clarify what types of projects are subject to this rule. The statutory language relating to applicability is subject to differing interpretations. The statutory language states this provision applies to "any state project or action significantly affecting the environment or for which an environmental impact statement is required." The major potential interpretations include:

1.) This applies only to state projects or state actions for which an EIS has been prepared; or

2.) This applies to state projects and to any action which significantly affects the environment or for which an EIS has been prepared; or

3.) This applies to state projects, to any action which significantly affects the environment, and to any decisions relating to actions for which an EIS has been prepared.

The EQB has taken the position that the legislature intended the first of these interpretations. This interpretation is the most narrowly defined. Under this interpretation, the EQB may act as a check on state agency decisions relating to projects for which an EIS has been prepared. The EQB may not intervene under this provision on local government decisions and the EQB may not intervene under this provision on any decision relating to activities for which an EIS was not prepared.

The alternative interpretations, which were rejected by the EQB, would have allowed EQB intervention in local government decisions and could have allowed challenge to the decision on need for an EIS. These interpretations were rejected in favor of a more definitive and more narrow approach. A narrow interpretation is desirable because the action authorized by the statute is extraordinary and thus clearly intended to be implemented under limited circumstances.

6 MCAR § 3.033 B. Prior notice required.

At least seven working days prior to the final decision of any state agency concerning an action subject to this rule, that agency shall provide the EQB with notice of its intent to issue a decision. Such notice shall include a brief description of the action, the date the final decision is expected to be issued, the title and date of EISs prepared on the agency action and the name, address and phone number of the project proposer and parties to any proceeding on the action. If the action is required by the existence of a public emergency, advance notice shall not be required. If advance notice is precluded by public emergency or statute, notice as provided above shall be given at the earliest possible time but not later than three calendar days after the final decision is rendered.

DISCUSSION: This provision is included to establish prior notice to the EQB regarding decisions that may potentially be subject to challenge. Prior notice is needed to enable timely action in light of the strict statutory limit to bringing the challenge within ten days of the decision. This would also allow publication of notice in the EQB Monitor if the case warrants. Content requirements for the notice are: to adequately define the action; the time frame for the decision; and the parties involved. The content requirements are designed to be adequate but not burdensome.

6 MCAR § 3.033 C. Decision to delay implementation.

At any time prior to or within ten days after the issuance of the final decision on an action, the chairperson of the EQB may delay implementation of the action by notice to the agency, the project proposer and interested parties as identified by the governmental unit. Notice may be verbal; however, written notice shall be provided as soon as reasonably possible. The chairperson's decision to delay implementation shall be effective for no more than ten days by which time the EQB must affirm or overturn the decision.

DISCUSSION: This paragraph is added to set forth the time frame for action. The initial time frame of ten days from date of issuance is statutory. However, the statute states that the board may delay implementation, as opposed to the chairperson of the board. The logistics of requiring a special board meeting to take this action within that time frame would cause this provision to be nonfunctional. An alternate time frame was therefore established by allowing the chairperson to take action delaying implementation but requiring board affirmation of that action within ten working days.

Prompt and adequate notice is required; however, the procedures for notice prior to exercise of this temporary authority have been kept to a minimum because it is likely that, if this provision is exercised, the time frame will be very brief. In addition, in accord with the statutory interpretation, such initial notice would be merely between the chairperson of the EQB, the proposer, and the affected state agencies. Complete notice and hearing requirements are set forth at 6 MCAR § 3.033 E.

6 MCAR § 3.033 D. Basis for decision to delay implementation.

The EQB, or the chairperson of the EQB, shall delay implementation of an action where there is substantial reason to believe that the action or approval is inconsistent with the policies and standards of Minn. Stat. §§ 116D.01 - 116D.06.

DISCUSSION: This paragraph is added to define the standard to be used by the EQB in determining whether or not to delay implementation of a state agency's action. The standard used is statutory and is the basic standard required by the Minnesota Environmental Policy Act. This paragraph is included to refer the reader to the proper source.

6 MCAR § 3.033 E. Notice and hearing.

Promptly upon issuance of a decision to delay implementation of an action, the EQB shall order a hearing. When the hearing will determine the rights of any private individual, the hearing shall be conducted pursuant to Minn. Stat. § 15.0418. In all other cases, the hearing shall be conducted as follows:

1. Written notice of the hearing shall be given to the governmental unit, the proposer, and parties, as identified by the governmental unit, no less than seven days in advance. To the extent reasonably possible, notice shall be published in the EQB Monitor and a newspaper of general circulation in each county in which the action is to take place. The notice shall identify the time and place of the hearing, and provide a brief description of the action and final decision to be reviewed and a reference to the EQB's authority to conduct the hearing. The hearing may be conducted by the EQB's chairperson or a designee;

2. Any person may submit written or oral evidence tending to establish the consistency or inconsistency of the action with the policies and standards of Minn. Stat. §§ 116D.01 - 116D.06. Evidence shall also be taken of the governmental unit's final decision; and

3. Upon completion of the hearing, the EQB shall determine whether to affirm, reverse, or modify the governmental unit's decision. If modification is required, the EQB shall specifically state those modifications. If the EQB fails to act within 45 days of notice given pursuant to 6 MCAR § 3.033 C. the agency's decision shall stand as originally issued.

DISCUSSION: This paragraph is added to define proper notice and hearing provisions relevant to exercise of this authority thus providing for the process requirements of adequate notice and opportunity to be heard. For actions in which the legal rights, duties, or privileges of parties are required by law or constitutional right to be determined pursuant to an agency hearing, the contested case notice and hearing requirements shall apply. Statutory authority for contested case proceedings is found at Minn. Stat. § 15.0418. Rules relating to implementation of that statute are found at 9 MCAR §§ 2.201 - 2.299. The alternative procedures set forth in this paragraph apply to activities that are not properly contested case proceedings.

Subparagraph one is included to define adequate notice. It should be noted that, if an activity is being challenged pursuant to this rule, it is likely that the activity is highly controversial. Therefore, the RGU will likely be able to identify the primary parties interested in the activity. Publication in the EQB Monitor and issuance of a press release are highly encouraged, however, compliance with the legislative time frame may preclude the most desirable time frame for notice via those publications.

Subparagraph two is included to delineate the fact that public comment is encouraged at the hearing. The record of the government decision in question also becomes a part of the hearing record. As required by Minn. Stat. § 116D.04 subd. 9, the standard of the Minnesota Environmental Policy Act is the base standard to be used by the EQB in making decisions relating to this provision.

Subparagraph three sets forth the statutory time deadline for the EQB to make its decision. This time is measured from the original notice from the EQB's chairperson to delay implementation. As provided by that statute, the decision of the EQB shall replace the original agency decision.

Introduction to Chapter Fourteen: Substitute Forms of Environmental Review

Chapters Twelve and Thirteen establish the basic process for implementing the state environmental review program. That process is set forth as a relatively simple and straight forward process that can be applied to any type of activity in any part of the state. The basic goal of this process is to assure that environmental factors are considered in government decision-making processes. In recognition of the fact that there may be processes in existence or capable of being developed that may address the need for environmental review more efficiently for certain types of activities or certain areas of the state, Chapter Fourteen sets out a framework for proposing and substituting those forms of environmental review.

Four types of substitute environmental review processes are envisioned in this chapter.

1. Joint federal/state EISs to eliminate duplication of effort on projects for which there is both federal and state involvement.

2. Generic EISs to address issues that are important to the state or a region that cannot be properly addressed in a narrow case by case focus.

3. A model ordinance provision to allow local government units to develop their own environmental review process for activities that are of purely local concern.

4. Alternative review to allow an open-ended approach for any governmental unit to substitute their process by demonstrating that it more effectively serves the goals of environmental review.

Introduction to 6 MCAR § 3.034 Alternative Review

This rule is included pursuant to Minn. Stat. § 116D.04 subd. 4a to establish a mechanism by which governmental units may substitute their own processes for the environmental review process set forth in Chapters Twelve and Thirteen. The provisions in this rule are intentionally open to avoid placing restrictions on potential processes. The purpose of these rules is to assure that adequate environmental review takes place - not to force it into a set procedure. Alternative review proposals will be considered on a case-by-case basis. If the proposal meets the basic needs for consideration of environmental impacts and alternatives, as well as for public involvement, the alternative will be approved. This rule is not a means for governmental units to avoid environmental review; it is a means of allowing them to complete it more efficiently.

The alternative review procedure is designed to be applied flexibly by allowing each governmental unit to develop a procedure that best fits its particular need and capabilities. It should be noted that an alternative review procedure could be proposed by a governmental unit to apply to all types of activities for which it is RGU - or for only one type of activity - i.e., a governmental unit may use an alternative review procedure for one type of activity and continue to use the procedures set forth in these rules for all other types of activities for which it is RGU.

In spite of the flexability of the process, it is anticipated that relatively few governmental units will seek approval of an alternative review procedure. The simple reason is that the rules as proposed present many opportunities for expediting environmental review. Alternative procedures are not likely to be able to further reduce the time frame or cost of documents to any great degree. Further, in order for it to pay for a governmental unit to propose an alternative reivew procedure, they would have to be in a position of having many projects subject to environmental review. This is merely from a cost management perspective. It will require staff time to develop the proposal and present it for review. For the alternative to pay, the savings generated by it must exceed the costs associated with the development of the alternative. It is, therefore, anticipated that this provision will be used only in cases where there is an established permitting or review procedure that accomplishes the same ends and for which the governmental unit would have several applications that would otherwise be subject to environmental review pursuant to these rules. This scenario is likely to apply only to permitting state agencies, such as the Department of Natural Resources, the Department of Transportation or the Pollution Control Agency, or to very high growth cities with a well developed comprehensive plan.

In short, while the alternative reivew procedure is flexible, its practical application is limited by the facts that 1) most governmental units seldom, if ever, have projects undergoing environmental review, and 2) the proposed process is written to be time and cost effective.

The current rules contain no provision for alternative review proposals. Although they do not specifically exclude the possibility of alternative review, they provide no framework to encourage development of such proposals where they would be functional. The proposed rules set forth the minimum standards the governmental unit must include to have the process considered alternative review. EQB staff will function in the capacity of assisting and coordinating governmental units in the

development of alternative review proposals where such proposals would be practical.

6 MCAR § 3.034 A. Implementation

The EQB may approve the use of an alternative form of environmental review for categories of projects which undergo review under other governmental processes. The governmental processes must address substantially the same issues as the EAW and EIS process and use procedures similar in effect to those of the EAW and EIS process. To qualify as an alternative form of review the governmental unit shall demonstrate to the EQB that its review process meets the following conditions:

1. The process identifies the potential environmental impacts of each proposed action;

2. The process addresses substantially the same issues as an EIS and uses procedures similar to those used in preparing an EIS but in a more timely or more efficient manner;

3. Alternatives to the proposed action are considered in light of their potential environmental impacts;

4. Measures to mitigate the potential environmental impacts are identified and discussed;

5. A description of the proposed action and analysis of potential impacts, alternatives and mitigating measures are provided to other affected or interested governmental units and the general public;

6. The governmental unit shall provide notice of the availability of environmental documents to the general public in at least the area affected by the action. A copy of environmental documents on actions reviewed under an alternative review procedure shall be submitted to the EQB. The EQB shall be responsible for publishing notice of the availability of the documents in the EQB Monitor;

7. Other governmental units and the public are provided with a reasonable opportunity to request environmental review and to review and comment on the information concerning the action; and

8. The process must routinely develop the information required in paragraphs A. 1. - A. 5. of this rule and provide the notification and review opportunities in paragraphs A. 6. and A. 7. of this rule for each action that would be subject to environmental review.

DISCUSSION: This paragraph sets forth the basic requirements of an alternative review process. Comments have been received indicating a general confusion between the concept of a permit or approval and alternative review. The fact that a unit of government is responsible for approving a project does not mean they will necessarily consider environmental factors or involve the public in their decision. The historic failure of some governmental units to do this led to the requirement for a public environmental review process. If the governmental unit can demonstrate that their established or proposed process attains the goal of adequate consideration of environmental impacts and the views of the public, they should consider substituting their process for the process set forth in these rules. This paragraph establishes the EQB as the responsible governmental unit in deciding the effectiveness of the proposal in addressing the base standards for environmental review. This is in keeping with the statutory responsibilities assigned to the EQB for implementing and monitoring environmental review in the state.

Subparagraph one sets forth the requirement that the potential environment impacts of the activity be identified by the alternative process proposed. This requirement is mandated by Minn. Stat. § 116D.04 subd. 4a and is necessary to adequately consider alternatives to the activity and methods to mitigate the impacts. The governmental unit should demonstrate its ability to recognize potential impacts and understand the significance of the impacts.

Subparagraph two sets a double requirement in relation to the EIS. The first requirement relates to the content of the EIS. 6 MCAR § 3.031 B. sets out the minimum content requirements that an EIS should have to provide adequate information on the potential impacts of a project. Pursuant to Minn. Stat. § 116.04 subd. 4a, the alternative procedure must establish a means of addressing these content requirements. If a given content requirement is not applicable or is better addressed in a different manner, the alternative procedure should identify why the change is desirable. The second requirement relates to the need for having an alternative procedure. As the statute requires, the proposal should clearly state how the alternative process will be more time efficient or more efficient in addressing potential impacts or the need for public comment. Alternative procedures developed for the sole purpose of avoiding the state process with no time advantages or cost benefits are likely to be questioned as being potentially a means of avoiding environmental review or a means of hiding the issues from public attention.

Subparagraph three identifies the need for the procedure to address alternatives to proposed activities. Some mechanism must be available to openly evaluate potential alternatives, including the no build alternative. This requirement is one of the primary purposes of environmental review.

Subparagraph four mandates a demonstration of the ability to identify and evaluate mitigation measures that may be implemented to minimize potential environmental effects. This requirement is one of the primary purposes of environmental review.

Subparagraph five sets forth minimal content requirements for public notice relating to the activity. For any environmental review process to be adequate, the public and other interested governmental units must be made knowledgeable of the activity.

Subparagraph six sets forth the basic notice requirements relating to the availability of the environmental documents. Two forms of notice are required:

1. Local notice - this may be in whatever form the RGU feels is most effective locally; and

2. EQB Monitor publication - to accomplish this notice requirement, the RGU merely has to send a copy of the document to the EQB.

EQB notification is necessary because of the statutory mandate for the EQB to monitor the environmental review program and analyze its effectiveness.

Subparagraph seven sets a reasonableness standard for time requirements established in the alternative review proposal. The time frame set forth in these rules may be altered provided that the alternative time frame allows adequate opportunity for public involvement. The question has arisen as to whether the statutory time frames may be altered via alternative review - i.e., whether the statutory time frame requirements apply only to the rules set by the EQB or to all environmental review procedures developed under the authority of the EQB rules. It is the opinion of the EQB that the later case applies - i.e., that the alternative proposals must comply with the statutory requirements. It should be noted, however, that the only minimum time requirement established by statute is the 30 day comment period for the EAW. All other statutory time requirements are maximum time frames.

Subparagraph eight mandates a uniform process to be applied to all projects subject to environmental review pursuant to the alternative process. This requirement is necessary to assure that adequate review will take place on every project and to establish predictability and uniformity in the process to facilitate public involvement. The alternative process must clearly state the procedures that will be followed.

6 MCAR § 3.034 B. Exemption from Rules

> If the EQB accepts a governmental unit's process as an adequate alternative review procedure, actions reviewed under that alternative review procedure shall be exempt from environmental review under 6 MCAR §§ 3.026, 3.027, 3.028, 3.030 and 3.031. On approval of the alternative review process, the EQB shall provide for periodic review of the alternative procedure to ensure continuing compliance with the requirements and intent of these environmental review procedures. The EQB shall withdraw its approval of an alternative review procedure if review of the procedure indicates that the procedure no longer fulfills the intent and requirements of the act and these rules. A project in the process of undergoing review under an approved alternative process shall not be affected by the EQB's withdrawal of approval.

DISCUSSION: This paragraph is included to clarify the point that projects submitted to an approved alternative review process are exempt from the procedural portions of these rules relating to the preparation, distribution and evaluation of EAWs and EISs. It should be noted that the alternative review procedure as proposed does not allow the development of alternative mandatory category thresholds that are different from the thresholds established in these rules. This is in line with the basic purpose of alternative review - i.e., it is intended as a means of utilizing alternative procedures to complete environmental review in a more timely or cost effective manner - but not as a means of avoiding it.

This paragraph further delineates EQB's continuing role in monitoring any alternative review procedures approved. If the EQB determines an approved alternative review procedure is failing to fulfill adequate standards of environmental review, the EQB may rescind its approval. It should be noted that such recision is not retroactive.

Introduction to 6 MCAR § 3.035 Model Ordinance.

This rule is proposed in compliance with Minn. Stat. § 116D.04 subd. 5a (h). The application of this rule is limited by statute to apply to:

1. Local governmental units;

2. Actions which do not require a state permit; and

3. Actions which are consistent with applicable comprehensive plans.

All three of these criteria must be met for this rule to apply.

The legislative intent is to provide an environmental review model for local units of government to apply on local projects that are of strictly local concern. This statutory provision is new. The current rules do not contain a model ordinance procedure.

This model ordinance is presented as a guide to local units that are interested in developing an environmental review procedure at the local level. It is projected that this provision will be utilized by relatively few local governmental units for several reasons:

1. The state environmental review process set forth by these rules is not excessively burdensome and relatively little would be gained via implementation of the substitute ordinance.

2. The statutory restrictions that exclude projects that require state permits and projects inconsistent with local comprehensive plans will force almost all controversial projects to be considered under the state environmental review rules. For the few additional projects that may be reviewable pursuant to the ordinance, it is likely to be most cost effective to use the same state process. Use of the same process tends to facilitate greater familiarity with the process on the part of the local government unit and the public, thus making for more efficient review.

3. If a local government unit feels that a local ordinance is desirable, they are likely to modify the model ordinance to better facilitate local conditions and needs, i.e., develop a more effective variation of the model ordinance.

It is anticipated that the primary benefit of this rule will be to serve as an incentive and model for local governmental units to develop a local environmental review policy. The ultimate goal of these rules and the state environmental policy is to incorporate environmental review at all stages of decision making to better serve the long range public interest. The EQB is working with representatives of local government units to adopt these basic guides to meet the local needs and concerns.

6 MCAR § 3.035 A. Application.

The model ordinance, set out in paragraph C. of this rule may be utilized by any local governmental unit which adopts the ordinance in lieu of 6 MCAR §§ 3.025-3.032 for projects which qualify for review under the ordinance.

DISCUSSION: This paragraph is included to clarify the point that projects reviewed pursuant to an approved model ordinance are exempt from the procedural portions of these rules relating to the preparation, distribution and evaluation of EAWs and EISs. This is consistent with the authority established at Minn. Stat. § 116D.04 subd. 5a (h).

6 MCAR § 3.035 B. Approval.

1. If a local governmental unit adopts the ordinance exactly as set out in paragraph C. of this rule, it shall be effective without prior approval by the EQB. A copy of the adopted ordinance shall be forwarded to the EQB.

2. If a local governmental unit adopts an environmental review ordinance which differs from the ordinance set out in paragraph C. of this rule, the EQB must determine whether the ordinance provides for the consideration of appropriate alternatives and ensures that decisions are made in accord with the policies and purposes of the act. If the EQB determines the proposed ordinance meets these requirements, the EQB shall approve the ordinance for adoption and shall periodically review its implementation.

3. Notice of adoption of the model ordinance pursuant to B. 1. and 2. of this rule shall be made in the EQB Monitor.

4. If the EQB determines that the proposed local ordinance does not meet its requirements, the local governmental unit shall be notified of the reasons for this decision in writing within 30 days.

DISCUSSION: This paragraph sets forth the procedural requirements for a local governmental unit to gain approval of a proposed ordinance.

Subparagraph one states that if the local governmental unit adopts the model ordinance as presented in these rules, EQB approval is automatic. The only procedural requirement is that the governmental

unit forward a copy of the adopted ordinance to the EQB. Receipt of this copy shall serve as notice to the EQB to publish notice of the adoption of the model ordinance in the EQB Monitor as required in subparagraph three.

Subparagraph two allows the local governmental unit to adopt a different environmental review ordinance. In such cases, however, EQB approval of the ordinance must be received before projects reviewed under the ordinance can be exempted from environmental review pursuant to these rules. The standard to be used by the EQB in evaluating the ordinance is statutory pursuant to Minn. Stat. § 116D.04 subd. 5a (h). This subparagraph further requires the EQB to monitor the implementation of local government ordinances. This requirement is consistent with the EQB's responsibilities relating to monitoring and implementing environmental review in the state.

Subparagraph three contains a requirement for publication of notice of adoption of an ordinance in the EQB Monitor. If the ordinance is the model ordinance, notification of the EQB is achieved by submitting a copy of the ordinance to the EQB. If the ordinance is different than the model ordinance, notification is achieved via the process of obtaining EQB approval. Publication of notice of adoption of a model ordinance is necessary to facilitate public participation.

Subparagraph four places a requirement upon the EQB to notify a local unit of government of the reasons for not approving a proposed ordinance. The 30 day time requirement for notification is included to insure prompt action by the EQB. This paragraph was included at the request of local governmental units to ensure that the EQB is open and prompt in dealing with requests for approval of local ordinances.

6 MCAR § 3.035 C. Model Ordinance.

AN ORDINANCE RELATING TO THE PREPARATION AND

REVIEW OF ENVIRONMENTAL ANALYSIS

The (county board) (town board) (city council) (watershed board) of ordains:

Section 1. Application. This ordinance shall apply to all actions which:

a. Are consistent with any applicable comprehensive plan; and

b. Do not require a state permit; and

c. The (board) (council) determines that, because of the nature or location of the action, the action may have the potential for significant adverse environmental effects; or

d. Are listed in a mandatory EAW or EIS category of the state environmental review program, 6 MCAR §§ 3.038 and 3.039, one copy of which is on file with the (county auditor) (town clerk) (city clerk) (watershed district board of managers).

This ordinance shall not apply to actions which are exempted from environmental review by 6 MCAR § 3.041 or to projects which the (board) (council) determines are so complex or have potential environmental effects which are so significant that review should be completed under the state environmental review program, 6 MCAR § 3.021 et seq.

Section 2. Preparation. Prior to or together with any application for a permit or other form of approval for an activity, the proposer of the action shall prepare an analysis of the action's environmental effects, reasonable alternatives to the project and measures for mitigating the adverse environmental effects. The ana-

lysis should not exceed 25 pages in length. The (board) (council) shall review the information in the analysis and determine the adequacy of the document. The (board) (council) shall use the standards of the state's environmental review program rules in its determination of adequacy. If the (board) (council) determines the document is inadequate, it shall return the document to the proposer to correct the inadequacies.

Section 3. Review. Upon filing the analysis with the (board) (council), the (board) (council) shall publish notice in a newspaper of general circulation in the (county) (city) (town) (district) that the analysis is available for review. A copy of the analysis shall be provided to any person upon request. A copy of the analysis shall also be provided to every local governmental unit within which the proposed project would be located and to the EQB. The EQB shall publish notice of the availability of the analysis in the EQB Monitor.

Comments on the analysis shall be submitted to the (board) (council) within 30 days following the publication of the notice of availability. The (board) (council) may hold a public meeting to receive comments on the analysis if it determines that a meeting is necessary or useful. The meeting may be combined with any other meeting or hearing for a permit or other approval for the activity. Public notice of the meeting to receive comments on the analysis shall be provided at least ten days before the meeting.

Section 4. Decision. In issuing any permits or granting any other required approvals for an activity subject to review under this ordinance, the (board) (council) shall consider the analysis and the comments received on it. The (board) (council) shall, whenever practicable and consistent with other laws, require that mitigation measures identified in the analysis be incorporated in the project's design and construction.

DISCUSSION: This paragraph sets forth the proposed model ordinance. Local governmental units that would be eligible to use this ordinance or an adaptation include counties, townships, cities, and watershed districts.

Section one defines the types of activities that may be subject to review pursuant to a model ordinance. The requirements of consistency with applicable comprehensive plans and lack of state authorization are statutory pursuant to Minn. Stat. § 116D.04 subd. 5a (h). In addition to these requirements, the activity must have some demonstrated measure of concern relating to environmental effects. This measure of concern may be met by a determination by the RGU that the activity may have the potential for significant environmental effects or by the fact that the project exceeds the threshold of one of the mandatory categories established in these rules. The standard relating to the potential for significant environmental effects is a statutory standard required pursuant to Minn. Stat. § 116D.04 subd. 5a (h) and is the same standard applied in these rules. It should be noted that this paragraph incorporates the thresholds of the mandatory categories of these rules into the local ordinance provisions. This is done because by virtue of the rule making process it must be established that activities of that scale in fact have the potential for significant environmental effects. The statutory standard has, therefore, been met in these cases. In addition, Minn. Stat. § 116D.04 subd. 5a (h) provides for a substitute process, however, the EQB is the only body with authority to establish mandatory categories.

The last paragraph of section one incorporates the exemption thresholds established by these rules. This is done because, by virtue of the rule making process, it is established that activities of that scale are so minor that they could not have the potential for significant environmental efects. For these categories of activities the need for environmental review has already been determined.

This section also provides a means by which the RGU may make a determination that a project otherwise subject to the ordinance is of a nature that review of the activity would be more effectively completed pursuant to the regular EAW/EIS process. If the RGU makes this determination the ordinance would not apply and the activity would than be subject to these rules relating to RGU designation--i.e., the local governmental unit would likely still be RGU, however, they would follow the procedures set forth in these rules as opposed to the ordinance.

Section two requires the analysis of the environmental effects to be considered along with the proposer's permit application for those projects subject to the ordinance. The primary content requirements for environmental documents, i.e., impact analysis, alternatives, and mitigation measures must be addressed in the analysis. Activities subject to the ordinance will likely be of relatively minor scope. The board or council is responsible for reviewing the document and verifying its accuracy, i.e., whether the doument presents complete and accurate information with regard to the issues of concern. The board or council should use the basic standards provided in these rules in making its adequacy determination. These standards are necessary because they reflect the statutory standards relating to environmental clarity and policy.

Section three sets forth the notice requirements to allow for public comment on the activity. The notice requirement entails local publication in the form of a press release or paid ad, at the option of the governmental unit, and publication in the EQB Monitor. Publication in the Monitor is required to establish a fixed date for starting the comment period and to facilitate monitoring of the environmental review process. Copies of the analysis should be made available to all interested parties to help ensure timely comments and open discussion of the proposal.

A 30 day comment period is required for public comment. A public meeting may be held within this time period if the governmental unit feels it would be helpful in obtaining required information. No formal procedural requirements are made in regard to this meeting; however, a ten day notice is required to allow interested persons adequate time to plan and prepare for the meeting. The ten working day notice requirement is the standard requirement of meeting notice pursuant to these rules.

Section four contains language guiding the decision making process relating to activities reviewed pursuant to the ordinance. This requirement includes due consideration of the information collected pursuant to review and incorporation of proper mitigation measures to reduce the impacts. This language does not add substantively to the ordinance but rather brings basic considerations to attention that the board or council should be following to properly fulfill their responsibilities.

Introduction to 6 MCAR § 3.036 Generic EISs.

A generic EIS may be ordered by the EQB to study types of actions that are not adequately reviewed on a case-by-case basis.

This rule is included to establish guidance relating to the substitution of a comprehensive study of a particular issue or type of activity for portions of the analysis for individual activities. Use of this provision generates benefits for the public by helping insure complete information is available for government decision making and for the proposer by insuring that research and information gathering that is of a general or public benefit be paid for by the taxpayer as opposed to the individual proposers. Individual proposers benefit from this information by the incorporation of relevant information into the project specific analysis. It should be noted that this is not a substitute for project specific environmental review but rather a means of providing for a substitute information gathering process that will make the environmental review process more efficient.

The current rules do not establish procedures or guidance relating to generic EISs, however, generic EISs are possible pursuant to the current rules. The legislative changes do not alter the basic concept of a generic EIS; however, they are interpreted to encourage alternative methods of gathering information, as would be provided by a generic EIS. The basic drawback to the use of generic EISs is that agencies do not typically have the funding for a comprehensive study of this nature. Funding typically must come via a special legislative appropriation. In cases in which the potential developers that would benefit from a generic EIS, it may be possible to assess costs incurred directly to those benefitting. The mechanism for such cost assessment must be within the scope of the enabling legislation for the governmental units. The EQB does not have authority to establish rules relating to cost assessment of generic EISs.

The intent of this rule is to provide information relating to the proper use of a generic EIS. Although this rule is not significantly different from the current rules, this rule establishes increased definition of procedures and greater visibility of the process to hopefully facilitate increased use of the process. Implemented properly the generic EIS may serve to reduce overall environmental review costs, expedite environmental review, and improve the ability of governmental units to develop long range plans relating to the exercise of their authority.

6 MCAR § 3.036 A. Criteria.

A generic EIS may be ordered for any type of action for which one or more of the following criteria applies:

1. Basic research is needed to understand the impacts of such actions;

2. Decision makers or the public have need to be informed of the potential impacts of such actions;

3. Information to be presented in the generic EIS is needed for governmental or public planning;

4. The cumulative impacts of such actions may have the potential for significant adverse environmental effects;

5. The regional or statewide significance of the impacts cannot be adequately addressed on a project-by-project basis.

6. Governmental policies are involved that will result in a series of actions that will cause physical manipulation of the environment and may have the potential for significant adverse environmental effects.

DISCUSSION: This paragraph is included to outline the most likely scenarios in which a generic EIS would be of benefit. The language is permissive, i.e., alternative scenarios could also establish the need for a generic EIS.

The most basic situation in which a generic EIS is desirable is when original data collection and research is required to define the potential impact. The basic function of a project specific EIS is to organize and present available information and other original information that is directly relevant to the proposal. If background data is required to facilitate interpretation of the project specific information, the cost of collecting the background data is more properly borne by the general public. Data collection of this nature is most properly coordinated by the agency with expertise in the subject area.

Subparagraphs two and three present criteria that are always present to some degree on activities subject to environmental review. If decision makers have authority to permit or approve a project, they have a need to be informed about the potential effects of the project to properly exercise their discretion. Likewise, a clear picture of the

impacts is necessary to enable long range planning in the public interest. The measure of these two criteria is thus largely a matter of degree. The test is whether the specific information to be gained by the generic EIS will yield a substantive addition to the ability of the governmental unit to act in the best interests of the public.

