

STATE OF MINNESOTA

ENVIRONMENTAL QUALITY BOARD

**Proposed Amendment to Rules Governing
the Minnesota Environmental Review Program,
Minnesota Rules, parts 4410.0200 to 4410.7070,
Adding Mandatory EAW and Exemption
Categories for Recreational Trail Projects**

**STATEMENT OF NEED
AND REASONABLENESS**

I. INTRODUCTION

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

These particular proposed amendments would add to the rules mandatory requirements for preparation of Environmental Assessment Worksheets (EAWs) for certain recreational trails and also exempt other recreational trails from review under this program. The amendments do not propose addition of any mandatory requirements for the preparation of Environmental Impact Statements (EISs) for recreational trails. The proposed amendments would not make any changes in the procedures for Environmental Review.

A. Environmental Review Program Rules

The Minnesota Environmental Review Program, established by the Minnesota Environmental Policy Act of 1973, has been in existence since 1974. The program operates under rules adopted by the Environmental Quality Board, which are binding upon all state agencies and political subdivisions of the state. The rules contain two basic parts: the procedures and standards for review under this program and listings of types of projects either for which review is mandatory or which are exempted entirely from review under this program. Mandatory review can either be in the form of an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS). The lists of types of projects subject to those requirements are generally referred to as the “mandatory categories.” The lists of exempt projects are referred to as “exemptions categories” or sometimes just “exemptions.” The list of mandatory EAWs is found at Minnesota Rules, part 4410.4300, mandatory EISs, at 4410.4400, and exemptions, at 4410.4600. This proposed rulemaking would add a subpart for recreational trail projects to part 4410.4300 and also a subpart to part 4410.4600.

The Environmental Quality Board was directed to adopt rules specifying mandatory and exemption categories for recreational trails by the Legislature in Minnesota Session Laws 2003, chapter 128, article 1, section 167, subdivision 3. The relevant provision states: “By January 1, 2005, the environmental quality board shall adopt rules providing for threshold levels for environmental review for recreational trails”. Currently, there are no mandatory categories or exemptions in the Environmental Review rules directly addressing recreational trails (except that certain bicycle and pedestrian trails are now exempt under part 4410.4600, subpart 14, item D, which exempts certain activities constructed in highway rights-of way). Historically some recreational trail projects have been reviewed under this program on a discretionary basis. Projects that fit neither mandatory categories nor exemptions can be reviewed on a discretionary basis by a unit of government with approval authority over the project either at the initiative of the governmental unit or in response to the filing of a citizens’ petition seeking an EAW. One reason for adopting mandatory review and exemption categories is to improve the predictability of recreational trail planning.

B. Recreational Trail Background Information

Much of the information contained in this section is summarized from the document *State-funded Trails for Motorized Recreation* by the Office of the Legislative Auditor, January 2003. Additional information can be found in that document, available on-line at www.auditor.leg.state.mn.us.

Recreational trails can be divided into two basic groups: motorized and non-motorized. Motorized recreational vehicles in turn can be divided into two broad groups: snowmobiles and off-highway vehicles (“OHVs”). These groups obviously differ in the season of use and type of surface over which they travel. They also differ in that Minnesota has an extensive system of existing snowmobile trails (almost 20,000 miles but far fewer OHV trails to date (less than 1,000 as of January 2003). Not only is the OHV trail system still developing compared to the snowmobile system, but also OHV registrations are growing at a faster rate than that of snowmobiles. Partly as a result of those trends, most of the public controversy in recent years over motorized recreational vehicles has centered on OHVs.

There are three classes of OHVs: all-terrain vehicles (“ATVs”); off-highway motorcycles (“OHMs”), often referred to as dirt bikes; and off-road vehicles (“ORVs”) also called 4X4 trucks. Each of the four groups of motorized recreational vehicles has its own dedicated fund used by the DNR to plan, develop, maintain, and administer trails for that type of vehicle, funded primarily from gas taxes and vehicle registration fees.

Non-motorized trail uses include hiking, bicycling, mountain-bicycling, horseback riding, cross-country skiing, and other uses such as inline-skating, and dog-sledding. Some trails host multiple uses, while others are dedicated for a single use. Some uses are more compatible for sharing trails, and some combinations are more likely to be authorized on the same trail than others. One factor influencing which uses can share trails is type of surface and width. Some

uses required a paved or hard surface, others do not. Data from the DNR on 272 trail projects during the years 1998 – 2002 shows the following grouping and frequency:

All trails	272
Snowmobile use only trails	125
Snowmobile and other uses	44
Off-highway motorcycles only	1
ATVs only	9
Horse riding allowed	15
Bicycling only	117
ATV with other uses	20
Multiple uses including some motorized	58
Multiple non-motorized uses	84
(Most for bicycling and hiking)	

Recreational trails may be constructed and managed in several different ways, some private, some public and some a combination of the two. The Legislative Auditor’s report cited above includes as its Table 1.1 a comprehensive cataloging of trail types. In addition to managing many trails directly, the DNR also administers a grant-in-aid program that provides funds and expertise to local private trail clubs who build and maintain the trails. The DNR reviews the plans for the trails before committing the grants. Counties and municipalities also build and maintain trails.

