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March 9, 2005

The Honorable Steve Mihalchick  
Administrative Law Judge  
Office of Administrative Hearings  
100 Washington Square, Suite 1700  
Minneapolis, MN 55401-2138

Re: Proposed amendments to rules governing the Environmental Review program,  
establishing mandatory EAW and Exemption categories for recreational trails;  
EQB staff responses to comments

Dear Judge Mihalchick:

The EQB staff offers the following comments, and responses to comments made at the public hearing and in writing as of earlier today. The EQB staff also expects to submit additional responses to comments by the end of the rebuttal period.

**EQB staff suggested modifications to proposed rules.** The EQB staff suggests the following modifications to the rules as proposed:

1. 4410.4300, subpart 37 (page 1, lines 22-24 of Revisor's draft): "For purposes of this subpart, 'existing trail' means an established corridor in current legal use that is not a designated State Forest Road."

Rationale: the EQB staff accepts the modification of the definition of "existing trail" proposed by the DNR in its comment letter from Mr. Moore dated March 9, 2005, on page 2.

2. 4410.4300 subp. 37, item A (page 1, line 26 of Revisor's draft):  
"A. Constructing a trail at least ten miles long on forested or other naturally vegetated land for a recreational use other than snowmobiling or cross-country skiing, unless exempted by part 4410.4600, subpart 14, item D, or constructing a trail at least 20 miles long on forested or other naturally vegetated land exclusively for snowmobiling or cross-country skiing."

Rationale: upon reading the transcript from the evening meeting in Hermantown, the EQB staff realized that a potential conflict existed in the proposed rules in the case where a pedestrian or bicycling trail was built in the right-of-way of the highway project. Existing rule 4410.4600, subpart 14, item D, exempts these activities but, without a specific citation to that exemption, proposed rule 4410.4300, subpart 37, item A, would make an EAW mandatory for some of those

projects (because according to 4410.4600, subpart 1, a mandatory category “trumps” an exemption). Here, the mandatory category should yield to the exemption. Adding the suggested language would make that happen.

3. 4410.4300, subpart 37, item C (page 2, line 11 of Revisor’s draft): Add a second sentence to C: “Paving an unpaved trail means to create a hard surface on the trail with a material impervious to water.”

Rationale: the comment letter from Mr. Don Youngdahl raised the question of how “paved” and “unpaved” were defined. This modification would clarify that the key feature of paving an unpaved trail is the creation of a hard, impervious surface. This is consistent with the description in the SONAR on page 16.

Mr. Youngdahl also advocated that, if “paving” were defined in the way here proposed, an additional category be added to cover adding an aggregate-type surface to a trail. The EQB staff finds that there is no documented environmental reason for doing so. Mr. Youngdahl’s request is based on statements of user preferences for “non-aggregate” surfaces.

4. 4410.4300, subpart 37, item D (page 2, lines 12-24 of Revisor’s draft): Divide the item D description of “off-highway vehicle recreation areas” into three separate categories, and amend the categories, as follows (deleted text is indicated by [ ] and new text by \_\_\_\_\_):

“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.

E. Constructing an off-highway vehicle recreation area of 640 or more acres or expanding an off-highway vehicle area by 640 or more acres, [on] if the land on which the construction or expansion is carried out [either] is not agricultural [or], is not forested or otherwise naturally vegetated, or has been significantly disturbed by past human activities such as [metallic or nonmetallic] mineral mining.

F. [If a] Some recreation areas for off-highway; vehicles [will] may be constructed partially on agricultural or forested or other naturally vegetated land and partially on land that is not agricultural, [or] is not forested or otherwise naturally vegetated, or has been significantly disturbed by past human activities. In that case, an EAW must be prepared if the sum of the [quotients] results obtained by dividing the number of acres of agricultural or forested or other naturally vegetated land by 80 and the number of acres of land that is not agricultural, [or] is not forested or otherwise naturally vegetated, or has been significantly disturbed by past human activities by 640, exceeds one.

