

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed
Amendments to Rules
Relating to Environmental
Review, Minn. Rules
Parts 4410.0200-4410.6500.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis at 9:30 a.m. on October 9, 1996, at the Centennial Office Building in St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1995 Supp.), to hear public comment, to determine whether the Minnesota Environmental Quality Board (EQB) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not any modifications to the rules proposed by the EQB after initial publication are substantially different.

The EQB's hearing panel consisted of Gregg Downing, Environmental Quality Board and Alan Mitchell, Office of the Attorney General. Approximately 26 persons attended the hearing, 13 persons signed the hearing register and 3 persons spoke at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to October 29, 1996. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on November 5, 1996, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The EQB submitted written comments responding to matters discussed in written comments and at the hearing.

NOTICE

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

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief

Administrative Law Judge approves the adverse findings of this Report, he will advise the EQB of actions which will correct the defects and the EQB may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected.

If the EQB elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the EQB may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the EQB makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the EQB files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On, August 9, 1996, the Environmental Quality Board requested the scheduling of a hearing and filed the following documents with the Chief Administrative Law Judge:

- a. A copy of the proposed rules certified by the Revisor of Statutes.
- b. The Notice of Hearing proposed to be issued.
- c. The Statement of Need and Reasonableness.

2. On, September 3, 1996, a Notice of Hearing and a copy of the proposed rules were published at 21 S. R. 310.

3. On August 21, 1996, the Environmental Quality Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Environmental Quality Board for the purpose of receiving such notice.

4. On the day of the hearing, the Environmental Quality Board placed the following additional documents in the record:

- a. The Request for Comments published in the State Register.

- b. The proposed rules, approved by the Revisor of Statutes.
 - c. The Statement of Need and Reasonableness.
 - d. The Certificate of Mailing and a copy of the letter transmitting the Statement of Need and Reasonableness to the Legislative Coordinating Commission.
 - e. The Notice of Hearing as mailed and published.
 - f. The Agency's certificate of mailing the Notice of Hearing and certificate of mailing list.
 - g. The Certificate of Additional Notice.
 - h. The two written comments received by the Agency during the publication of the proposed rules in the State Register.
 - i. The January 1991 Solicitation of Outside Opinions as published in the State Register.
 - j. The August 1991 report: Recommendations for Revisions to the Minnesota Environmental Review Program.
 - k. The March 1993 report: Concepts for Revision of the Environmental Review Program.
 - l. The April 10, 1995 Notice of Proposed Amendment of Rules Without a Public Hearing as published at 19 S. R. 2067.
 - m. Notice of public forum held on July 18, 1995 and request for comments as published in the State Register on July 3, 1995 at 20 S. R. 6.
 - n. "Guide to the Rules of the Minnesota Environmental Review Program" (1989 edition), guidance issued by the EQB staff.
5. The documents were available for inspection at the Office of Administrative Hearings from the date of the hearing.
6. The period for submission of written comment and statements remained open through October 29, 1996, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on November 5, 1996, the fifth business day following the close of the comment period. On November 5, 1996, the Chief Administrative Law Judge approved an extension of the deadline for completion of this report through November 10, 1996.

Nature of the Proposed Rules

7. This rulemaking procedure involves amendments to the Environmental Quality Board's rules governing the Minnesota environmental review program which has been in effect since 1974. The function of the environmental review program is to avoid and minimize damage to Minnesota's environmental resources caused by public and private development. On an on-going basis the board monitors the effectiveness of the process and keeps track of any problems associated with the rules. It is through this review process that the current rules are being amended.

Statutory Authority

8. The EQB stated that it has rulemaking authority to adopt the proposed amendments to the rules under Minn. Stat. § 116D.04 and 116D.045. Minn. Stat. § 116D.04, subd. 5a, provides general rulemaking authority to adopt rules in conformity with chapter 116D. The Administrative Law Judge finds that the EQB has the general and specific authority to adopt the proposed rule amendments.

Rulemaking Legal Standards

9. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989). The EQB prepared a Statement of Need and Reasonableness ("SONAR") in support of the amendments of the rule. At the hearing, the EQB primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the amendments. The SONAR was supplemented by the comments made by the EQB at the public hearing and in its written post-hearing comments.

The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects

rationality with the agency's choice of action to be taken." Manufactured Housing Institute, supra, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943).

In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.15, subd. 3 (Supp. 1995). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (Supp. 1995).

Impact on Farming Operations

10. Minn. Stat. § 14.111 (Supp. 1995), imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

Analysis of Proposed Rules

General

11. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the EQB has demonstrated the need for and reasonableness of the provisions of the rules that are not discussed in this Report by an affirmative presentation of facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which is originally proposed. Minn. Stat. § 14.05, subd. 3. The standards to determine if the new language is substantially different from that which was originally proposed by the

EQB are found in Minn. Stat. § 14.05. subd. 2. Any language proposed by the EQB which differs from the rules as published in the State Register and is not discussed in this Report is found not to constitute a substantially different rule.

Rule-by-Rule Discussion

4410.0200, subp. 51. Mitigation.