C. Development of proposed amendments; public comment

The EQB published and distributed a Request for Comments on July 28, 2003. The notice asked that comments be submitted by October 1, 2003, but several commenters requested additional time, and the last comments were not received until March 1, 2004. Based on the comments, EQB prepared a document presenting a number of options for various types of trail categories, referred to as “Staff Proposed Options,” which was reviewed with the Board on May 20, 2004 and then distributed to interested persons who requested inclusion on an e-mail distribution list for purposes of this rulemaking. Notice was also given in the *EQB Monitor* on June 7, 2004. Comments on the options were due by July 19, 2004. All comments received from the public in both rounds of comments are posted at the EQB’s website, at www.eqb.state.mn.us. The proposed rule amendments were drafted by staff after review of the comments received.

Alternative Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Diana Telschow, EQB secretary, at Environmental Quality Board, 300 Centennial Building, 658 Cedar Street, St. Paul, MN 55155; telephone: 651/297-1257; fax: 651/296-3698. TTY users may call the Department of Administration at 800-627-3529.

II. STATUTORY AUTHORITY

The Board's statutory authority to adopt the rules is set forth in Minnesota Session Laws 2003, chapter 128, article 1, section 167, subdivision 3, which states:

“By January 1, 2005, the environmental quality board shall adopt rules providing for threshold levels for environmental review for recreational trails”.

The Board also has standing authority to adopt and amend the mandatory categories and exemptions pursuant to Minnesota Statutes, section 116D.04, subd. 2a (a) which states:

“The board shall by rule establish categories of actions for which environmental impact statements and for which environmental assessment worksheets shall be prepared as well as for categories of actions for which no environmental review is required under this section.”

Under these laws, the Board has the necessary statutory authority to adopt the proposed rules.

III. THE NEED FOR THE RULES

Legislative authorization for adopting mandatory review and exemption categories for recreational trails was due to significant recent controversy over motorized recreational vehicle use in Minnesota. Significant legislative attention has been given to various aspects of motorized recreational vehicle use in the past several legislative sessions, and several significant changes have been made to laws relating to these uses. In addition, and partly in response to legislative actions, the Department of Natural Resources has undertaken a number of significant changes in how it manages recreational vehicle use on lands under its jurisdiction. Perhaps the most significant action being taken is the legislatively-mandated analysis and reclassification of trails on state forest lands for motorized uses. By legislative action, that process is exempted from any review under the Environmental Review program. The classification must be completed by 2008 at the latest.

This rulemaking action by EQB to create Environmental Review categories is only a small part of the overall changes that are taking place with respect to recreational trails in Minnesota at the present time. The vast majority of motorized trail designations for the foreseeable future will not be subject to whatever rules the EQB adopts, since the vast majority of such designations will take place under the ongoing legislatively-exempted process. The benefit of the mandatory review and exemption categories with respect to state projects and state lands will primarily come after the current reclassification process is completed. While not all possible state trail projects are part of the reclassification program, the resources needed for the reclassification effort will consume most of the DNR's available trail planning staff, so it is not anticipated that there will be many state projects potentially subject to these rules for a number of years. In the

meantime, the rules will largely affect only local or regional projects, including grant-in-aid projects assisted by grants administered by the DNR.

One particular aspect of the controversy over motorized recreational vehicle usage in Minnesota led to this rulemaking in a direct way. When the DNR released its first trail system plans for the three regions of northern Minnesota in 2000 and 2001, citizens petitioned for Environmental Review and filed lawsuits when the DNR, in part, denied the petitions. While the Court of Appeals ruled that only some of the actions in the system plans constituted actual “projects” subject to environmental review, trail planning by the DNR was seriously impeded for several years. This situation brought attention to the fact that the existing Environmental Review program rules did not have any guidance (in the form of mandatory review and exemption categories) regarding which kinds of trails were subject to review. This realization is a major factor leading to this rulemaking.

Throughout the history of the program, as various types of activities either emerged as new forms of endeavor (e.g., creation and testing of genetically-modified organisms) or became controversial due to increased occurrence or changes in scale (e.g., concentrated livestock production), the EQB has added or amended mandatory and exemption categories to try to create a framework of predictability for review of these activities. Predictability of review is very important to most project proposers in the scheduling of their projects, estimating costs, seeking financing, and other aspects of project implementation. Proposers have continually told the EQB that they understand the need for review of certain projects but that what they cannot accept is too much uncertainty about whether review is needed and in how long it will take. When there are no mandatory review or exemption categories, review is uncertain for all projects. Establishing reasonable categories cannot end all uncertainties for all projects, but it does greatly reduce the level of uncertainty for most. Predictability is helpful to the public as well. The present rulemaking seeks to do this for recreational trails.

IV. COMPLIANCE WITH VARIOUS STATUTORY REQUIREMENTS

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

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

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

The proposed rule amendments would directly affect units of government, primarily the Department of Natural Resources (DNR) but also certain counties and municipalities, that would be required to prepare EAWs pursuant to the proposed mandatory categories. The unit of government required to prepare the EAWs would bear the primary costs of the EAWs, although

other units of government or private organizations sponsoring trail projects subject to a mandatory EAW would be required to supply data necessary to complete the EAW form, which would sometimes involve additional costs beyond the costs of developing the trail plans themselves.

The public that uses recreational trails would be only indirectly affected by the proposed rules, and only with respect to the schedule for implementing a trail project. The need to prepare a mandatory EAW would in some cases extend the planning and review process for a trail and hence delay its implementation. However, for some of the trails that are proposed to be covered by the mandatory EAW categories, Environmental Review may have been sought through the citizens' petition process anyway. For some projects that would fit the proposed exemption categories, the proposed rules may actually expedite implementation of the project by eliminating the possible delay that would result from the filing of a citizens' petition if the project were not exempted.