Subparagraph four relates to the ability of a generic EIS to analyze impacts resulting from many projects in an additive and synergistic context. The limitation placed on the scope of project specific EISs may prevent the governmental unit from adequately assessing the total and long range impacts. Subparagraph five brings in the same concept on a geographic scale. The generic EIS offers an opportunity to perform a coordinated analysis. This analysis is then available for reference for later related activities.

Subparagraph six relates to the ability of using a generic study in the development of government policy. This application may have a more indirect benefit to specific activities. This criteria is more oriented to the informational needs of government units during the processes of program development.

6 MCAR § 3.036 B. EQB as RGU.

If the EQB orders a generic EIS, the EQB shall be the RGU for the generic EIS.

DISCUSSION: This paragraph is included to define the responsibiltiies relating to generic EISs. The EQB is proposed as the RGU for all generic EISs because a generic EIS typically involves coordination among many government units. The EQB is in one of the best positions for such coordination since the heads of the major state agencies with responsibilities relating to resource management are members of the board.

This provision also provides a measure of control on the quality of generic EIss. EQB meetings are public meetings with strict notice requirements to facilitate public involvement and scrutiny of the generic EIS.

This paragraph does not preclude other governmental units from undertaking comprehensive studies on their own initiative. It does mean, however, that such studies cannot be billed as generic EISs. Reference to the findings of a generic EIS should connote a measure of quality and public participation as provided by this rule. If other governmental units desire a generic EIS to be prepared on issues within their jurisdiction, their proper action is to request the EQB to order the generic EIS. If the EQB complies with the request, the EQB would be the RGU responsible for coordinating the study and determining its adequacy. Responsibilities relating to the actual preparation would be assigned with regard to which governmental unit is best able to furnish the needed services.

6 MCAR § 3.036 C. Public requests for generic EISs.

A governmental unit or any other person may request the EQB to order a generic EIS.

DISCUSSION: This paragraph is included to clarify for the reader that any individual or governmental unit is free to request the EQB to order and undertake preparation of a generic EIS. This action does not require a petition or any formal process. The EQB will, however, make its determination on the record provided or otherwise available. Therefore, to maximize the potential for having the EQB honor the request, a record documenting the need for a generic EIS should be provided.

An open and unencumbered process is desirable to facilitate public involvement in determining the need for environmental studies necessary to facilitate the EQB's responsibilities relating to monitoring the quality of the state's environment.

EIS preparation, the preparation and circulation of the EAW, and the time requirements.

DISCUSSION: This paragraph establishes a scoping process as part of the preparation process for generic EISs. Such a process is necessary to define the relevant issues and depth of the study. Issues conducive to generic EISs frequently have the potential for unlimited investigation if their goals are not closely defined. Poor definition obscures the potential relevance of the study.

The same scoping process is used as for project specific EISs. This process is desirable because it establishes strict procedural requirements to insure opportunity for input from interested parties. The substantive content flows from the participants. This enables an open process with opportunity for a flexible product. The requirements for permit identification, EAW procedures and time deadlines are deleted because a generic EIS addresses general issues as opposed to specific projects. Time deadlines should be established via the scoping meetings to fit the design of the study. The EQB as RGU is responsible for coordinating the scoping process.

6 MCAR § 3.036 G. Content.

In addition to any issues that may be addressed in the scoping process, the generic EIS shall contain the following:

1. Any new data that has been gathered or the results of any new research that has been undertaken as part of the generic EIS preparation;

2. A description of the possible impacts and likelihood of occurrence, the extent of current use, and the possibility of future development for the type of action; and

3. Alternatives including recommendations for geographic placement of the type of action to reduce environmental harm, different methods for construction and operation, and different types of actions that could produce the same or similar results as the subject type of action but in a less environmentally harmful manner.

DISCUSSION: This paragraph is included to define content requirements for generic EISs that differ from the project specific content requirements normally developed via the scoping process. These requirements are basic to the concept of generic review and are included to assist the reader in conceptualizing the potential use of a generic EIS.

Subparagraph one incorporates original data collection as an objective of the generic EIS preparation process. Project specific EISs usually focus primarily on the research and collection of prior data that may be relevant to the project. A basic advantage of the generic EIS is that it allows the scoping of specific research designed to provide information unique to the issues of concern. Although the inclusion of this data is self evident, this feature of the generic EIs is included for informational purposes.

Subparagraph two is intended to expand upon the analysis of impacts as defined in the content requirements for project specific EISs. The framework for the impact description and analysis in the generic EIS is cumulative. It entails an analysis of current impacts, as well as known and projected impacts related to future development.

Subparagraph three is intended to expand upon the discussion of alternatives defined in the content requirements for project specific EISs. The framework for the discussion of alternatives is considerably broader in the generic EIS. It may include recommendations for changes in government policy to adequately deal with projected development as well as project specific recommendations. This content requirement should be specifically geared to facilitating long range planning for the affected governmental units.

6 MCAR § 3.036 H. 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.

DISCUSSION: This paragraph is included to provide specific language clarifying the fact that a generic EIS does not replace the need for project specific review. The intent of the generic EIS is rather to facilitate project specific review. This clarification is necessary to provide guidance to governmental units in the proper use of the generic EIS after completion and to help assure proper procedures are followed and correct information is provided to developers. Proper use of the generic EIS will facilitate scoping project activities more narrowly and enabling abbreviated preparation schedules. It should be noted that governmental units must use relevant information presented in both the project specific EIS and the generic EIS in making their decisions to grant or deny permits. The record of decision should reflect consideration of these sources of information.

6 MCAR § 3.036 I. Relationship to projects.

The fact that a generic EIS is being prepared shall not preclude the undertaking and completion of a specific project whose impacts are considered in the generic EIS.

DISCUSSION: This paragraph is included to provide specific language clarifying the fact that a generic EIS may not be used solely as a means of delaying or preventing completion of specific projects. The intent of a generic EIS is to provide information beyond the scope of individual activities and to facilitate more efficient review of those activities. This clarification is necessary to provide guidance to governmental units in the proper use of the generic EIS and to help assure proper procedures are followed and correct information is provided to developers and other persons affected by proposed activities. Governmental units may postpone decision making awaiting the recommendations of a generic EIS; however, such action must be in compliance with the procedures implementing their authority. This rule contains no authorization to deviate from other established legislative or administrative procedures.

Introduction to 6 MCAR § 3.037 Joint federal/state EIS.

This rule is added pursuant to Minn. Stat. § 116D.04 subd. 5a (i) to clarify for governmental units the proper procedures to follow for projects that are also subject to federal regulations relating to environmental review. The state does not have authority to supplant federal regulations. On the other hand, it is not necessarily valid to say that, if a project is subjected to environmental review on the federal level, issues that are of concern to state and local authorities will be addressed. Federal, state and local governmental unit's enabling legislation and authority is modeled to address differing social and environmental concerns. As a result, the informational needs to facilitate responsible decision making in the implementation of that authority are different. The approach taken in these rules is to provide direction to governmental units to coordinate environmental review with any federal informational needs to avoid duplication of effort, expedite review and reduce costs in compliance with the overall purpose of these rules. This rule is included in the Chapter on substitute forms of environmental review because cooperative processes may reduce procedural demands, cost, and possibly informational demands. This rule does not provide authority to completely substitute one process for the other. The current rules contain a similar provision. The format was changed in an attempt to provide increased clarity.

Federal EISs will generally be prepared only on large projects and projects with federal funding. Federal agencies with environmental jurisdiction are included on the distribution list for state environmental review documents to facilitate early involvement, if applicable. The requirement to list known permit and approval requirements in the EAW is also designed to bring opportunities for cooperative assistance to light early in the process.

6 MCAR § 3.037 A. Cooperative processes.

> Governmental units shall cooperate with federal agencies to the fullest extent possible to reduce duplication between Minn. Stat. ch. 116D and the National Environmental Policy Act.

DISCUSSION: This paragraph is included to provide specific direction to governmental units to cooperate with applicable federal rules and processes. Governmental units are legally bound to comply with these statutes. This language is included at this point to advise governmental units of relevant procedures that may assist them in most effectively implementing their responsibilities.

6 MCAR § 3.037 B. Joint responsibility.

> Where a joint federal/state EIS is prepared, the RGU and one or more federal agencies shall be jointly responsible for preparing the EIS. Where federal laws have EIS requirements in addition to but not in conflict with those in Minn. Stat. § 116D.04, governmental units shall cooperate in fulfilling these requirements as well as those of state laws so that one document can comply with all applicable laws.

DISCUSSION: This paragraph is included to clarify that the responsibilities relating to preparation of the EIS are joint. The state does not have authority to direct federal agencies to be responsible for state and local concerns and the state does not have the authority to grant state or local governmental units the power to be responsible for preparation of federal documents. The elected procedure, therefore, is to recognize the dual authority and direct state and local governmental units to cooperate with the federal process. This language is included to advise governmental units of relevant procedures that may assist them in most effectively implementing their responsibilities.

6 MCAR § 3.037 C. Federal EIS as draft EIS.

> If a federal EIS will be or has been prepared for an action, the RGU shall utilize the draft or final federal EIS as the draft state EIS for the action if the federal EIS addresses the scoped issues and satisfies the standards set forth in 6 MCAR § 3.028 B.

DISCUSSION: This paragraph is included to enable complete substitution of federal documents for state environmental review documents. The base requirement is that the applicable document satisfies the information needs of environmental review on the state level as established through scoping and these rules. This provision is necessary to encourage effective use of available information and facilitate a more efficient environmental review process.

Introduction to Chapter Fifteen: Mandatory Categories

Chapter 15 presents a composite listing of all category thresholds for the environmental review program. This chapter represents a significant change from the current rules. Under the current rules, thresholds were established which mandated the preparation of an EAW. There were no mandated EIS thresholds. The current rules contain a listing of exemptions; however, these exemptions are general and tend not to be project specific.

The legislative amendments require the establishment of mandatory EAW, EIS and exemption categories at Minn. Stat. § 116D.04 subd. 2a (a). The basis for this change is the desire to establish greater predictability to the process, i.e. if parties know at the onset that an EAW or an EIS must be prepared, they can proceed with environmental review immediately and avoid the confrontations and time delays involved in project-by-project determinations. Likewise, if proposers know definitely that a project will not be subject to environmental review procedures, they may proceed with the assurance that the project will not be interrupted or intentionally delayed via petition actions. This chapter implements that legislative mandate.

The process of developing mandatory category thresholds has been extremely controversial. These thresholds were developed through an extensive public comment process in which interested parties provided arguments relating to the potential importance of the impacts of these types of activities and the potential fiscal impact.

In reviewing these categories, four major questions must be considered:

1. Is there a need for a mandatory category relating to that type of project or that impact;

2. What is the proper qualitative measure of that type of project or that impact (for example, should size of industrial facilities be measured in sq. ft. of ground area occupied, sq. ft. of floor space, cost of the facility, type of end product, type of waste products, number of employees, etc.);

3. What is the proper quantitative measure of that type of project or that impact, i.e. how many units of whatever was selected as the basis of measurement in 2 above; and,

4. Is the threshold administratively manageable?

For the most part, these considerations are sequential. Interested persons providing comment on these categories are requested to indicate which realm of consideration their comments address.

The mandatory categories in the proposed rules are organized into "category areas". These category areas were selected on the basis of types of projects that are most likely to be subjected to environmental review or that are the most controversial. Categories within a category area are designed to address specific types of projects or impacts that are of most concern within that category area.

The discussion of the mandatory categories in this statement of need and reasonableness follows:

a. Statement of need for category area.

b. Statement of proposed categories within the category area.

(1) Proposed EAW categories

(2) Proposed EIS categories

(3) Proposed exemption categories

c. Statement of categories in the current rules that relate to the category area.

(1) Current EAW categories

(2) Current exemption categories

d. Statement relating to the reasonableness of the qualitative measure of the categories and alternatives considered.

e. Statement relating to the reasonableness of the quantitative measure of the categories and alternatives considered.

f. Brief discussion of public comment or controversy relating to the categories.

g. Statement relating to the projected number of projects that will be impacted by the category threshold.

h. Listing of primary sources of information relating to the category area.

The presentation of the mandatory categories in the proposed rules is broken into four separate rules. This was done to assist the reader in locating the relevant protions of the categories and to facilitate understanding of the significance of the category. Theses headings state:

6 MCAR § 3.038 Mandatory EAW Categories.

An EAW must be prepared for activities that meet or exceed the threshold of any of the following categories.

6 MCAR § 3.039 Mandatory EIS Categories.

An EIS must be prepared for activities that meet or exceed the threshold of any of the following categories.

DISCUSSION: This language is repetitive of 6 MCAR § 3.025 B.; however, it is necessary at this point in the rules also to facilitate proper understanding of procedures for projects exceeding the mandatory thresholds.

6 MCAR § 3.040 Discretionary EAWs

A governmental unit with jurisdiction may order the preparation of an EAW for any activity that does not exceed the mandatory thresholds designated in 6 MCAR §§ 3.038 or 3.039 if:

A. The governmental unit determines that, because of the nature or location of the proposed actions, the action may have the potential for significant adverse environmental effects, and

B. The primary purpose of the action is not exempted pursuant to 6 MCAR § 3.041.

DISCUSSION: This special rule was inserted relating to discretionary EAWs to facilitate proper interpretation of procedures relating to projects that do not exceed the mandatory thresholds and are not exempt. This rule was inserted as a result of the public meetings. At these meetings it was noted that some persons were interpreting the rules as requiring an EAW for all projects that are not exempt. This is not the case - in practice, the majority of projects that are not exempt will not require an EAW. An alternative way to view this is as four potential groupings that may apply to a project:

1. Mandatory EIS - require an EAW: require an EIS.

2. Mandatory EAW - require an EAW: optional EIS.

3. Discretionary - optional EAW: optional EIS.

4. Exempt - no EAW; no EIS.

6 MCAR § 3.041 Exemptions

Activities within the following categories are exempt from these rules.

DISCUSSION: An attempt was made to categorize the exemptions into category areas approximating the category areas used for the mandatory categories. The exemptions are set in a separate rule to facilitate quick reference and easier understanding of the rules.

The remaining discussion of this chapter is presented by category area. All relevant categories within that category area, i.e. mandatory EAW, mandatory EIS, or exemptions, are discussed together to reduce repetition and to facilitate comparison. The RGU for projects subject to a category is designated in parentheses after each category. RGUs were selected on the basis of which governmental unit has the major responsibility for authorizing a project or the greatest expertise in evaluating the environmental impacts of the project. For projects for which approval is primarily a local land use decision, the local unit of government is designated as the RGU. Separate justification is not provided for each RGU designated; however, relevant authority is discussed within the context of the discussion on reasonableness.

At the end of the discussion of each category area, numerical projections and records are presented for each applicable category. Note that the record for the current rules represents the number of actual EAWs received between February 13, 1977 and October 20, 1981. Projections reflect the number of EAWs anticipated yearly pursuant to the current rules. For categories under which proposals are not likely, but possible, a projection of one in five years was made. For categories under which it is very unlikely that any proposals will be made, a projection of zero is indicated. The projections are estimates based on the past history of the rules, comments received at public meetings and estimates of future development activities. The records and estimates refer to the number of activities that exceeded or are projected to exceed the mandatory thresholds. This does not include records or projections as to the number of petitions, discretionary EAWs, or volunmtary EAWs or EISs.

Category Area: Nuclear Fuels and Nuclear Waste

This category area is proposed because of the potential for significant adverse environmental and human health effects. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 A. Nuclear Fuels and Nuclear Waste

1. Construction or expansion of a facility for the storage of high level nuclear waste. (EQB)

2. Construction or expansion of a facility for the storage of low level nuclear waste for one year or longer. (MHD)

3. Expansion of a high level nuclear waste disposal site. (EQB)

4. Expansion of a low level nuclear waste disposal site. (EQB)

5. Expansion of an away-from-reactor facility for temporary storage of spent nuclear fuel. (EQB)

6. Construction or expansion of an on-site pool for temporary storage of spent nuclear fuel. (EQB)

Mandatory EIS - 6 MCAR § 3.039 A. Nuclear Fuels and Nuclear Waste

1. The construction or expansion of a nuclear fuel processing facility, including fuel fabrication facilities, reprocessing plants, and uranium mills. (DNR for uranium mills or PCA)

2. Construction of a high level nuclear waste disposal site. (EQB)

3. Construction of an away-from-reactor facility for temporary storage of spent nuclear fuel. (EQB)

4. Construction of a low level nuclear waste disposal site. (MHD)

Exemption - 6 MCAR § 3.041 - None

DISCUSSION: Under the current rules, the following category is directly relevant to the nuclear fuels and nuclear waste category area:

Mandatory EAW: 6 MCAR § 3.024 e_1. Construction of nuclear material processing plants and facilities - (PCA)

Exemption: None

In establishing these categories, nuclear waste was categorized into three main types: high level waste, low level waste, and spent nuclear fuel. In addition, nuclear fuel processing facilities are addressed. Waste facilities are distinguished by whether they are designed for disposal or for temporary storage and by whether the proposal entails construction at a new site or the expansion of an existing facility.

These categories are addressed on an all or none basis, i.e. no quantitative thresholds are applied. The basic reason for this is that commercially feasible operations are likely to generate enough waste to be of concern and that even small amounts of nuclear waste are likely to generate significant public concern and could be hazardous.

Low level waste is generated in Minnesota primarily from electrical generating facilities, medical facilities, research laboratories and industrial manufacturing facilities. Low level waste generated in these facilities may be stored on site to allow the waste to decay to background levels or to accumulate to a sufficiently large volume for shipment. Environmental review of on-site storage facilities should be done in conjunction with environmental review of the total facility.

Low level waste shipped from the site may be sent to a temporary storage facility. This could be a commercial operation or a government facility. These facilities are likely to store the waste for periods in excess of one year. This is especially true currently because Minnesota has no in-state disposal facility. These facilities and any facilities designed to store wastes on-site for greater than one year, would require the preparation of an EAW.

Currently, low level waste is shipped out of state for disposal. If a site is selected in Minnesota for development for the disposal of these wastes, an EIS would be required. If that site were ever expanded to accommodate additional waste capacity, an EAW would be necessary. The lesser requirement for the expansion of an existing facility is because the controversial siting aspects of review would be reduced and because a small percentage increase is not likely to result in significant adverse environmental impacts.

The primary high level nuclear waste generated in Minnesota is spent nuclear fuel rods from the Monticello and Prairie Island power plants. Categories are proposed to specifically address the storage of this waste. On-site storage facilities require preparation of an EAW, whereas, the construction of a storage facility at a different location would require an EIS. The current rules have no categories relating to this type of category; however, the expansion of the Prairie Island storage facility was reviewed by the EQB pursuant to a citizen petition. The EQB did not order preparation of an EIS on that expansion.

Minnesota currently does not have any facilities that generate high level nuclear waste other than spent fuel rods. Categories are included, however, to cover the possibility that such facilities may be constructed in the future or that a site may be designed to accommodate such wastes generated in other states.

The current rules included a category relating to nuclear fuel processing facilities. No EAWs were prepared under this category in the current rules. The proposed category is essentially the same but includes the potential expansion of such facility, if there ever is one, and identifies the types of facilities that could be subject to the category. This category is controversial because of recent exploration for uranium in the state and the possibility of construction of a uranium mill if deposits are located that are capable of commercial development.

The Minnesota Department of Health has regulatory authority relating to fissionable materials pursuant to Minn. Stat. § 144.12. The Radioactive Waste Management Act at Minn. Stat. § 116C.71 requires legislative authorization of any radioactive waste management facility. Primary authority relating to the impacts of processing facilities rests with the Pollution Control Agency pursuant to Minn. Stat. § 115.03 and Minn. Stat. § 116.07. Environmental review documents prepared pursuant to these proposed rules would be subject to cooperative state/federal procedures. The U.S. Nuclear Regulatory Commission has jurisdiction over nuclear materials.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 e_1.	0	-	-
§ 3.038 A.1.	-	0	-
§ 3.038.A.2.	-	1/5 years	-
§ 3.038 A.3.	-	0	-
§ 3.038.A.4.	-	0	-
§ 3.038 A.5.	-	0	-
§ 3.038 A.6.	-	0	-
§ 3.039 A.1.	-	-	0
§ 3.039 A.2.	-	-	0
§ 3.039 A.3.	-	-	0
§ 3.039 A.4.	-	-	1/5 years

Reference documents that may be of interest include:

1. "Low-level Radioactive Waste in Minnesota"; Minnesota Department of Health; July, 1981.

2. "Uranium: A Report on the Possible Environmental Impacts of Exploration, Mining and Milling in Minnesota"; Legislative Commission on Minnesota Resources; June, 1980.

3. "Uranium in Minnesota; An Introduction to Exploration, Mining and Milling"; Center for Urban and Regional Affairs; 1980.

4. "Uranium Exploration, Mining and Milling in Minnesota; A Review of the State's Regulatory Framework"; Minnesota Environmental Quality Board; September, 1981.

Category Area: Electric Generating Facilities

This category area is proposed because of the need for coordinating public review with relation to the need for and alternatives to generating facilities as well as with relation to the siting of proposed facilities and because of potential significant environmental impacts relating to air quality, energy use and secondary development resulting from these facilities. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 B. Electric Generating Facilities

Construction of an electric power generating plant and associated facilities designed for or capable of operating at a capacity of 25 megawatts or more. (EQB)

Mandatory EIS - 6 MCAR § 3.039 B. Electric Generating Facilities

Construction of a large electric power generating plant pursuant to 6 MCAR § 3.055. (EQB)

Exemptions - 6 MCAR § 3.041 B. Electric Generating Facilities

Construction of an electric generating plant or combination of plants at a single site with a combined capacity of less than five megawatts.

DISCUSSION: Under the current rules, the following category is directly relevant to the electric generating facilities category area:

Mandatory EAW: 6 MCAR § 3.024 c_1. Construction of electric generating plants at a single site designed for, or capable of, operation at a capacity of 200 or more megawatts (electrical) - (PCA).

Exemption: None

The EIS threshold proposed is consistent with current power plant siting regulations. Special procedures relating to the implementation of this category are set forth at 6 MCAR § 3.055. This threshold is the same as the EAW threshold under the current rules. An EIS is likely to be prepared on these facilities pursuant to the current procedures.

The proposed EAW threshold is set at 50% of the LEPGP size criteria threshold. The electric generating facilities most likely to be impacted by the proposed category would be new coal fired facilities. Currently, there are approximately 30 coal fueled electric generating facilities of 25 megawatts or larger in Minnesota. Environmental impacts likely to be of concern include air pollution, water pollution, thermal pollution, transportation and storage related impacts, and adjacent land use issues. Hydro, alternative fuel, solar or wind powered facilities are likely to be less than 25 megawatts in size. All nuclear facilities would require an EIS.

The following graph presents EQB projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 c_1.	0	-	-
§ 3.038 B.	-	1	-
§ 3.039 B.	-	-	0

Reference documents that may be of interest include:

1. Regulating Electrical Utilities in Minnesota: The Reform of Legal Institutions; Joint Committee on Science and Technology; March, 1980.

Category Area: Petroleum Refineries

This category area is proposed because of the potential for environmental impacts relating to air pollution, transportation, energy use, toxic discharge, spills, water pollution, and odors resulting from these facilities. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 C. Petroleum Refineries

Expansion of an existing petroleum refinery facility which increases its capacity by 10,000 or more barrels per day. (PCA)

Mandatory EIS - 6 MCAR § 3.039 C. Petroleum Refineries

Construction of a new petroleum refinery facility. (PCA)

Exemptions - 6 MCAR § 3.041: None

DISCUSSION: Under the current rules, the following category is directly relevant to the petroleum refinery category area:

Mandatory EAW: 6 MCAR § 3.024 f. Construction of a new oil refinery, or an expansion of an existing refinery that shall increase capacity by 10,000 barrels per day or more--(PCA)

Exemption: None

The EIS threshold proposed was a part of the EAW threshold of the current rules. It is likely that an EIS would have been prepared on new facilities pursuant to the current procedures because of the expected impacts and the need for environmental review.

The EAW threshold proposed is the same as the EAW threshold for expansion under the current rules.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 f.	0	-	-
§ 3.038 C.	-	1/5 years	-
§ 3.039 C.	-	-	0

Category Area: Fuel Conversion Facilities

This category area is proposed because of the potential for environmental impacts resulting from these facilities and because there are many areas of controversy relating to potential impacts of these types of categories since they are largely untested in practice. Specific categories recommended with this category area include:

Mandatory EAW - 6 MCAR § 3.038 D. Fuel Conversion Facilities

1. Construction of a facility for the conversion of coal, peat, or biomass sources to gaseous, liquid, or solid fuels if that facility has the capacity to utilize 25,000 dry tons or more per year of input. (PCA)

2. Construction or expansion of a facility for the production of alcohol fuels which would have or would increase its capacity by 5,000,000 or more gallons per year of alcohol produced. (PCA)

Mandatory EIS - 6 MCAR § 3.039 D. Fuel Conversion Facilities

1. Construction of a facility for the conversion of coal, peat, or biomass sources to gaseous, liquid or solid fuels if that facility has the capacity to utilize 250,000 dry tons or more per year of input. (PCA)

2. 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. (PCA)

Exemptions - 6 MCAR § 3.041 C. Fuel Conversion Facilities

Expansion of a facility for the production of alcohol fuels which would have or would increase its capacity by less than 500,000 gallons per year of alcohol produced.

DISCUSSION: Under the current rules, the following category is directly related to the fuel conversion category area:

Mandatory EAW: 6 MCAR § 3.024 j. Construction of a new mineral or fuel processing or refining facility, including, but not limited to, smelting and hydrometallurigical operations--(PCA or DNR)

Exemptions: None

The current EAW category was designed primarily to deal with the potential for coal or peat conversion. This category was developed at a time when the likelihood of such a proposal was fairly remote. The proposed rules attempt to distinguish potential size differences for such projects and to distinguish those projects from alcohol production.

Fuel conversion facilities for coal and peat have the potential for significant impacts with regard to air pollutant and water pollutant discharges, and transportation impacts. The state currently has no facilities of this nature. If such a proposal is submitted, it is likely to be highly controversial because of these potential impacts and because of the energy policy issues it would present.

A dry ton year of imput figure was used as the gualitative measure of size for coal and peat gasification facilities because this is the most available standard for both types of facilities. The alternative of utilizing an output measure was considered but rejected because different types of fuel output are possible from coal and peat resources.

Fuel conversion facilities for alcohol production are generally viewed as having a lesser potential for significant environmental impact. In addition, the technology for alcohol production has been tested and applied; consequently, more data on environmental impacts is available. These facilities have the potential for significant impacts with regard to water pollution, odors, transportation systems and land use patterns. These facilities are likely to become more common in the future; therefore, controversy relating to use of natural areas for energy production and the use of agricultural land for energy production is anticipated.

Gallons of alcohol produced were used as the qualitative measure of facility size because this is the most commonly used method of describing facility size and because this measure is most directly related to emissions and discharges. The alternatives of tons, dry tons, and bushels were considered but rejected because they were not as easily applied to all potential types of biomass sources. Potential biomass sources include corn grain, corn residue, special energy crops, grasses, timber, crop residues and other grains.

The exemption threshold proposed was selected to assure that no private farming operations would be subject to petitions. It is anticipated that most private operations will be considerably smaller than

500,000 gallons and most commercial operations will be at least one million gallons yearly. The impacts resulting from such small facilities are likely to be insignificant.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 j.	4	-	-
§ 3.038 D.1.	-	1	-
§ 3.038 D.2.	-	2	-
§ 3.039 D.1.	-	-	1/5 years
§ 3.039 D.2.	-	-	1/5 years

Reference documents that may be of interest include:

1. Grain Motor Fuel Alcohol Technical and Economic Assessment Study; U.S. Department of Energy; June 1979.

2. The Report of the Alcohol Fuels Policy Review, Raw Materials Availability Reports; U.S. Department of Energy; September 1979.

Category Area: Transmission Lines

This category area is proposed because of the potential for significant adverse environmental impacts associated with construction, operation, and maintenance of a linear facility, as well as significant social and economic impacts associated with the location of a linear facility.

Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 E. Transmission Lines

Construction of a transmission line at a new location with a nominal capacity of 70 kilovolts or more with 20 or more miles of its length in Minnesota. (EQB)

Mandatory EIS - 6 MCAR § 3.039 E. Transmission Lines

Construction of a high voltage transmission line pursuant to 6 MCAR § 3.056. (EQB)

Exemptions - 6 MCAR § 3.041 D. Transmission Lines

Construction of a transmission line with a nominal capacity of 69 kilovolts or less.

DISCUSSION: Under the current rules, the following category is directly relevant to the transmission lines category area:

Mandatory EAW: 6 MCAR § 3.0204 d_1. Construction of electric transmission lines and associated facilites designed for, or capable of, operation at a nominal voltage of 200 kilovolts AC or more, or operation at a nominal voltage of + 200 kilovolts DC or more, and are 50 miles or more in length -- (EQC);

Exemptions: None

The EIS threshold proposed is consistent with regulations relating to the routing of transmission lines. Special procedures

relating to the implementation of this category are set forth at 6 MCAR § 3.056. This threshold is the same as the EAW threshold under the current rules, however, projects meeting that threshold would require an EIS pursuant to current procedures. Therefore, this threshold does not represent a change.

Transmission lines in Minnesota are of one of the following nominal ratings for AC: 69 kV, 115/138 kV, 161 kV, 230 kV, 345 kV, 500 kV. DC lines are either 250 kV or 400 kV. Sixty nine kV lines are generally regarded as less controversial with regard to potential environmental impacts. These 69 kV lines are usually of short length and serve the function of distributing power from the primary network to specific service lines. These lines have been exempted from environmental review.

Transmission lines of 115/138 kV, 161 kV, and 230 kV capacities are commonly termed high voltage transmission lines. These lines tend to be much more controversial and have similar potentials for environmental impacts. The proposed EAW category represents a significant change in that 115/138 kV and 161 kV lines over 20 miles in length would be subject to mandatory environmental review. Under the current rules such review was discretionary. This change is proposed because of three primary reasons: 1. these lines have similar potentials for environmental impacts, 2. these lines may be fairly easily upgraded to up to two levels higher transmission capacity, and 3. these lines have been controversial in the past as witnessed by several citizen requests for environmental review of 115 kV facilities.

The proposed EAW threshold is set for facilities that exceed 20 miles in length. These facilities frequently traverse more than one county and usually entail greater impact as a function of increased length. The abbreviated EAW format would place little additional burden upon the utility because the information requested would be developed pursuant to their own internal environmental review or pursuant to federal requirements. Facilities in excess of 69 kV nominal capacity but less than 20 miles in length would be subject to environmental review on a discretionary basis.