Rationale: several commenters had a hard time understanding this category just for the sheer large number of words necessary to cover all components of the category. Staff suggests breaking up the one category into three separate categories. Staff intends to make no change in the substance of the category. The changes are only to enhance readability and facilitate

comprehension. To complete this change, the introduction to the subpart should be changed, at page 1, line 18, to read: “If a project listed in Items A to [D] E will . . . .”

5. 4410.4600, subpart 27 (page 3, line 6 of Revisor’s draft): “For purposes of this subpart, existing trail means an established corridor in current legal use that is not a designated State Forest Road.”

Rationale: the EQB staff accepts the modification of the definition of “existing trail” proposed by the DNR in its comment letter from Mr. Moore dated March 9, 2005, on page 2.

6. 4410.4600, subpart 27, item A (page 3, line 11 of Revisor’s draft): A. Rerouting less than one continuous mile of a recreational trail if the reroute is necessary to avoid sensitive resources or to alleviate safety concerns. Multiple reroutes on the same trail must be treated as independent projects, except that where the cumulative length of currently proposed reroutes exceeds one mile on any five-mile segment of trail, as measured along the rerouted trail, those reroutes are not exempt.

Rationale: several commenters asked whether the 5-mile segment of trail referred to here would be measured along the existing or the rerouted trail. During the hearings, the staff indicated a preference for measuring along the rerouted trail. This language would clarify the rule in that way.

The addition of “currently proposed” as a modifier of “reroutes” would clarify that past reroutes or possible future reroutes would NOT be counted as part of the cumulative total of reroutes in determining if the “1-in-5 mile” exception to the exemption applied. While this question did not come up explicitly in the hearings, the EQB staff believes that it is a question that will come up in practice and should be clarified by such a modification.

**EQB staff responses to other comments.** The following are responses to selected comments received. No modifications to the proposed rules are suggested in these responses. The EQB staff will likely respond to other comments in its rebuttal period letter.

**Comment:** the EQB is “singling out” motorized uses and unfairly focusing the proposed rules more on motorized uses than on non-motorized uses. The Legislature intended that all uses be treated equally. Recreation areas other than for off-highway vehicles also ought to be included in the category created by item D of 4410.4300, subpart 37.

**EQB staff response:** the EQB staff believes that it was the intent of the Legislature that no type of trail use be arbitrarily excluded from consideration in development of these rules. We do not agree that the Legislature meant for exactly the same result for every type of trail use. If the Legislature had intended a single threshold for all trails, that threshold could have been established through legislation. We believe the Legislature directed the EQB to adopt administrative rules as a sign that the Legislature recognized that the rulemaking process under the Administrative Procedures Act was necessary to craft appropriate distinctions among categories for various types of trails.

The EQB has considered all types of trail uses in developing the proposed rules and, in fact, has proposed rules that do treat all non-winter uses the same with respect to the need for an EAW for new trail construction (item A of subpart 37). Where proposed rules apply only to some types of trails, we believe there is sufficient evidence in the record of important differences in potential for causing environmental impacts among trail types. Moreover, the EQB's proposed categories that do pertain specifically to summertime motorized uses are far more moderate than advocated by most of the commenters who expressed concerns about motorized uses.

There is already in the existing rules a category covering conversion of land use on 80 or more acres of agricultural, forested, native prairie or other naturally-vegetated land, at 4410.4300, subpart 36, Land Use Conversions. This category would apply, with the same 80-acre threshold as proposed for OHVRAs, to other types of recreational uses as well as to OHVRAs. By creating the category specifically for OHVRAs as proposed, the EQB can set a higher threshold (640 acres) for lands which have already been significantly disturbed in the past. In effect, creating the specific category gives a break to OHVs.

**Comment:** the EQB should have based its proposed mandatory EAW thresholds on factors other than the type of use to be made of the trail, such as the trail surface, width, length, and methods of construction.

**EQB staff response:** the proposed rules do base the thresholds in part upon the physical characteristics of the trail and its surface. However, the EQB staff is convinced that the use of a trail is an important factor in the potential for certain types of environmental effects. Therefore, it is appropriate that the rule reflect a blend of use and physical characteristics in the thresholds.