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues

The only costs that the EQB will incur in the implementation of the rules will be for the costs of time and materials for updating guidance materials to incorporate the rule amendments. These costs will be minimal. The EQB staff will also be required to spend a certain amount of time providing information and technical assistance about the new categories to RGUs and interested parties, however, those costs will be off-set somewhat by a reduced need to provide assistance with respect to citizens' petitions for recreational trails. The needed staff time will be absorbed by the existing staff complement.

The DNR will bear most of the costs resulting from implementation of these rule amendments since the DNR is expected to be the RGU for most of the needed reviews. The estimated cost of the reviews is described under factor # 5 below.

It is not anticipated that these rule amendments would have any effect on state revenues.

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

Because of the overlap between these two factors as they relate to this rulemaking, factors #3 & #4 are discussed jointly in this section.

The purpose of the proposed rule is to make the possible need for Environmental Review of recreational trail projects more predictable through creating mandatory review and exemption

categories specific to recreational trails. Within the scope of the Environmental Review process, there is no alternative method available to accomplish this objective.

Within the general scheme of adopting mandatory categories, the EQB did consider a number of alternative approaches to deriving specific mandatory review and exemption categories which are discussed below. Most of the alternatives were suggested by public comments received in response to the Request for Comments (July 2003) and the Staff Proposed Options document (May 2004).

One alternative approach considered was to use land ownership as a basic factor in setting the categories. Some commenters advocated distinguishing between trails based on whether the lands crossed were publicly or privately owned, and some on whether the lands were state-owned. The EQB ultimately rejected using land-ownership as the basis for the categories because the existing mandatory and exemption categories do not recognize land ownership as the basis for distinguishing which types of projects require or are exempt from review. In fact, one of the fundamental differences between Minnesota's environmental review program and that of many other jurisdictions is that Minnesota's program extends review to private actions (provided there is governmental approval or financial assistance involved). Restricting recreational trail categories to only public or state-owned lands would be inconsistent with this basic principle.

Another alternative considered was to entirely disregard trail *use* as a factor in the categories. Some commenters asserted that trail use was an unimportant factor with respect to potential environmental impacts, or that basing categories on trail use would be unfair to certain types of trail users. Under this alternative, factors such as trail length, trail surface, and trail construction methods would have served as the sole bases for the categories. The EQB rejected this alternative because there seems ample evidence, some of it documented in submissions from a number of commenters, that the type of use, and especially motorized use, is indeed an important determinant of the potential environmental effects of a trail.

A third alternative considered was to make motorized trail use the focus of the rulemaking. Under this approach, mandatory EAW and EIS categories would have been adopted covering all or almost all motorized trails, whether new construction or designation of an existing trail, with essentially no exemptions for any motorized trails. This alternative was advocated by many of the persons who commented during the informal comment periods. This option was rejected by the EQB because it was recognized that motorized use is not the only reason why recreational trail projects may have environmental impacts. In addition, some of the concerns advanced by commenters about the negative impacts of motorized recreation are not relevant to Environmental Review. For example, preparing Environmental Review documents cannot enforce against the possibility that trail users will illegally ride off the trail and damage natural resources. One specific possible exemption category that would have applied to motorized uses that was considered but eventually rejected was "designating an existing state forest road for motorized recreational use." This idea had been included in the Staff Proposed Options and had been strongly supported by some commenters. However, it turns out that recreational uses, including motorized uses, are already legal on state forest roads under state law

(DNR rule, part 6100.1950). Because the use is already allowed, there would be no point to designating a state forest road for motorized use, and consequently there is no need to exempt an action that would never take place.

Another alternative considered was to create categories based on detailed information about possible resource impacts from trail projects. A number of commenters had suggestions for how such categories could be worded. One specific example of a detailed category was included in the Staff Proposed Options document of May 2004, specifically mandatory EIS option #2. That option included factors of: trail length, season of use, land cover, crossing of water resources, number of occurrences of proximity to water resources, and existing density of trails in the area. The EQB ultimately rejected the alternative of detailed, multi-factor categories because it is inconsistent with the fundamental purpose of the mandatory category system, which is to create “predictability” about whether or not a project will require review. For the categories to create predictability, they must be simple to interpret and to apply, and be applicable early in the design of a project. Detailed analysis of a project should not be needed to determine if any category thresholds are met. Among the existing mandatory categories, almost all require only a few pieces of basic information about a project in order to determine if the project fits a category or not.

In addition to the alternative approaches to categories discussed above, another alternative considered by the EQB but rejected was the establishment of mandatory EIS categories for recreational trails. Some comments received in response to the Request for Comments suggested mandatory EIS requirements for certain trails, and the EQB included two mandatory EIS options in its Staff Proposed Options document, one for certain trails and one for certain off-highway vehicle recreation areas. However, no mandatory EIS categories are proposed in this rulemaking, for two reasons. First, there was little agreement among interested persons about whether mandatory EISs were needed or what the threshold parameters should be. Second, it was decided that the option covering trails was too complicated in comparison with other mandatory EIS categories in the existing rules, as described in the preceding paragraph. Also, it is not unusual to have mandatory EAW requirements for a type of project without having corresponding mandatory EIS requirements. Of the 35 types of projects with mandatory EAW categories, only 24 have corresponding EIS categories. Because the time and cost of preparation of an EIS greatly exceeds that of the EAW, and because an EAW can lead to an EIS if necessary, it is prudent, and potentially less costly and intrusive, to be more conservative in the establishment of mandatory EIS categories than mandatory EAW categories.