12. As published in the State Register, the EQB proposed the following amendment to the definition of mitigation:

“Mitigation” means:

F. reducing or avoiding impacts by development and implementation of pollution prevention plans.

In its final comments, the EQB proposed the following modification to the published amendment:

Mitigation. Mitigation means:

F. Reducing or avoiding impacts by ~~development and~~ implementation of pollution prevention ~~plans~~ measures.

In its final and responsive comments, the Minnesota Center for Environmental Advocacy (MCEA) agreed with the final modifications made by the EQB but asked that the definition be clarified further by the insertion of the word “enforceable” before pollution prevention measures. MCEA asserted that mitigation is achieved only if implementation of pollution prevention measures is made enforceable.

The EQB recommended that the word “development” be deleted and that the word “plans” be replaced with the word “measures” because a pollution prevention measure can be instituted without first developing a specific plan. However, the EQB decided not to insert the word “enforceable” before “pollution prevention” because, while it understood the concern of MCEA, that mitigation measures must actually be implemented, not promised, in order to protect the environment, it would be out of place to add the modifier “enforceable” to item F when it does not appear in the other items of this subpart. The forms of mitigation specified in the other items must also be actually put into effect in order to protect the environment.

The EQB further asserted that the use of the word “implementation” already requires that the pollution prevention measures be put into place to be considered as mitigation. In addition, there may be some voluntary pollution prevention measures implemented to reduce impacts that go beyond what is legally enforceable, and such measures should also be considered as mitigation.

The Administrative Law Judge finds that the decision of the EQB not to add the word “enforceable” in the definition is reasonable. As the EQB has stated, there is not a modifier in the other items of the subpart and it would be out of place to add a modifier in item F when it does not appear in the remaining items of the subpart. The Administrative Law Judge finds

that the amendment to the published rule is needed and reasonable and is not a substantially different rule than was published.

4410.0400, subp. 4. Appeal of final decisions.

13. Under part 4410.0400, subpart 4, the EQB has proposed that an appeal of a decision by a Responsible Government Unit (RGU) must be made within 30 days of the RGU's decision, instead of within 30 days after publication of the RGU's decision in the EQB Monitor, as the current rule provides. The EQB has not recommended any changes to its rule as published in the State Register.

The EQB states in its SONAR, that the amendment is needed because of the discrepancy between the timeframes for appeal specified in the rules and Minn. Stat. 116D.04, subd. 10. Minn. Stat. § 116D.04, subd. 10 provides, in part: "...Judicial review under this section shall be initiated within 30 days after the governmental unit makes the decision,..." Both the rules and statute allow 30 days for appeal, but the rules count the time from the date of the EQB Monitor notice of the decision while the statute counts the time from the date of the RGU decision. The EQB asserts that the amendment will end the discrepancy by altering the rule timeframe to be the same as that in the statutes. The EQB believes that the rule should be changed to be consistent with the statute so that no persons are misled by the different language in the rule. The EQB also points out that the RGU is required to give written notice of its decisions to petitioners and commentators within five working days.

In further support of its position, the agency states in its final comments that it is well-settled that when an administrative rule conflicts with a statute, the rule must give way. Special School District No. 1 v. Dunham, 498 N.W.2d 441, 445 (Minn. 1993) (It is elemental that when an administrative rule conflicts with the plain meaning of a statute, the statute controls.) Furthermore, an administrative agency may not by rule change a statute of limitation time period. Dumont v. Commissioner of Taxation, 154 N.W. 2d 196, 200 (Minn. 1967) (Statutes of limitation are within the legislative domain and may not be altered by the courts or administrative agencies.)

Based on the above case law and the advice of their agency counsel, the EQB believes that it has no authority to change the statute of limitations and that providing a different timeframe in the rule merely leads to confusion and possibly to the loss of an appeal that is filed more than thirty days after the decision. Particularly since publication in the EQB Monitor can occur weeks, even months, after the RGU decision, the existing rule would, in many cases purport to extend the statute of limitations for a rather long time.

There were several objections made at the hearing and in the final and responsive comments to the proposed amendments. All of the commentators in opposition to the rule stated generally that the rule amendment would harm public participation in the process and that getting a response from the RGU about a decision was an exercise in futility because the RGU was not timely in notifying the affected parties within the five days required in the rule. Therefore, this would decrease the amount of appeal time available for the parties.

In its final comments, MCEA specifically asserts that the amendment is beyond the EQB's legal authority and is not supported by an adequate identification of need or reasonableness. In support of its position, the MCEA cites the March 29, 1982, rule decision of the hearing examiner. In the 1982 rule proceeding the EQB proposed the identical rule amendment that is being proposed in this proceeding. In the 1982 report, the hearing examiner concluded that:

...The need for this amendment arises because the opportunity to appeal an RGU's decision, 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. (p. 13.)

The MCEA maintains that the decision of the 1982 hearing examiner should stand because the alternative EQB proposes, which is the same alternative overruled in 1982, fails to provide constitutional due process of law. MCEA also asserts that the EQB has the implied power to formulate the necessary classifications and definitions, State v. Hopf, 323 N.W.2d 746 (1982), and that for almost 15 years the EQB has classified and defined responsible government unit decision, for purposes of judicial review, as "made" at the time they are published in the EQB Monitor.

14. MCEA argues also that the rule amendment is not supported by an adequate identification of need or reasonableness and would constitute an impermissible obstacle to citizen participation in the environmental review process. Currently, RGUs are required to report their environmental review decision to the EQB within five working days, and EQB is required to publish notice of the decision in the EQB Monitor, a bimonthly publication. As a result, no significant "lawful" delay results from the existing rule.