The following graph presents EQB projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 d_1.	0	-	-
§ 3.038 E.	-	2	-
§ 3.039 E.	-	-	1/5 years

Reference documents that may be of interest include:

1. Public Health and Safety Effects of High Voltage Overhead Transmission Lines; Minnesota Department of Health; October 1977.

2. Electric Power Transmission Lines - an Assessment of Rights of Way Compatability; Environmental Quality Board; final draft - available for review at the EQB office.

Category Area: Pipelines

This category area is proposed because of the potential for significant adverse environmental effects during construction as well as during the use of the facility if a leak should develop. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 F. Pipelines

1. Construction of a pipeline, greater than six inches in diameter and having more than 50 miles of its length in Minnesota, used for the transportation of coal, crude petroleum fuels, or oil or their derivatives. (EQB)

2. Construction of a pipeline for transportation of natural or synthetic gas at pressures in excess of 200 pounds per square inch with 50 miles or more of its length in Minnesota (EQB)

Mandatory EIS - None

Exemptions - None

DISCUSSION: Under the current rules, the following category is directly relevant to the pipeline category area:

Mandatory EAW: 6 MCAR § 3.024 g. Construction of a pipeline greater than six inches in diameter and 50 miles in length--(DNR)

Exemptions: None

Proposed category 6 MCAR § 3.038 F.1. is substantively the same category as contained in the current rules. The language has been changed to conform to the language used in the definition of large energy facilities as defined at 6 MCAR § EA 501 (f).

Proposed category 6 MCAR § 3.038 F.2. is a new category. The threshold of this category corresponds to the large energy facility threshold as defined at 6 MCAR § EA 501 (f).

These categories are needed because, although a certificate of need must be prepared for large energy facilities, the certificate of need process does not entail a comprehensive assessment of potential environmental impacts. The thresholds were selected to promote consistency with the certificate of need process. Pipelines of less capacity or a shorter distance are likely to be connecting pipelines or a part of a distribution system and environmental review may be required on a discretionary basis if significant adverse impacts are anticipated.

The following graph presents EQB projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Processed	# EISs/Year Processed
§ 3.024 g.	1	-	-
§ 3.038 F.1.	-	1/5 years	-
§ 3.038 F.2.	-	1/5 years	-

Category Area: Transfer Facilities

The category area is proposed because of environmental impacts associated with operation of the facilities, because these facilities are typically located near water resources, and because these facilities are often very controversial in the immediate vacinity. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 G. Transfer Facilities

1. Construction of a facility designed for or capable of transferring 300 tons or more of coal per hour or with an annual throughput of 500,000 tons of coal from one mode of transportation to a similar or different mode of transportation; or the expansion of an existing facility by these respective amounts. (PCA)

2. Construction of a new facility or the expansion by 50 percent or more of an existing facility for the bulk transfer of hazardous materials with the capacity of 10,000 or more gallons per transfer, if the facility is located in a shoreland area, delineated flood plain, or a state or federally designated wild and scenic rivers district. (PCA)

Mandatory EIS - None

Exemptions - 6 MCAR § 3.041 E. Transfer Facilities

Construction of a facility designed for or capable of transferring less than 30 tons of coal per hour or with an annual throughput of less than 50,000 tons of coal from one mode of transportation to a similar or different mode of transportation; or the expansion of an existing facility by these respective amounts.

DISCUSSION: The current rules contain no EAW or exemption categories relating to the transfer facility category area.

The need for the category relating to coal transfer facilities was voiced early in the process of developing category areas. Concerns documenting this need included fugitive dust emissions, leaking, noise levels, transportation related issues, local land use issues, and potential water pollution issues if the facility is located near a water resource. The threshold was developed to be consistent with certificate of need definitions. The threshold used corresponds to the definition of "coal transshipment facility" at 6 MCAR § 2.090 4 E. The exemption category threshold was set at 10% of this threshold. The intention of the exemption threshold is to prevent petitions for minor industrial operations where coal is used as an energy source. If operations of this nature have the potential for significant impacts, the issue should be raised pursuant to the primary purpose of the activity.

The need for the category relating to the transfer of hazardous materials was raised during the public participation process. The primary concerns documenting this need included the potential for spills resulting in serious water contamination if that facility is near water resources. The threshold was derived to be higher than the amount of material carried by an average truck transport but still sensitive enough to apply to large transfer facilities associated with barge transportation.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.038 G.1.	-	1	-
§ 3.038 G.2.	-	1	-

Category Area: Underground Storage

This category is proposed because this type of project is new and largely untested: is very large in scope, has the potential for groundwater contamination and serious human health impacts and is very controversial. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 H. Underground Storage

1. Expansion of an underground storage facility for gases or liquids that requires a permit, pursuant to Minn. Stat. § 84.57. (DNR)

2. Expansion of an underground storage facility for gases or liquids, using naturally occurring rock materials, that requires a permit pursuant to Minn. Stat. § 84.621. (DNR)

Mandatory EIS - 6 MCAR § 3.039 F. Underground Storage

1. Construction of an underground storage facility for gases or liquids that requires a permit pursuant to Minn. Stat. § 84.57. (DNR)

2. Construction of an underground storage facility for gases or liquids, using naturally occurring rock materials, that requires a permit pursuant to Minn. Stat. § 84.621. (DNR)

Exemptions - None

DISCUSSION: Under the current rules, the following category is directly relevant to the underground storage category area:

Mandatory EAW: 6 MCAR § 3.024 i. Construction of an underground storage facility for gases and liquids that requires a permit, pursuant to Minn. Stat. § 84.57 (1974) --(DNR).

Exemptions: None

Minn. Stat. § 84.57 mandates a permit for the displacement of groundwater by the underground storage of gases or liquids under pressure. The Department of Natural Resources (DNR) is the responsible permitting agency. No specific rules have been promulgated regarding this authority. One facility of this type has been constructed in Minnesota. No EIS was prepared for that facility. The DNR is currently processing a second application. An EIS has been ordered on the proposed facility. The primary environmental effects of concern on this type of project are groundwater quantity and quality impacts. The lack of a formal process for citizen comment further documents the need for environmental review of this type of activity.

Minn. Stat. § 84.621 mandates a permit for the storage of gases or liquids, other than water, in natural rock formations underground. These formations could be naturally occurring or the result of the mining of rock material to create a storage site in a rock formation. No facilities of this type currently are found in Minnesota and no formal proposals have been presented. It is known, however, that the concept of mining rock to create an underground cavity in the bedrock is being discussed. The purpose of the cavity would be to potentially store petroleum products. The primary environmental concerns associated with such an activity would be related to groundwater quality and safety concerns. The DNR is the responsible permitting agency for this type of activity. No specific rules have been promulgated regarding this authority. The lack of a formal process for citizen comment further documents the need for environmental review of this type of activity.

No threshold is applied to these activities - i.e., projects of these types would have to be sufficiently large in scale for economic reasons that they would raise the potential for significant environmental impacts. Further, use of a threshold could raise the potential of attempts to piecemeal projects that may be controversial. The impacts of the entire facility should be considered prior to the approval of any part. The lesser EAW requirement is applied for expansion because once a facility is constructed, the original EIS can be used as an information base plus the facility will have developed a record relating to its actual impacts. The need for an EIS on an expansion can thus be developed on a case-by-case basis.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 i.	0	-	-
§ 3.038 H.1.	-	0	-
§ 3.038 H.2.	-	0	-
§ 3.039 F.1.	-	-	1/5 years
§ 3.039 F.2.	-	-	1/5 years

Category Area: Storage Facilities

This category area is proposed because of concerns relating to potential environmental impacts and because of the likelihood of controversy relating to the siting of these types of projects. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 I. Storage Facilities

1. Construction of a facility designed for or capable of storing more than 7,500 tons of coal or with an annual throughput of more than 125,000 tons of coal; or the expansion of an existing facility by these respective amounts. (PCA)

2. Construction of a facility on a single site designed for or capable of storing 1,000,000 gallons or more of hazardous materials. (PCA)

3. Construction of a facility designed for or capable of storing on a single site 100,000 gallons or more of liquified natural gas or synthetic gas. (PCA)

Mandatory EIS - None

Exemptions - 6 MCAR § 3.041 F. Storage Facilities

Construction of a facility designed for or capable of storing less than 750 tons of coal or more, with an annual throughput of less than 12,500 tons of coal; or the expansion of an existing facility by these respective amounts.

DISCUSSION: Under the current rules, the following category is directly relevant to the storage facilities category area:

Mandatory EAW: 6 MCAR § 3.024 h. Construction of facilities on a single site that are designed for, or capable of, storing a total of one million or more gallons of liquid natural gas, liquid petroleum gas, or other liquid fuels - (PCA).

Exemptions: None

The need for proposed category 6 MCAR § 3.038 I.1. was voiced early in the process of developing category areas. Concerns documenting the need for this category include fugitive dust emissions, leaching, transportation related issues, and water pollution issues. The threshold was developed to be consistent with certificate of need definitions. The threshold used corresponds to the definition of "large coal storage facility" at 6 MCAR § 2.0904 L. The exemption category threshold was set at 10% of the EAW threshold. The intention of the exemption threshold is to prevent petitions for minor industrial operations where coal is used as an energy source. If operations of this nature have the potential for significant impacts, the issue should be raised pursuant to the primary purpose of the activity.

Proposed category 6 MCAR § 3.038 I.2. is substantively similar to the category in the current rules. The threshold level corresponds to the threshold for a large energy facility as set forth at 6 MCAR § EA 501 (f). The category was changed as a result of comments received during the public participation process to apply to all hazardous materials as opposed to only petroleum fuels. It is likely, however, that only petroleum fuels will be stored in sufficient quantities to trigger this threshold.

Proposed category 6 MCAR § 3.038 I.3. was included in the current threshold at a threshold of 1,000,000 gallons. Natural gas and synthetic gas facilities were separated from the proposed petroleum category because the 1,000,000 gallon threshold was unrealistic. Natural and synthetic gases are typically stored in much smaller facilities. These facilities are stored under pressure and create controversy relating to the explosive nature of the facility.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 h.	2	-	-
§ 3.038 I.1.	-	4	-
§ 3.038 I.2.	-	3	-
§ 3.038 I.3.	-	3	-

Category Area: Metallic Mineral Mining and Processing.

This category area is proposed because of the environmental impacts associated with mine facilities and processing facilities and because of significant land use implications relating to these types of projects. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 J. Metallic mineral mining and processing.

1. Mineral deposit evaluation of metallic mineral deposits other than natural iron ore and taconite. (DNR)

2. Expansion of a stockpile, tailings basin, or mine by 320 or more acres. (DNR)

3. Expansion of a metallic mineral plant processing facility that is capable of increasing production by 25 percent per year or more, provided that increase is in excess of 1,000,000 tons per year in the case of facilities for processing natural iron ore or taconite. (DNR)

Mandatory EIS - 6 MCAR § 3.039 G. Metallic mineral mining and processing.

1. Mineral deposit evaluation involving the extraction of 1,000 tons or more of material that is of interest to the proposer principally due to its radioactive characteristics. (DNR)

2. Construction of a new facility for mining metallic minerals or for the disposal of tailings from a metallic mineral mine. (DNR)

3. Construction of a new metallic mineral processing facility. (DNR)

Exemptions - 6 MCAR § 3.041 G. Mining

1. General mine site evaluation activities, that do not result in a permanment alteration of the environment, including mapping, aerial surveying, visual inspection, geologic field reconnaissance, geophysical studies, and surveying, but excluding exploratory borings.

2. Expansion of metallic mineral plant processing facilities that is capable of increasing production by less than ten percent per year, provided that increase is less than 100,000 tons per year in the case of facilities for processing natural iron ore or taconite.

3. Scram mining operations.

DISCUSSION: Under the current rules, the following categories are directly relevant to the metallic mineral mining and processing category area:

Mandatory EAW: 6 MCAR § 3.024

j. Construction of a new mineral or fuel processing or refining facility, including, but not limited to, smelting and hydrometallurgical operations - (PCA or DNR).

n. Construction or opening of a new facility for mining metallic minerals - (DNR).

b_1. Conversion of 40 or more contiguous acres of forest cover to a different land use. (Local)

Exemptions: None

For the purposes of this discussion, metallic mineral mining related impacts may be viewed in the following stages:

1. Exploration and initial site evaluation activities

2. Bulk sampling and mineral deposit evaluation

3. Mining

4. Processing

5. Disposal of wastes related to mining, including reclamation activities.

General mine site evaluation activities are excluded from these rules pursuant to 6 MCAR § 3.041 G.1. This represents a significant change from the current rules. Under the current rules, all mining related activities were subject to environmental review. The exemption category excludes those activities that will not result in permanent alteration of the environment. Exploratory borings are not included in* this exemption because these activities are controversial and the subject of scientific debate as to the significance of potential impacts. Significant public concern has been expressed relating to potential health impacts resulting from groundwater contamination, especially through radioactive mineral deposits. This type of exploratory activity is, therefore, subject to environmental review on a discretionary basis with the Department of Natural Resources (DNR) as responsible governmental unit.

* unknown effects of exploratory borings on groundwater

Mineral deposit evaluation activities have the potential for causing environmental impacts similar to those of mining - but on a smaller scale. This type of mining activity was not specifically addressed in the current rules. Minnesota has had lengthy experience in evaluating the impacts of mineral deposit evaluation and mining of natural iron ore and taconite. These activities are regulated pursuant to the Mineland Reclamation Rules, 6 MCAR § 1.401. This regulation pro-

Hyper. of iron ore exploration

vides adequate review for most natural iron ore and taconite mineral deposit evaluation activities, therefore, this type of activity is excluded from 6 MCAR § 3.038 J.1. and is subject to environmental review on a discretionary basis. Minnesota has had relatively little experience in evaluating the impacts of mining and mineral deposit evaluation of other types of mineral deposits. Such mining is considered most likely in Minnesota for ores of copper, nickel, and uranium. Because of the lack of experience and lack of other regulations related to these mining activities, they are subject to mandatory environmental review. Extensive evaluation of radioactive deposits has been elevated to a mandatory EIS category pursuant to 6 MCAR § 3.039 G.1. because of the increased potential for adverse environmental impacts and human health impacts. The 1,000 ton threshold was recommended by the DNR as a feasible threshold to indicate a concern for significant adverse environmental impacts. This threshold is near the limit of ore commonly analyzed for evaluation of the deposit.

Metallic mineral mining activities may have the potential for significant impacts on ground and surface water quality and quantity, air quality, land use impacts and demographic impacts that may disrupt the local economy. 6 MCAR § 3.039 G.2. requires a mandatory EIS for all new metallic mineral mining proposals. An all or none threshold is used because these activities must be of an economically feasible scale and that scale would, of necessity, be sufficient to potentially pose the threat of significant impacts. At 6 MCAR § 3.038 J.2. an acreage threshold is used for the EAW for expansion of an existing facilty. The lesser EAW requirement is provided for expansions because the impacts related to land use, siting, and demographics are reduced and the primary concerns relate to the mitigation of direct physical impacts. This could be done without an EIS. Scram mining operations are exempted pursuant to 6 MCAR § 3.041 G.3. because these operations, by definition, do not impact significant amounts of new land or new resources. These activities are much smaller in scale and tend to be oriented to maximizing the resource. The current rules require an EAW for new mining operations. Although the proposed rules appear to be more stringent by requiring an EIS for new facilities, in practice an EIS would have been prepared on new facilities under current regulation. Therefore, this does not represent a substantial new requirement. Environmental review of expansions of mining operations was discretionary under the current rules. The current rules did not exempt scram mining operations.

Metallic mineral processing facilities have the potential for significant impacts on ground and surface water quantity and quality, air quality, and demographic impacts that may disrupt the local economy. 6 MCAR § 3.039 G.3. requires a mandatory EIS for all new processing facilities. An all or none threshold is used because these facilities must be of an economically feasible scale and that scale would, of necessity, be sufficient to pose the threat of significant impacts. At 6 MCAR § 3.038 J.3. a percentage expansion figure is used as a threshold for an EAW. The lesser EAW requirement is provided for expansions because the impacts related to siting and demographics are reduced and the primary concerns relate to the mitigation of direct physical impacts. This could be done without an EIS. At 6 MCAR § 3.041 G.2., a percentage expansion figure is used to exempt certain minor expansions. This exemption is intended to allow equipment changes, alterations that may increase production efficiency, and minor operational changes without environmental review. The current rules require an EAW for new processing facilities. Although the proposed rules appear to be more stringent by requiring an EIS for new facilities, in practice an EIS would have been prepared under current regulations. Therefore, this does not represent a substantial new requirement. Environmental review of expansions of processing facilities was discretionary under the current rules. The current rules contained no exemptions relating to the expansion of processing facilities.

Waste or tailings disposal facilities have the potential for significant impacts on ground and surface water quantity and quality, air quality, and land use impacts. 6 MCAR § 3.039 G.2 requires a mandatory EIS for all new tailings disposal facilities. An all or none threshold is used because these facilities must be sufficiently large to

be economically feasible and functionally practical such that the size would be sufficient to pose the threat of significant impacts. At 6 MCAR § 3.038 J.2. an acreage threshold is used for an EAW requirement for expansion of an existing facility. The lesser EAW requirement is provided for expansions because the impacts related to land use and siting are largely reduced and mitigation efforts may be able to be tied into the existing design. This could be done without an EIS. No exemptions are established relating to disposal facilities because even relatively small facilities may generate substantial local impacts. The current rules do not specifically address tailings disposal facilities; however, these facilities would typically be addressed in conjunction with specific mining proposals.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 j.	0	-	-
§ 3.024 n.	0	-	-
§ 3.024 b_1	2	-	-
§ 3.038 J.1.	-	1/5 years	-
§ 3.038 J.2.	-	1	-
§ 3.038 J.3.	-	0	-
§ 3.039 G.1.	-	-	1/5 years
§ 3.039.G.2.	-	-	1/5 years
§ 3.039 G.3.	-	-	1/5 years

Category Area: Nonmetallic Mineral Mining

This category area is proposed because of the potential for significant effects on ground and surface water quality and quantity, air quality, land use, and the local and state economy. Other local and state regulations relating to these activities do not necessarily deal with the full spectrum of potential impacts. Environmental review would facilitate multi-agency coordination. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 K. Nonmetallic mineral mining.

1. Development of a facility for the extraction or mining of peat which will result in the excavation of 160 or more acres of land during its existence. (DNR)

2. Development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 40 or more acres of land to a mean depth of ten feet or more during its existence. (local)

Mandatory EIS - 6 MCAR § 3.039 H. Nonmetallic mineral mining.

1. Development of a facility for the extraction or mining of peat which will utilize 320 acres of land or more during its existence. (DNR)

2. Development of a facility for the extraction or mining of sand, gravel, stone, or other nonmetallic minerals, other than peat, which will excavate 160 acres of land or more to a mean depth of ten feet or more during its existence. (local)

Exemptions: 6 MCAR § 3.041 G. Mining

1. General mine site evaluation activities, that do not result in a permanent alteration of the environment, including mapping, aerial surveying, visual inspection, geologic field reconnaissance, geophysical studies, and surveying, but excluding exploratory borings.

DISCUSSION: Under the current rules, the following category is directly relevant to the nonmetallic mineral mining category area:

Mandatory EAW: 6 MCAR § 3.024.o. Construction or opening of a facility for mining gravel, other non-metallic minerals, and fuels involving more than 320 acres - (Local, except DNR with respect to peat fuels).

Exemptions: None

This category area is subdivided into categories relating to peat and categories relating to aggregate minerals because the impacts relating to these activities differ. A third type of nonmetallic mineral that could be mined in Minnesota, marl, is not included in this category area. Mining of marl almost always takes place in lake basins. This activity would be addressed by the Wetlands and Protected Waters category area.

The extraction of peat resources has the potential for causing environmental impacts relating to land use, air quality, water quality, mining and drainage. Current peat mining activities tend to be of small scale and for the purpose of marketing the peat as a horticultural product or as a briquet fuel. Peat mining is expected to be extremely controversial if proposals develop to utilize the resource for other energy uses. Data based on actual development of these resources on a broad scale is limited. The threshold levels of 160 acres for a mandatory EAW (6 MCAR § 3.038 K.1.) and 320 acres for a mandatory EIS (6 MCAR § 3.039 H.1.) coincide with Department of Natural Resources policy as set forth in the Minnesota Permit Program Policy Recommendations. In the current rules the 320 acre threshold for an EAW for nometallic resources would have applied to peat extraction.

The extraction of aggregate resources has the potential for causing environmental impacts relating to land use, transportation, noise, air quality, water quality and vibrations. Proposed activities are frequently in or near populated areas and, therefore, tend to be controversial. The threshold levels of 40 acres to a ten foot depth for a mandatory EAW (6 MCAR § 3.038 K.2.) and 160 acres to a ten foot depth for a mandatory EIS (6 MCAR § 3.039 H.1.) were developed pursuant to the public participation process and on the basis of the history of environmental review for these activities. The current EAW threshold is 320 acres; however, the category is not specific as to the degree of mining required to trigger the threshold. (I.e., if a lesser area is actually developed, the entire parcel of land would still be included in the measurement). Petitions have been received for environmental review on facilities as low as 10 acres.

General mine site evaluation activities that do not result in a permanent alteration of the environment are excluded from these rules pursuant to 6 MCAR § 3.041 G.1. The current rules do not contain any exemptions relating to nonmetallic mineral mining. This exemption is included to focus environmental review on the primary purpose of the proposed activity.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 W.	1	-	-
§ 3.038 K.1.	-	1	-

§ 3.038 K.2.	-	10	-
§ 3.039 H.1.	-	-	1
§ 3.039 H.2.	-	-	2

Category Area: Paper or Pulp Processing Mills

This category area is proposed because of the potential for significant effects on water quality, air quality, solid waste generation, and transportation impacts. These potential impacts are regulated by several different agencies. Environmental review would facilitate multi-agency coordination. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 L. Paper or pulp processing mills.

Expansion of an existing paper or pulp processing facility that will increase its production capacity by 50 percent or more. (PCA)

Mandatory EIS - 6 MCAR § 3.039 I. Paper or pulp processing.

Construction of a new paper or pulp processing mill. (PCA)

Exemptions: 6 MCAR § 3.041 H. Paper or pulp processing facilities.

Expansion of an existing paper or pulp processing facility that will increase its production capacity by less than ten percent.

DISCUSSION: Under the current rules, the following category is directly relevant to the Paper or Pulp Processing Mills category area:

Mandatory EAW: 6 MCAR § 3.024 x. Construction of a new paper and pulp processing mill (PCA).

Exemptions: None

Paper and pulp processing mills have a broad range of environmental impacts. Water related impacts include the use of large quantities of water and the discharge of both cooling and process waters. Air quality related impacts are primarily associated with power generation at the facility. The degree of the problem is tied to the type and amount of fuel used. Solid wastes in the form of ashes from power generation and sludges from process water treatment may pose serious disposal problems. Raw materials and products of these facilities are bulky materials and the facilities are labor intensive; therefore, transportation related impacts are likely to be a further issue. The EIS threshold, 6 MCAR § 3.039 I. is set at an all or none threshold for new facilities. This is reasonable because the size of these facilities must be economically practical and that size would have the potential for significant impacts. These are new impacts on the local environment and significant wildlife and land use questions must also be addressed. This category corresponds to the current EAW threshold; however, in practice an EIS is likely to be prepared on a new facility pursuant to current procedures. Therefore, this does not represent a major change in the requirements for environmental documents.

The Pollution Control Agency has recently prepared an EIS on the expansion of the St. Regis facility. This project was highly controversial. The conclusion of the EIS was that, given controls, the expansion would have no significant environmental effects. The expansion was greater than 50%. The experience of that EIS and the current Blandin expansion EAW indicates that impacts related to expansions of less than 50% can be adequately handled through permitting. Expansions greater than 50% should require an EAW because of the magnitude of additional wastewater and solid waste generated and because of additional air quality and transportation impacts. The current rules did not have a category related to the expansion of these facilities.

At 6 MCAR § 3.041 H., a ten percent figure is used to exempt minor expansions. This exemption is intended to allow equipment changes, alterations that may increase production efficiency, and minor operational changes without environmental review. Expansions between ten and 50 percent are subject to environmental review on a discretionary basis because such expansions are likely to be of a magnitude that will generate controversy and because of the scope and potential significance of impacts. The current rules do not contain exemptions relating to paper and pulp processing mills.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 x.	1	-	-
§ 3.038 L.	-	1	-
§ 3.039 I.	-	-	1/5 years

Reference documents that may be of interest include:

1. St. Regis Expansion EIS; Pollution Control Agency; 1979.

Category Area: Industrial/commercial/institutional facilities.

This category area is proposed because of the potential for significant impacts on water quality, air quality, solid waste generation, hazardous waste generation, transportation, land use, demographic and economic impacts on local economies. The spectrum of impacts is diverse and the regulation of the impacts varies in effectiveness with the units of government responsible. This type of project tends to be controversial, as witnessed by the number of projects previously subjected to environmental review. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 M. Industrial/commercial/institutional facilities.

1. Construction of a new or expansion of an existing industrial, commercial, or institutional facility equal to or in excess of the following thresholds, expressed as gross floor space:

   a. Unincorporated area - 100,000 sq. ft.

   b. Third or fourth class city - 200,000 sq. ft.

   c. Second class city - 300,000 sq. ft.

   d. First class city - 400,000 sq. ft. (local)

2. Construction of a new or expansion of an existing industrial, commercial, or institutional facility of 20,000 or more sq. ft. of ground area, if the local governmental unit has not adopted approved shoreland, flood plain, or wild and scenic rivers land use district ordinances, as applicable, and either:

   a. The activity involves riparian frontage, or

   b. Twenty thousand or more sq. ft. of ground area to be developed is within a shoreland area, delineated flood plain, or state or federally designated wild and scenic rivers district. (local)

Mandatory EIS - 6 MCAR § 3.039 J. Industrial/commercial/institutional facilities.

1. Construction of a new or expansion of an existing industrial, commercial, or institutional facility equal to or in excess of the following thresholds, expressed as gross floor space:

   a. Unincorporated area - 250,000 sq. ft.

   b. Third or fourth class city - 500,000 sq. ft.

   c. Second class city - 750,000 sq. ft.

   d. First class city - 1,000,000 sq. ft. (local)

2. Construction of a new or expansion of an existing industrial, commercial, or institutional facility of 100,000 or more sq. ft. of ground area, if the local governmental unit has not adopted state approved shoreland, flood plain, or wild and scenic rivers land use district ordinances, as applicable, and either:

   a. The activity involves riparian frontage, or

   b. One hundred thousand or more sq. ft. of ground area to be developed is within a shoreland area, delineated flood plain, or state or federally designated wild and scenic rivers district. (local)

Exemptions - 6 MCAR § 3.041 I. Industrial/commercial/institutional facilities.

1. Construction of a new or expansion of an existing industrial, commercial, or institutional facility of less than the following thresholds, expressed as gross floor space, if no part of the development is within a shoreland area, delineated flood plain, or state or federally designated wild and scenic rivers district:

   a. Third or fourth class city or unincorporated area - 50,000 sq. ft.

   b. Second class city - 75,000 sq. ft.

   c. First class city - 100,000 sq. ft.

2. The construction of an industrial, commercial, or institutional facility with less than 4,000 sq. ft. of gross floor space, and with associated parking facilities designed for 20 vehicles or less.

3. Construction of a new parking facility for less than 100 vehicles if the facility is not located in a shoreland area, delineated flood plain, or state or federally designated wild and scenic rivers district.

DISCUSSION: Under the current rules, the following categories are directly relevant to the industrial/commercial/institutional facilities category area:

Mandatory EAW: 6 MCAR § 3.024.

a. Construction of a new industrial park of over 320 acres in size - (Local);

b. Construction of a facility or integral group of facilities with at least 250,000 square feet of commercial or retail floor space or at least 175,000 square feet of industrial floor space, or a mixture of commercial, industrial and retail floor space totaling at least 250,000

square feet, unless located in an industrial park for which an EIS has already been prepared - (Local);

c. Any industrial, commercial or residential development of 40 or more acres, any part of which is within a floodplain area, as defined by the "Statewide Standards and Criteria for Management of Floodplain Areas of Minnesota" - (Local);

d. Construction of a commercial or industrial development, any part of which is within a shoreland area (as defined by Minn. Stat. § 105.485 (1974), covering 20,000 or more square feet of ground space, not including access roads or parking areas, and located on a parcel of land having 1,500 feet or more of shoreline frontage -(Local);

Exemptions: 6 MCAR § 3.026.

3. Construction or alteration of a store, office, or restaurant designed for an occupancy of 20 persons or less, if not in conjunction with the construction or alteration of two or more stores, offices, or restaurants accumulating an occupancy load of more than 30 persons, unless designated to be a historical structure.

Several variables affected the selection of the qualitative measure for this category area:

1. Amount of impact is related to size of facility (Note - this can be operational size or amount of surface area occupied).

2. Size of facility can be measured by physical size, work force or production.

3. Type of impact is a function of the type of product.

4. Severity of impact is a function of location (Note - especially proximity to water resources).

5. Economic/demographic impacts are a function of the ability of the local and regional environment and local societal structure to adapt to the facility.

The diversity of these variables precludes fine tuning of categories to the degree desired. As a result, for facilities located in upland areas, where water related impacts are likely to be more easily addressed, thresholds relating to the operational size of the facility relative to the size of the local community were used. The basic theory is that the larger the facility, the greater the output and the greater the potential for local societal and environmental disruption. Square footage thresholds were set at relatively high levels (i.e., not likely to be proposed) for the EIS category and at moderate levels for the EAW category to allow discretion by the RGU in evaluating the merit of the other variables.

For facilities located near water resources, the variables associated with water quality and loss of habitat adjacent to aquatic ecosystems were assigned added importance. Therefore, thresholds associated with the proximity to the resource and the amount of ground area that is rendered impervious (thus increasing runoff potential) were added while the local economic/demographic impacts were given less priority. This in itself would primarily impact larger cities with relation to these rules. However, the DNR has regulatory authority over development within shoreland, floodplain and wild and scenic river areas. Local governmental units must adopt local ordinances complying with these base standards. These ordinances must be approved by the DNR on a case-by-case basis. Therefore, the category for developments near water resources was further tied to whether or not the local governmental unit has complied with existing regulations. Those that have are presumed to have incorporated adequate environmental protection measures and are, therefore, subject to the same threshold as developments in upland areas. Those that have not are subject to more stringent thresholds.