The above discussion summarizes broad alternative approaches or methods for developing the categories that the EQB considered. Additional information about alternatives considered in drafting specific category language is presented at appropriate points in the section on rule-by-rule analysis later in this document.

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

The costs involved in implementing the proposed rules will occur due to the mandatory EAW category proposals. The best way to estimate the costs of implementing the proposed mandatory EAW requirements is to consider costs incurred in preparing EAWs on similar projects in the past, but unfortunately, comparable data is very limited. To date, only one recreational trail EAW that would be representative of the expected costs has been prepared, the EAW prepared by the DNR in 2001 on a voluntary basis for the Moosewalk/Mooserun Trail, a 35 mile long ATV trail. DNR staff calculate that the EAW for that project cost in the neighborhood of \$40,000 in staff time and expenses. This figure probably represents the “high end” of likely costs for preparation of an EAW insofar as the of the trail was quite long and the fact that RGUs can usually refine their procedures and reduce costs as they gain familiarity with preparing EAWs for a given type of project. Therefore, a reasonable estimate of the costs of preparing a mandatory EAW under the proposed categories would be \$10,000 to \$50,000 depending on the length of the trail and the complexity of issues associated with the project. It should be kept in mind that similar or greater costs (due to the cost of reviewing a petition and deciding to do an EAW) would be incurred for some of the same projects without the proposed rules since review could be initiated by citizen petition under the present rules

The total annual costs of complying with the proposed rule will obviously depend on the number of projects meeting the EAW category thresholds each year. To make an estimate of those numbers, one can use data assembled by the DNR on trail projects over the 5-year period between 1998 and 2002. (Spreadsheets with that trail information will be entered as an exhibit into the hearing record.) According to that information, there were approximately 3 trail projects per year that would have exceeded the thresholds in the proposed mandatory EAW categories. Multiplying this estimate of the number of annual projects by the estimated cost of review of each project gives a total annual cost estimate range of \$30,000 to \$150,000.

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

It is possible to predict the likely consequences of not adopting the proposed rules, but less so to predict the costs. If the proposed rule amendments are not adopted individual recreational trail projects will remain subject to Environmental Review on a case-by-case basis.

Based upon the experiences of the recent past, a substantial number of these projects may have petitions filed on them seeking preparation of an EAW. For other projects, especially if they are long or if there is public controversy evident, the DNR or another unit of government may decide to voluntarily complete an EAW. Almost no projects will be exempted from possible review (occasional projects could be covered by existing exemptions). Whether mandatory, the result of a petition, or voluntary, the cost of preparing the EAW will be the same (and as estimated in the previous section). Where a citizens’ petition is filed, the RGU will incur the costs of reviewing the petition and making a decision on the need for an EAW, in addition to the cost of preparing the EAW if it is decided to do so. To date, we have no data on the costs of

handling a project-specific trail petition because the petitions filed on trails to date have covered trail plans for a whole state forest, not specific trail projects. The DNR's costs for dealing with the petitions for entire trail plans would not be representative of the costs to be incurred for dealing with a petition on a single trail.

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

It is possible that the U.S. Forest Service or National Park Service could propose a recreational trail within Minnesota that would fit the proposed mandatory EAW categories. It is likely that the federal agency would analyze the environmental impacts of the project under requirements of the National Environmental Policy Act, which prescribes environmental documents similar to state EAWs and EISs. If for such a trail permits were sought from the State or a local unit of government, review could be triggered under the proposed rule. If that were to happen specific provisions in existing parts of the Environmental Review rules would act to prevent duplication of effort and to provide for joint state-federal review with one set of environmental documents. These provisions are: part 4410.1300, which provides that a federal Environmental Assessment document can be directly substituted for a state EAW document and part 4410.3900, which provides for joint state and federal review in general.

B. Performance-based rules

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

The present rulemaking does not affect the procedures of Environmental Review. It merely would add certain recreational trail projects to the list of projects subject to the existing procedures, while making other trail projects exempt from those procedures. Consequently, this rulemaking does not offer the opportunity for adopting performance-based rules or providing procedural flexibility. Environmental Review is not a regulatory program, and hence the EQB has no "regulatory objectives" in this rulemaking.

It should be noted that the existing procedural rules for Environmental Review do provide opportunities for flexibility in conducting review, and the EQB has added to those opportunities over the years in various rulemakings. In 1982, the Alternative Review provisions at 4410.3600 were adopted allowing specific governmental review permitting processes to be designated as acceptable substitutes for the EAW and EIS processes. In 1988 the Alternative Urban Areawide Review process was created, which has become a popular mechanism for local units to better mesh environmental review with their comprehensive planning processes. In 1997 amendments were adopted that allow for direct substitution of a federal Environmental Assessment document for the state EAW and the tiered EIS concept was added to provide for more expeditious review of projects involving complex review and permitting that proceeds in stages (or "tiers").

C. Additional Notice

Minnesota Statutes, sections 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules or explain why these efforts were not made.