MCEA asserts that the real problem, or the real "need," that should be addressed is for EQB to enforce its rule requiring RGUs to report their decisions to EQB within 5 working days. In many cases, RGUs do not report their decisions until months, sometimes years, from the time they are adopted. Enforcement of the five-day reporting rule will eliminate any concern that project proposers may have with regard to potential delay of final clearance for project start-up.

The Administrative Law Judge agrees with the EQB that the plain meaning of the statute, which provides that judicial review must be taken within 30 day after the governmental unit makes the decision, conflicts with the current rule language, which provides that the action be initiated within 30 days after publication of the RGU's decision in the EQB Monitor. The Administrative Law Judge finds that the statutory language should prevail. The legislature has made a determination that judicial review under this section shall be initiated within 30 days after the governmental unit makes the decision.

Even though the current rule provision was approved in the 1982 rule proceeding, the statutory language still prevails. As the agency points out, there is no discussion of the statutory language in relation to the rule language. Minn. Stat. § 116D.04, subd. 10, was

added by the legislature in 1980 and it is doubtful whether the agency had even applied the provision at the time of the 1982 rule hearing.

However, the Administrative Law Judge also recognizes the public's frustration with the failure of the RGU to follow the five working day notification period that is established in the rules. A five working day notification is established under Minn. Rule 4410.1100, subp. 8, (notification by the RGU of the need for an EAW in the petition process), Minn. Rule 4410.1700, subp. 5, (notification by the RGU on the need for an EIS) and 4410.2800, subp. 6 (notification by the RGU on the adequacy of an EIS.) There was no rule cite for notification by an RGU on the need for an EAW other than in the petition process under Minn. Rule, 4100.1000. If a five working day notification period does not exist in the current rules, then the Administrative Law Judge recommends that such a notification period be established in this rule proceeding. With the time period for judicial review being within 30 days from the date of the RGU decision, it is imperative that all affected parties be given the proper notification by the RGU.

Furthermore, because the notification by the RGU is so important to this process, the Administrative Law Judge recommends that the EQB sufficiently address all complaints regarding the failure of RGU to follow the reporting deadlines and enforce the five day reporting rule provisions to the extent allowed.

The Administrative Law Judge finds that the modification made to this rule part is needed and reasonable. Furthermore, any modification by the EQB to add an additional five day notification period by the RGU would not make the rule substantially different than the rule as published. It would not be substantially different because the amendment in this part is tied closely to the fact that sufficient notice will be given to the affected parties through the notification by the RGU of its decision in the three areas addressed in this rule part.

4410.0500, subp. 3, item C. RGU Selection Procedures.

15. The EQB is proposing to add a paragraph to item C which refines the RGU selection criteria for petitions. The proposed rule provides that the EQB chair or designee shall not designate as the RGU any governmental unit which has made its final decisions to grant all permits or approvals required to construct a project.

Commentators, at the hearing and in the post hearing comments, were generally supportive of this amendment, but felt that the amendment did not go far enough. In its final comments, MCEA proposed modifying the agency's proposal to read:

C....the EQB chair or designee shall not designate as the RGU any governmental unit which is a proposer or has already made its final decisions to grant preliminary or final decisions on some or all permits or approvals required to construct the project.

MCEA asserts that the above modification would better address the conflict of interest issue. First, MCEA suggests that project proposers should be within the group that is prohibited from designation as the RGU in the case of a citizen petition. Second, MCEA

argues that it is unreasonable to exclude only government units that have granted all required permits or approvals. Typically, projects reviewed by local government units are subject to a number of preliminary approvals before the mayor or other responsible public official signs the resolution granting final approval. Therefore, the opponents argue, EQB's proposed amendment accomplishes little or nothing and does not reasonably address the need of diminishing the inherent conflict of interest arising when the project proposer and the RGU are the same.

The National Audubon Society (NAS), at the hearing and in its final comments, also supports the general direction of the EQB in attempting to take some of the inherent conflicts out of the RGU designation process. However, like MCEA, the NAS also recommended language at the hearing which would go farther in the removal of the conflict of interest, arguing that notwithstanding language elsewhere in these rules, no local government unit shall be designated an RGU if they are also the proposer of the project in question. (T., p. 50). The NAS argued that the current system is not a good public process, does not provide credibility, and puts the agency in a position to be evaluating the impact of something that they initiated.

The NAS not only wanted the inherent conflict removed from the citizen petition process but also in other rule parts where it appears. The specific rule provision addressed at the hearing and in the final comments was in the proposed new mandatory EAW category, subpart 36, regarding land use conversions. The NAS recommended that the conflict of interest should also be removed from this part where the project proposer is also the RGU. The NAS argued that the conflict of interest should not be allowed to continue in this part just because it is a practice in other parts of the rule.

In its final comments, the EQB states that it recognizes the concerns raised by the commentators and states that such issues have been voiced frequently by the parties over the past several years. However, the EQB explains that even though it has heard the concerns it has elected not to attempt such a major and controversial change at this time. The EQB states that the entire system of selecting RGU's, whether in the mandatory categories or in response to a citizen petition, is based on identifying the governmental body with the greatest responsibility over the project. That body often is the governmental unit proposing the project.