In actual application, developments in shoreland areas are most likely to be involved. All Minnesota counties have adopted shoreland ordinances; therefore, all developments in unincorporated areas actually would have the same measure applied. Approximately 50 of Minnesota's approximately 850 cities have adopted shoreland ordinances. Approximately 150 more cities will have adopted ordinances within the next biennium. This schedule will cover almost all cities likely to have proposed developments of sizes exceeding this threshold. Communities that feel they may be adversely impacted may develop ordinances ahead of the DNR schedule. Therefore, the use of this measurement for developments near water resources is projected to have relatively minimal long range impact in relation to the number of projects subject to environmental review.

The actual quantitative thresholds proposed were the subject of considerable controversy through the public meeting process used in preparation of these rules. Although these thresholds do not represent consensus, they do represent a negotiated workable threshold. The categories proposed are more direct (i.e., fewer and more specific) than the thresholds of the current categories. Several factors are relevant in evaluating the reasonableness of these thresholds:

1. Although the EAW thresholds are lower than those of the current rules for third and fourth class cities and unincorporated areas, the thresholds are relaxed for first and second class cities.

2. The current rules categories relating to development near water resources apply to projects "any part of which is located within" a shoreland or floodplain. This is a more encompassing approach than tying the category strictly to the ground area to be developed and riparian development.

3. The exemptions are designed to be more project specific to promote increased predictability in the application of these rules.

The following graph presents EQB projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 a.	0	-	-
§ 3.024 b.	48	-	-
§ 3.024 c.	31	-	-
§ 3.024 d.	10	-	-
§ 3.038 M.1.a.	-	2	-
§ 3.038 M.1.b.	-	5	-
§ 3.038 M.1.c.	-	5	-
§ 3.038 M.1.d.	-	2	-
§ 3.038 M.2.	-	20	-
§ 3.039 J.1.a.	-	-	1/5 years
§ 3.039 J.1.b.	-	-	1/5 years
§ 3.039 J.1.c.	-	-	1/5 years
§ 3.039 J.1.d.	-	-	1/5 years
§ 3.039 J.2.	-	-	1

Reference documents that may be of interest include:

1. Shoreland Management Classification System for Public Waters; Department of Natural Resources; January, 1976.

Category Area: Air Pollution

This category area is proposed because of public concern relating to air quality and its impact on human health and the environment, especially via implications relating to acid rain. This category area is proposed because other category areas may not be specific enough to review projects with potentially significant impacts on air quality. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 N. Air pollution.

1. Construction of a stationary source facility that generates 100 tons or more per year of any single air pollutant after installation of air pollution control equipment. (PCA)

2. Construction of a new parking facility for 1,000 or more vehicles. (PCA)

Mandatory EIS: None

Exemptions: None

DISCUSSION: Under the current rules, the following categories are directly relevant to the air pollution category area:

Mandatory EAW: 6 MCAR § 3.024

e. Construction of a facility that generates more than a maximum of 2,500 vehicle trips per hour or a maximum of 12,500 vehicle trips per eight-hour period - (Local);

k. Construction of a facility if the cumulative emissions of particulate matter and sulfur oxides exceed 50 tons per day - (PCA).

Exemptions: None

The EAW category at 6 MCAR § 3.038 N.1. represents a revision in the current EAW category to make it more practical. The qualitative measure was changed from a measurement of only particulates and sulfur oxides to a measurement for any single air pollutant. Emissions that would trigger the threshold are likely to be particulates or sulfur oxides; however, other pollutants, especially nitrogen oxides and ozone, are also of major concern. The measurement is designated as post treatment as an incentive for the installation of proper pollution control equipment. Synergistic impacts are not addressed specifically by the category; however, a lower threshold will facilitate a review of potential synergistic impacts on a case-by-case basis. The quantitative measure was adjusted to a realistic figure. The threshold of 50 tons per day (18,250 tons per year) in the current rule's EAW category was so high it excluded all facilities. Very large and inefficient sources currently in operation in Minnesota would correspond to approximately only 1,000 tons per year. The proposed threshold coincides with federal regulations which classify facilities of 100 tons per year as a major source of air pollution. This threshold is also consistent with the proposed state off-set rule. Technology is available to minimize this impact and past experience has demonstrated that early environmental review can control problems associated with major sources of air pollution.

The EAW category at 6 MCAR § 3.038 N.2. is a simplified measurement that is consistent with the current rule. Primary environmental issues raised by these facilities include runoff from the facility, carbon monoxide and lead air emissions, petroleum and lead runoff, and associated aquatic impacts. These impacts are most closely associated with the number of vehicles using a facility. A facility

accommodating 1,000 vehicles would correspond to approximately 300,000 sq. ft. or approximately seven acres.

No exemptions are listed under this category area; however, it should be noted that 6 MCAR § 3.041 I.3. exempts facilities for less than 100 vehicles if the facility is not located in a shoreland area, flood plain area or state or federally designated wild and scenic rivers district.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 e.	9	-	-
§ 3.024 k.	0	-	-
§ 3.038 N.1.	-	3	-
§ 3.038 N.2.	-	2	-

Category Area: Hazardous Waste

This category area is proposed because of the potential for ground and surface water contamination and the resultant human health and environmental impacts that may result from the disposal, processing and storage of hazardous wastes. Additional concerns include potential air quality, noise and odor impacts, safety questions relating to handling, and transportation and land use issues. This issue was not specifically addressed in the current rules. Minn. Stat. § 115A specifically addresses this issue. The categories are proposed in a format to coincide with the implementation of this legislation. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 O. Hazardous waste.

1. Construction or expansion of a hazardous waste disposal facility. (PCA)

2. Construction of a hazardous waste processing facility which sells processing services to generators, other than the owner and operator of the facility, of 1,000 or more kilograms per month capacity, or expansion of such facility by 1,000 or more kilograms per month capacity. (PCA)

3. Construction of a hazardous waste processing facility of 1,000 or more kilograms per month capacity or expansion of a facility by 1,000 or more kilograms per month capacity if the facility is located in a shoreland area, delineated flood plain, state or federally designated wild and scenic rivers district, or in an area characterized by soluble bedrock. (PCA)

4. Construction of a facility for the storage of hazardous waste of 5,000 or more gallons capacity or expansion of a facility by 5,000 gallons or more capacity, if the facility is located in a shoreland area, delineated flood plain, state or federally designated wild and scenic rivers district, or in an area characterized by soluble bedrock. (PCA)

Mandatory EIS - 6 MCAR § 3.039 K. Hazardous waste.

1. Construction or expansion of a hazardous waste disposal facility for 1,000 or more kilograms per month. (PCA)

2. The construction or expansion of a hazardous waste disposal facility in a shoreland area, delineated flood plain, state or federally designated wild and scenic rivers district, or in an area characterized by soluble bedrock. (PCA)

3. Construction or expansion of a hazardous waste processing facility which sells processing services to generators other than the owner and operator of the facility, if the facility is located in a shoreland area, delineated flood plain, state or federally designated wild and scenic rivers district, or in an area characterized by soluble bedrock. (PCA)

Exemptions: None

DISCUSSION: The current rules do not contain any EAW or exemption categories directly relevant to the hazardous waste category area.

The categories proposed pursuant to this category area may be viewed in three distinct phases.

1. Storage facilities

2. Processing facilities

3. Disposal facilities

The storage category, 6 MCAR § 3.038 O. 4. is designed to apply to facilities for long term storage. The 5,000 gallon threshold is regarded as a likely dividing line between strictly temporary facilities and long term storage. Below this threshold it is likely that materials are being gathered primarily to make shipment economically practical. The gallon unit of measurement is used because these wastes are usually stored as liquids in 55 gallon drums. Concerns relating to storage facilities are mainly the potential for accidental spills and leaks. No EIS category is proposed because the need for an EIS can best be addressed on a case-by-case basis depending on the nature and location of the activity.

The processing facility categories, 6 MCAR §§ 3.038 O. 2. and 3. and 6 MCAR § 3.039 K. 3., have several built-in variables:

1. Whether the facility sells services

2. The proximity to sensitive areas

3. Quantity

The commercial/non-commercial distinction was included because commercial facilities are likely to acquire a variety of different substances from a variety of different sources. Such facilities are likely to generate a more broad spectrum of pollutants and are likely to be more controversial. An all or none threshold is applied as an EIS threshold if the facility is to be located in a sensitive area. For other commercial facilities the 1,000 kilogram per month threshold is used. This threshold is selected because it is consistent with federal regulations relating to hazardous waste. For non-commercial facilities, environmental review is discretionary unless the facility is located in a sensitive area and processes in excess of 1,000 kilograms per month. This threshold was applied because the permit process is adequate to deal with non-commercial facilities in sensitive areas that process small amounts of hazardous waste. In non-sensitive areas, the permit process is capable of providing adequate review of non-commercial facilities.

The most significant concerns relate to hazardous waste disposal. These facilities are permanent and the danger of contamination is long lasting. The disposal facility categories, 6 MCAR § 3.038. O.1., and 6 MCAR § 3.039 K.1. and 2. have the same variables as processing facilities. The base line is that all disposal facilities will require some form of environmental review. If the facility is located within a sensitive area or if the facility has a capacity

exceeding the federal threshold, an EIS is mandated. The need for an EIS on other disposal facilities is determined on a case-by-case basis. It is unlikely that small facilities will be proposed; therefore, an EIS will probably be mandated for all proposed facilities.

No exemption categories are proposed because of the significance of potential impacts and because these facilities are likely to be very controversial.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.038 0.1	-	1	-
§ 3.038 0.2.	-	6	-
§ 3.038 0.3.	-	3	-
§ 3.038 0.4.	-	5	-
§ 3.039 K.1.	-	-	1
§ 3.039 K.2.	-	-	1/5 years
§ 3.039 K.3.	-	-	1/5 years

Category Area: Solid Waste

This category area is proposed because of the potential for significant impacts relating to ground and surface water contamination through the migration of leachate and because environmental review is needed to assist governmental units in adequately assessing resource recovery alternatives. Additional environmental concerns relate to methane gas generation, fugitive dust, emissions, odor and noise problems, transportation issues, aesthetic impacts, toxic air emissions and land use issues. This category area is extremely controversial. Minn. Stat. ch. 115A specifically addresses this issue. The categories are proposed in a format to coincide with the implementation of this legislation. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 P. Solid Waste

1. Construction of a mixed municipal solid waste disposal facility for up to 100,000 cubic yards of waste fill per year. (PCA or Metropolitan Council)

2. Expansion by 25 percent or more of previous capacity of a mixed municipal solid waste disposal facility for up to 100,000 cubic yards of waste fill per year. (PCA or Metropolitan Council)

3. Construction or expansion of a mixed municipal solid waste transfer station for 300,000 or more cubic yards per year. (PCA or Metropolitan Council)

4. Construction or expansion of a mixed municipal solid waste resource recovery facility for 100 or more tons per day of input. (PCA or Metropolitan Council)

Mandatory EIS - 6 MCAR § 3.039 L. Solid Waste

1. Construction of a mixed municipal solid waste disposal facility for 100,000 cubic yards or more of waste fill per year. (PCA or Metropolitan Council)

2. Construction or expansion of a mixed municipal solid waste disposal facility in a shoreland area, delineated flood plain, state or federally designated wild and scenic rivers district, or in an area characterized by soluble bedrock. (PCA or Metropolitan Council)

3. Construction or expansion of a mixed municipal solid waste resource recovery facility for 500 or more tons per day of input. (PCA or Metropolitan Council)

4. Expansion by 25 percent or more of previous capacity of a mixed municipal solid waste disposal facility for 100,000 cubic yards or more of waste fill per year. (PCA or Metropolitan Council)

Exemptions: None

DISCUSSION: Under the current rules, the following category is directly relevant to the solid waste category area:

Mandatory EAW: 6 MCAR § 3.024

w. Construction of a sanitary landfill for an excess of 100,000 cubic yards per year of waste fill, or any sanitary landfill located in an area characterized by soluble bedrock, where leachates may significantly change groundwater quality - (PCA).

Exemptions: None

The categories proposed pursuant to this category area may be viewed in three distinct phases:

1. Transfer facilities

2. Resource recovery facilities

3. Disposal facilities

The transfer facility category is set forth at 6 MCAR § 3.038 P.3. Impacts associated with this type of facility are primarily transportation issues, noise, odor, aesthetics, rodent and pest problems, and land use issues. These problems are usually controversial because the facilities are typically located in populated areas. The cubic yard measure is used because transfer vehicles are measured in cubic yards and because existing state solid waste regulations utilize this measurement. The threshold of 300,000 cubic yards is proposed because only very large transfer stations are likely to require environmental review. Other facilities can be adequately regulated through the permit process. The experience of the PCA indicates 300,000 cubic yards is reasonable as a threshold.

The resource recovery facility categories are set forth at 6 MCAR § 3.038 P.4. and 6 MCAR § 3.039 L.3. Impacts associated with this type of facility are primarily air emissions, ash disposal, noise, odor, and transportation issues. A tons per day unit of measure is used because tons is the standard unit of measure for resource recovery and BTU's/ton is the standard unit of measure with relation to use of solid waste for energy production. The 100 tons per day threshold was used for the EAW because these facilities are likely to be modular units. Performance and construction standards for modular units are standardized; therefore, project specific review on a discretionary basis is adequate. One hundred tons per day corresponds to 10% of the major air emission threshold. Resource recovery facilities are likely to be located in heavily populated areas with air quality problems and are likely to have toxic air emissions. Therefore, environmental review at this threshold is reasonable. The 500 tons per day threshold was used for the EIS because this is approximately the level at which an incinerator would have to meet new source performance standards. Five hundred tons per day would yield approximately 50 tons per year of particulate emissions. This corresponds to approximately 50% of the major

source threshold. However, these facilities are likely to be located in heavily populated areas and are likely to have additional toxic emissions; therefore, this more restrictive threshold is reasonable.

Disposal facility categories are set forth at 6 MCAR §§ 3.038 P.1., 2., and 5. and 6 MCAR §§ 3.039 L.1., 2. and 4. The variables built into these categories include:

1. Whether the facility is new or an expansion
2. The proximity to sensitive areas
3. Quantity

For new disposal facilities the issue of siting is of primary importance. Cost requirements of operation and transportation factors make small disposal facilities unlikely. The 100,000 cubic yard per year threshold coincides with state solid waste regulations. There are approximately 20 facilities in operation with a capacity of over 100,000 cubic yards per year. Smaller facilities are likely to be modified and are not subject to the same regulations as the large facilities. Environmental review is necessary for all new facilities; however, the decision on need for an EIS on a case-to-case basis is adequate for the small facilities. For expansions of existing facilities, siting is less of an issue; however, the 100,000 cubic yards per year threshold was utilized for an EIS to maintain consistency with state solid waste regulations and because of the potential for ground and surface water contamination from that amount of waste. The lesser EAW threshold is used for expansions that do not exceed 100,000 cubic yards per year and for very large facilities where the expansion exceeds that amount. A 25 percent cut off is used to allow small increases in capacity to accommodate minor changes in the configuration as may be necessary for final contour plans.

An all or none threshold was used for facilities in sensitive areas. These locations carry a high potential for ground and surface water pollution. PCA experience in dealing with existing facilities demonstrates that problems are likely and that an EIS is necessary to adequately assess the potential for problems in these locations.

No exemption categories are proposed because of the significance of potential environmental and land use impacts.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 w.	2	-	-
§ 3.038 P.1.	-	2	-
§ 3.038 P.2.	-	4	-
§ 3.038 P.3.	-	1	-
§ 3.038 P.4.	-	1	-
§ 3.038 P.5.	-	3	-
§ 3.039 L.1.	-	-	2
§ 3.039 L.2.	-	-	1/5 years
§ 3.039 L.3.	-	-	1
§ 3.039 L.4.	-	-	2

Category Area: Sewage Systems

This category area is proposed because of problems associated with treatment facilities including ground and surface water pollution due to effluent discharges and sludge and ash disposal, and air pollution from sludge incineration. Problems associated with sewer systems include erosion during construction and maintenance, elimination or degradation of wetland habitats and adjacent water resources, and ground and surface water pollution resulting from seepage from sewer lines. Additional concerns are generated because of increased potential for secondary development fostered by the installation of a new system. Specific categories recommended within this category area include:

Mandatory EAW - 6 MCAR § 3.038 Q. Sewage systems.

1. Construction of a new wastewater treatment facility or sewer system with a capacity of 30,000 gallons per day or more. (PCA)

2. Expansion of an existing wastewater treatment facility or sewer system by an increase in capacity of 50 percent or more over existing capacity or by 50,000 gallons per day or more. (PCA)

Mandatory EIS: None

Exemptions - 6 MCAR § 3.041 J. Sewage systems

Construction of a new wastewater treatment facility or sewer system with a capacity of less than 3,000 gallons per day or the expansion of an existing facility by less than that amount.

DISCUSSION: The current rules do not contain any EAW or exemption categories directly relevant to the sewage systems category area.

A sewage system may be viewed as consisting of the treatment facility and the sewer system or conveyance system to that facility. Sewage systems were formerly a major source of concern relating to water pollution; however, much progress has been made in lessening impacts pursuant to the federal Clean Water Act. For projects receiving federal funds pursuant to the Clean Water Act, limited environmental review takes place. For facilities not receiving federal funds no federal environmental review is required. The threshold is proposed to exclude small new facilities and minor additions to existing sewage systems. The threshold for new systems was set at a level approximately equivalent to the required size of a facility to service 300 people. The threshold for expansions was set at a level approximately equal to the expansion of services for 500 people. A second threshold for expansions was set for 50% because the base expansion threshold would potentially exclude small facility expansions for 150 to 500 people. Expansions of that relative magnitude are likely to generate significant local impacts such that environmental review is reasonable.

An exemption threshold is proposed to exclude very small facilities designed to treat wastes generated by 30 or fewer persons. This threshold is 10% of the mandatory threshold. The threshold levels have been recommended by the PCA as reasonable thresholds based on the existing PCA permit and approval processes.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.038 Q.1.	-	10	-
§ 3.038 Q.2.	-	10	-

Category Area: Residential Development

This category area is proposed because of the potential for significant impacts on land use, demographic and economic impacts on local economies, transportation facilities, wildlife habitat and water quality. Additional concerns are generated because of increased potential for secondary development fostered by increased population and human activity. Specific categories recommended within this category area include:

Mandatory EAW 6 MCAR § 3.038 R. Residential development.

1. Construction of a permanent or potentially permanent residential development of:

   a. Fifty or more unattached or 75 or more attached units in a unsewered area.

   b. One hundred or more unattached or 150 or more attached units in a third or fourth class city or sewered unincorporated area.

   c. One hundred and fifty or more unattached or 225 or more attached units in a second class city.

   d. Two hundred or more unattached or 300 or more attached units in a first class city. (local)

2. Construction of a permanent or potentially permanent residential development of 20 or more unattached units or of 30 or more attached units, if the local governmental unit has not adopted state approved shoreland, flood plain, or wild or scenic rivers land use district ordinances, as applicable, and either:

   a. The activity involves riparian frontage, or

   b. Five or more acres of the development is within a shoreland, delineated flood plain, or state or federally designated wild and scenic rivers district. (local)

Mandatory EIS - 6 MCAR § 3.039 M. Residential development

1. Construction of a permanent or potentially permanent residential development of:

   a. One hundred or more unattached or 150 or more attached units in an unsewered area.

   b. Four hundred or more unattached or 600 or more attached units in a third or fourth class city or sewered unincorporated area.

   c. Six hundred or more unattached or 900 or more attached units in a second class city.

   d. Eight hundred or more unattached or 1200 or more attached units in a first class city. (local)

2. Construction of a permanent or potentially permanent residential development of 40 or more unattached units or of 60 or more attached units, if the local governmental unit has not adopted state approved shoreland, flood plain, or wild and scenic rivers land use district ordinances, as applicable, and either:

   a. The activity involves riparian frontage, or

b. Ten or more acres of the development is within a shoreland, delineated flood plain, or state or federally designated wild and scenic rivers district. (local)

Exemptions - 6 MCAR § 3.041 K. Residential development

1. Construction of a sewered residential development, no part of which is within a shoreland area, delineated flood plain or state or federally designated wild and scenic rivers district, of:

   a. Less than ten units in an unincorporated area.

   b. Less than 20 units in a third or fourth class city.

   c. Less than 40 units in a second class city.

   d. Less than 80 units in a first class city.

2. Construction of a single residence or multiple residence with four dwelling units or less and accessory appurtenant structures and utilities.

DISCUSSION: Under the curent rules, the following categories are directly relevant to the residential development category area:

Mandatory EAW - 6 MCAR § 3.024

t. Construction of a new or additional residential development that includes 100 or more units in an unsewered area or 500 or more units in a sewered area - (Local);

u. Construction of a residential development consisting of 50 or more residential units, any part of which is within a shoreland area (as defined by Minn. Stat. § 105.485 (1974)) (Local);

Exemptions - 6 MCAR § 3.026

2. Construction or alteration of a single or multiple residence with four dwelling units or less and accessory appurtenant structures and utilities, when not in conjunction with the construction or alteration of two or more such residences.

Several variables affected the selection of thresholds for this category area:

1. Degree of the impact is related to the potential increase in population numbers.

2. Nature and degree of the impact is related to the potential population density.

3. Severity of the impact is a function of location (note - especially proximity to water resources).

4. Economic/demographic impacts are a function of the ability of the local and regional environment and local societal structure to adapt to increased human population.

The diversity of these variables and differences relative to the nature and location of residential developments precludes specificity to the degree desired. For facilities located in upland areas where water related impacts are less likely to be major issues, thresholds relating the number of residential dwellings to the size of the local community were used. This measure was used because larger communities are more likely to be able to provide social and economic services to accommodate a greater population increase; therefore, the societal and environmental disruption per capita increase is likely to be lower. Thresholds were

set at relatively high levels (i.e., not likely to be proposed) for the EIS categories and at moderate levels for the EAW categories to allow discretion by the RGU in evaluating the merit of all variables.

For facilities located near water resources, the variables associated with water quality and loss of habitat adjacent to aquatic ecosystems were assigned added importance. Differential thresholds related to size of the community were dropped and thresholds related to the proximity of the development to the resource and the geographic size of the development were included. This change in itself would primarily impact larger cities. However, the DNR has regulatory authority over development within shoreland, floodplain, and wild and scenic river areas. Through this authority, the DNR has set base standards for development in these areas. Local governmental units must adopt local ordinances complying with these base standards. These ordinances must be approved by the DNR on a case-by-case basis. Therefore, the threshold for residential developments was tied to whether or not the local governmental unit has complied with existing regulations. Those that have are presumed to have incorporated adequate environmental protection measures and are, therefore, subject to the same thresholds as developments in upland areas. Those that have not are subject to more stringent thresholds.

In actual application, developments in shoreland areas are most likely to be involved. All Minnesota counties have adopted shoreland ordinances; therefore, all developments in unincorporated areas actually would have the same measure applied. Approximately 50 of Minnesota's approximately 850 cities have adopted shoreland ordinances. Approximately 150 more cities will have adopted ordinances within the next biennium. This schedule will cover almost all cities likely to have proposed developments of sizes exceeding these thresholds. Communities that feel they may be adversely impacted may develop ordinances ahead of the DNR schedule. Therefore, the use of this measurement for developments near water resources is projected to have relatively minimal long range impact in relation to the number of projects subject to environmental review.

The actual quantitative thresholds proposed were the subject of considerable controversy through the public meeting process used in preparation of these rules. Although these thresholds do not represent consensus, they do represent a negotiated workable threshold. Several factors must be considered in evaluating the reasonableness of the proposed thresholds:

1. Under the proposed rules, this category area was the most frequently petitioned category area. This is an indication of the controversial nature of these categories and the fact that the current categories did not properly address actual need for environmental review.

3. The current categories did not allow a differential threshold for attached vs. unattached developments.

3. The current categories relating to shorelands included projects "any part of which" was located in the shoreland. The proposed categories are more relaxed in this measurement and require either riparian impact or an acreage threshold.

4. The proposed exemption categories remove the potential for petitions on small developments based on considerations other than environmental concerns.

The following graph presents EQB projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 t.	31	-	-
§ 3.024 u.	115	-	-
§ 3.038 R.1.a.	-	2	-
§ 3.038 R.1.b.	-	10	-
§ 3.038 R.1.c.	-	10	-
§ 3.038 R.1.d.	-	2	-
§ 3.038 R.2.	-	10	-
§ 3.039 M.1.a.	-	-	1/5 years
§ 3.039 M.1.b.	-	-	1
§ 3.039 M.1.c.	-	-	1/5 years
§ 3.039 M.1.d.	-	-	1/5 years
§ 3.039 M.2.	-	-	2

Reference documents that may be of interest include:

1. Shoreland Management Classification System for Public Waters; Department of Natural Resources; January 1976.

Category Area: Recreational Development

This category area is proposed because recreational developments are typically proposed adjacent to areas with significant natural resources. Such development may significantly increase human activity in sensitive areas. These developments often are very controversial locally and may have significant impacts on local land use. Specific categories proposed within this category area include:

Mandatory EAW: 6 MCAR § 3.038 S. Recreational development.

Construction of a seasonal or permanent recreational development, accessible by vehicle, consisting of 50 or more sites. (local)

Mandatory EIS: None

Exemptions: None

DISCUSSION: Under the current rules, the following category is directly relevant to the recreational development category area:

Mandatory EAW - 6 MCAR § 3.024

v. Construction of a development cnsisting of "condominium-type" campgrounds, mobile home parks, or other semi-permanent residential and/or recreational facilities, any part of which is within a shoreland area (as defined by Minn. Stat. § 105.485 (1974) or floodplain (as defined by the "Statewide Standards and Criteria for Management of Floodplain Areas of Minnesota") exceeding a total of 50 units or, if located in areas other than the above, exceeding a total of 100 units - (Local);

Exemptions: None

The threshold measure as proposed is designed to exclude wilderness camps accessable only by foot, canoe or plane. These facilities are usually not located in areas where local controversy is likely. The 50 unit threshold was developed through the public meeting process.

It corresponds to the threshold in the current rules for recreational developments in sensitive areas. The alternative of a higher threshold for developments that are not located in shoreland areas, flood plain areas, and wild and scenic river areas was considered but rejected at the request of representatives of local governmental unit. This alternative was rejected because of the likelihood of local controversy regardless of the proximity to water resources. Projects of this nature may be proposed to facilitate hunting, snowmobiling, hiking, horseback riding, bike riding, etc. These activities may have significant impacts on local land use.

The following graph presents EQB projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 v.	20	-	-
§ 3.038 S.	-	4	-

Category Area: Airport Projects

This category area is proposed because of the potential for significant impacts related to local and regional land use, local economic and demographic issues, transportation, noise, air quality, and energy. New facilities and expansion of existing facilities to accommodate noisier aircraft are likely to be very controversial. Specific categories proposed within this category area include:

Mandatory EAW: 6 MCAR § 3.038 T. Airport projects

Construction of a runway extension that would upgrade an existing airport runway to permit usage by aircraft over 12,500 pounds that are at least three decibels louder than aircraft currently using the runway. (DOT or local)

Mandatory EIS: 6 MCAR § 3.039 N. Airport projects

Construction of a paved and lighted airport runway of 5,000 ft. length or greater. (DOT or local)

Exemptions: 6 MCAR § 3.041 L. Airport projects

1. Runway, taxiway, apron, or loading ramp construction or repair work including reconstruction, resurfacing, marking, grooving, fillets and jet blast facilities, except where such action will create environmental impacts off airport property.

2. Installation or upgrading of airfield lighting systems, including beacons and electrical distribution systems.

3. Construction or expansion of passenger handling or parking facilities including pedestrian walkway facilities.

4. Grading or removal of obstructions and erosion control activities on airport property except where such activities will create environmental impacts off airport property.

DISCUSSION: Under the current rules, the following category is directly relevant to the airport projects category area:

Mandatory EAW - 6 MCAR § 3.024

m. Construction of a new airport that is within the key system, pursuant to Minn. Stat. § 360.305, subd. 3 (1974) -(Aeronautics).

Exemptions: None

The basic qualitative measure applied to these categories is that airports able to accommodate jet aircraft have greatest potential to create significant environmental impacts. Facilities to accommodate jet aircraft must include a runway of 5,000 length or greater. The construction of a new facility to accommodate jet air traffic is proposed as a mandatory EIS threshold.

The more likely case is that an existing facility would be expanded from a strictly small aircraft facility to a jet aircraft facility. Similar concerns could arise with runway modifications to allow use by larger jet facilities. Such potential expansion is addressed as a mandatory EAW with the need for an EIS discretionary. The 12,500 pound aircraft weight corresponds to a minimal weight for jet aircraft. The three decibel increase corresponds to a noise increase 1,000 times the prior noise level.

Construction of new facilities for multi-engine, twin engine and single engine aircraft and expansion of these facilities to less than jet aircraft capacity is subject to environmental review on a discretionary basis.

The proposed EIS category corresponds to the current EAW threshold. Minnesota has 18 key system airports. Key system airports are airports capable of handling jet aircraft. Minnesota has 73 intermediate system airports (light to medium sized multi-engine aircraft) and 50 landing strip system airports (single and twin engine aircraft).

The exemption categories are proposed to coincide with the Federal Aviation Administration's categorical exclusions from formal environmental assessment.

The following graph presents EQB and Department of Transportation projections and records relating to the number of projects subject to environmental review:

Rule No.	# Processed 1977 Rules	# EAWs/Year Projected	# EISs/Year Projected
§ 3.024 m.	1	-	-
§ 3.038 T.	-	2	-
§ 3.039 N.	-	-	0

Reference documents that may be of interest include:

1. Airport Environmental Handbook; Federal Aviation Administration; March, 1980.

Category Area: Highway Projects

This category area is proposed because of the potential for significant impacts related to local and regional land use, local economic and demographic issues, transportation, noise, air quality, energy, water quality, erosion, drainage, water resources, habitat destruction, and construction impacts. New facilities and the expansion of existing facilities to accommodate increased traffic are likely to be very controversial. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 U. Highway projects.

1. Construction of a road on a new location over one mile in length that will function as a collector roadway. (DOT or local)

2. Construction of additional travel lanes on an existing road for a length of one or more miles. (DOT local)

3. The addition of one or more new interchanges to a completed limited access highway. (DOT or local)

Mandatory EIS: 6 MCAR § 3.039 O. Highway projects.

Construction of a road on a new location which is four or more lanes in width and two or more miles in length. (DOT or local)

Exemptions: 6 MCAR § 3.041 M. Highway projects.