Our proposed Additional Notice Plan is based on the Additional Notice Plan used at the time of the Request for Comments, which was approved by the Office of Administrative Hearings on July 24, 2003. The Additional Notice Plan consists of the following elements:

- Posting on the EQB Website. The Notice of Hearing, the proposed rule amendments, and the SONAR will be posted at the EQB website.
- Mailing of the Notice of Hearing. We will mail the rules and Notice of Hearing to everyone who has registered to be on the Department's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a. In addition, we will mail notice of the rulemaking to a special supplemental mailing list prepared for this rulemaking. This special list was developed by EQB staff from several mailing lists maintained by the Department of Natural Resources which are known to contain the names of organizations, groups, and persons interested in recreational trail matters. The DNR had three lists of organizations that belong to the following umbrella groups that have been directly involved in trail issues in recent years: the Minnesota Recreational Trail Users' Association (MRTUA); the Minnesota Motorized Trails Coalition (MMTC); and the DNR's Motorized Trails Task Force (MTTF). The EQB used these three lists as the core of its supplemental list. The EQB also reviewed two more general lists provided by the DNR and selected some of the entries to place on its supplemental list. These more general lists are known as the DNR Commissioners' Office Key Stakeholders List and the Trails & Waterways Division's Off-Highway Vehicle Mailing List. (Since these lists included hundreds of names, EQB selected only those entries that appeared to represent a statewide or regional group of persons interested in this topic, and not those of single individuals, groups that appear to be of only local scope, or organizations on the list for unrelated reasons that likely have no interest in recreational trails). The notice sent to the special list will be a summary of the Notice of Hearing and proposed rules that will direct the recipient to visit the EQB website or contact the EQB offices for the complete Notice of Hearing, proposed rules, and SONAR.
- Publication of the Notice of Hearing information in the *EQB Monitor*. The Monitor is a bi-weekly publication of the EQB concerning events in the environmental review program and is routinely examined by many persons and organizations with a potential interest in environmental review activities.
- Press Release to Major Circulation Newspapers. We will send a press release about the Notice of Hearing to newspapers throughout the state. There will likely be a heavier coverage in northern part of state because that is where most of the recreational trails tend to be located.

Our Notice Plan also includes giving notice required by statute. We will mail the rules and Notice of Hearing to everyone who has registered to be on the Department's rulemaking

mailing list under Minnesota Statutes, section 14.14, subdivision 1a. We will also give notice to the Legislature per Minnesota Statutes, section 14.116.

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

In this section the proposed rule text is presented in larger type to distinguish it from the SONAR analysis text.

In the earlier section addressing Regulatory Analysis, issues #3 & #4, the SONAR has described alternative approaches to mandatory review and exemption categories that the EQB considered in developing the proposed rules analyzed below. That general discussion supplements the following discussion of the details of the proposed rules.

In reviewing the EQB's proposed categories, it should be kept in mind that nearly all the existing mandatory and exemption thresholds are imperfect simplifications of complicated activities, and that the basic purpose of mandatory categories is simply to provide "predictability" to project proposers, RGUs, and the public about which projects will undergo Environmental Review and which are exempt in order to avoid potentially time-consuming case-by-case decisions for every project. Projects of lesser magnitude than the mandatory EAW thresholds may still be reviewed on a discretionary basis (unless exempted), which interested persons can request through the citizens' petition process.

4410.4300 Mandatory EAW categories

Subp. 37 [new]. Recreational trails. If a project listed in this subpart will be built on state-owned land or funded, in whole or part, by grant-in-aid funds administered by the DNR, the DNR is the RGU. For other projects, if a governmental unit is sponsoring the project, in whole or in part, that governmental unit is the RGU. If the project is not sponsored by a unit of government, the RGU is the local governmental unit. For purposes of this subpart, "existing trail" means an established corridor in current legal use.

This paragraph prescribes which governmental unit will be the RGU, which stands for "Responsible Governmental Unit," for preparing EAWs for the recreational trails for which review will be required under this subpart. Each mandatory category has an RGU designation listed for it in the appropriate subpart of part 4410.4300. The Department of Natural Resources (DNR) is named as RGU for all trail projects for which it is either the project constructor or the provider of grant-in-aid funds. This assignment is consistent with the general principles for RGU assignment at part 4410.0500 that (1) if a state agency will carry out a project it is the RGU (4410.0500, subp. 1) and (2) the RGU is the unit with the greatest responsibility for supervising or approving the project as a whole or has expertise that is relevant for the review (4410.0500, subp. 5, item B). Where grant-in-aid funds are being supplied to assist with a project the DNR must review and approve the plans for the project prior to entering into the grant agreement.

This gives the DNR a strong degree of authority over the project. In addition, the DNR staff has expertise with the review of recreational trails that is likely to be greater than that available to a local unit of government that would be a sponsor for a grant-in-aid trail. Furthermore, assigning all grant-in-aid projects to the DNR will promote more uniform review of all grant-in-aid projects regardless of where they take place. For those projects not constructed by the DNR or involving state grant-in-aid funds, but which will be sponsored by another unit of government, the sponsoring unit will be the RGU; this is consistent with the general principle of RGU assignment cited as #2 above. For all other projects, the RGU will be the local governmental unit, in keeping with the RGU assignment in other mandatory categories where the permitting responsibility is at the local level. It should be noted that there may be some private trail projects which require no governmental permits, and therefore would not be “governmental actions” under these rules and not be subject to Environmental Review at all.