Furthermore, the agency rejects the proposal of MCEA that no entity be designated an RGU if it has granted one, but not all, of the permits required for a project. The staff states that there will be too many instances in which the intended RGU will be disqualified if one preliminary decision is grounds for disqualification. Cities and states, the PCA and DNR, are often the selected RGU, and these units often have more than one decision to make before giving final authorization to a project. The staff does not believe that the first decision along the route should necessarily disqualify the most appropriate RGU when there are still other decisions to be made.

The Administrative Law Judge finds that the proposed rule, as published originally, is needed and reasonable. The EQB's policy decision not to adopt the additional amendments proposed by MCEA and NAS is reasonable and has a rational basis in that the additional

amendments would represent a fundamental change in how the entire environmental review system is conducted under Chapter 116D.

4410.1200, item G. EAW content.

4410.1300, EAW form.

16. The amendments in these two rule provisions were generally supported by the commentators. However, the MCEA suggested that with respect to part 4410.1200, item G, the following clarifying phrase should be added starting on page 5, line 33, after the words “identification of”: “the number of persons and geographic area that these-~~who~~ will benefit from the project.” The EQB responds that it will not adopt the suggested language because a number will likely be difficult to derive and the geographic area can often be too encompassing to be meaningful. The EQB believes that simply requiring the identification of those who will benefit will provide information on both numbers and geography.

Allen Frechette, Environmental Health Manager for Scott County, in his pre-hearing comments, commented on part 4410.1200 and 4410.1300. Mr. Frechette asserts that the EAW content and form leaves too much discretion for the EQB to develop and is lacking in uniform standards and guidelines that can be applied by the RGU. Mr. Frechette suggests that the content and form of an EAW be included in the rules and be open for public comment. The SRF Consulting Group, Inc., had similar concerns regarding the lack of guidance in the rules for completion of an EAW form.

EQB responds in its final comments that the issue of guidance on the content and the completion of the EAW form applies more to the guidance booklet entitled “EAW Guidelines” (1990) than to the rules themselves. EQB states that the concise and general nature of rules precludes including the type of guidance needed for preparing the wide variety of EAWs possible in the rules themselves. The agency states that such comments may be helpful to the EQB staff when the guidance is updated. EQB also argues that the comment regarding the method of developing the EAW form is outside the scope of this rulemaking.

The Administrative Law Judge agrees that the scope of the comment regarding the method of developing the form is outside this rulemaking. The agency does not have to justify provisions that have already been adopted and which are not being amended, Minn. Rule 1400.2070, subp. 1. However, the Administrative Law Judge disagrees with the agency that the concise and general nature of rules precludes including the type of guidance needed for preparing the wide variety of EAWs possible in the rules themselves. Rules should provide as much guidance and criteria as possible to guide the public in the implementation of a program. Granted, not every situation and detail can be accounted for in determining an EAW. However, certainly more information can be provided than just saying that the EQB chair shall develop a form. Standards and criteria for the form and content should and can be addressed in the form section of the rule in more detail. Perhaps some of the information contained in the EAW Guidelines would be more appropriate in the rules. The Administrative Law Judge recommends that future rulemakings consider providing more guidance for this section in the rule itself.

The Administrative Law Judge finds that the EQB's proposed amendments regarding additional detail in part 1400.1200 and the use of a federal form in part 1400.1300 are found to be needed and reasonable.

4410.1400. Preparation of an EAW.

17. In the State Register, the EQB proposed the following amendment:

...When an EAW is to be prepared, ~~except pursuant to part 4410.1100, subpart 6,~~ the proposer shall submit the completed data portions of the EAW to the RGU ~~for its consideration and approval for distribution.~~ The RGU shall determine whether the proposer's submittal is complete and, if complete, shall have 30 days to add supplementary material, if necessary, and to approve the EAW for distribution. The RGU shall be responsible for the completeness and accuracy of all information.

In its final comments, the EQB recommends the following modification to the published rule on page 7, lines 8-10:

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

In its modification the EQB states that it added a specific procedure for when the RGU has determined the data submittal is complete and for when the 30 day period to add supplementary material starts.

Commentators were supportive of some of the above modifications but wanted to see additional timelines and procedures added to the process. Specifically, the Minnesota Chapter of the National Association of Industrial & Office Properties (NAIOP) in its final comments made three specific recommendations: 1) that a 10 day time period be added for a completeness determination by the RGU, and a five-day time period be added for informing the proposer of the incompleteness determination, 2) when the RGU finds a submission incomplete, the RGU provide the proposer a written description of the deficiencies which must be corrected to make the submittal complete. and 3) that the EQB establish a procedure for the resolution of disputes by the EQB when the RGU and proposer disagree about completeness. Each will be discussed separately below.

The Minnesota Chamber of Commerce, in its final comments, agreed with the NAIOP that specific time periods should be added and that the proposer should be notified as to what specific data is lacking. The Minnesota Chapter, American Planning Association recommended that if time were set for a completeness determination it should be longer than

10 days and cautioned against the requirement of notification to the proposer of specific details regarding incompleteness.

Time periods.

18. NAIOP asserts that specified time periods are necessary to carry out the purpose of the EAW which is designed to “rapidly” assess the environmental effects which may be associated with a proposed project. NAIOP explains that private developers and businesses seeking to expand their facility face the uncertainties of markets, financing, governmental approvals, and construction seasons. They must translate these uncertainties into project schedules and unforeseen delay can kill a project. NAIOP submits that specific time frames for each RGU procedural step in the EAW process best assure rapidity and permit effective planning by private developers and businesses.