1. Highway safety improvement projects.

2. Installation of traffic control devices, individual noise barriers, bus shelters and bays, loading zones, and access and egress lanes for transit and paratransit vehicles.

3. Modernization of an existing roadway or bridge by resurfacing, restoration, or rehabilitation which may involve the acquisition of minimal amounts of right-of-way.

4. Roadway landscaping, construction of bicycle and pedestrian lanes, paths, and facilities within existing right-of-way.

5. Any stream diversion or channelization, within the right-of-way of an existing public roadway, associated with bridge or culvert replacement.

6. Reconstruction or modification of an existing bridge structure on essentially the same alignment or location, which may involve the acquisition of minimal amounts of right-of-way.

DISCUSSION: Under the current rules, the following categories are directly relevant to the highway projects category area:

Mandatory EAW: 6 MCAR § 3.024

1. Main roadway grading construction of a four-or-more lane, divided highway with a least partial control of access of ten route miles or more in length and carrying 10,000 vehicles ADT (Average Daily Traffic) - (Hwys);

Exemptions: 6 MCAR § 3.026

5. Repaving or reconstruction of existing highways not involving the addition of new travel lanes or acquisition of additional right-of-way.

6. Installation of traffic control devices on existing streets, roads, and highways other than installation of multiple fixtures or extended stretches of highway.

16. Local bus stops and bus shelters or transit signs, which do not require accessory parking facilities.

Minnesota roadways are commonly classified as either:

1. Arterial roadways (major through highways)

2. Collector roadways (providing access to arterials from local roadways)

3. Local roadways (residential and distribution network)

The following chart represents an approximate tabulation of the mileage of existing roadways:

Arterial:	State trunk highways	12,100
Collector:	County State Aid Highways	30,000
	Municipal State Aid Streets	1,700

Local:	County Roads	15,100
	Township Roads	53.600
	City Streets	12,800
	Other (forest roads, etc)	4,200

Although the cumulative impact of local roadways is greatest, primary concern is generated by the construction of arterial and collector roadways because they tend to induce secondary development in the area and they accommodate approximately 85% of the total mileage driven by motorists. Arterial roadways are commonly four or more lanes in width. The EIS category at 6 MCAR § 3.039 O. uses this as a qualitative threshold. A minimum length threshold of two miles is applied to exclude minor connections to existing roadways and minor extensions to adjacent development. This category may also apply to large collector roadways. An additional qualifier in this category is the fact that this category applies only to roads of this type being constructed on new locations. Upgrading existing roadways is subject only to a mandatory EAW. This distinction is made because siting and land use are likely to be major controversial issues on new developments whereas upgrading of facilities is more like to be an accommodation to service existing development. New four lane highways require acquisition of approximately 50 acres per mile and are likely to foster secondary development on adjacent lands.

New collector roadway construction would be subject to a mandatory EAW pursuant to 6 MCAR § 3.038 U. 1. A one mile minimum threshold is applied to exclude minor connections to existing roadways and extensions to adjacent existing development. Upgrading of exisiting facilities to accommodate additional travel lanes or new interchanges requires a mandatory EAW pursuant to 6 MCAR § 3.038 U. 2. and 3. these changes in a roadway are likely to induce secondary development which will generate the potential for significant environmental impacts. Environmental review is most proper at the initial stage of development of the affected area.

The Minnesota Department of Transportion's transportation plan reflects minimal emphasis on new construction or expansion of the existing system. Therefore, these categories are not likely to have a significant impact. The exemption categories are proposed to coincide with the Federal Highway Administration's categorical exclusions from environmental assessment.

The following graph presents EQB and Department of Transportation projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
6 MCAR § 3.024 I.	0	-	-
6 MCAR § 3.038 U. 1.	-	2	-
6 MCAR § 3.038 U. 2.	-	4	-
6 MCAR § 3.038 U. 3.	-	2	0
6 MCAR § 3.039 O.	-	-	1

Reference documents that may be of interest include:

1. Transportation Plan; Minnesota Department of Transportation; 1978

2. Environmental Impact Rules 23 CFR 771; U.S. Department of Transportation; October 30, 1980

Category Area: Barge Fleeting

This category area is proposed because of the potential for significant environmental impacts related to water quality, sedimentation and erosion, recreational use of water resoures, commercial transportation, habitat deterioration, and adjacent land use. No single agency is responsible for coordinated programming of proposed

activities, therefore, environmental review is necessary. Specific categories proposed within this category area include:

Mandatory EAW: 6 MCAR § 3.038 V. Barge fleeting.

Construction of a new or expansion of an existing barge fleeting facility. (DOT or Port Authority)

Mandatory EIS: 6 MCAR § 3.039 P. Barge fleeting facilities.

Construction of a barge fleeting facility at a new off-channel location that involves the dredging of 1,000 or more cubic yards. (DOT or Port Authority)

Exemptions: None

DISCUSSION: Under the current rules there are no mandatory EAW or exemption categories directly relevant to the barge fleeting category area.

Regulation of barge fleeting is not focused with any central agency. Local government comprehensive plans typically do not address the problems and needs of a commercial barge navigation system. Primary problems associated with the environmental impacts center on the effects of dredging and spoil disposal on water quality and habitat disruption for wildlife populations.

The threshold used for the EIS category at 6 MCAR § 3.039 P. centers on off-channel failities at new locations. These proposals entail controversial siting and land use issues. A minimum dredge threshold was set at 1,000 cubic yards to allow minor or temporary facilities. The 1,000 cubic yard threshold was established as a reasonable cut-off pursuant to the public meeting process.

The EAW category at 6 MCAR § 3.038 V. sets forth an all or none threshold relating to the construction or expansion of the capacity of facilities at either on channel or off-channel locations. Dredging for the purpose of maintaining existing capacity would not be included in this category. The all or none threshold is reasonable to facilitate coordination between governmental units involved and to address the impacts related to disturbance of the habitat and operation of the facility in addition to potential dredging impacts

No exemptions are proposed for this category area because coordination between governmental units is needed, and because adequate site specific information is usually lacking.

The following graph presents EQB and Department of Transportation projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
6 MCAR § 3.038 V.	-	4	-
6 MCAR § 3.039 P.	-	-	1

Reference documents that may of of interest include:

1. Barge Fleeting Study: Final Draft; Metropolitan Council; April 9, 1981.

2. St. Paul Mississippi River Critical Area Plan (with revisions); Environmental Quality Board; 1981.

3. Final Implementation Report, GREAT I Study; U.S. Corps of Engineers, 1980.

Category Area: Water Appropriation and Impoundments

This category area is proposed because of the potential for significant impacts related to ground water quantity and quality, dam safety, habitat alternation, flooding, and land use issues. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 W. Water appropriation and impoundments.

1. A new appropriation for commercial or industrial purposes of either surface water or ground water averaging 30,000,000 gallons per month, or exceeding 2,000,000 gallons in any day during the period of use; or a new appropriation of either ground water or surface water for irrigation of 540 acres or more in one continuous parcel from one source of water. (DNR)

2. A new or additional permanent impoundment of water creating a water surface of 160 or more acres. (DNR)

3. Construction of a Class II dam. (DNR)

Mandatory EIS - 6 MCAR § 3.039 Q. Water appropriation and impoundments.

Construction of a Class I dam. (DNR)

Exemptions - 6 MCAR § 3.041 N. Water impoundments.

A new or additional permanent impoundment of water creating a water surface of less than ten acres.

DISCUSSION: Under the current rules, the following categories are directly relevant to the water appropriation and impoundments category area:

Mandatory EAW: 6 MACR § 3.024

p. A new appropriation for commercial or industrial purposes of either surface water or ground water averaging 30 million gallons per month, or exceeding 2 million gallons in any day during the period of use; or a new appropriation of either ground water or surface water for irrigation of 640 acres or more in one continuous parcel from one source of water - (DNR);

q. Any new or aditional impoundment of water creating a water surface in excess of 200 acres - (DNR);

Water appropriation may have significant impact upon existing users of the water and the rights of potential users as well as potential water table impacts that may alter entire ecosystems. Water appropriation is regulated by the Department of Natural Resources (DNR) pursuant to 6 MCAR § 1.5050, however, for large projects more comprehensive environmental review is necessary. The proposed categories and thresholds are the same as the current rules with one exception. The threshold for agricultural appropriation is reduced from 640 to 540 acres. This was done to clarify the threshold. The original intent was to cover center pivot irrigation systems capable of irrigating one section (640 acres) of land. However, such a system actually wets approximately 540 acres. The 540 figure was used in response to requests to clarify the intent of the category. An acreage measure is used for agricultural appropriations because this measurement is more compatible with the DNR's regulatory system.

Actual "gallons per month" and "gallons per day" threshold were used as the qualitative measure for industrial and commercial appropriations to balance consideration of short term and long term impacts. Some large users draw at peak rates for short periods of time, whereas some large users have a constant need. Periods of time shorter than one day would be unreasonable to measure, whereas, periods of time

longer than one month would mark the mid-range effects, the gallon thresholds used are the same as under the current rules.

The impoundment category at 6 MCAR § 3.038 W.2. utilized a surface area qualitative measure because this measure is most closely tied to changes in land use. The volume threshold of acre-feet of water was considered but rejected as having a less direct correlation with impacts and as being more difficult to use administratively. This category was restricted to permanent impoundments because temporary impoundments frequently do not last long enough to modify the current land use. The quantitative threshold was reduced from 200 acres as in the current rules to the proposed 160 acres. This measurement is more consistent with conventional land measurement and with other categories proposed relating to permanent conversion of natural and agricultural lands. Impoundments less than ten acres in size were exempted because impacts resulting from these facilities are likely to be minor and of a strictly localized nature. This exemption is likely to apply only to agricultural basins and habitat improvement projects.

Dam construction and safety is regulated by the DNR pursuant to 6 MCAR § 1.5030. Environmental review is necessary because of the potential for significant property damage and danger to human safety. The DNR regulations are based on the comparative impact potential of the dams. The existing DNR dam classifications were used as thresholds for the EIS category at 6 MCAR § 3.039 Q. and the EAW category at 6 MCAR § 3.038 W. 3. The current rules have no corresponding categories.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.024 p.	3	-	-
§ 3.024 q	9	-	-
§ 3.038 W. 1.	-	1	-
§ 3.038 W. 2.	-	1	-
§ 3.038 W. 3.	-	1	-
§ 3.039 Q.	-	-	0

Category Area: Marinas

This category area is proposed because of the potential for significant impacts related to water quality, air quality, noise, wildlife habitat, aesthetics, and the use of public resources. Specific categories proposed within this category area includes:

Mandatory EAW - 6 MCAR § 3.038 X. Marinas.

> Construction or cumulative expansion of a marina or harbor project which results in a total of 20,000 or more sq. ft. of temporary or permanent water surface area used for docks, docking, or maneuvering of watercraft. (local)

Mandatory EIS - 6 MCAR § 3.039 R. Marinas.

> Construction of a new or expansion of an existing marina, harbor, or mooring project on a state or federally designated wild and scenic river. (local)

Exemptions - 6 MCAR § 3.041 O. Marinas.

> Construction of private residential docks for use by four or less boats and utilizing less than 1,500 sq. ft. of water surface area.

DISCUSSION: Under the current rules, the following category is directly relevant to the marinas category area:

Mandatory EAW: 6 MCAR § 3.024

s. Any marina and habor project of more than 20,000 square feet of water surface area - (local);

Exemptions: None

The qualitative measure of the thresholds applied to the EAW category at 6 MCAR § 3.038 X. is the area of water surface occupied by the facility. This measure most appropriately reflects the total potential for impacts from the facility. The quantitative threshold proposed corresponds to approximately one half acre. Such a facility would accommodate approximately 80 boats. The proposed category is the same as the current rules. This threshold has proven to be reasonable for defining major facilities.

Marinas may be constructed in wild and scenic river areas, however, because of the unique character of these areas, the areas are generally inappropriate for marinas. Under the current rules, requests for EISs on marinas have mostly been confined to wild and scenic river systems. The proposed category at 6 MCAR § 3.039 R. mandates an EIS for marina proposals in these unique habitats.

The exemption threshold for marinas at 6 MCAR § 3.041 O. is based on the definition of marina. A 1,500 sq. ft. facility would accommodate approximately five boats. These facilities are not likely to be controversial and would have minimal impacts.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.024 s.	10	-	-
§ 3.038 X.	-	2	-
§ 3.039 R.	-	-	1

Category Area: Stream Diversion

This category area is proposed because the alteration of watercourses affects flooding in downstream and adjacent areas, wildlife habitat, fisheries resources, water quality, and area land use. The traditional analysis of flood control and drainage projects usually does not consider broad and long range environmental implications. Environmental review will facilitate a more comprehensive analysis. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 Y. Stream diversion.

> The diversion or channelization of a designated trout stream or a natural watercourse with a total watershed of ten or more sq. mi., unless exempted by 6 MCAR § 3.041 P. (local)

Mandatory EIS - none

Exemptions - 6 MCAR § 3.041 P. Stream diversion.

> Routine maintenance or repair of a drainage ditch within the limits of its original construction flow capacity, performed within 20 years of construction or major repair.

DISCUSSION: The current rules contain no EAW or exemption categories relating to the stream diversion category area.

The qualitative measure applied to the EAW category at 6 MCAR § 3.038 Y. is restricted to trout streams and natural watercourses because they have significant habitat, recreational, and resource values.

Alteration of these watercourses may significantly impact natural drainage. A ten square mile quantitative threshold is applied to make the category administratively feasible and because minor diversion of headwaters watercourses is likely to have minimal flooding and habitat impacts. A ten square mile drainage area corresponds to approximately 6,400 acres.

Routine maintenance of drainage ditches is exempted from environmental review pursuant to 6 MCAR § 3.041 P. An average time requirement for maintenance is approximately 15 years.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.038 Y.	-	1	-

Category Area: Wetlands and Protected Waters

This category area is proposed because of the potential for significant impacts related to flood control, erosion control, water quality, wildlife habitat, recreation, and aesthetics. Impacts generated by proposals subject to this category area often are long range and are often manifested at locations removed from the area of immediate impact. Environmental review facilitates a comprehensive view of the potential impacts of these projects. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 E. Wetlands and protected waters.

1. Actions that will change or diminish the course, current, or cross section of one acre or more of any protected water or protected wetland except for those to be drained without a permit pursuant to Minn. Stat. § 105.391, subd. 3. (local)

2. Actions that will change or diminish the course, current or cross section of 40 percent or more or five or more acres of a Type 3 through 8 wetland of 2.5 acres or more, excluding protected wetlands, if any part of the wetland is within a shoreland area, delineated flood plain or a state or federally designated wild and scenic rivers districts. (local)

Mandatory EIS - 6 MCAR § 3.039 S. Wetlands and protected waters.

Actions that will eliminate a protected water or protected wetland except for those to be drained without a permit pursuant to Minn. Stat. § 105.391, subd. 3. (local)

Exemptions - none

DISCUSSION: Under the current rules, the following category is directly relevant to the wetlands and protected waters category area:

Mandatory EAW - 6 MCAR § 3.024

r. An action that will eliminate or significantly alter a wetland of Type 3,4, or 5 (as defined in U.S. Department of Interior, Fish and Wildlife Service, Circular 39, "Wetlands of the U.S., 1956") of five or more acres in the seven-county metropolitan area, or of 50 or more acres outside the seven-county metropolitan area, either singly or in a complex of two or more wetlands - (local);

Exemptions - none

An EIS is required for the elimination of a protected water or protected wetland pursuant to 6 MCAR § 3.039 S. This is reasonable

because these resources have been determined to be significant pursuant to the Department of Natural Resources (DNR) inventory program. The elimination of such resources would have significant local and regional impacts. A quantitative threshold of one acre is set to require an EAW at 6 MCAR § 3.038 Z. 1. This is reasonable because an alteration of one acre is likely to affect the total aquatic ecosystem. In addition, impacts of that size are likely to foster additional development in the area. Environmental review is reasonable to reduce the possibility of piecemealing the elimination or degradation of the resource.

Minn. Stat. § 105.391 subd. 3 establishes the DNR "waterbank" program. This program sets forth a process for compensation to farmers if they are denied a permit to drain wetlands for agricultural purposes. If the DNR does not have adequate funds to compensate the proposer, the wetland may be drained without a permit. This statutory provision is proposed as an exemption from environmental review as well.

The mandatory EAW category at 6 MCAR § 3.038 Z. 2. addresses the problem of the destruction of wetlands adjacent to lakes and rivers. These wetlands serve valuable functions to the aquatic ecosystem of the lakes and rivers and also serve as reservoirs to minimize flooding potential during wet periods. This category is reasonable because environmental impacts from these activities frequently are not addressed by the applicable regulatory mechanisms. The DNR does not have permit authority over these resources and local ordinances typically do not address the total resource impact potential.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.024 r.	25	-	-
§ 3.038 Z. 1.	-	4	-
§ 3.038 Z. 2.	-	2	-
§ 3.039 S	-	-	0

Category Area: Agriculture and Forestry

This category area is proposed because of the potential for significant impacts relating to water quality, soil erosion, and land use. It should be noted that this is a difficult category area to address because many activities generating these impacts are not subject to government approval. These rules apply only to activities for which government approval is required, therefore, some activities with potentially significant impacts will not be subject to environmental review. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 AA. Agriculture and forestry.

1. Harvesting of timber for commercial purposes on public lands within a state park, historical area, wilderness area, scientific and natural area, wild and scenic rivers district or critial area that does not have an approved plan under Minn. Stat. §§ 86A.09 or 116G.07. (DNR)

2. A clearcutting of 80 or more contiguous acres of forest, any part of which is located within a shoreland area and within 100 feet of the ordinary high water mark of the lake or river. (DNR)

3. Actions resulting in the conversion of 640 or more acres of forest or naturally vegetated land to a differing open space land use. (local)

4. Actions resulting in the permanent conversion of 80 or more acres of agricultural, forest, or naturally vegetated land to a more intensive, developed land use. (local)

Mandatory EIS - None

Exemptions 6 MCAR § 3.041 Q. Agriculture and forestry.

1. Harvesting of timber for maintenance purposes.

2. Public and private forest management practices, other than clearcutting or the application of pesticides, that involve less than 20 acres of land.

DISCUSSION: Under the current rules, the following categories are directly relevant to the agriculture and forestry category area:

Mandatory EAW - 6 MCAR § 3.024

z. Harvesting of timber within the Boundary Waters Canoe Area Portal Zone or in a State Park or Historical Area, that is not included in an annual timber management plan filed with the Council - (DNR);

a [1] Permanent removal of 640 or more contiguous acres of forest cover - (DNR);

b [1] Conversion of 40 or more contiguous acres of forest cover to a different land use - (local);

Exemptions - none

Harvesting of timber on publicly owned lands is likely to be controversial. Most activities of this nature are subjected to public review pursuant to the development of a management plan for the area. Environmental review for timber harvesting on public lands not included in such plans is proposed pursuant to 6 MCAR § 3.038 AA.1. It is reasonable to require public review over activities that may significantly alter publicly owned resources.

Clearcutting of timber may be controversial depending on the location of the clearcut. A mandatory EAW is required at 6 MCAR § 3.038 AA. 2. for large clearcutting activities adjacent to water resources. Significant erosion and runoff may result from such activities. The 80 acre quantitative threshold and the 100 foot proximity threshold were established pursuant to the public meeting process as being reasonable. In practice, clearcuts usually do not exceed 20 to 40 acres. It should be noted that private timber management practices are not subject to this category if they do not require government approval.

Forest management practices not likely to have significant impacts are exempted from these rules pursuant to 6 MCAR § 3.041 Q. 1. and 2. These practices include the harvesting of timber to maintain the facility and access to the facility and minor forest management activities. Clearcutting and application of pesticides remain subject to environmental review because these activities may have the potential for significant impacts. These exemption categories were established as reasonable pursuant to the public meeting process.

Mandatory categories at 6 MCAR § 3.038 AA. 3. and 4. are proposed to address activities with the potential for significant impacts that may not otherwise receive adequate review. In establishing the qualitative threshold, a distinction was made based upon the length of time the impact was likely to last. For activities for which the resource was "permanently converted" - i.e. the inability to readily convert the resource back to its original condition - the 80 acre threshold was regarded as likely to have the potential for significant impacts. Likely activities pursuant to that category include residential, commercial and industrial developments. For activities for which the resource was substantially changed but, by application of differing management practices, could be restored to essentially it's prior condition, 640 acres was regarded as a likely threshold to have the potential for significant impacts. Activities likely pursuant to this category include the drainage and conversion of natural areas to agricultural use or the clearing of forested areas for agricultural

purposes. It should be noted that private management practices if they do not require government approval are not subject to this category. These categories represent a relaxation of the current EAW categories.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.024 z	7	-	-
§ 3.024 a [1]	0	-	-
§ 3.024 b [1]	2	-	-
§ 3.038 AA.1.	-	2	-
§ 3.038 AA.2.	-	0	-
§ 3.038 AA.3.	-	0	-
§ 3.038 AA.4.	-	2	-

Category Area: Animal Feedlots

This category were is proposed because of the potential for significant environmental impacts relating to ground and surface water quality, odors, and local land use issues. This type of activity is likely to be controversial if the location is in a sensitive area or near residential or recreational developments. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 BB. Animal feedlots.

> The construction of an animal feedlot facility with a capacity of 1,000 animal units or more or the expansion of an existing facility by 1,000 animal units or more. (PCA, if in a shoreland, delineated flood plain, or Karst area, or local)

Mandatory EIS - none

Exemptions - 6 MCAR § 3.041 R. Animal feedlots.

> The construction of an animal feedlot facility of less than 100 animal units or the expansion of an exisitng facility by less than 100 animal units no part of which is located within a shoreland area, delineated flood plain, or state or federally designated wild and scenic rivers district.

DISCUSSION: The current rules contain no EAW or exemption categories relating to the animal feedlot category area.

Although the current rules do not contain a mandatory EAW category relating to these facilities, several citizen petitions were submitted on animal feedlot facilities pursuant to the current rules. Facilities petitioned were of a smaller size than the proposed threshold but the facilities were located in areas of soluble bedrock. The proposed threshold corresponds to the threshold established in the Clean Water Act. Facilities of this size must be evaluated to determine if a National Pollutant Discharge Elimination System (NPDES) permit is required. The alternative of requiring an EAW only for facilities located within a shoreland area, delineated flood plain area or area with soluble bedrock was considered but rejected on the basis of local government comments indicating that activities of this scale are very controversial and should be noticed to the public.

The exemption category is proposed because projects of this size are not likely to result in significant impacts. Projects of this type have the potential to generate petitions based more on "neighborhood disputes" than true impacts. This threshold is a reasonable level to prevent abuse of the environmental review process in this manner.

The following graph presents EQB and PCA projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.038 BB.	-	18	-

Category Area: Natural Areas

This category is proposed because natural areas are publicly owned properties that have been set aside to preserve significant natural resources for future generations. These are sensitive areas of unique quality which may be significantly impacted by inappropriate development. Environmental review is necessary for these activities to allow public involvement in decisions affecting publicly owned resources. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 CC. Natural areas.

> Actions resulting in the permanent physical encroachment on lands within a national park, state park, wilderness area, scientific and natural area, or state trail corridor when such encroachment is inconsistent with the management plan prepared for the recreational units. (DNR or local)

Mandatory EIS - none

Exemptions - none

DISCUSSION: The current rules contain no EAW or exemption categories relating to the natural areas category area.

Enabling legislation conferring authority for the designation of these public facilities mandates the preparation of a master management plan for the unit. These plans may vary according to the characteristics of the area and purposes for designation. As a result, the standard of "inconsistent with the management plan" is proposed. This is the most reasonable method of addressing the diversity among these units.

The following graph presents EQB and DNR projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.038 CC.	-	1	-

Category Area: Historic Places

This category area is proposed because there is very little government authority to protect sites listed on the National Register of Historic Places. The requirement for environmental review prior to the destruction of such facilities is needed to provide the public an opportunity to take part in decisions that may significantly affect the preservation of our national hertiage. Historical resources are protectible natural resources under the Minnesota Environmental Right Act at Minn. Stat. ch. 116B. Specific categories proposed within this category area include:

Mandatory EAW - 6 MCAR § 3.038 DD. Historical places.

Destruction of a property that is listed on the National Register of Historic Places. (permitting state agency or local)

Mandatory EIS - none

Exemptions - none

DISCUSSION: The current rules contain no EAW or exemption categories relating to the historic places category area.

To be listed on the National Register of Historic Places, a potential site must:

1. Meet established criteria;
2. Be approved by a State review board;
3. Be approved for listing by the owner; and
4. Be accepted by the National Register.

Approximately 907 sites in Minnesota are currently listed on the National Register. Sites so listed are regarded to be nationally significant resources. These sites are frequently privately owned and there may be little financial incentive for the owner to maintain the site if it is located in a high development potential area. Public review may produce feasible alternatives to the destruction of the facility. The opportunity to review these alternatives via environmental review is reasonable because of the lack of other forms of regulation.

The following graph present EQB and State Historical Preservation Office projections and records relating to the number of projects subject to environmental review:

Rule #	# Processed 1977 Rules	# EAWs/year Projected	# EISs/year Projected
§ 3.038 DD.	-	1	-

Reference documents that may be of interest include:

1. Historic Preservation for Minnesota Communities; Minnesota Historical Society; January, 1980.

Category Area: Standard Exemptions

This is proposed pursuant to Minn. Stat. § 116D.04 subd. 2a (a) as an exemption only category area to delineate the scope of environmental review. Comments received pursuant to the public meeting process indicate there is public confusion relating to the potential scope of environmental review. Specific exemptions proposed within this category area include:

Exemptions - 6 MCAR § 3.041 A. Standard exemptions.

1. Activities for which no governmental action is required.
2. Activities for which all governmental action has been completed.
3. Activities for which, and so long as, a public agency has denied a required governmental approval.
4. Activities for which a substantial portion of the activity has been completed and an EIS would not influence remaining implementation or construction.

5. Activities for which environmental review has already been initiated under the prior rules or for which environmental review is being conducted pursuant to 6 MCAR § 3.034 or 3.035 of these rules.

DISCUSSION: These exemptions are substantively the same as the general exemptions found at 6 MCAR § 3.026 A. of the current rules. They are repeated at this point to facilitate public understanding of the scope of these rules. These exemptions are a summarization of the statutory language relating to activities that are subject to environmental review.

Environmental review is effective only if it is done early enough to guide construction. If the project is already substantially completed and further information could not mitigate impacts, the basic purpose of environmental review is defeated.

Alternative review procedures and the model ordinance provisions are designed to substitute for the provisions in these rules. If substitute review procedures have been approved by the EQB, specific activities covered are no longer subject to these rules.

The explicit statement of these conditions is necessary to facilitate proper interpretation and implementation of these rules.

Category Area: Utilities

This is proposed as an exemption only category area to exclude minor activities related to the servicing of existing facilities or proposed projects. This is needed to focus environmental review on the core proposal and to ensure review occurs at an early stage in the proposal. The proposed exemption within this category area is:

Exemption 6 MCAR § 3.041 S. Utilities.

Utility extensions as follows: water service mains of 500 ft. or less and one and a half inches diameter or less; sewer lines of 500 feet or less and eight inch diameter or less; local electrical service lines; gas service mains of 500 ft. or less and one inch diameter or less; and telephone service lines.

DISCUSSION: Under the current rules, the following category was included to cover this need:

Exemption - 6 MCAR § 3.026

13. Utility extensions as follows: water service mains of 500 feet or less and one and a half inches diameter or less; sewer lines of 500 feet or less and eight inch diameter or less; electrical service lines of 500 feet or less and 240 volts or less; gas service mains of 500 feet or less and one inch diameter or less; and telephone service lines of 500 feet or less.

The thresholds proposed were established as reasonable pursuant to the public meeting process. The thresholds established are designed to exclude minor distribution lines and services lines. Environmental review should be focused at the initial stages of proposal, as opposed to the stage of providing basic service to existing development.

Category Area: Construction Activities

This is proposed as an exemption only category area to exclude minor construction acivities that do not have the potential for significant impacts. This is needed to focus environmental review on the core proposal and to prevent potential abuse of the intent of environmental review by "nuisance" petitions. Specific exemptions proposed within this category area include;

Exemptions - 6 MCAR § 3.041 T. Construction activities.

1. Construction of accessory appurtenant structures including garages, carports, patios, swimming pools, agricultural structures, excluding feedlots, or other similar buildings not changing land use or density.

2. Accessory signs appurtenant to any commercial, industrial, or institutional facility.

3. Operations, maintenance, or repair work having no substantial impact on existing structures, land use or natural resources.

4. Restoration or reconstruction of a structure provided that the structure is not of historical, cultural, architechtural, archeological, or recreational value.

5. Demolition or removal of buildings and related structures except where they are of historical, archeological, or architectural significance.

DISCUSSION: Under the current rules, the following categories were included to cover this need:

Exemptions -6 MCAR § 3.026

1. Operation, maintenance, or repair work involving no substantial change in existing structures, land uses, or water quality.

4. Restoration or reconstruction of a structure in whole or in part being increased or expanded by less than 25 percent of its original size, square footage, or capacity, and aggregating less than 5,000 square feet, provided that such structure has not been designated to be of historical, cultural, archeological, or recreational value by a public agency.

14. Construction of accessory appurtenant structures including garages, carports, patios, swimming pools, fences, barns, or other similar agricultural structures, excluding feedlots; or other similar buildings not changing land use or density.

15. Grading or filling of 750 cubic yards or less.

18. Filling of earth into previously excavated land with materials compatible with the natural material on the site.

21. Accessory signs appurtenant to any commercial, industrial, or institutional facility not regulated by an agency of the State.

The proposed categories were established pursuant to the public meeting process as being necessary to prevent delays relating to projects that do not have the potential for significant environmental impacts. These categories are substantially the same as the current rules, however, the wording has been changed to avoid "impact exemptions."

Category Area: Land Use

This is proposed as an exemption only category area to exclude minor land use actions that do not have the potential for significant impacts. This is needed because these activities may be controversial in the immediate vacinity and failure to specifically exempt these activities could result in "nuisance" petitions. Specific categories proposed within this category area include:

Exemptions - 6 MCAR § 3.041 U. Land Use

1. Individual land use variances including minor lot line adjustments and side yard and setback variances, not resulting in the creation of a new subdivided parcel of land or any change in land use character or density.

2. Minor temporary uses of land having negligible or no permanent effect on the environment.

3. Maintenance of existing landscaping, native growth, and water supply reservoirs, excluding the use of pesticides.

DISCUSSION: Under the current rules, the following categories were included to cover this need.