The final sentence of this paragraph is a provision to define the meaning of “existing trail” as used in items A and B. It is intended to provide the RGU with a standard for distinguishing legitimate trails now in existence from unplanned or unauthorized tracks or pathways through forests or other lands which, although they may physically resemble legitimate trails, should not be recognized as acceptable routes for future recreational travel. Such a provision is necessary to address a potentially serious issue raised in the comments on the Staff Proposed Options from the Minnesota Center for Environmental Advocacy. In those comments, an objection was raised to any categories using thresholds based on length due to the presence of many unauthorized, unplanned pathways now in forests. The commenter stated that because of the prevalence of such pathways, long trails could be created by “stitching together” unplanned trails with short segments of newly constructed trails, so that “even a small amount of new alignment would allow designation of very large stretches of OHV trail.” In order to avoid this problem, it is necessary to create a definition for “existing trail” that excludes the unplanned and unauthorized trails. The meaning proposed for “existing trail” has two aspects: (1) it must have an established corridor that is clearly recognizable on the ground; and (2) the corridor must now host at least one legally authorized use. This meaning would exclude pathways which now physically exist but which are not legally recognized for use.

A. Constructing a trail at least 10 miles long on forested or other naturally vegetated land for a recreational use other than snowmobiling or cross-country skiing, or constructing a trail at least 20 miles long exclusively for snowmobiling or cross-country skiing.

Item A would require mandatory preparation of an EAW for the kinds of trails named with the thresholds based on trail length. Item A covers construction of new trails (or extensions of existing trails) which do not follow the alignment of an existing trail. Except for winter uses, the threshold proposed for this category is 10 miles. For the named winter uses, the threshold is proposed to be twice as long, 20 miles, as these uses are generally considered to have lesser potential for environmental impacts due to the fact that frozen soil conditions and snow or ice cover greatly reduce the potential for physical environmental damage. Item A would only apply

to trails crossing land that was now forested or otherwise covered with natural vegetation for a distance of at least 10 continuous miles. If a trail was to be partially on naturally vegetated land only the length on such land would be counted.

Length was chosen as the primary threshold parameter in order to make the recreational trail categories analogous to the existing categories for linear-type projects, including electrical transmission lines (subp. 6), pipelines (subp. 7), and highways (subp. 22). As stated in the 1982 SONAR, linear projects “usually entail greater impact as a function of increased length.” (pg. 119) Although different types of linear projects differ in the extent of their potential for various environmental impacts, generally speaking they all vary in accordance with project length. Specifically for recreational trails, while different types of trails or trail uses vary in their potential for impacts such as ecological damage, runoff and erosion, damage to water resources, and noise, the potential for these impacts will tend to increase with the length of the project simply because, all else being equal, a longer trail has more likelihood of encountering sensitive resources of whatever kind. Another benefit of using length as a surrogate for impact potential is that it is “use neutral.” A number of commenters, particularly motorized use organizations, were very concerned about some trail users being “singled out” in the proposed rules, i.e., treated differently than other types of users. Using trail length as the threshold parameter avoids this concern. Finally, length is a basic parameter of trail design that is easy to determine in the early stages of design, promoting an early determination of the need for EAW preparation with accompanying planning efficiency.

The thresholds of 10 and 20 miles were chosen for a number of reasons. Most fundamentally, for almost all types of projects covered by the existing mandatory and exemption categories there is a “gap” between the magnitudes of project that are exempt and the smallest projects for which review is mandatory. Following this principle (in the absence of any compelling reasons not to), the EQB chose to set the mandatory EAW thresholds at some reasonable number of miles, rather than including trails of all lengths (as many commenters had advocated, at least for motorized trails). Further, the most common ratio of the sizes of exemption thresholds to mandatory EAW thresholds among the existing categories is 1:10. Following that reasoning, the proposed threshold of 10 miles for mandatory EAWs for most trails and the numerical exemption thresholds of (less than) 1 mile at items A and C of the proposed exemption categories are reasonable choices. Since snowmobiles and cross-country skiing have a lesser potential for impacts, doubling the threshold to 20 miles is a reasonable choice for those types of trails.

Another reason for choosing 10 miles as the basic threshold number is that it makes sense when compared to the thresholds for the other linear-type projects in other subparts. The highway categories have a length threshold of 1 mile, pipelines, either 0.75 or 5 miles depending upon the nature of the product transported and other factors, and transmission lines, 20 miles. Most people would undoubtedly agree that recreational trails in general pose less potential for environmental impacts than most highway or pipeline projects, and somewhat more than electrical transmission line corridors (where there is little activity after construction is completed, little potential for impacts beyond the right-of-way, and less direct physical intrusion by the

structures than from a continuous trail surface).

One way to check on the reasonableness of proposed thresholds is to compare estimates of how many EAWs would result with the numbers of EAWs prepared due to other existing mandatory categories. The EQB recently examined mandatory EAW records from the 4-year period 2000-2003 to compare one category with another. The data from that analysis showed that during that time 570 EAWs were prepared due to the 35 existing EAW categories, an average of 143 per year. Only 10 of the 35 categories resulted in at least 5 EAWs per year and the median number was 1 EAW per year per category. Using the DNR's estimate from section III.A factor #5 of 3 EAWs per year likely to result from the proposed recreational trail categories, it appears that the number of EAWs likely due to the proposed thresholds would fall roughly mid-pack when compared to all 36 categories.