NAIOP also points out that in other parts of the rules, there are specific time periods and deadlines on RGUs, such as in this particular rule where the RGU is given 30 days to add supplementary materials. NAIOP acknowledges the necessity to give RGUs a reasonable time period for the completeness determination, but asserts that the insertion of the word “promptly” is no time period at all. Also, the time period is provided for informing a proposer that a submittal is incomplete. In contrast, if the proposal is complete, the RGU has a fixed time period, five days, to inform the proper parties of the completeness.

In its responsive comments, the Minnesota Chamber of Commerce agreed with the NAIOP’s assessment that the word “promptly” does not solve the uncertainty of the current rule and just provides another vague term. Since other parts of the rules contain fixed time periods, it is not unreasonable to set a fixed time for the statement of completeness.

In its final comments, the Minnesota Chapter, American Planning Association stated that if any specific time is to be considered, that 10 business days should be the minimum, five days is far too short a time, given the complexity of many projects. For extremely complex projects, such as facilities requiring extensive air emission modeling, even 10 days may be too short.

In response to the suggestion that there be a specific time period for the completeness determination made by the RGU, the EQB states that it agrees that the RGU should be directed to review the submittal for completeness as expeditiously as possible, but hesitates to specify a specific period of time because the task of EAW submittal review and the procedures and resources of the RGUs vary greatly from one project to the next. The EQB agreed to add the term “promptly” to at least specify the intent that the RGU must proceed with review in good faith and without groundless delays.

Notification of deficiencies.

19. The Minnesota Chapter, American Planning Association (Association) cautioned against any requirement that an RGU notify the project proposer in detail

regarding what specific data is lacking. The Association stated that such a requirement is part of an extremely flawed piece of legislation regarding applications reviewed under zoning ordinances. It argues that the notification requirement simply adds work rather than making the process more user-friendly. This additional work causes additional delay which, ultimately, hurts the project proposer as well as the community at large. Such a requirement also intensifies an adversarial feeling between project proposer and RGU, which is contrary to current trends in cooperative public/private endeavors.

The Minnesota Chamber of Commerce disagreed with the statements by the Association that notifying the proposer of what specific data is lacking would “simply add work rather than making the process more user-friendly.” For the process to be “user-friendly” in the “cooperative public/private endeavor” as the Association desires, the RGU must be required to detail what information is necessary to complete the EAW. Without such specificity, the proposal can be held captive for an indeterminate period of time trying to “guess” what the RGU requires.

The EQB did not provide a response to this recommendation of providing a written statement of the deficiencies to the proposer. The Administrative Law Judge agrees with the decision by the agency not to require a written statement and finds the rule as proposed to be needed and reasonable.

Dispute resolution.

20. With respect to the procedure for the resolution of disputes regarding completeness, in its final comments, the EQB states such a procedure would be too major a change without considerable public discussion, which to date has not occurred on this topic. The EQB also explains that under the decentralized process set up in 1982, the EQB has very limited roles except when it itself is the RGU. The EQB did not see a need for the EQB to be involved as a decision maker in content disputes. The Administrative Law Judge agrees with the EQB that to institute a resolution procedure would constitute a substantial change in the rule and it is reasonable not to include such a procedure in the rules at this time.

The Administrative Law Judge has reviewed the above comments and finds that the rule as modified by the EQB in its final comments is needed and reasonable and does not make the rule substantially different than as published. However, the administrative judge recommends that the agency consider adding the time periods as recommended by the parties.

A specific period of review for a completeness determination could be a reasonable time period that would take into account the various projects and resources of the RGU. The agency should be able to establish some agreeable time frame, that would be reasonable and flexible enough to balance the needs of the RGU to have enough time for the review and the need of the proposer to have an expected time frame upon which the review will be completed. The agency should also consider the insertion of the five day return of incomplete documents. The time period matches the notification period if the submittal is

complete and is reasonable since the determination of incompleteness has already been made.

Likewise, the EQB should also consider adding the recommendations for providing a written explanation by the RGU of what is necessary for the completion of the EAW. It is not unreasonable that when the submission is returned to the proposer, that there be some type of written explanation as to what is necessary to complete the submission. By putting in writing what is needed to complete the submission, there will be written documentation as to what is needed between the parties which may lessen the future need for a formal dispute resolution process to decide whether the submission is complete. If the RGU has made a thorough analysis of why the EAW is incomplete, then a written document explaining what is needed to complete the EAW should not take that much additional time.

The Administrative Law Judge finds that the amendment to Minn. Rule 4410.1400, as finally proposed by the EQB, is needed and reasonable, even if the EQB does not adopt the recommendations proposed by the commentators. However, if the agency proposes changes to this rule provision after this Report is issued, the agency must submit the proposed changes to the Chief Administrative Law Judge for a determination as to whether the modification makes the rule substantially different than that as originally published.

4410.1700, subp. 7, item D. Decision on need for EIS.

21. The EQB proposed the following amendment as published in the State Register:

D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, or of EIS's EISs previously prepared on similar projects or generic EISs previously prepared pursuant to part 4410.3800.