Exemptions: 6 MCAR § 3.026

12. Maintenance of existing landscaping, native growth, and water supply reservoirs, excluding the use of pesticides.

17. Minor temporary uses of land having neglibible or no permanent effect on the environment, including such things as carnivals and sales of Christmas trees.

19. Individual land use variances including minor lot line adjustments and side yard and setback variances, not resulting in the creation of a new subdivided parcel of land or any change in land use character or density.

The proposed categories are substantively identical to the current categories. They were accepted as reasonable in the implementation of the current rules. Minor language revisions were suggested pursuant to the public meeting process.

Category Area: Research and Data Collection

This is proposed as an exemption only category area to exclude minor research activities that do not have the potential for significant impacts. This is necessary because research activities frequently are dependent upon unique conditions and thus are subject to short notice changes. Subjecting these activities to environmental review could thwart the goal of the research. The proposed exemption within this category area is:

Exemption - 6 MCAR § 3.041 V. Research and data collection.

Basic data collection, training program, research, experimental management, and resource evaluation projects which do not result in an extensive or permanent disturbance to an environmental resource, and do not constitute a substantial commitment to a further course of action having potential for significant adverse environmental effects.

Under the current rules, the following category was included to cover this need:

Exemptions: 6 MCAR § 3.026

20. Basic data collection, training programs, research, experimental management, and resource evaluation projects which do not result in an extensive or permanent disturbance to an environmental resource, and do not constitute a substantial commitment to a further course of action having potential for significant environmental effects.

The proposed category is identical to the current category. This category has been accepted as reasonable in the implementation of the current rules and was regarded as reasonable pursuant to the public meeting process.

Category Area: Financial Transactions

This is proposed as an exemption only category area to exclude activities that are not the base of environmental concern. This is needed to focus environmental review on the actual activity that has the potential for environmental impact. Specific categories proposed within this category area include:

Exemptions - 6 MCAR § 3.041 W. Financial transactions.

1. Acquisition or disposition of private interests in real property, including leaseholds, easements, right-of-way, or fee interests.

2. Purchase of operating equipment, maintenance equipment, or operating supplies.

DISCUSSION: Under the current rules, the following categories were included to cover this need:

Exemptions: 6 MCAR § 3.026

8. Purchase of operating equipment, maintenance equipment, or operating supplies.

9. Sales or lease of surplus governmental property other than land, radioactive material, pesticides, or buildings.

10. Loan, mortgage, guarantee, or insurance transactions in connection with now or existing structures or uses as defined in subparagraphs 6 MCAR § 3.026 C.2., 3. or 4.

11. Borrowing for purposes other than capital construction or land purchase.

These proposed categories represent minor revisions to the current categories. These rules apply only to activities that impact the environment. The activities included in this category area do not have a physical impact on the environment and, therefore, are not within the scope of the rules. Comments received at public meetings however, demonstrated a desire for express language exempting these transactions. This was regarded as reasonable to insure proper interpretation and implementation of these rules.

Category Area: Licenses

This is proposed as an exemption only category area to exclude routine projects which are generally minor and have minimal environmental impacts. Specific categories proposed within this category area include:

Exemptions - 6 MCAR § 3.041 X. Licenses.

1. Licensing or permitting decisions related to individual persons or activities directly connected with an individual's household, livelihood, transportation, recreation, health, safety, and welfare, such as motor vehicle licensing or individual park entrance permits.

2. All licenses required under electrical, fire, plumbing, heating, mechanical and safety codes and regulations, but not including building permits.

DISCUSSION: Under the current rules, the following categories were included to cover this need:

Exemptions: 6 MCAR § 3.026

7. Licensing or permitting decisions relating to individual persons or activities directly connected with an individual's household, livelihood, transportation, recreation, health, safety, and welfare,

such as motor vehicle licensing, hunting licenses, professional licenses, and individual park entrance permits.

These proposed categories represent minor revisions to the current categories. The additional category was added pursuant to comments made at the public meetings relating to ministerial licensing related to actual construction. This type of licensing is usually non-discretionary and, therefore, not subject to these rules. This category was added to clarify that point for the reader. This is reasonable to insure proper interpretation and implementation of the rules.

Category Area: Governmental Actions

This is proposed as an exemption only category area to exclude certain governmental actions that do not have a direct physical impact on the environment. Specific categories proposed within this category area include:

Exemptions - 6 MCAR § 3.041 Y. Governmental actions.

1. Proposals and enactments of the legislature.

2. Rules or orders of governmental units.

3. Executive orders of the Governor, or their implementation by governmental units.

4. Judicial orders.

5. Submissions of proposals to a vote of the people of the State.

DISCUSSION: The current rules identify those categories as exempt pursuant to the definition of actron contained at 6 MCAR § 3.022 B.

The categories included in this category area do not represent project specific actions. These actions may affect the environment indirectly (i.e., by appropriating money, providing general authority, etc.), however, these actions are followed by other government action that will implement the action and directly affect the environment. Environmental review is more reasonable at the point of implementation.

Category Area: Pesticides

This category area was deleted from the current rules. Under the current rules, the following category was included:

Mandatory EAW: 6 MCAR § 3.024

y. The application of restricted use pesticides over more than 1,500 contiguous acres - (agriculture);

No EAWs were prepared pursuant to this category. Restricted use pesticides are regulated by the Department of Agriculture. They may be applied only by licensed applicators and they are typically applied on relatively small acreages.

Alternative methods of addressing the need for environmental reivew in this category area were considered, however, none were deemed acceptable pursuant to the public meeting process. It was, therefore, deemed most reasonable to exclude this category area from mandatory categories and a low environmental review on a discretionary basis.

Reference documents that may be of interest include:

1. Pesticide Task Force Report to the Minnesota Environmental Qualtiy Council, Parts 1 and 2, Environmental Quality Board; June 17, 1976

2. Metabolism of Pesticides, Update II; U.S. Fish and Wildlife Service; 1978

Introduction to Chapter 16: Early Notice Rules

The intent of this chapter is to fulfill the directive of the Minnesota Environmental Policy Act at Minn. Stat. § 116D.04, subd. 8: that the board establish a procedure for early notice to the board and the public of natural resource management and development permit applications and other impending state actions having significant environmental effects in order to facilitate coordination of environmental decision making and the timely review of agency decisions. To accomplish these objectives the board, in 1977, established a publication called the EQB Monitor which includes the notices required by the Policy Act in addition to notices of other environmentally related actions of general interest.

Chapter Sixteen identifies which notices are required to be published by the board and governmental units and establishes the procedures for submitting notices for publication and the procedures to be used by the board in preparing and distributing the Monitor. The proposed rules are substantially the same as those presently in effect which can be found in the current rules at 6 MCAR §§ 3.033 - 3.040. Because there is nominal change to this chapter the proposed rules are presented as amendments to the current rules as demonstrated by the underlining and deletion. A number of the changes were made for editing purposes, i.e., to make this chapter consistent with the numbering system and wording of previous chapters. The need and reasonableness of making these changes is generically addressed below. Only those changes made for non-editing purposes will be specifically addressed in the context of the rules in which they occur.

The following changes are considered as editing changes and occur throughout the chapter.

1. Addition of the word "adverse" to modify the term "environmental effects". To clarify that the environmental review process, and in this chapter, the early notice system are concerned primarily with negative impacts, the DNR recommended inserting the word "adverse" to describe "environmental effects". Describing "effects" in this manner will lessen confusion of the meaning of the term and will direct individuals to concentrate on the important aspects of a project vis-a-vis the environmental review process.

2. Use of the acronym "EQB" in place of "Council", "MEQC", and "EQC": To lessen confusion in reading the rules only one term is used to refer to the Environmental Quality Board.

3. Use of the terms "governmental unit" or "unit" in place of the terms "public agencies" and "agencies": The meaning of the new terms is substantively the same as the old and are changed in this chapter to make its wording consistent with that of the previous chapters.

The following rule-by-rule presentation will identify further changes proposed for the early notice procedures. In this chapter the rule is identified by being set-off by asterisks preceding the rule and following the discussion of the changes proposed for the rule.

* *

6 MCAR § 3.042 ~~3.033~~ Authority and purpose.

A. To provide early notice of impending actions which may have significant adverse environmental effects, the EQB ~~Council~~ shall, pursuant to Minn. Stat. § 116D.04, subd. 8 ~~(1974)~~, publish a bulletin with the name of "EQB Monitor" ~~"EQC Monitor"~~ containing all notices as specified ~~in 6 MCAR § 3.044 3.035~~. The EQB ~~Council~~ may prescribe the form and manner in which the governmental units ~~agencies~~ submit any material for publication in the EQB ~~EQC~~ Monitor, and the EQB Chairperson ~~of the Council~~ may withhold publication of any material not submitted according to the form or procedures the EQB ~~Council~~ has prescribed.

B. These rules are intended to provide a procedure for notice to the EQB ~~MEQC~~ and to the public of natural resource management and development permit applications, and impending governmental and private actions that may have significant adverse environmental effects. The notice through the early notice procedures is in addition to public notices otherwise required by law or regulations.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

6 MCAR § 3.043 ~~3.034~~ Exemptions.

A. All National Pollutant Discharge Elimination System Permits granted by the ~~Minnesota Pollution Control Agency~~ PCA, under the authority given ~~it~~ by the Environmental Protection Agency ~~of the United States of America~~, shall be exempt from these rules unless otherwise provided by resolution of the EQB ~~Council~~.

B. Where, in the opinion of any governmental unit ~~public agency~~, strict observance of 6 MCAR §§ 3.042 - 3.046 ~~3.033 - 3.035~~ would jeopardize the public health, safety, or welfare, or would otherwise generally compromise the public interest, the governmental unit ~~agency~~ shall comply with these rules as far as practicable. In such cases, the governmental unit ~~agency~~ shall carry out alternative means of public notification and shall communicate the same to the EQB ~~Council~~ Chairperson.

C. Any federal permits for which review authority has been delegated to a non-federal governmental unit ~~public agency~~ by the federal government may be exempted by resolution of the EQB ~~Council~~.

DISCUSSION: Only editing type changes are being proposed for this rule.

* *

6 MCAR § 3.044 ~~3.035~~ EQB ~~EQC~~ Monitor publication requirements.

A. Governmental units ~~Public agencies~~ are required to publish the following in the EQB ~~EQC~~ Monitor except that this section constitutes a request and not a requirement with respect to federal agencies.

1. ~~Notice of receipt of applications or government proposals for the natural resources management and development permits listed below.~~ When an action has been noticed pursuant to 6 MCAR § 3.044 A. 3. ~~3.035 A. 3.~~ separate notice of individual permits required by that action need not be made unless changes in the action are proposed which will involve new and potentially significant adverse environmental effects not considered previously. No decision granting or denying a permit application for which notice is required to be published in this section shall be effective until 30 days following publication of the notice.

DISCUSSION: The first sentence in rule A.1. is being proposed for deletion as it is considered unnecessary. In the attempt to keep the rules as brief as possible unnecessary language has been pared. In the current rules a listing of the permits for which notice was required was developed from subdivision 5 (a) of the original MEPA. This subdivision identified selected Minnesota Statutes which established the authority for permits defined as "Permits for natural resources management and development". Subdivision 5 (a) was repealed as a part of the 1980 amendments to MEPA leaving no statutory definition. Lacking such definition this sentence is being proposed for deletion because it no longer refers to any specific permits.

The last sentence added to rule A.1. is identical to a requirement found in the current rules at 6 MCAR § 3.031 A. The sentence was moved to this location in order to place all the aspects of a rule in the same section. The rule is needed if the early notice requirement is to be effective. If agencies could make their permitting decisions immediately upon publication, the intent of early notice would be defeated; the publication would serve no purpose other than to inform the board and the public of an action that has already taken place. By providing a 30 day waiting period the board and the interested public have an opportunity to participate in the decision making process of an agency rather than adversarily approaching the agency after the fact.

* *

a. Filling of ten or more acres of public waters -- Work in the Beds of Public Waters (Minn. Stat. § 105.42). DNR

b. Dredging of ten or more acres of public waters -- Work in the Beds of Public Waters (Minn. Stat. § 105.42). DNR

c. All public hearings conducted pursuant to water resources permit applications (Minn. Stat. ch. 105). DNR

d. Permit to mine or lease to prospect for iron ore, copper-nickel, or other materials (Minn. Stat. §§ 93.16, 93.335, 93.351). DNR

e. Earth removal lease (Minn. Stat. § 92.50). DNR

f. Section 401 Certifications (33 USC Section 1341; Minn. Stat. § 115.03.) PCA

g. Construction of a public use airport (Minn. Stat. § 360.018, subd. 6). DOT

h. Special local need registration for pesticides (Minn. Stat. § 18A.23; 3 MCAR § 1.0338 B.). MDA

DISCUSSION: All but two of these actions which require publication are identical to requirements in the current rules. They have been regrouped and identified as amendments to the rule for the sake of clarity and convenience. The existing rule corresponding to the proposed rules are found at 6 MCAR § 3.035 A.1. of the current rules. The specific sections are as follows:

Proposed Rule		Current Rule
a	-	f
b	-	g
c	-	h
d	-	n
e	-	p
g	-	x

Only proposed rules f. and h. are new. The Pollution Control Agency requested that publication of the "401 Certifications" be required. The "401 Certification" is a process whereby federal agencies' permits for discharge to water and all the U.S. Army Corps of Engineers' permits are passed through the PCA for their review and approval. It is PCA's intention to use the "401 Certification" process only with significant actions which involve a major controversy or impact. PCA's intent fits with the purpose of the early notice provision to apprise the board and the public of actions having significant effects as set forth at Minn. Stat. § 116D.04 subd. 8.

The Minnesota Department of Agriculture requested the publication of section h. be required. The current rules at 6 MCAR § 3.024 B.1.y. require the preparation of an EAW for the application of restricted use pesticides. The proposed rules do not contain such a mandatory

category. Requiring publication of the action of the MDA to register certain publication is proposed as a substitute process to allow the board and the public to become aware of the types of pesticides that may be used in future applications. The registration of a pesticide is the earliest step in their use and will provide an opportunity for interested persons to comment on the appropriateness of using selected pesticides.

* *

~~a. Navigational obstructions within designated state or federal Wild and Scenic River land use districts.~~

~~b. Commercial and industrial wharves used for cargo transfer.~~

~~c. Channelization of one or more miles of designated Class I or II public water courses.~~

~~d. Any marina and harbor project of more than 20,000 square feet of water surface area.~~

~~e. Any new or additional impoundment of water creating a water surface in excess of 200 acres.~~

~~f. Filling of ten or more acres of public waters.~~

~~g. Dredging of ten or more acres of public waters.~~

~~h. All public hearings conducted pursuant to water resources permit applications (Minn. Stat. Ch. 105 (1974)).~~

~~i. A new appropriation for commercial or industrial purpose of either surface water or ground water averaging 30 million gallons per month, or exceeding two million gallons in any day during the period of use; or a new appropriation of either ground water or surface water for irrigation of 640 acres or more in one continuous parcel from one source of water.~~

~~j. Application for the underground storage of gas or liquids.~~

~~k. County, state or federal auctions for sale of publicly owned timber on any tract adjacent to a public highway.~~

~~l. County, state or federal auctions for sale of publicly owned timber on any tract adjacent to public waters of the State.~~

~~m. County, state or federal auctions for sale of publicly owned timber on any tract, any part of which is within one quarter (1/4) mile of an organized public, private or nonprofit recreation area or camp.~~

~~n. Notice of all public permit and lease sales for state permits and leases to prospect for and mine iron ore, copper-nickel, or other minerals as required by Minn. Stat. §§ 93.16, 93.335, and 93.351 (1974) and Copper-Nickel Rules and Regulations.~~

~~o. Permits and leases for iron ore in non-merchantable deposit areas (Minn. Stat. 93.283).~~

~~p. New leases and permits for use of state forest lands for summer cabins, commercial recreational facilities and gravel pits.~~

~~q. Roads through state forest lands exceeding five miles in length.~~

~~r. Facility plans for new or expansion of industrial treatment works not covered by NPDES permits (Minn. Stat. § 115.07, subd. 1 (1974)).~~

~~s. Facility plans for new or expansion of liquid storage facility equal to or exceeding 50,000 gallons (Minn. Stat. § 155.43, subd. 3 (2) (1974)).~~

~~t. New or expansion of solid waste disposal systems handling 100 cubic yards or more of solid waste per day (Minn. Stat. § 116.07, subd. 4A (1974)).~~

~~u. Installation permit application for new or expansion of incinerators with capacity equal to or in excess of one ton per hour of solid waste (Minn. Stat. § 116.07, subd. 4A (1974)).~~

~~v. Installation permit application for new or expansion of an emission facility emitting 100 tons or more per year of any restricted air contaminant (Minn. Stat. § 116.07, subd. 4A (1974)).~~

~~w. New or expansion of a feedlot designed for 1,000 cattle or more equivalent animal units (Minn. Stat. § 116.07, subd. 7 (1974)).~~

~~x. Construction of a public use airport (Minn. Stat. § 360.018, subd. 6 (1974)).~~

DISCUSSION: The publication requirements in this section are being proposed for deletion for the following reasons: (1) Although the action is shown as deleted it has been simply regrouped and renumbered for ease in reading and understanding the rule; (2) The action is sufficiently covered by a mandatory category. Because the purpose of this section is to provide a system of notifying the board and the public of potentially significant actions it need not include notices of actions which are sufficiently noticed elsewhere. Projects for which environmental review will be accomplished via earlier portions of the environmental review process will receive adequate notice and the opportunity for the board and the public to comment is well established; and (3) Following discussions with the involved agencies it has become apparent that certain of the notices from the curent rules do not raise any interest from the board or the public. To continue to publish these notices would serve no purpose other than to increase the time required for implementing the action.

The following list identifies the notice and the basis for no longer requiring publication using one of the three reasons cited above.

Current Rule		Basis
a.	-	3
b.	-	2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 G. and M.)
c.	-	2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 Z.)
d.	-	2 (Projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 X.)
e.	-	2 (Projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 W. 2.)
f.	-	1 (Notice is required pursuant to (a) of the proposed rules.)
g.	-	1 (Notice is required pursuant to (b) of the proposed rules.)
h.	-	1 (Notice is required pursuant to (c) of the proposed rules.)
i.	-	2 (Projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 W. 1.)
j.	-	2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 H. 1. and 2. or an EIS pursuant to 6 MCAR § 3.039 F. 1. and 2.)
k.,l.,m.	-	3 and 2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 AA.)
n.	-	1 (Notice is required pursuant to (d) of the proposed rules.)

o. - 2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 J.)

p. - 3 and 1 (Gravel pits would require notice pursuant to (e) of the proposed rules.)

q. - 2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 CC.)

r. - 3

s. - 2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 I. 3.)

t. - 2 (Significant projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 P.)

u. - 3

v. - 2 (Projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 N. 1.)

w. - 2 (Projects would require preparation of an EAW pursuant to 6 MCAR § 3.038 BB.)

x. - 1 (Notice would be required pursuant to (g) of the proposed rules.)

* *

2. Impending actions proposed by state agencies when the proposed action may have the potential for significant adverse environmental effects.

DISCUSSION: Only an editing change is being proposed for this rule.

* *

3. Notice of the availability of a completed EAW pursuant to 6 MCAR § 3.027 D. 1.

4. RGU's decision on the need to prepare an EIS pursuant to 6 MCAR § 3.028. A. 4.

5. Notice of the time, place and date of the EIS scoping meeting pursuant to 6 MCAR §§ 3.030 C. 1. b. and C. 2. a.

6. ~~3.~~ EIS preparation notices ~~and Negative Declaration Notices.~~ pursuant to 6 MCAR § 3.030 F.

7. Amendments to the EIS scoping decision pursuant to 6 MCAR § 3.030 E. 5.

8. Availability of draft and final EIS pursuant to 6 MCAR §§ 3.031 E. 5. and F. 4.

9. ~~4.~~ Notice of draft EIS informational meetings ~~or hearings~~ to be held pursuant to 6 MCAR § 3.031 E. 7. ~~3.029 A. 6.~~

10. RGU's adequacy decision of the final EIS pursuant to 6 MCAR § 3.031 G. 7.

11. Notice of activities undergoing environmental review under alternative review processes pursuant to 6 MCAR § 3.034 A. 6.

12. Adoption of model ordinances pursuant to 6 MCAR §§ 3.035 B. 1. and 2.

13. Environmental Analyses prepared under adopted model ordinances pursuant to 6 MCAR § 3.035 C.

DISCUSSION: These rules contain a comprehensive listing of the notices and actions which are required to be published as a part of the EAW and EIS process described in earlier chapters. The purpose of repeating these notice requirements in this section is to enable the user of the rules to quickly determine which notices and actions are required to be published in the Monitor. The citation contained in the individual

rule allows quick reference to the portion of the earlier chapters where the requirement appears.

* *

14. ~~6.~~ Notice of the application for a Certificate of Need for a large energy facility, pursuant to Minn. Stat. § 116H.13.

15. ~~5.~~ Notice of other actions that the EQB ~~Council~~ may specify by resolution.

DISCUSSION: Only an editing type change is being proposed for these two rules.

* *

B. Governmental units ~~Public agencies~~ may publish notices of general interest or information in the EQB ~~EQC~~ Monitor. ~~, including notices of consolidated state permit applications, the latter to be commenced at the direction of the Council.~~

DISCUSSION: In addition to the editing type changes being proposed for this rule, it is being proposed that publication of notices of consolidated state permit applications filed pursuant to 6 MCAR § 3.101 et seq. be the responsibility of the EQB. That responsibility is identified in rule C.8. below. This change is proposed because it is the EQB who is responsible for processing consolidated permit applications and it is the EQB which is first notified when an applicant desires to use the consolidated approach.

* *

C. The EQB ~~MEQC~~ is required to publish the following in the EQB ~~EQC~~ Monitor:

1. Receipt of a valid petitions~~, pursuant to 6 MCAR § 3.032,~~ and assignment of a RGU ~~Responsible Agency therefore.~~ pursuant to 6 MCAR §§ 3.026 C. and E.

~~2. Receipt of Draft or Final EIS.~~

2. Decision by the EQB that it will determine the adequacy of a final EIS pursuant to 6 MCAR § 3.031 G. 1.

3. EQB's adequacy decision of the final EIS pursuant to 6 MCAR § 3.031 G. 7.

4. Receipt by the EQB of an application for a variance pursuant to 6 MCAR § 3.032 D. 3.

5. ~~3.~~ Notice of any public hearing held pursuant to ~~Minn. Stat. § 116D.04, subd. 9 (1974).~~ 6 MCAR § 3.033 E. 1.

~~4. Receipt by the Council of notice of objections to a negative declaration by petitioners or a public agency, and the time and place at which the Council will review the matter, including notice of public hearings, if any.~~

DISCUSSION: The changes proposed in these rules are made to correspond to changes being proposed in the EAW/EIS process. This section contains a comprehensive listing of the notices the EQB is required to publish in the EQB Monitor pursuant to the proposed rules and provides citations to the earlier rules to allow the reader of the rule quick reference to the detailed requirement.

* *

6. ~~5.~~ The EQB's ~~Council's~~ decision to hold public hearings on a recommended Critical Area pursuant to Minn. Stat. § 116G.06, subd. 1(c). ~~(1974) (Critical Areas Act, 1973).~~

7. ~~6.~~ Notice of application for a Certificate of ~~Corridor Compatibility or~~ Site Compatibility~~,~~ or a High Voltage Transmission Line Construction Permit pursuant to Minn. Stat. § 116C.51 et seq. ~~(Power Plant Siting Act of 1973).~~

DISCUSSION: In addition to the editing changes proposed for these rules, the requirement for notice of applications for a Certificate of Corridor Compatibility is deleted. This deletion occurs as a result of changes made to the Power Plant Siting Act at Minn. Stat. § 116.C.57 which eliminated the designation of suitable corridors from the power plant siting process.

* *

8. Receipt of a consolidated permit application pursuant to 6 MCAR § 3.102 A.

DISCUSSION: Publication of this notice is being proposed to become the responsibility of the EQB for the reasons stated above. It is not a new notice only the responsibility of who provides the notice is being proposed for change.

* *

6 MCAR § 3.045 ~~3.036~~ Content of notice. ~~A.~~ The information to be included in the notice for natural resources management and development permit applications and other items in 6 MCAR §§ 3.044 A. 1. and 2. ~~3.035 A. 1. and 2.~~ shall be submitted by the governmental unit ~~public agency~~ on a form approved by the EQB ~~Council~~. This information shall include but not be limited to:

A. ~~1.~~ Identification of applicant, by name and mailing address.

B. ~~2.~~ The location of the proposed project, or description of the area affected by the action by county, minor civil division, public land survey township number, range number, and section number.

C. ~~3.~~ The name of the permit applied for, or a description of the proposed project or other action to be undertaken in sufficient detail to enable other state agencies to determine whether they have jurisdiction over the proposed action.

D. ~~4.~~ A statement of whether the agency intends to hold public hearings on the proposed action, along with the time and place of the hearings, if they are to be held in less than 30 days from the date of this notice.

E. ~~5.~~ The identification of the governmental unit ~~agency~~ publishing the notice, including the manner and place at which comments on the action can be submitted and additional information can be obtained.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

6 MCAR § 3.046 ~~3.037~~ Statement of compliance. Each governmental permit or agency authorizing order subject to the requirements of ~~these Rules~~ 6 MCAR § 3.044 A. 1. issued or granted by a governmental unit ~~public agency~~ shall contain a statement by the unit ~~agency~~ concerning whether ~~these rules~~ the provisions of 6 MCAR §§ 3.042 - 3.046 have been complied with, and publication dates of the notices, if any, concerning that permit or authorization.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

~~are borne by~~ to the requesting party. Ten copies of each issue of the EQB ~~EQC~~ Monitor, however, shall be provided without cost to the legislative reference library and ten copies to the state law library, and at least one copy to designated EQB ~~MEQC~~ depositories.

DISCUSSION: Other than the proposed editing changes, the only proposed change in this rule is to make the costs of distribution discretionary to the EQB rather than mandatory. This proposed change is in line with the decision not to charge for subscriptions to Monitor.

* *

~~D. The MEQC shall provide adequate office space, personnel, and supply necessary equipment for the operation of the EQC Monitor without cost to the agencies.~~

DISCUSSION: This rule is proposed for deletion as unnecessary language which only adds to the bulk of the rules. It is the responsiblity of the EQB to publish the Monitor and thus to carry out the responsibility to provide the facilities and funding necessary.

* *

~~§ 3.040 General.~~

~~A. Publication duties of the EQC Monitor may be transferred to the State Register upon resolution of the Council.~~

DISCUSSION: This rule is proposed for deletion because it is advisory and adds nothing to the substance of the rules. Removal of this rule does not prohibit the EQB from transferring the publication duties to another entity.

* *
* *

Introduction to Chapter 17: Assessing the Cost of Preparing Environmental Impact Statements.

The intent of this chapter is to fulfill the directive of the Minnesota Environmental Policy Act at Minn. Stat. § 116D.045: that the board develop procedures to assess the proposer of an action for the reasonable costs of preparing and distributing an environmental impact statement. To accomplish this objective the board, in 1977, promulgated rules identified as the "Chargeback Rules", which established the procedures to be used in assessing EIS preparation costs. The proposed rules are substantially the same as those presently in effect which can be found at 6 MCAR §§ 3.041-3.046. Because the proposed rules involve only nominal changes to the current rules this chapter is presented as amendments to the current rules as demonstrated by the underlining and deletion. The majority of the proposed changes were made for editing purposes, i.e., to make this chapter consistent with the numbering system and wording of previous chapters. The need and reasonableness of making these changes is generically addressed below. Only those changes made for nonediting purposes will be specifically addressed in the context of the rule in which they occur.

The following changes are considered as editing changes and occur throughout the chapter.

1. Use of the acronym "RGU" in place of "Responsible Agency": The new term has the same meaning as the old and is changed in this chapter to make its wording consistent with that of previous chapters.

2. Use of the acronym "EQB" in place of "Council" and "EQC": To lessen confusion in reading the rules only one term is used to refer to the Environmental Quality Board.

3. Use of the terms "governmental unit" or "unit" in place of the terms "public agencies" and "agencies": The meaning of the new terms is substantively the same as the old and are changed in this chapter to make its wording consistent with that of previous chapters.

The following rule-by-rule presentation will identify further changes proposed for the chargeback procedures. In this chapter the rule is identified by being set-off by asterisks preceding the rule and following the discussion of the changes proposed for the rule.

* *

6 MCAR § 3.049 ~~3.041~~ Actions requiring an assessment of the EIS preparation cost.

When a private person proposes to undertake an action, and the final determination has been made that an EIS will be prepared by a governmental unit ~~public agency~~ on that action, the proposer shall be assessed for the reasonable costs of preparing and distributing that EIS in accord with 6 MCAR §§ 3.050 - 3.054 ~~3.042 - 3.046~~.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

6 MCAR § 3.050 ~~3.042~~ Determining the EIS assessed cost.

A. Within 30 days after the EIS preparation notice has been issued, ~~final determination has been made that an EIS will be prepared,~~ the RGU ~~Responsible Agency~~ shall submit to the EQB ~~Council~~ a written agreement signed by the proposer and the RGU ~~Responsible Agency~~. The agreement shall include the EIS estimated cost, the EIS assessed 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 6 MCAR §§ 3.051 A. and B. ~~3.043 A. and B.~~ may be used as a guideline in determining the EIS estimated cost. The EIS assessed cost shall identify the proposer's costs for the collection and analysis of technical data to be supplied to the RGU ~~Responsible Agency~~ and the costs which will result in a cash payment by the proposer to the EQB ~~Council~~ if a state agency is the RGU ~~Responsible Agency~~ or to a local governmental unit ~~Agency~~ when it is the RGU ~~Responsible Agency~~. If an agreement cannot be reached, the RGU ~~Responsible Agency~~ shall so notify the EQB ~~Council~~ within 30 days after the final determination has been made that an EIS will be prepared.

DISCUSSION: Other than the editing changes the only change proposed for this rule is to identify the issuance of the EIS preparation notice as the start of the 30 day period for negotiation of the chargeback agreement. This change is necessitated by the change in the appeal process of EIS preparation decisions. In the proposed rules the issuance of the EIS preparation notice is the final administration decision as to when an EIS is to be prepared. In the current rules this decision by a state or local agency was appealable to the EQB thus the need in the current rules to provide for that occurance.