B. Designating at least 25 miles of an existing trail for a new motorized recreational use other than snowmobiling.

Item B covers situations where a governmental unit is proposing a change in authorized uses on an existing trail to allow use by a form of motorized recreational vehicle not previously allowed to use the trail. The threshold is proposed as 25 miles, two and one-half times the main threshold of item A, on the basis that the potential for environmental damage is diminished by the fact that a trail already traverses the route. This category is proposed to exclude the designation of snowmobile use, which instead is proposed for an exemption (see the section later on Exemptions for the rationale).

In applying items A and B, if a proposed trail will contain segments of newly constructed trail and segments that will follow an existing trail but be designated for a new motorized use, an EAW must be prepared if the sum of the quotients obtained by dividing the length of the new construction by 10 miles and the length of the existing but newly designated trail by 25 miles, equals or exceeds one.

This provision is proposed to deal with the likely common occurrence where a planned trail will include segments of new alignment and also segments with new use designations on existing trails. In such cases, how can it be determined if the mandatory review thresholds are exceeded? The solution proposed is borrowed from existing subparts of 4410.4300. At subparts 19 and 32, residential developments and mixed residential and commercial projects a similar arithmetic operation is prescribed for determining if review is mandatory. Here is an example of how this method would work: suppose an ATV trail is proposed with a total length of 18 miles, 8 on new alignment and 10 as a designation of an existing snowmobile trail for ATV use. To determine if an EAW is mandatory divide 8 by 10 (quotient = 0.8), and 10 by 25 (quotient = 0.4), then add the quotients ($0.8 + 0.4 = 1.2$). Since the sum of 1.2 exceeds 1, review is mandatory for this project.

C. Paving 10 or more miles of an existing trail, unless exempted by part 4410.4600, subpart 27, items B or F.

Item C would require preparation of a mandatory EAW for situations where an existing unpaved trail is upgraded by paving it for a length of at least 10 miles. The rationale is that creating an impervious surface over that length of trail creates sufficient potential for runoff and erosion problems to warrant review. The clause about exemptions is included to clarify that the reconstruction of a paved trail or the construction or rehabilitation of a paved, non-motorized trail within the Twin Cities Metropolitan Regional Park System is exempt, rather than covered by this category if the length exceeds 10 miles.

D. Constructing an off-highway vehicle recreation area of 80 or more acres, or expanding an off-highway vehicle recreation area by 80 or more acres, on agricultural land or forested or other naturally-vegetated land, or constructing an off-highway vehicle recreation area of 640 or more acres, or expanding an off-highway vehicle recreation area by 640 or more acres, on land which either is not agricultural or naturally-vegetated or has been significantly disturbed by past human activities such as metallic or non-metallic mineral mining. If a recreation area for off-highway vehicles will be constructed partially on agricultural or naturally-vegetated land and partially on land that is not agricultural or naturally-vegetated or has been significantly disturbed by past human activities, an EAW must be prepared if the sum of the quotients obtained by dividing the number of acres of agricultural or naturally-vegetated land by 80 and the number of acres of land that is not agricultural or naturally-vegetated or has been significantly disturbed by past human activities by 640, equals or exceeds one.

Item D deals with recreation areas for off-highway vehicles. Such areas would include an intensive network of trails as well as special events areas designed especially for various types of off-highway vehicles. Because of the concentrated network of trails, it is appropriate to provide a separate mandatory EAW category for recreation areas, and to base the threshold on acreage rather than trail length. Two thresholds are proposed, one for “undisturbed,” naturally vegetated land or agricultural land and another for land that either is not naturally-vegetated or agricultural, or has been previously disturbed to a great extent by human activities. The most likely disturbed areas to be used for recreation areas are former mine sites, so the rule explicitly lists metallic and non-metallic mining as past human activities making land suitable for the “disturbed” classification. The only existing recreation area for OHVs was established by the DNR on a former mine site near Gilbert and another similar area near Virginia has been authorized but not yet built. The proposed 80 acre threshold for naturally-vegetated and agricultural areas corresponds with the threshold used in the land use conversion mandatory category at subpart 36, which deals with the permanent conversion of such lands to more intensive human uses. For non-naturally-vegetated lands, agricultural, or disturbed lands, a much higher threshold is appropriate and thus 640 acres was chosen; this provides a 1:8 ratio and sets the threshold equal

to the common land measure of one section. Since it is likely that recreation areas could be proposed on lands subject to both thresholds, the same arithmetic method for determining if review is mandatory as is proposed at items A and B is proposed to be used here as well.

4410.4600 Exemptions from environmental review

Subp. 27 [new]. **Recreational trails.** The projects listed in items A to F are exempt. For purposes of this subpart, “existing trail” means an established corridor in current legal use.

As was already explained under the subpart establishing mandatory EAW categories for recreational trails, a definition of “existing trail” is needed in the exemptions subpart to distinguish legitimate trails from unplanned, unauthorized pathways that may exist. The rationale for the definition given is explained in the section on the mandatory EAW categories.

A. Rerouting less than 1 continuous mile of a recreational trail if the reroute is necessary to avoid sensitive areas or to alleviate safety concerns. Multiple reroutes on the same trail must be treated as independent projects, except that where the cumulative length of reroutes exceeds 1 mile on any 5 mile segment those reroutes are not exempt.