In its final comments, the EQB recommended modifying item D as follows:

D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, ~~or of including other EISs previously prepared on similar projects or generic EISs previously prepared pursuant to part 4410.3800.~~

At the hearing and in their final comments, The National Audubon Society and MCEA strongly objected to the published amendment to add the reference to "generic EISs" to item D. The parties argued that an EIS and a generic EIS were two separate forms of environmental review and are not interchangeable. They argue that the addition of the phrase "generic EISs" only served to confuse the distinction between the two types of impact statements.

The EQB agreed to remove the reference to “generic EISs” and proposed to modify the rule as stated above. The EQB’s modification is broader than its initial proposed language because it includes the use of “other EISs” not only EISs previously prepared on similar projects. Therefore, it would seem not to preclude the use of generic EISs, but the rule, as modified does not put significant emphasis on the generic EISs with the specific reference. This is reasonable because, as NAS points out, under 4410.3800, subpart 8, information contained in the generic EIS can be used in the project-specific environmental review, but the two are not interchangeable. MCEA stated in its responsive comments that it agreed with the changes proposed by the EQB.

22. One other commentator, Sherilyn Young, asked that the new term “available” be defined more precisely. Ms. Young cited one example in which there were studies in European countries which are not published in English and that they could be ruled unavailable when such information may be helpful in the decision making process. The EQB responds that this word was chosen because it could not write a rule that would cover all the situations of whether a study is available.

In its SONAR (p. 8), the EQB states that the reason why the term “available” was added was to address a frequently asked question as to whether “other environmental studies” included only studies already completed (or completed results of studies underway but not totally yet completed) or included studies yet to be undertaken. The EQB explains that the 1982 SONAR (p. 63) is clear that it is existing studies that were contemplated in this rule. If a study is still underway, or yet to be undertaken it is unavailable.

The Administrative Law Judge finds that the rule as finally proposed is needed and reasonable and does not make the rule substantially different than published. However, the Administrative Law Judge agrees, to some extent, that the use of the word “available” could be problematic and suggests that the term could be defined or clarified. For example, the EQB could add a sentence to this item that provides: “For the purposes of this subpart, available environmental studies means only those studies which are finished and whose conclusions have been published or otherwise finalized. Studies which are partially finished or not yet undertaken will not be considered.” Language such as this would specifically address the problem of incomplete studies as identified in the SONAR. It is found that if the agency adopted the above language, the provision, as modified, would be needed and reasonable and would not constitute a substantially different rule as proposed.

4410.2100, subp. 1. EIS Scoping Process. Purpose.

23. In the State Register, the EQB proposed that subpart 1 be amended as follows:

The EQB staff recommends subpart 1 be amended as follows:

Subpart 1. Purpose. The scoping process shall be used before the preparation of the EIS to reduce the scope and bulk of the EIS, identify only those significant issues relevant to the proposed project,...

In its responsive comments, the EQB recommended that subpart 1 be modified as follows:

Subpart 1. Purpose. The scoping process shall be used before the preparation of the EIS to reduce the scope and bulk of the EIS, identify only those potentially significant issues relevant to the proposed project,...

The EQB states in its responsive comments that it agrees with the comment from the MCEA that the modifier “potentially” should be inserted before “significant” for the reason that at the time of the scoping process (before the analysis is done) it is not possible to know if the various impacts are truly significant or only potentially significant. Thus, at this stage, the stage of planning the EIS, one must consider all the potentially significant impacts in order to address the actually significant impacts.

In her final comments, Sherilyn Young asked that the term “significant” be defined more precisely. The EQB responded that the term appears in statute and throughout the rules a modifier of “impacts” and “effects” and represents the level at which impacts require EIS-level analysis and mitigation. There have been attempts for over 20 years by the EQB to develop a definition of this word, but all have ended in frustration.

The Administrative Law Judge agrees with the EQB’s rationale for including the modifier “potentially significant” in this part and the effort to align the rules more closely with the statutory language under Minn. Stat. § 116D.04, subd. 2a, as stated in the SONAR on pages 11 and 12 and in the post hearing comments. This change, and the similar changes made in parts 4410.2300, items G and H, and 4410.2800 are found to be needed and reasonable and do not make the rule substantially different than that as proposed initially.

4410.2100, subp. 11 Modification of project; Termination of EIS.

24. Some commentators objected to the EQB amendment to change the review period from 30 days to 10 days on the basis that public review will be jeopardized. The EQB responded in its responsive comments that the ten days is ten working days or 14 calendar days so that the period is reduced to one-half, not one-third of the original. (See, Minn. Rule 4410.0200, subp. 12 for the definition of “day” and how days are counted.) Secondly, the EQB explains that this provision relates to projects that are not new, but for those which have been reviewed and for which termination of the requirement to do an EIS is being considered. Therefore, the affected public will already be familiar with the project.

The Administrative Law Judge agrees with the EQB that this is one provision where the review period can be shortened from 30 calendar days to ten working days. Therefore, the rule as amended is found to be needed and reasonable. For reasons of clarity, it is suggested the board insert the word “working” before “days.” Such a change is found to be necessary and reasonable and not to constitute a substantial change.

4410.2100, subp. 12. Amendment of scope by order of EQB pursuant to resolution of a cost dispute.

25. The EQB proposed the following all new provision:

If in resolving an EIS cost disagreement pursuant to part 4410.6410, the EQB finds that the scope of the EIS is not in conformance with parts 4410.2100 to 4410.2500, the EQB may order the RGU to amend the scope of the EIS to the extent necessary to resolve the cost disagreement.