* *

B. The EIS assessed cost shall not exceed the following amounts unless the proposer agrees to an additional amount:

1. There shall be no assessment for the preparation and distribution of an EIS for an action which has a project estimated cost of one million dollars or less.

2. For an action whose project estimated cost is more than one million dollars but is ten million dollars or less, the EIS

assessed cost shall not exceed .3 percent of the project estimated cost except that the project estimated cost shall not include the first one million dollars of such cost.

3. For an action whose project estimated cost is more than ten million dollars but is 50 million dollars or less, the EIS assessed cost shall not exceed .2 percent of each dollar of such cost over ten million dollars in addition to the assessment in (2) ~~above.~~ of this rule.

4. For an action whose project estimated cost is more than 50 million dollars, the EIS assessed cost shall not exceed .1 percent of each dollar of such cost over 50 million dollars in addition to the assessment in ~~(2) and~~ (3) ~~above.~~ of this rule.

C. The proposer and the RGU ~~Responsible Agency~~ shall include in the EIS assessed cost the proposer's costs for the collection and analysis of technical data which the RGU ~~Responsible Agency~~ incorporates into the EIS. The amount included shall not exceed one-third of the EIS assessed cost unless a greater amount is agreed to by the RGU ~~Responsible Agency~~. When practicable, the proposer shall consult with the RGU ~~Responsible Agency~~ before incurring such costs.

D. Federal/state EIS. When a joint federal/state EIS is prepared pursuant to 6 MCAR § 3.037 ~~3.025 F. 4.~~ and the EQB ~~Council~~ designates a non-federal agency as the RGU ~~Responsible Agency~~, only those costs of the state RGU ~~Responsible Agency~~ may be assessed to the proposer. The RGU ~~Responsible Agency~~ and the proposer shall determine the appropriate EIS assessed cost and shall forward that determination to the EQB ~~Council~~ in accord with these rules.

E. Related actions EIS. When specific actions are included in a related actions EIS, only the portion of the EIS estimated cost that is attributable to each specific action may be used in determining the EIS assessed cost for its proposer. The RGU ~~Responsible Agency~~ and each proposer shall determine the appropriate EIS assessed cost and shall forward that determination to the EQB ~~Council~~ in accord with these rules.

DISCUSSION: Only editing type changes are being proposed for these rules.

* *

6 MCAR § 3.051 ~~3.043~~ Determining the EIS estimated cost, the EIS actual cost and the project estimated cost.

A. In determining the EIS estimated cost or the EIS actual cost, the following items shall be included:

1. The cost of the RGU's ~~Responsible Agency's~~ staff time including direct salary and fringe benefit costs.

2. The cost of consultants hired by the RGU ~~Responsible Agency~~.

3. The proposer's costs for the collection and analysis of technical data expended for the purpose of preparing the EIS.

4. Other direct costs of the RGU ~~Responsible Agency~~ for the collection and analysis of information or data necessary for the preparing of the EIS. These costs shall be specifically identified.

5. Indirect costs of the RGU ~~Responsible Agency~~ not to exceed the RGU's ~~Responsible Agency's~~ normal operating overhead rate.

6. The cost of printing and distributing the draft EIS and the final EIS.

7. The cost of any public hearings or public meetings held in conjunction with the preparation of the final EIS.

B. The following items shall not be included in determining the EIS estimated cost or the EIS actual cost:

1. The cost of collecting and analyzing information and data incurred before the final determination has been made that an EIS will be prepared unless the information and data were obtained for the purpose of being included in the EIS.

2. Costs incurred by a private person other than the proposer or a governmental unit ~~public agency~~ other than that RGU ~~Responsible Agency~~, unless the costs are incurred at the direction of the RGU ~~Responsible Agency~~ for the preparation of material to be included in the EIS.

3. The capital costs of equipment purchased by the RGU ~~Responsible Agency~~ or its consultants for the purpose of establishing a data collection program, unless the proposer agrees to including such costs.

C. The following items shall be included in determining the project estimated cost:

1. The current market value of all the land interests, owned or to be owned by the proposer, which are included in the boundaries of the action. The boundaries shall be those defined by the action which is the subject of the EIS preparation notice.

2. Costs of architectural and engineering studies for the design or construction of the action.

3. Expenditures necessary to begin the physical construction or operation of the action.

4. Construction costs required to implement the action including the costs of essential public service facilities where such costs are directly attributable to the proposed action.

5. The cost of permanent fixtures.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

6 MCAR § 3.052 ~~3.044~~ Revising the EIS assessed cost.

A. If the proposer substantially alters the scope of the action after the final determination has been made that an EIS will be prepared and the EIS assessed cost has been determined, the proposer shall immediately notify the RGU ~~Responsible Agency~~ and the EQB ~~Council~~.

1. If the change will likely result in a net change of greater than five percent in the EIS assessed cost, the proposer and the RGU ~~Responsible Agency~~ shall make a new determination of the EIS assessed cost. The determination shall give consideration to costs previously expended or irrevocably obligated, additional information needed to complete the EIS

and the adaptation of existing information to the revised action. The RGU ~~Responsible Agency~~ shall submit either a revised agreement or a notice that an agreement cannot be reached following the procedures of 6 MCAR § 3.050 A. ~~3.042 A.~~ except that such agreement or notice shall be provided to the EQB ~~Council~~ within 20 days after the proposer notifies the RGU ~~Responsible Agency~~ and the EQB ~~EQC~~ of the change in the action. If the changed action results in a revised project estimated cost of one million dollars or less, the proposer shall not be liable for further cash payments to the EQB ~~Council~~ or to the local governmental unit ~~Agency~~ beyond what has been expended or irrevocably obligated by the RGU ~~Responsible Agency~~ at the time it was notified by the proposer of the change in the action.

2. If the proposer decides not to proceed with the proposed action, the proposer shall immediately notify the RGU ~~Responsible Agency~~ and the EQB ~~Council~~. The RGU ~~Responsible Agency~~ shall immediately cease expending and obligating the proposer's funds for the preparation of the EIS.

   a. If cash payments previously made by the proposer exceed the RGU's ~~Responsible Agency's~~ expenditures or irrevocable obligations at the time of notification, the proposer may apply to the EQB ~~Council~~ or to the local governmental unit ~~Agency~~ for a refund of the overpayment. The refund shall be paid as expeditiously as possible.

   b. If cash payments previously made by the proposer are less than the RGU's ~~Responsible Agency's~~ expenditures or irrevocable obligations at the time of notification, the RGU ~~Responsible Agency~~ shall notify the proposer and the EQB ~~Council~~ within ten days after it was notified of the project's withdrawal. Such costs shall be paid by the proposer within 30 days after the RGU ~~Responsible Agency~~ notifies the proposer and the EQB ~~Council~~.

B. If, after the EIS assessed cost has been determined, the RGU ~~Responsible Agency~~ or the proposer uncovers a significant environmental problem that could not have been reasonably foreseen when determining the EIS assessed cost, the party making the discovery shall immediately notify the other party and the EQB ~~Council~~. If the discovery will likely result in a net change of greater than five percent in the EIS assessed cost, the proposer and the RGU ~~Responsible Agency~~ shall make a new determination of the EIS assessed cost. The RGU ~~Responsible Agency~~ shall submit either a revised agreement or a notice that an agreement cannot be reached following the procedures of 6 MCAR § 3.050 A. ~~3.042 A.~~ except that such agreement or notice shall be provided to the EQB ~~Council~~ within 20 days after both parties and the EQB ~~Council~~ were notified.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

6 MCAR § 3.053 ~~3.045~~ Disagreements regarding the EIS assessed cost.

A. If the proposer and the RGU ~~Responsible Agency~~ disagree about the information to be included in the EIS or the EIS assessed cost, the proposer and the RGU ~~Responsible Agency~~ shall each submit a written statement to the EQB ~~Council~~ identifying the information each has recommended for inclusion in the EIS, the EIS assessed cost, and the project estimated cost within ten days after the RGU ~~Responsible Agency~~ notifies the EQB ~~Council~~ that an agreement could not be reached. The statements shall

include a discussion of the need to include the information in the EIS, the identification of the information and data to be provided by each party, the EIS preparation costs identified in 6 MCAR §§ 3.051 A. and B. ~~3.043 A. and B.~~ as they pertain to the information to be included in the EIS, a brief explanation of the costs, and a discussion of alternative methods of preparing the EIS and the costs of those alternatives.

B. If the proposer and the RGU ~~Responsible Agency~~ disagree about the project estimated cost, the proposer shall submit in writing a detailed project estimated cost in addition to the requirements of ~~section~~ paragraph A. ~~above~~ of this rule. The RGU ~~Responsible Agency~~ may submit a written detailed project estimated cost in addition to the requirements of ~~Section~~ paragraph A. ~~above~~ of this rule. The statements shall be submitted to the EQB ~~Council~~ within ten days after the RGU ~~Responsible Agency~~ notifies the EQB ~~Council~~ that an agreement could not be reached. The project estimated cost shall include the costs as identified in 6 MCAR § 3.051 C. ~~3.043 C.~~ and a brief explanation of the costs. The estimates shall be prepared according to the categories in 6 MCAR § 3.051 ~~3.043~~ so as to allow a reasonable examination as to their completeness.

C. If the proposer and the RGU ~~Responsible Agency~~ disagree about a revision of the EIS assessed cost prepared following the procedures in 6 MCAR § 3.052 ~~3.044~~, the proposer and the RGU ~~Responsible Agency~~ shall use the applicable procedures described in 6 MCAR §§ 3.053 A. or B. ~~3.045 A. or B.~~ in resolving their disagreement except that all written statements shall be provided to the EQB ~~Council~~ within ten days after the RGU ~~Responsible Agency~~ notifies the EQB ~~Council~~ that an agreement cannot be reached.

DISCUSSION: Only editing changes are being proposed for these rules.

* *

D. If the proposer and the RGU ~~Responsible Agency~~ disagree about the EIS actual cost as determined by 6 MCAR § 3.054 B. ~~3.046 B.~~, the proposer and the RGU ~~Responsible Agency~~ shall prepare a written statement of their EIS actual cost and an estimate of the other party's EIS actual cost. The items included in 6 MCAR §§ 3.051 A. and B. ~~3.043 A. and B.~~ shall be used in preparing the EIS actual cost statements. These statements shall be submitted to the EQB ~~Council~~ and the other party within 20 days after the ~~Council has accepted the~~ final EIS has been accepted as adequate by the RGU or the EQB.

DISCUSSION: In addition to the editing changes proposed for this rule, the end period for submitting "actual cost" statements is altered to reflect changes in the EIS process identified in earlier chapters. The EQB will no longer act on all final EISs. Rather the preparing agency, and in some cases the EQB, will be making the final EIS adequacy decision. The end period for submission is appropriately altered to reflect the proposed change.

* *

E. The EQB ~~Council~~ at its first meeting held more than 15 days after being notified of a disagreement shall make any determination required by ~~sections~~ paragraphs A. - D. of this rule ~~above~~. The EQB ~~Council~~ shall consider the information provided by the proposer and the RGU ~~Responsible Agency~~ and may consider other reasonable information in making its determination. This time limit shall be waived if a hearing is held pursuant to 6 MCAR § 3.053 F. ~~3.045 F.~~

DISCUSSION: Only editing changes are being proposed for this rule.

* *

F. If either the proposer or the RGU ~~Responsible Agency~~ so requests, the EQB ~~Council~~ shall hold a hearing to facilitate it in making its determination. ~~The hearing shall follow the procedures outlined in 6 MCAR § 3.028 A.3.~~

DISCUSSION: Beyond the editing changes proposed for this rule, deletion of reference to the hearing procedures to be followed is proposed. The proposed rules do not contain a procedure for hearing. If a hearing is required on an action it would be required to follow the procedures of the Office of Administrative Hearings and the provisions of Minn. Stat. ch. 15.

* *

G. Nothing in ~~sections~~ paragraphs A. - F. of this rule ~~above~~ shall prevent the proposer from making one half of the cash payment as recommended by the RGU's ~~Responsible Agency's~~ proposed EIS assessed cost for the purpose of commencing the EIS process. If the proposer makes the above cash payment, preparation of the EIS shall immediately begin. If the required cash payment is altered by the EQB's ~~Council's~~ determination, the remaining cash payments shall be adjusted accordingly.

DISCUSSION: Only editing changes are being proposed for this rule.

* *

6 MCAR § 3.054 ~~3.046~~ Payment of the EIS assessed cost.

A. The proposer shall make all cash payments to the EQB ~~Council~~ or to the local governmental unit ~~Agency~~ according to the following schedule:

1. At least one half of the proposer's cash payment shall be paid within 30 days after the EIS assessed cost has been submitted to the EQB ~~Council~~ pursuant to 6 MCAR § 3.050 A. ~~3.042 A.~~ or has been determined by the EQB ~~Council~~ pursuant to 6 MCAR §§ 3.053 E. or F. ~~3.045 E. or F.~~

2. At least three fourths of the proposer's cash payment shall be paid within 30 days after the draft EIS has been submitted to the EQB ~~Council~~.

DISCUSSION: Only editing changes are being proposed for these rules.

* *

3. The final cash payment shall be paid within 30 days after the ~~Council has accepted the~~ final EIS has been submitted to the EQB.

DISCUSSION: The change to this rule relates to procedural changes in the proposed rule. As previously identified the EQB will no longer make an adequacy decision on all final EISs. However, RGUs will still be required to supply a copy of the final EIS to the EQB. Thus the end of the time period for the final cash payment is proposed to correspond with a 30 day period after the EQB receives the EIS for its records rather than the decision date of the current rules.

* *

a. The proposer may withhold final cash payment of the EIS assessed cost until the RGU ~~Responsible Agency~~ has submitted a detailed accounting of its EIS actual cost to the proposer and the EQB ~~Council~~. If the proposer chooses to wait, the remaining portion of the EIS assessed cost shall be paid within 30 days after the EIS actual cost statement has been submitted to the proposer and the EQB ~~Council~~.

b. If the proposer has withheld the final cash payment of the EIS assessed cost pending resolution of a disagreement over the EIS actual cost, such payment shall be made within 30 days after the EQB ~~Council~~ has determined the EIS actual cost.

DISCUSSION: Only editing changes are being proposed for these rules.

* *

B. The proposer and the RGU ~~Responsible Agency~~ shall submit to each other and to the EQB ~~Council~~ a detailed accounting of the actual costs incurred by them in preparing and distributing the EIS within ten days after the ~~Council has accepted the~~ final EIS has been submitted to the EQB. If the cash payments made by the proposer exceed the RGU's ~~Responsible Agency's~~ EIS actual cost, the proposer may apply to the EQB ~~Council~~ or to the local governmental unit ~~Agency~~ for a refund of the overpayment. The refund shall be paid as expeditiously as possible.

DISCUSSION: In addition to the editing changes proposed for this rule, the action triggering the period for exchange of "actual cost" statements is being changed to reflect changes in the EIS procedure. As previously identified the EQB will no longer make an adequacy decision on all final EISs. Thus the need to identify a new action which begins the period for exchange of the statements.

* *

C. If the RGU ~~Responsible Agency~~ is a state agency, the proposer shall make all cash payments of the EIS assessed cost to the EQB ~~Council~~ which shall deposit such payments in the state's general fund.

D. If the RGU ~~Responsible Agency~~ is a local governmental unit ~~Agency~~, the proposer shall make all cash payments of the EIS assessed cost directly to the local governmental unit ~~Agency~~. The local governmental unit ~~Agency~~ shall notify the EQB ~~Council~~, in writing, of receipt of each payment within ten days following its receipt.

DISCUSSION: Only editing changes are being proposed for these rules.

* *

E. No RGU ~~Responsible Agency~~ shall commence with the preparation of an EIS until at least one half of the proposer's required cash payment of the EIS assessed cost has been paid. ~~Notwithstanding other sections of these Rules, the Responsible Agency shall prepare and file the Draft EIS within 120 days of the date of this payment. This time limitation may be extended by the Council only for good cause upon written request by the Responsible Agency.~~

DISCUSSION: In addition to the editing change the last two sentences of this rule are proposed for deletion. The 1980 amendments to MEPA require that an EIS be prepared within 280 days. To provide flexibility to the RGU's the proposed rules do not specify how that 280 days is to be divided as opposed to the current rules which required a draft EIS to be prepared within 120 days. Because the time period for preparation of the draft EIS is at the discretion of the RGU, there is no longer a need to specify the period allowed nor to provide a mechanism to extend that period.

* *

F. Upon receipt or notice of receipt of the final payment by the proposer, the EQB ~~Council~~ shall notify each state agency having a possible governmental permit interest in the action 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 an action for which an EIS is prepared until the required cash payments of the EIS assessed cost for that action or that portion of a related actions EIS have been paid in full.

DISCUSSION: Only an editing change is being proposed for this rule.

* *

G. ~~Except as provided in 6 MCAR § 3.046 E. all~~ All time periods included in 6 MCAR §§ 3.050 - 3.054 ~~3.042 - 3.046~~ may be extended by the EQB ~~Council~~ chairperson only for good cause upon written request by the proposer or the RGU ~~Responsible Agency~~.

DISCUSSION: Beyond the editing changes proposed for this rule the only proposed change is the deletion of the reference to the time period in E. above which is also being proposed for deletion.

* *
* *

Introduction to Chapter Eighteen: Special Rules for Certain Large Energy Facilities

This chapter is added to incorporate special rules for two classes of large energy facilities, i.e., large electric power generating plants (LEPGPs) and high voltage transmission lines (HVTLs). The need for special rules relating to these facilities is basically due to the highly complex permitting processes and high degree of public concern relating to their need and construction. Primary jurisdiction relating to the environmental review of these facilities is contained in three separate laws, i.e., The Minnesota Environmental Policy Act (Minn. Stat. ch. 116D), the Power Plant Siting Act (Minn. Stat. §§ 116C.51 - 116C.69), and the Energy Act (Minn. Stat. ch. 116H). In addition, many federal state and local governments may have jurisdiction relating to construction or siting permits or approvals.

During the public meetings held in 1975 to receive comments on the current rules, substantial testimony was presented which demonstrated the need to develop a process that was nonduplicative and time efficient but that would include maximum public participation. Pursuant to this testimony, special rules were developed for the environmental review of LEPGPs and HVTLs and these rules became part of the current environmental review rules. The rules as proposed modify the current special rules for these facilities. The major modifications relate to the timing of the EIS and content requirements.

Approval of LEPGPs and HVTLs follows four basic stages:

1. The Certificate of Need process under the authority of Minn. Stat. § 116H.13 and implemented via 6 MCAR § EA 500 and 6 MCAR § 2.0601. This process defines the Energy Agency review of an application by a utility detailing the need for and description of a proposed facility.

2. The Siting process under authority of Minn. Stat. §§ 116C.51-116C.69 and implemented via 6 MCAR §§ 3.071-3.082. This process defines the Environmental Quality Board authority to select a general study area and eventually a specific site or route for a facility for which the need has been established by the Energy Agency.

3. The Environmental review process under authority of Minn. Stat. ch. 116D and implemented via 6 MCAR §§ 3.021-3.047. This represents the current environmental review process.

4. The permit stage. At this stage, governmental units must decide whether or not specific design features of the proposal meet the regulatory standards which the governmental unit is required to enforce.

The primary changes in the proposed rules as compared to the current rules include:

1. A change in the information required relating to identification of environmental impacts at the certificate of need stage;

2. A clarification in the scope of discussion relating to conservation and load-management alternatives; and

3. Preparation of the EIS at the siting stage.

The rules in this chapter were developed in consultation with the Energy Agency, the Power Plant Siting division of the EQB and a special task force of representatives from utilities and citizen groups, in addition to the public review processes for the entire set of proposed rules.

Introduction to 6 MCAR § 3.055 Special rules for LEPGPs.

The term large energy facility is defined at Minn. Stat. § 116H.02, subd. 5 and 6 MCAR § EA 501 (f). Two types of large electric facilities have been selected from this list for the establishment of special rules relating to their environmental review because of the complexity of permitting processes. The processes relating to environmental review of LEPGPs and HVTLs are set forth in separate rules. In the current rules, the review procedures were presented together in the context of the same rule. The separate rule format of the proposed rules was selected because a separation of the processes facilitates a more definitive presentation of the rules for easier public comprehension.

6 MCAR § 3.055 A. Applicability.

> Environmental review for LEPGPs as defined in Minn. Stat. § 116C.52, subd. 4 shall be conducted according to the procedures set forth in this rule. Environmental review shall consist of an environmental report at the certificate of need stage and an EIS at the site certificate stage. Energy facilities subject to Minn. Stat. § 116H.13, but excluded under Minn. Stat. § 116C.52, subd. 4, shall not be subject to this rule. Except as expressly provided in this rule, 6 MCAR §§ 3.024 - 3.036 shall not apply to facilities subject to this rule. No EAW need be prepared for any facilities subject to this rule.

DISCUSSION: This paragraph is provided to outline the basic environmental review procedure for LEPGPs prior to the presentation of the substantive process. This paragraph notes a basic change in the process, i.e., that now only two environmntal documents need be prepared, the environmental report and the EIS. In the current rules the EIS is prepared at the siting stage.

This paragraph further clarifies that this rule applies only to LEPGPs. Under Minn. Stat. § 116H.13, all large energy facilities must have a certificate of need. However, this rule establishes substitute environmental review requirements for those large energy facilities that are LEPGPs. 6 MCAR § 3.056 establishes substitute environmental review requirements for those large energy facilities that are HVTLs. All other energy facilities are subject to the environmental review procedures set forth in 6 MCAR §§ 3.024 - 3.036.

A certificate of need is required for electric power generating plants that exceed the large energy facility threshold as set forth at Minn. Stat. § 116H.02, subd. 5 (a): "Any electric power generating plant or combination of plants at a single site with a combined capacity of 50,000 kilowatts or more, or any facility of 5,000 kilowatts or more

which requires oil, natural gas, or natural gas liquids as a fuel and for which an installation permit has not been applied for by May 19, 1977 pursuant to Minn. Reg. APC 3 (a);"

This rule applies to those large energy facilities that also exceed the LEPGP threshold as set forth at 6 MCAR § 3.072 G: "electric power generating equipment and associated facilities designed for or capable of operating at a capacity of 50,000 kilowatts or more."

The reason LEPGPs have special review procedures is that LEPGPs tend to be highly controversial and subject to a spectrum of regulatory requirements and review procedures. These special rules allow a more relevant and more direct review for this type of facility. The requirement for the preparation of an EAW has been eliminated because the certificate of need application accomplishes the major goals of the EAW in bringing the proposal into a public review procedure.

6 MCAR § 3.055 B. Environmental report at certificate of need stage.

1. The MEA shall be responsible for preparation of an environmental report on a LEPGP subject to this rule.

2. The environmental report shall be prepared for inclusion in the record of certificate of need hearings conducted under Minn. Stat. § 116H.13. The report and comments thereon shall be included in the record of the hearings.

3. The environmental report on the certificate of need application shall include:

   a. A brief description of the proposed facility;

   b. An identification of reasonable alternative facilities including, as appropriate, the alternatives of different sized facilities, facilities using different fuels, different facility types, and combinations of alternatives;

   c. A general evaluation, including the availability, estimated reliability, and economic, employment and environmental impacts, of the proposal and alternatives; and

   d. A general analysis of the alternatives of no facility, different levels of capacity, and delayed construction of the facility. The analysis shall include consideration of conservation and load management measures that could be used to reduce the need for the proposed facility.

4. The environmental report need not be as exhaustive or detailed as an EIS nor need it consider site-differentiating factors.

5. Upon completion of the draft environmental report, the report shall be circulated as provided in 6 MCAR § 3.031 E. 3. In addition, one copy shall go to each regional development commission in the state. At least one copy shall be available for public review during the hearings conducted under Minn. Stat. § 116H.13.

6. The MEA shall provide notice of the date and locations at which the draft environmental report shall be available for public review. Notice shall be provided in the manner used to provide notice of public hearings conducted under Minn. Stat. § 116H.13 and may be provided in the notice of the hearings.

7. Comments on the draft environmental report shall be received during and entered into the record of hearing conducted under Minn. Stat. § 116H.13.

8. The draft environmental report and any comments received during the hearings shall constitute the final environmental report.

9. Preparation and review of the report, including submission and distribution of comments, shall be completed in sufficient time to enable the Director of the MEA to take final action pursuant to Minn. Stat. § 116H.13 within the time limits set by that statute.

10. Upon completion of a final environmental report, notice thereof shall be published in the EQB Monitor. Copies of the final environmental report shall be distributed as provided in paragraph B. 5. of this rule.

11. The MEA shall not make a final determination of need for the project until the final environmental report has been completed.

12. A supplement to an environmental report may be required pursuant to 6 MCAR § 3.031 I. if a Minn. Stat. § 116H.13 determination is pending before the MEA.

DISCUSSION: This paragraph presents the substantive process relating to the preparation of environmental documents for the certificate of need process. Subparagraph one establishes the Energy Agency as the RGU for the preparation of the environmental report. The Energy Agency is responsible for the implementation of certificate of need procedures as set forth in Minn. Stat. § 116H.13 and implemented through 6 MCAR § EA 500 and 6 MCAR § 2.0601. The environmental report is a document summarizing the certificate of need application and reasons supporting the decision. This document serves as the initial basis for environmental review relating to the project.

Minn. Stat. § 116H.13, subd. 4 mandates a public hearing for certificate of need proceedings. Subparagraph two consolidates the need hearing with an initial consideration of environmental impacts. The merging of the review of need and the environmental report helps assure that the potential impacts of the proposal and alternatives will be considered in making the certificate of need decision. The hearing record, which is incorporated into further review processes, must reflect such consideration. This procedure is the same as under the current rules.

Subparagraph three establishes the content requirements of the environmental report. It is necessary that the report adequately describe the scope of the facility, including a summary of the need for the facility as presented in the need application. This is necessary to adequately define a base consideration from which the range of alternatives can be evaluated. Alternatives considered must be identified and contrasted to the proposal. This subparagraph includes examples of classes of alternatives that are necessary to be considered for adequate comparison as well as the basic parameters of consideration that must be made. The analysis required is consistent with the factors specified in the criteria for assessment of need in 6 MCAR § 2.0611. The assessment of alternatives is of primary importance in the determination of need; i.e., once need is established, relatively little can be done to alleviate impacts other than minor mitigation measures. A major reduction in impact is achieved if alternatives can be established which eliminate the need for the project or to establish facilities and methods of addressing need that result in less adverse environmental effects. The environmental report must define the impacts of those alternatives to enable selection of the method of fulfilling need that is least damaging to the environment.

Subparagraph four modifies the depth to which the analysis of certain alternatives must be presented. The rule does not mandate forecasting for the applicant's service area in the environmental report. The limited time available for completion of the environmental report after submission of a need application is not sufficient for an evaluation of alternative forecasts. The evaluation of alternative forecasts is developed during the course of the public hearings. The evaluation of the effects of alternative facilities in the environmental report will complement detailed information on the applicant's forecasts in the hearing record.

Detailed information on alternative sites and alternative facility designs is not always available at the certificate of need stage due to the sequential nature of the regulatory process for these facilities. The limited time available for preparation of an environmental report at the certificate of need stage precludes development of detailed site specific studies.

Subparagraph five establishes the distribution requirements for the environmental report. The proposed distribution requirements for the EIS as set forth at 6 MCAR § 3.031 E. 3. are used as the base with the additional requirement of one copy to each regional development commission (RDC) in the state. There are 13 RDCs in the state. This additional requirement was added because LEPGPs tie into the state grid system and may affect electric energy need and supply in areas other than the immediate area of construction. Submission of the report to the RDC offices provides regional locations where the copy is available without entailing an undue distribution cost. The alternative of distribution to the EAW distribution list as set forth at 6 MCAR § 3.027 D.1. was considered and rejected. Use of the EAW list would add the U.S. Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service and Minnesota Historical Society while deleting governmental units with permitting authority. The EIS list was considered more directly relevant to assure that parties with primary interest receive copies. If these agencies are involved with actual approval authority, they would be notified pursuant to the EIS list. If they are interested parties without approval authority they are free to request a copy of the report. These agencies will be notified pursuant to the notice requirements of this rule.

A copy is required to be available at the hearing to facilitate public comment and reference on a timely basis.

Subparagraph six establishes notification requirements. The notice procedures for the certificate of need hearing are deemed to provide adequate notice to interested persons. These notice requirements are incorporated into this rule to avoid duplication and confusion of the processes. The notice provisions for the certificate of need proceedings are set forth at 6 MCAR § EA 504 (a) and (b). These provisions state:

> "6 MCAR § EA 504 (a) Hearing Date. Within ten days after an application is received by the Agency, the hearing examiner shall set a time and place for a public hearing on the application. The hearing shall commence within eighty days after the receipt of an application."
>
> "6 MCAR § EA 504 (b) Hearing Examiner to Issue Notice. Within ten days after an application is received by the Agency, the hearing examiner shall issue a notice of application and hearing. Such notice shall contain a brief description of the substance of the application, the name of the hearing examiner, and the time and place of hearing, and shall be published in the state register. The notice shall also be published in newspapers of general circulation throughout the state, and shall be publicized in such other manner as the director may deem appropriate. Copies of the notice shall be mailed to appropriate state, federal and local agencies."

Notice of the application for a certificate of need for any large energy facility must be printed in the EQB Monitor pursuant to 6 MCAR § 3.044 A. 14.

Subparagraph seven establishes the period of time during which comments on the draft environmental report may be submitted to the Energy Agency for inclusion into the record of the hearing. Pursuant to 6 MCAR § EA 504 (a), the hearing must commence within 80 days of receipt of an application. The hearing must be noticed within ten days of receipt of an application as provided at 6 MCAR § EA 504 (b). The date of closing of the record is established by the hearing examiner at the close of the hearing.

Special rules relating to the submission of comments are found at 6 MCAR § EA 514 (c) (1):

> "Statement by Any Person. Any person may submit a written statement, under oath, relevant to the subject matter of the hearing prior to or at the hearing. In the absence of special circumstances, any person submitting such a statement shall be subject to cross-examination by any party. If such person is not available for cross-examination upon timely request, the written statement may be stricken from the record, in whole or in part, or may be given such weight as the hearing examiner deems appropriate."

And 6 MCAR § EA 514 (c) (4):

> "After the Close of the Hearing. All statements or information submitted after the close of the hearing during the period in which the record is open shall become a part of the record only if submitted under oath or by affirmation. Such statements or information shall be provided to all parties and proof of service shall be filed with the hearing officer at the time such statements or information is submitted. Upon request of a party, the hearing examiner may reconvene the hearing for the purpose of cross-examination of the statement or information submitted after the close of the hearing."