Most of the proposed categories incorporate a length factor. One of the three EAW categories proposed for trails is based on the surface characteristics (paving) of the trail. Many of the proposed categories distinguish winter uses from non-winter uses. While on first impression this distinction may appear to be made on the basis of types of uses, in actuality the distinction is largely based on the differences in the nature of the trail surface between winter and non-winter conditions – snowmobiling and cross-country skiing are treated differently because by their nature they are done on snow-covered trails over frozen soil.

**Comment:** the proposed rules should include EAW categories for trail projects that involve a grade-separated crossing, have potential to adversely affect adjacent land use, or significantly change access, surface, slope, or sight lines. The proposed exemptions should be modified accordingly to eliminate any exemptions for projects involving these features or effects.

**EQB staff response:** while the EQB staff acknowledges that the concerns raised in these comments are legitimate issues that should be dealt with in trail design, we do not believe that the issues raised constitute a valid basis for requiring review under the Environmental Review program because they are not environmental issues under the EQB's definition of "environment" at 4410.0200, subpart 23..

**Comment:** the proposed rules were developed more to promote administrative convenience and to expedite trail planning than to protect the environment. All motorized trails should have

EAWs prepared for them. The EQB staff ignored the strong preference for such review expressed by the majority of commenters in the earlier informal comment periods.

**EQB staff response:** the EQB staff takes it as a given that environmental review plays an important role in environmental protection in Minnesota. However, as described in the SONAR, environmental review mandatory review categories seldom cover all projects of a given type. For almost all types of projects for which we have categories, there are some small projects which are exempted, a group of much larger projects that require mandatory EAWs, and often (but not always) a group of even larger projects for which an EIS is mandatory. For almost all types of projects covered by categories, the majority of projects are neither exempt nor require mandatory review, but are subject to discretionary review on a case-by-case basis. This same general analysis was applied to recreational trail projects. The EQB staff does not believe that a sufficient case has been made that ALL motorized trails require preparation of an EAW. The fact that many persons opposed to motorized recreational vehicle use believe that they all should be reviewed does not establish a factual need for that level of review.

**Comment:** the DNR witnesses listed in the SONAR and appearing at the hearings are more “promoters” of trail construction than experts on environmental impacts from trails.

**EQB staff response:** the DNR witnesses attended the hearings in order to help answer questions about DNR trail planning and review and to provide historical background information about trails in Minnesota. They did not appear as experts on environmental impacts.

**Comment:** more trail projects need review than would be required by the proposed rules because the Department of Natural Resources has a poor track record in establishing environmentally-sound trails and avoiding user conflicts. The use of funds from dedicated accounts creates a sense of obligation among DNR trail planners and creates institutionalized pressures to get trails built and to overlook significant environmental effects.

**EQB staff response:** while an integral feature of environmental review is an opportunity for the public to review the environmental effects of projects, environmental review is not intended as an oversight mechanism over agency decision-making. EQB staff believes that at root these comments are about the issue of whether or not the trail planning processes of the DNR and other governmental units incorporate sufficient public participation and accountability. That issue cannot be resolved through the rules for environmental review.

Finally, there have been many comments to which we believe no response from the EQB staff is appropriate or necessary. These include comments about: whether the Legislature should have directed the EQB to adopt such rules; the fairness of funding motorized trail EAWs out of the dedicated funds for those types of trails; the past track record of the DNR and other units of government in planning and establishing trails; and issues of enforcement of laws governing motorized trail use, especially claims that motorized users frequently leave the established trails and cause environmental damage. We do not believe that these issues can be resolved by conducting or not conducting environmental review, and hence do not bear on whether the proposed rules should be adopted or modified. We do not deny that some valid and important

issues are raised in these comments, only that this rulemaking is not a forum where they can be addressed.

Thank you for your consideration of our responses.

Sincerely,

A handwritten signature in black ink that reads "Michael Sullivan". The signature is written in a cursive style with a prominent initial "M" and a long, sweeping underline.

Michael Sullivan  
Executive Director