In its responsive comments, the EQB proposed the following modification:

If in resolving an EIS cost disagreement pursuant to part 4410.6410, the EQB finds that the scope of the EIS is not in conformance with parts 4410.2100 to 4410.2500, the EQB may order the RGU to amend the scope of the EIS to the extent necessary to ~~resolve the cost disagreement~~ conform to the requirements of these rules, and the new scope of the EIS shall be considered in resolving the cost dispute.

On page 10 of the SONAR, the EQB writes that subpart 12 was added to correct a discrepancy between the EIS content and EIS cost provisions of the rules (4410.6000 to 4410.6500) that stems from the fact that those respective sections of the rules date from different times. The cost provisions date from 1977. When the EIS process was overhauled in 1982 and scoping was added, no provision was added to link the EQB’s authority to alter a cost agreement (between the RGU and the proposer) with the scope of the EIS itself. This amendment, explains the EQB, would provide that linkage and allow the EQB to adjust the scope of the EIS to the extent necessary to conform to its revision of the EIS cost.

26. MCEA states that they support this change, provided the rule would be amended to require the EQB to make a new scoping decision pursuant to the scoping rules that ensure due process of law by providing for public participation. MCEA asserts that if the RGU’s scoping does not conform to law, the EIS will not conform to law. The lawful process for making scoping decisions that do not conform to law is the process under 4410.2100. MCEA cites Minn. Stat. § 116D.04, subd. 2(e) which provides that an open process shall be utilized to limit the scope of the environmental impact statement.

In its responsive comments, the EQB states that it disagrees that a new scoping process under 4410.2100 needs to be done because it would require more process

than is necessary under the circumstances and would potentially re-open scoping issues that had already been settled by the RGU.

The EQB further contends that the process by which the EQB would resolve a cost disagreement and an associated scoping correction would automatically be a public process, and provide sufficient opportunity for public involvement without repeating the entire EIS scoping process. The process of EQB decision making is governed by the EQB operating rules, at Minn. Rules, chapter 4405. Those rules provide for public notice of impending decision, opportunity to submit written comments and opportunity for oral presentation to the EQB. In addition, under part 4410.6410, subp. 2, the EQB may order a contested case hearing to receive further public testimony about the cost dispute. The staff believes that these opportunities provide ample due process to interested citizens. The EQB asserts that the level of public participation provided by the EQB's operating rules automatically provides more public involvement than the process by which the RGU can amend the scope under subpart 8 of 4410.2100.

Furthermore, states EQB, the issues associated with the cost dispute will be narrow; only a few topics will be in dispute, not the entire EIS scope. It would be wasteful to repeat the entire scoping process to resolve these relatively narrow issues.

The Administrative Law Judge finds that the EQB decision not to repeat the whole scoping process is reasonable, especially in light of the procedures outlined in 4410.2100, subp. 8, which already allows for an amendment of the EIS scoping decision without starting over the whole scoping process. However, the Administrative Law Judge recommends that the EQB could add procedures to this subpart which are comparable to the procedures in subpart 8. Such an addition is found to be needed and reasonable and would not make the rule substantially different from the rule as published. If the agency proposes such an amendment, such language must be submitted to the Chief Administrative Law Judge for review.

The proposed rule, as modified, is found to be needed and reasonable and does not constitute a substantial change from that proposed in the State Register.

4410.2300, item G. EIS content; alternatives.

27. In the State Register, the EQB proposed the following amendment to item G:

...The EIS must address one or more alternatives of each of the following types or provide a succinct but thorough explanation of why there is no potentially environmentally superior alternative of that type that would meet the underlying need for or purpose of the project: alternative sites, alternative technologies, modified designs or layouts, modified scale or magnitude, and alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping or for the draft EIS.

Alternatives included in the scope of the EIS as established under part 4410.2100 that were considered but eliminated based on information developed through the EIS analysis shall be discussed briefly and the reasons for their elimination shall be stated. The alternative of no action shall be addressed.

In its responsive comments, the EQB has made the following modification to the rule:

The EIS must address one or more alternatives of each of the following types of alternatives or provide a concise succinct but thorough explanation of why there is no potentially environmentally superior alternative of that a particular type that would meet the underlying need for or purpose of the project is included in the EIS; alternative sites, alternative technologies, modified designs or layouts, modified scale or magnitude, and alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping or for the draft EIS. An alternative may be excluded from analysis in the EIS if it would not meet the underlying need for or purpose of the project, it would likely not have any significant environmental benefit compared to the project as proposed, or another alternative, of any type, that will be analyzed in the EIS would likely have similar environmental benefits but substantially less adverse economic, employment, or sociological impacts.

The EQB made the modification after further examination of the comments regarding whether private projects where the proposer already owns the land should be automatically exempted from needing to examine site alternatives. Upon further examination, the EQB realized that its proposed amendment failed to take into account all necessary reasons for excluding a particular alternative from analysis in the EIS. The EQB states that the above modification would correct this omission.

Furthermore, the EQB states that the above modification is necessary to clarify that in selecting alternatives for analysis in the EIS, the RGU must consider not only the need for or purpose of the project and whether the alternative would be preferable from an environmental viewpoint, but also how the alternatives compare to each other with respect to the other types of impacts (economic, employment and sociological). Without this clarification, the proposed amendment could have actually impeded disclosure about reasonable alternatives. The EQB asserts that this modification is a clarification to existing practices regarding alternative analysis.