It should be noted that 6 MCAR § EA 507 establishes additional rights to persons that formally intervene in the proceedings.

The comment procedures of the certificate of need proceedings are incorporated into this rule to avoid duplication and confusion of the processes.

Subparagraph eight provides for the preparation of a final report. Under the current rules a special final report was not prepared but rather the comments were available for public review. These comments were then considered and, where relevant, addressed in the EIS. The proposed rule requires consideration of these comments prior to the decision on need for the facility. This is necessary to make sure the decision on need gives proper consideration of the comments.

Subparagraph nine establishes a time guide for the preparation of these documents. Minn. Stat. § 116H.13, subd. 5 requires a decision on the need for the facility within six months of submission of the application. Subparagraph nine allows for a flexible schedule to complete the final report; however, it mandates completion by the end of the six month period. This provision, in essence, requires the establishment of time deadlines on a project-by-project basis to assure timely compliance. The Energy Agency, as RGU, is responsible for the establishment of a time effective schedule.

Subparagraph ten establishes a requirement for publication of notice of availability of the final environmental report in the EQB Monitor. In addition, copies of the report must be submitted to those persons that received copies of the draft report. Adequate notice is essential to facilitate timely comment and participation in the preparation of the EIS. Interested persons and parties providing comment on the draft should have adequate opportunity to evaluate the manner in which their comments have been addressed.

Subparagraph eleven is needed to assure that decisions relating to need are made on the basis of all information available and to help prevent prejudgement of need. Minn. Stat. § 116H.13, subd. 5 requires the decision to be accompanied by a statement of reasons for the decision. The decision and the statement should be compatible with the final environmental report.

Subparagraph twelve provides for supplementing the original report if it is later deemed to be inadequate. This provision is limited by the requirement that no decision on need shall have been made. This limitation is self apparent because the purpose of the

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environmental report is to assist in making the need determination. If that determination has already been made, there is no basis for adding to the report. The proper approach in those cases is to incorporate the additional information in the EIS at the siting stage or in a supplement to the EIS.

6 MCAR § 3.055 C. EIS at certificate of site compatibility stage.

1. The EQB shall be responsible for preparation of the EIS on a LEPGP subject to this rule.

2. The draft of the EIS shall be prepared for inclusion in the record of the hearings to designate a site for a LEPGP under Minn. Stat. § 116C.58. The draft EIS and final EIS shall be included in the record of the hearing.

3. The draft EIS shall conform to 6 MCAR § 3.031 B. It shall contain a brief summary of the environmental report and the certificate of need decision relating to the project, if available. Alternatives shall include those sites designated for public hearings pursuant to Minn. Stat. § 116C.57, subd. 1 and rules promulgated thereunder. Significant issues to be considered in the EIS shall be identified by the EQB in light of the citizen evaluation process established in Minn. Stat. § 116C.59 rather than through a formal scoping process.

   The EIS need not consider need for the facility and other issues determined by the MEA nor contain detailed data which are pertinent to the specific conditions of subsequent construction and operating permits and which may be reasonably obtained only after a specific site is designated.

4. Upon completion, the draft EIS shall be distributed as provided in 6 MCAR § 3.031 E. 3. In addition, one copy shall go to each regional development commission representing a county in which a site under consideration is located. At least one copy shall be available for public review during the hearings conducted under Minn. Stat. § 116C.58.

5. The EQB shall provide notice of the date and location at which the draft EIS shall be available for public review. Such notice shall be provided in the manner used to provide notice of the public hearings conducted under Minn. Stat. § 116C.58 and may be provided in the notice of the hearings.

6. The EQB or a designee shall conduct a meeting to receive comments on the draft EIS. The meeting may but need not be conducted in conjunction with hearings conducted under Minn. Stat. § 116C.58. Notice of the meeting shall be given at least ten days before the meeting in the manner provided above and may be given with the notice of hearing.

7. The EQB shall establish a final date for submission of written comments after the meeting. After that date comments need not be accepted.

8. Within 60 days after the last day for comments, the EQB shall prepare responses to the comments and shall make necessary revisions in the draft. The draft EIS as revised shall constitute the final EIS. The final EIS shall conform to 6 MCAR § 3.031 F.

9. Upon completion of a final EIS, notice thereof shall be published in the EQB Monitor. Copies of the final EIS shall be distributed as provided in paragraph C. 4. of this rule.

10. Prior to submission of the final EIS into the record of a hearing under Minn. Stat. § 116C.58, the EQB shall determine the EIS to be adequate pursuant to 6 MCAR § 3.031 G.

11. A supplement to an EIS may be required pursuant to 6 MCAR § 3.031 I.

12. The EQB shall make no final decision designating a site until the final EIS has been found adequate. No governmental unit having authority to grant approvals subsequent to a site designation shall grant any final approval for the construction or operation of a facility subject to this rule until the final EIS has been found adequate.

DISCUSSION: This paragraph presents the substantive process relating to the preparation of environmental documents for the site selection process. This paragraph represents a significant change from the current rules. Under the Power Plant Siting rules the site selection process resulted in a "certificate of site compatibility" which designated the most feasible site for construction of the LEPGP. Following this process current rules required the preparation of an EIS.

This paragraph proposes the merging of these two processes, i.e., preparation of the EIS as a part of the site selection process. The advantages of this proposed process include a saving in total preparation time and the ability to identify the most feasible site on the basis of the complete environmental data.

Subparagraph one establishes the EQB as the RGU for the preparation of the EIS. The EQB is responsible for the implementation of siting regulations pursuant to 6 MCAR § 3.071. The alternative of designating the PCA as RGU was considered but rejected. The PCA was responsible for the preparation of the EIS under the current rules, whereas the EQB was responsible for the site selection process under the current rules. The alternative of PCA as RGU was rejected because the EQB has a more central coordinative role whereas the PCA has primarily a regulatory role. It is anticipated that the EQB and PCA will work closely together in the preparation of the document.

Minn. Stat. § 116C.58 mandates public hearings for site designation proceedings. Subparagraph two incorporates the draft and final EIS into the record of such hearings. The inclusion of the EIS is necessary to assure the selection of the site most compatible with available environmental data. The hearing record must reflect consideration of these documents.

Subparagraph three establishes the content requirements of the EIS. This rule incorporates the basic EIS requirements plus a summary of the environmental report and certificate of need decision. Although these documents are available for review, the incorporation of a summary facilitates public review of the documents. If the summary raises issues that are challenged, the interested party should consult the complete documents.

Minn. Stat. § 116C.57, subd. 1, mandates a process for the designation of potential sites. The procedures for designation are set forth at 6 MCAR § 3.074. Through this process the utility must propose a site from the inventory and may propose other sites for consideration at public meetings. As a result of those public meetings the specific site alternatives are defined. The EIS need consider only those sites designated pursuant to that process.

Minn. Stat. § 116C.59 mandates a public participation process relating to the selection of sites. This process is further defined at 6 MCAR § 3.075. Pursuant to that rule, the EQB has appointed a "power plant siting advisory committee". This subparagraph combines the role of that committee with the need for scoping the EIS. This combination maximizes the opportunity for public involvement and provides for more timely review by eliminating potentially duplicative processes.

Subparagraph three allows for a further reduction in the potential scope of the EIS by permitting the omission of information relating to need for the facility and detailed site specific information if that information is more relevant to mitigation of the impacts. The infor-

mation relating to need is most properly considered during the certificate of need process. If a party wishes to challenge that determination, the proper appeal is to district court. Detailed site specific information is most likely of primary relevance to specific mitigation measures that may be imposed via the permitting process. If such information is not of value in helping to differentiate between potential sites, the scope of the EIS should exclude the collection of that data until after the site has been selected. This will help reduce costs relating to the collection of data that will not be relevant to the actual project.

Subparagraph four establishes the distribution requirements for the draft EIS. These requirements are identical to the distribution requirements for the environmental report with the exception of a reduced requirement for the regional development commissions (RDCs). This requirement is reduced to include only those RDCs representing counties in which a designated site is located. This reduction is made because the need determination has been completed and the issues to be addressed in the EIS are of primary concern in the region of proposed construction. Other RDCs may receive copies upon request. The remaining governmental units on the distribution list are likely to be interested in the project through all stages.

Subparagraph six establishes notification requirements. The current notice procedures provided in Minn. Stat. § 116C.58 for the public hearing process for siting are deemed to provide adequate notice to interested persons for the proposed joint process. Minn. Stat. § 116C.58 requires at least one public hearing in each county in which a site is being considered. Notice of the hearing must be published in a legal newspaper of general circulation in the county where the hearing will be held and by certified mail to chief executives of all governmental units representing the area in which the site is proposed. This notice must be issued at least ten days in advance but not more than 45 days in advance pursuant to the statute.

Subparagraph seven allows for the extension of the comment period for comments relating to the draft EIS. The actual period of time for the extension will be determined pursuant to the hearing. The standard of reasonableness relating to the specific project should be used. Interested parties are responsible for complying with that time deadline.

Subparagraph eight establishes a maximum time deadline for the EQB to complete the final EIS. Sixty days after availability of all comments is deemed adequate to verify and research issues raised by the comments and to incorporate responses to the comments. The basic final EIS content requirements are incorporated into this rule. It should be noted that this also establishes the flexibility to modify those requirements pursuant to the scoping decision.

Subparagraph nine establishes the distribution and notice requirements for the final EIS. At this stage of the proceeding, the identity of interested parties should be well established and reflected in the interested person mailing list for the proposed project. Incorporation of the distribution requirements for the draft EIS establishes a requirement to provide the final EIS to these persons. The EQB Monitor is used to provide notice because it is the primary publication for monitoring environmental review for the state.

Subparagraph ten requires a formal adequacy determination by the EQB. The standards and procedures of the state environmental review process are incorporated into these special rules. This provides a uniform standard for state EISs and provides an additional opportunity for interested persons to provide comment for the record relating to the degree to which their concerns were addressed in the final EIS.

Subparagraph eleven incorporates the state environmental review procedures relating to the preparation of supplemental EISs. These procedures are deemed adequate to address additional informational needs that may arise via this process.

Subparagraph twelve establishes a prohibition on final governmental actions relating to the proposal until after the EIS has been found adequate by the EQB. This is necessary to help prevent decisions from being made on the basis of false or inadequate information.

6 MCAR § 3.055 D. Cooperative Processes.

6 MCAR §§ 3.028 E., 3.032 D. and E., 3.036 and 3.037 shall apply to energy facilities subject to this rule. Variance applications may be submitted without preparation of an EAW.

DISCUSSION: This paragraph is necessary because this rule is a substitute environmental review procedure and, pursuant to paragraph A of this rule, other provisions of the environmental review procedures do not apply unless specifically stated. Inclusion of this paragraph incorporates provisions related to phased actions, variance, emergency actions, generic EISs and joint federal/state EISs. Incorporation of these provisions provides needed flexability to adapt these procedures to specific projects for most efficient and effective environmental review.

Introduction to 6 MCAR § 3.056 Special Rules for HVTLs

The term large energy facility is defined at 6 MCAR § EA 501 (f). Two types of large energy facilities have been selected from this list for the establishment of special rules relating to their environmental review because of the complexity of permitting processes and public controversy related to them. The processes relating to environmental review of LEPGPs and HVTLs are set forth in separate rules. In the current rules the review procedures were presented together in the context of the same rule. The separate rule format of the proposed rules was selected because a separation of the processes facilitates a more definitive presentation of the rules for easier public comprehension.

6 MCAR § 3.056 A. Applicability.

Environmental review for HVTLs as defined in Minn. Stat. § 116C.52, subd. 3, unless exempted pursuant to Minn. Stat. § 116C.57, subd. 5, shall be conducted according to the procedures set forth in this rule. Environmental review shall consist of an environmental report at the certificate of need stage and an EIS at the route designation and construction permit stage. Energy facilities subject to Minn. Stat. § 116H.13 but excluded under Minn. Stat. § 116C.52, subd. 3, or exempted under Minn. Stat. § 116C.57, subd. 5 shall not be subject to this rule. Except as expressly provided in this rule, 6 MCAR §§ 3.024 - 3.036 shall not apply to facilities subject to this rule. No EAW need be prepared for any facilities subject to this rule.

DISCUSSION: This paragraph is provided to outline the basic environmental review procedure for HVTLs prior to the presentation of the substantive process. This paragraph notes a basic change in the process, i.e. that now only two environmental documents need be prepared - the environmental report and the EIS. Under the current rules the EIS is prepared at the route designation stage.

This paragraph further clarifies that this rule applies only to certain HVTLs. Under Minn. Stat. § 116H.13, all large energy facilities must have a certificate of need. However, this rule establishes substitute environmental review requirements for some of the HVTLs that are included in the definition of large energy facilities. 6 MCAR § 3.056 establishes substitute environmental review requirements for those large energy facilities that are HVTLs. All other energy facilities are subject to the environmental review procedures set forth in 6 MCAR §§ 3.024 - 3.036.

A certificate of need is required for those high voltage transmission lines that exceed the large energy facility threshold as set forth at Minn. Stat. § 116H.02, subd. 5 (b):

"Any high voltage transmission line with a capacity of 200 kilovolts or more and with more than 50 miles of its length in Minnesota; or, any high voltage transmission line with a capacity of 300 kilovolts or more with more than 25 miles of its length in Minnesota;"

This rule applies to those high voltage transmission lines that exceed the HVTL threshold as set forth at 6 MCAR § 3.072 E.:

"a conductor of electric energy and associated facilities designed for and capable of operation at a nominal voltage of 200 kilovolts or more."

Minn. Stat. § 115C.57 subd. 5 allows an exemption process for certain HVTL routes. The procedures relating to the implementation of this exemption process are set forth at 6 MCAR § 3.078. In essence, the process allows a utility to apply for an exemption and establishes notice requirements relating to that application and procedures by which interested parties may submit comments. Based on comments received, the EQB may exempt that route from the routing selection process. This exemption is intended to allow an abbreviated process for noncontroversial projects. It should be noted that such exempted projects are exempt from the provisions of this rule; however, they may still be subject to the certificate of need proceedings of the Energy Agency and, to the environmental review procedures set forth at 6 MCAR §§ 3.024 - 3.036 if they are brought into environmental review via a discretionary process as delineated at 6 MCAR § 3.025 C.

The reason HVTLs have special review procedures is that HVTLs tend to be highly controversial and subject to a spectrum of regulatory requirements and review procedures. These special rules allow a more relevant and more direct review for this type of facility. The requirement for the preparation of an EAW has been eliminated because the certificate of need application accomplishes the major goals of the EAW in bringing the proposal into a public review procedure.

6 MCAR § 3.056 B. Environmental Report at Certificate of Need Stage.

1. The MEA shall be responsible for preparation of an environmental report on an HVTL subject to this rule.

2. The environmental report shall be prepared for inclusion in the record of certificate of need hearings conducted under Minn. Stat. § 116H.13. The report and comments thereon shall be included in the record of the hearings.

3. The environmental report on the certificate of need application shall include:

   a. A brief description of the proposed facility;

   b. An identification of reasonable alternatives of a different sized facility, a transmission line with different endpoints, upgrading existing transmission lines, and additional generating facilities;

   c. A general evaluation, including the availability, estimated reliability, and economic, employment and environmental impacts, of the proposal and alternatives; and

   d. A general analysis of the alternatives of no facility and delayed construction of the facility. The analysis shall include consideration of conservation and load management measures that could be used to reduce the need for the proposed facility.

   e. The environmental report need not be as exhaustive or detailed as an EIS nor need it consider factors that depend upon specific routes or facility designs.

6 MCAR § 3.056 C. EIS at Route Designation and Construction Permit Stage

1. The EQB shall be responsible for preparation of an EIS on an HVTL subject to this rule.

2. The draft of the EIS shall be prepared for inclusion in the record of the hearings to designate a route for a HVTL under Minn. Stat. § 116C.58. The draft EIS and final EIS shall be included in the record of the hearing.

3. The draft shall conform to 6 MCAR § 3.031 B. It shall contain a brief summary of the environmental report and the certificate of need decision relating to the project, if applicable. Alternatives shall include those routes designated for public hearing pursuant to Minn. Stat. § 116C.57, subd. 2 and rules promulgated thereunder. Significant issues to be considered in the EIS shall be identified by the EQB in light of the citizen evaluation process established pursuant to Minn. Stat. § 116C.59 rather than through a formal scoping process. Need for the facility and other issues determined by the MEA need not be considered in the EIS.

4. Review of draft EIS. The draft EIS shall be reviewed in the manner provided in 6 MCAR §§ 3.055 C.4. - 11.

5. The EQB shall make no final decision designating a route until the final EIS has been found adequate. No governmental unit having authority to grant approvals subsequent to a route designation shall grant any final approval for the construction or operation of a facility subject to this rule until the final EIS has been found adequate.

DISCUSSION: This paragraph presents the substantive process relating to the preparation of environmental documents for the route designation process. This paragraph represents a significant change from the current rules. Under the Power Plant Siting rules the route designation process resulted in a "construction permit" which designated the most feasible route for construction of the HVTL. Following this process the EIS was prepared.

This paragraph proposes the merging of these two processes, i.e. preparation of the EIS as a part of the route designation process. The advantages of this proposed process include a saving in total preparation time and the ability to identify the most feasible route on the basis of the complete environmental data.

Subparagraph one establishes the EQB as the RGU for the preparation of the EIS. The EQB is responsible for route designation pursuant to Minn Stat. § 116C.57. Under the current rules the EQB is also responsible for the preparation of an EIS on any HVTLs for which the EQB determines an EIS is necessary. This rule alters this process in that preparation of an EIS would be mandatory for any HVTL which is subject to route designation proceedings. This is necessary to assure that complete environmental data is available to enable selection of the most feasible route.

Minn. Stat. § 116C.58 mandates public hearings for route designation proceedings. Subparagraph two incorporates the draft and final EIS into the record of such hearings. The inclusion of the EIS is necessary to assure the designation of the route most compatible with available environmental data. The hearing record must reflect consideration of these documents.

Subparagraph three establishes the content requirements of the EIS. This rule incorporates the basic EIS requirements plus a summary of the environmental report and certificate of need decision. Although these documents are available for review, the incorporation of a summary facilitates public review of the documents. If the summary raises issues that are challenged, the interested party should consult the complete documents.

f. The report shall be reviewed in the manner provided in 6 MCAR §§ 3.055 B. 5. - 12.

DISCUSSION: This paragraph presents the substantive process relating to the preparation of environmental documents for the certificate of need process. Subparagraph one establishes the Energy Agency as the RGU for the preparation of the environmental report. The Energy Agency is responsible for the implementation of certificate of need procedures as set forth in 6 MCAR § EA 500 and 6 MCAR § 2.0601. The environmental report is a document summarizing the certificate of need application and reasons supporting the decision. This document serves as the initial basis for environmental review relating to the project.

Minn. Stat. § 116H.13, subd. 4, mandates a public hearing for certificate of need proceedings. Subparagraph two consolidates the need hearing with an initial consideration of environmental impacts. The merging of the review of need and the environmental report helps assure that the potential impacts of the proposal and alternatives will be considered when making the certificate of need decision. The hearing record, which is incorporated into further review processes, must reflect such consideration. This procedure is the same as under the current rules.

Subparagraph three establishes the content requirements of the environmental report. It is necessary that the report adequately describe the scope of the facility, including a summary of the need for the facility as presented in the need application. This is necessary to adequately define a base consideration from which the range of alternatives can be evaluated. Alternatives considered must be identified and contrasted to the proposal. This subparagraph includes examples of classes of alternatives that are necessary to be considered for adequate comparison as well as the basic parameters of consideration that must be made. The analysis required is consistent with the factors specified in the criteria for assessment of need in 6 MCAR § 2.0611.

The assessment of alternatives is of primary importance in the determination of need, i.e. once need is established, relatively little can be done to alleviate impacts other than mitigation measures. A major reduction in impact is achieved if alternatives can be established which eliminate the need for the project or if facilities and methods of addressing need that result in less adverse environmental effects are identified. The environmental report must define the impacts of those alternatives to enable selection of the method of fulfilling need that is least damaging to the environment.

Subparagraph 3.e. modifies the depth to which the analysis of the alternatives must be presented. The analysis does not mandate forecasting for the applicant's service area. The limited time available for completion of the environmental report after submission of a need application is not sufficient for an evaluation of alternative forecasts. The evaluation of alternative forecasts is developed during the course of the public hearings. The evaluation of the effects of alternative facilities in the environmental report will complement detailed information on the applicant's forecasts in the hearing record.

Detailed information on routes and route alternatives is not always available at the certificate of need stage due to the sequential nature of the regulatory process for these facilities. The limited time available for preparation of an environmental report at the certificate of need stage precludes development of detailed site specific studies.

Subparagraph 3.f. incorporates the same preparation, distribution, notice, comment and review procedures that apply to the special review procedures for LEPGPs. The need and reasonableness of those procedures is analogous to the need and reasonableness for the procedures for the special review of HVTLs. Please refer to the discussion relating to 6 MCAR §§ 3.055 B. 5-12 in this document for an analysis of need and reasonableness.

Minn. Stat. § 116C.57 subd. 2 mandates a process for the designation of potential routes. The procedures for designation are set forth at 6 MCAR § 3.073. Through this process alternative routes are delineated and reviewed by a citizens route evaluation committee. The alternative routes must be identified and noticed prior to the public hearing process. The EIS need consider only those routes identified.

Minn. Stat. § 116C.59 mandates a public participation process relating to the designation of routes. This process is further defined at 6 MCAR § 3.073 and 6 MCAR § 3.075 A. Pursuant to those rules, the EQB appoints a citizens route evaluation committee. This subparagraph combines the role of that committee with the need for scoping the EIS. This combination maximizes the opportunity for public involvement and provides for more timely review by eliminating potentially duplicative processes.

Subparagraph three allows for futher reduction in the potential scope of the EIS by allowing the omission of information relating to need for the facility. The information relating to need most properly is considered during the certificate of need process. If a party wishes to challenge that determination, the proper appeal is to district court.

Subparagraph four incorporates the same preparation, distribution, notice comment and review procedures that apply to the special review procedures for LEPGPs. The need and reasonableness of those procedures is analogous to the need and reasonableness for the procedures for the special review of HVTLs. Please refer to the discussion relating to 6 MCAR §§ 3.055 C.4-11 in this document for an analysis of need and reasonableness.

Subparagraph five establishes a prohibition on final governmental actions relating to the proposal until after the EIS has been found adequate by the EQB. This is necessary to help prevent decisions from being made on the basis of false or inadequate information or as a result of undue political influence.

6 MCAR § 3.056 D. Review of HVTLs Requiring No Certificate of Need.

An EIS for HVTLs subject to Minn. Stat. §§ 116C.51 - 116C.69 but not subject to Minn. Stat. § 116H.13 shall consist of an EIS to be prepared as provided in paragraph C. of this rule. The alternative of no action shall be considered.

DISCUSSION: This paragraph is needed to clarify the proper environmental review procedures for facilities that are subject to route designation procedures but not to certificate of need proceedings.

Minn. Stat. § 116H.13 applies to large energy facilities. 6 MCAR § EA 501 (8) states that high voltage transmission lines with a capacity of 200 kilovolts or more having more than 100 miles of its length in Minnesota are large energy facilities and, therefore, are subject to certificate of need proceedings. — no longer applicable

Minn. Stat. § 116C.52, subd. 3 defines a high voltage transmission line as a conductor of electric energy and associated facilities designed for and capable of operation at a nominal voltage of 200 kilovolts or more unless exempted by the EQB. Minn. Stat. § 116C.57 mandates route designation procedures for high voltage transmission lines.

Therefore, any high voltage transmission lines that are less than 100 miles long are subject to route designation procedures, unless exempted by the EQB, but are not subject to certificate of need procedures. This paragraph requires an EIS to be prepared for those high voltage transmission lines. The relevant procedures for EIS preparation are the same as for HVTLs over 100 miles in length, i.e. as set forth in paragraph C.

Several relevant points should be noted relating to this provision:

1. An EAW need not be prepared. In the normal process, the environmental report serves an analogous function. Since no environmental report is prepared in these situations, it is advisable but not necessary to prepare an EAW. The public participation process may be adequate to dispense with the need for an EAW.

2. The scoping function of the EAW is completed by the use of the public participation process for the determination of scope.

3. Subparagraph C.3. states the need for the facility and other issues determined by the MEA need not be addressed in the EIS. In these cases, since there were no certificate of need proceedings, the MEA did not make any determinations. Therefore, if there are any issues that are relevant to the project that would normally be addressed via certificate of need proceedings, these issues should receive special attention in the scoping process to assure they are addressed in the EIS.

6 MCAR § 3.056 E. Cooperative Processes.

6 MCAR §§ 3.028 E., 3.032 D. and E., 3.036 and 3.037 shall apply to facilities subject to this rule. Variance applications may be submitted without preparation of an EAW.

DISCUSSION: This paragraph is necessary because this rule is a substitute environmental review procedure and, pursuant to paragraph A of this rule, other provisions of the environmental review procedures do not apply unless specifically stated. Inclusion of this paragraph incorporates provisions related to phased actions, variance, emergency actions, generic EISs and joint federal/state EISs. Incorporation of these provisions provides needed flexability to adapt these procedures to specific projects for the most efficient and effective environmental review.

In the Matter of the Proposed Adoption
of Rules of the Minnesota Environmental
Quality Board Governing the
Environmental Review Program

STATEMENT OF
COMPLIANCE WITH
RULEMAKING PROCEDURES

I, CHRISTIE ELLER, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Christie Eller

Christie Eller
Special Assistant Attorney General

Dated: July 23, 1982

accompanied 7/12 submission

In the Matter of the Proposed Adoption of Rules of the Minnesota Environmental Quality Board Governing the Environmental Review Program

STATEMENT OF COMPLIANCE WITH RULEMAKING PROCEDURES

I, CHRISTIE ELLER, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Christie B. Eller

Christie Eller
Special Assistant Attorney General

Dated: July 12, 1982

In the Matter of the Proposed Adoption of Rules of the Minnesota Environmental Quality Board Governing the Environmental Review Program

AFFIDAVIT OF MAILING NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

TOM RULLAND, being first duly sworn, deposes and says:

That on the 23rd day of July, 1982, in the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Notice of Submission to the Attorney General by depositing in the State of Minnesota Central Mail System for United States mailing at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who requested notice that the rules in the above-entitled matter have been submitted to the Attorney General.

Tom Rulland

Subscribed and sworn to before me,
this 23rd day of July, 1982.

Kenneth D. Kadlec
Notary Public

KENNETH D. KADLEC
Notary Public Ramsey Co., MN
My Commission Expires Oct. 22, 1986

STATE OF MINNESOTA

ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed Adoption
of Rules of the Minnesota Environmental
Quality Board Governing the
Environmental Review Program

NOTICE OF
SUBMISSION TO THE
ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date, July 23, 1982, for review as to form and legality. Pursuant to 1 MCAR § 1.206 C., the Attorney General will not approve the rules for at least 10 calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that Office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, 204 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-1288. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

If you are interested in determining what changes, if any, were made in the proposed rules after publication in the State Register and before submission to the Attorney General, you may contact Ken Kadlec, Environmental Quality Board, 100 Capitol Square Building, 550 Cedar Street, Saint Paul, Minnesota 55101, (612) 296-8253.

Tom Rulland, Manager
Program Analysis and Review
Environmental Quality Board

accompanied 7/12/82 submission to AG

N/A

See 7/12 letter to JMM

STATE OF MINNESOTA

ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed Adoption of Rules of the Minnesota Environmental Quality Board Governing the Environmental Review Program

NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date, July 12, 1982, for review as to form and legality. Pursuant to 1 MCAR § 1.206 B., the Attorney General will not approve the rules for at least 20 calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that Office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, G-25 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-7030. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

If you are interested in determining what changes, if any, were made in the proposed rules after publication in the State Register and before submission to the Attorney General, you may contact Ken Kadlec, Environmental Quality Board, 100 Capitol Square Building, 550 Cedar Street, Saint Paul, Minnesota 55101 (612) 296-8253.

Tom Rulland, Manager
Program Analysis and Review
Environmental Quality Board

Minnesota
Environmental Quality Board
100 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101
Phone 296-2319

July 23, 1982

RECEIVED
JUL 23 1982
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

J. Michael Miles
Assistant Attorney General
Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

Dear Mr. Miles:

We are hereby withdrawing the Environmental Review Program rules submitted on July 12, 1982 for your review. These rules are withdrawn from review at this time because of our failure to notice parties that requested notification pursuant to the Rule Hearing Register. We have received no requests for notification other than those appearing on the Rule Hearing Register.

The rules will be submitted for your review as soon as this requirement has been fulfilled.

Sincerely,

Tom Rulland, Manager
Policy Analysis and Review

TR/meo

Minnesota
Environmental Quality Board
100 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101
Phone 296-2319

RECEIVED
JUL 23 1982
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

July 23, 1982

J. Michael Miles
Assistant Attorney General
Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

Dear Mr. Miles:

Attached are materials required pursuant to Minn. Stat. § 15.0412 subd. 4e and 1 MCAR § 1.202 for your review of the Environmental Review Program rules as adopted by the Minnesota Environmental Quality Board. Tow copies of the rules, as adopted, have been submitted to the Revisor's Office for review.

We request that you notify us promptly of any questions or requests for information. Our statutory six-month deadline for publication in the "State Register" expires October 2, 1982. We are concerned that if any Board action is required we may exceed the statutory deadline.

Sincerely,

Tom Rulland, Manager
Policy Analysis and Review

TR/meo

attachments

Minnesota
Environmental Quality Board
100 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101
Phone 269-2319

July 12, 1982

J. Michael Miles
Assistant Attorney General
Administration Building
50 Sherburne Avenue
St. Paul, MN 55155

Dear Mr. Miles:

Attached are materials required pursuant to Minn. Stat. § 15.0412 subd. 4e and 1 MCAR § 1.202 for your review of the Environmental Review Program rules as adopted by the Minnesota Environmental Quality Board. Two copies of the rules as adopted have been submitted to the Revisor's Office for review.

Please note that no one has requested notice of submission to the Attorney General's office; therefore, no affidavit of mailing is attached.

We request that you notify us promptly of any questions or requests for information. Our statutory six month deadline for publication in the State Register expires October 2, 1982. We are concerned that if any Board action is required we may exceed the statutory deadline.

Sincerely,

Tom Rulland, Manager
Policy Analysis and Review

TR/meo

attachments

AN EQUAL OPPORTUNITY EMPLOYER