Item A would provide an exemption for certain projects whose objective is to correct common routing problems on existing trails. Allowable routing problems would be limited to situations where an existing trail now comes into proximity to sensitive resources, such as water bodies or ecologically sensitive areas and situations where the trail location and configuration create issues of rider safety. However, it is not the intent of this exemption to encourage the rerouting of a trail to make it safer where safety could be adequately improved by other means, such as by posting warning signs or using other methods to slow travel to a speed where the existing trail can be safely negotiated. The EQB considered inserting the qualifier: “except where the safety concerns could be remedied by posting a speed limit instead of rerouting the trail,” but rejected that option when it learned from the DNR staff that it is not clear that units of government have the legal authority to post speed limits on recreational trails.

One mile is a reasonable threshold to propose for this exemption. As explained in the SONAR discussion of item A of the mandatory EAW categories, an exemption threshold of 1 mile would result in a 1:10 ratio between the exemption threshold and the 10 mile EAW threshold for new trails. Also, a 1 mile exemption threshold would be long enough to allow for design flexibility in making needed trail improvements.

The second sentence of item A is proposed to address questions sure to arise in applying the rules about how to handle multiple reroutings on a given trail. The principle this provision is attempting to put into practical terms is that isolated reroutings spaced “far enough” apart should be treated as independent projects, but if reroutings are crowded together there comes a point where they should no longer be treated as independent. The proposed criteria would be a

cumulative total of 1 mile of reroutings along any given 5 miles of trail. Exceeding 1 mile in any 5 would mean that more than 20% of the trail would be rerouted over that length, which is a reasonable threshold at which to consider the reroutings as cumulative.

B. Reconstructing, rehabilitating, or maintaining an existing trail involving no changes in designated use.

The activities covered by this proposed exemption would have a very minimal impact on the environment and warrant being exempted. There is already a similar exemption for highway projects at subpart 14, item C, covering “resurfacing, restoration, or rehabilitation that may involve minimal amounts of right-of-way.” The meaning of “existing trail” would conform to that explained under the section on the proposed mandatory EAW categories.

C. Constructing less than 1 continuous mile of trail for use by snowmobiles or cross-country skiers.

D. Constructing a trail for winter-only use across agricultural land or across frozen water.

E. Designating an existing trail for use by snowmobiles or cross-country skiers.

Items C, D & E all pertain to exemptions for trails restricted to snowmobiling and cross-country skiing and are therefore treated together. As noted previously, snowmobiles and cross-country skiers have a low potential for environmental impacts because of snow and ice cover on the ground and frozen soils. Therefore, it is reasonable to create some exemptions that cover only those two kinds of uses. Items C and D would exempt two situations of new trail construction for these two uses: construction on any type of land if under 1 mile in length and construction across agricultural land or frozen water of any length. The 1 mile exemption threshold would correspond in length to that for trail rerouting under item A and would likewise have the 1:10 ratio compared to the basic EAW threshold. On agricultural land and frozen water, no size limit is proposed on the exemption due to the minimal potential for environmental impacts under winter conditions. Also, it should be noted that item D is worded so as to cover other possible kinds of winter trails, such as winter-only ATV trails. Although there are no such designated trails at present, DNR staff indicate that such trails are possible in the future. Item E would exempt the designation of any existing trail for use by snowmobiles or cross-country skiers only. The meaning of “existing trail” would conform to that explained under the section on the proposed mandatory EAW categories.

F. Constructing or rehabilitating a non-motorized trail within the Twin Cities Metropolitan Regional Park System.

Item F would exempt non-motorized trails constructed within the Twin Cities Regional

Park system from environmental review on the basis that such trails (1) have a relatively low potential for environmental impacts and (2) already undergo an extensive and public planning process that incorporates review of environmental factors. This type of exemption was originally suggested by the Metropolitan Council parks staff and later supported by the Dakota County Office of Planning. The Metropolitan Council staff prepared and submitted with its comment letter a chart that shows the comparability of the contents of an EAW with the contents of the master plans for regional park units. The letter with the accompanying chart will be included as an EQB exhibit in the hearing record.

Note: existing rule part 4410.4600, subp. 14, item D already exempts trails constructed in road rights-of-way. That rule will not be affected by this proposed rulemaking. Several commenters suggested exempting trails constructed in conjunction with roadway projects, most commonly pedestrian or bicycle trails. While the EQB agrees with this idea, it believes that the cited existing exemption under highway exemptions adequately covers this concept.

VI. LISTS OF WITNESSES & EXHIBITS AT HEARINGS

A. Witnesses

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

1. Mr. Gregg Downing, EQB staff, will testify about the development and content of the rules.
2. The following Department of Natural Resources (DNR) staff will be available to provide information about recreational trails and trail use in Minnesota and to explain the DNR's trail development and review activities: Tom Balcom, Environmental Review Section, Tim Browning, Trails & Waterways Division, & Brian McCann, Trails & Waterways Division..

B. Exhibits

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

- July 2003 Request for Comments & comments received in response to the Request for Comments
- May 2004 Staff Proposed Options documents & comments received in response
- *State-funded Trails for Motorized Recreation*, Office of the Legislative Auditor, January 2003.
- Data from DNR on trail project characteristics for 1998-2002 (Excel spreadsheets)

VII. CONCLUSION

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

Dated: November 9, 2004

Robert A. Schroeder
Chair, Environmental Quality Board