The EQB staff is opposed to adding language that would automatically exclude private projects from the obligation to examine alternate sites as was suggested by some commentators. Instead, the EQB asserts that the modified provision allows the RGU to explain why in a particular situation no alternative sites are being examined in the EIS, based on the three stated criteria for excluding alternatives. Finally, the EQB asserts that there are circumstances in which alternative sites should be examined for private projects when the private party already owns the land.

The Administrative Law Judge finds that the EQB's position for not granting the general exemption for private projects is reasonable and has a rational basis. The provision, as amended, is found to be necessary and reasonable and not substantially different from the rule as proposed.

4410.2500 Incomplete or unavailable information.

28. The EQB has made no modifications to the proposed amendment. As the EQB noted, several commentators objected to the elimination of the current rule on page 10, lines 21 to 26, fearing that the elimination of the need to weigh the risk of the project against the need for the project and the elimination of a worst-case analysis would diminish the public's understanding of the impacts of the project and lessen the analysis of certain "cutting-edge" impacts. The MCEA argues in its Response to Comments that worst-case analysis is essential to environmental review under Minnesota law in instances where information on environmental impacts is uncertain. The Administrative Law Judge cannot agree - the EQB's decision to rely on scenarios based on credible scientific evidence alone has a rational basis, and a failure to require inclusion of a "worst-case" scenario does not render the proposed rule amendment unreasonable.

In its SONAR (p. 12) and responsive comments, the EQB explained that it is following the federal rule in the proposals to this part. It is the general intent of the rule to substitute the present federal language for the older federal language. The EQB agrees with the federal Council on Environmental Quality's explanation as to why the worst-case analysis is a flawed technique and should be removed. The EQB asserts that there is no change proposed in the circumstances to which this part will apply. The conditions under which it applies have been reworded somewhat but the conditions are still based on the same three factors: excessive cost; cannot be obtained within the legal time limits for an EIS; or the required knowledge is beyond the state of the art (i.e. the means to obtain the information are unknown.) Therefore, the EQB asserts, all that is changed is what the analysis requirements are if any of these conditions is met.

In addition, the EQB states that the fear that this change would eliminate doing risk assessments in EISs is unfounded. This rule part does not specify the contents of an EIS, that is determined in the EIS scoping process under part 4410.2100 and the content requirements of part 4410.2300. Part 4410.2500 only deals with what to do in preparing the EIS if it turns out, for one of the three reasons stated, that the anticipated information is unavailable or incomplete.

The Administrative Law Judge finds that the EQB has established a rational basis for the proposed rule amendments to this part. Therefore, the agency has established the need and the reasonableness for the proposed amendment.

4410.2800, subp. 4, item A. EIS adequacy determination.

29. In the State Register, the EQB proposed the following amendment to subpart 4, item A:

A. addresses the significant issues raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed at a level of detail commensurate with their significance and their relevance to a reasoned choice among alternatives;

A: In its final comments, the EQB has made the following modification to subpart 4, item

A. addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with part 4410.2300, items G and H, at a level of detail commensurate with their significance and their relevance to a reasoned choice among alternatives.

The addition of the word “potentially” was previously discussed under part 4410.2100. The Administrative Law Judge has found the rule, as finally modified, to be needed and reasonable and not substantially different than the proposed rule.

4410.3610. Alternative Urban Areawide review process.

30. In its responsive comments, the EQB recommends inserting the following paragraph on page 13, line 10, at the end of subpart 1:

For purposes of this part, “light industrial development, facility or project” includes a development, facility, or project engaged in the assembly of products from components that are not produced at the site, but does not include any development, facility, or project, including an assembly development, facility, or project, meeting the requirements for a mandatory EAW at part 4410.4300, subps. 2 to 13, 15 to 18, or 24, or a mandatory EIS at part 4410.4400, subps. 2 to 10, 12, 13, or 25.

The EQB asserts that this sentence was added to address a concern raised by Sherilyn Young, that there are some ambiguities with the current light industrial definition. The EQB agrees with Ms. Young that the types of facilities that she is commenting about must be excluded from the Alternative Urban Areawide Review (AUAR) process because it is not designed to address their impacts.

The EQB further explains that the proposed modification would clarify that assembly facilities are eligible for AUAR review but that any industrial facility would not be eligible if it has any characteristics fitting one or more of the mandatory EAW or EIS categories established to delineate industrial attributes that necessitate project-specific review. Any industrial project with any such attributes should be reviewed through an individual EAW or EIS and should not be reviewed as part of a broader AUAR analysis.

The Administrative Law Judge finds that the modification is needed and reasonable and is not a substantially different rule than that as proposed.

4410.4000. Tiered EIS.

31. Based on a comment by the Judge at the hearing, the EQB has recommended that the term “consequences” on page 15, line 27 be replaced with the phrase “environmental, economic, employment and sociological impacts,” so that the sentence on lines 24 though 28 would be amended to read as follows:

...The level of detail in earlier tiers need not be as great as that in later tiers, provided that it is sufficient to reasonably inform decision makers of the environmental and other significant ~~consequences~~ environmental, economic, employment and sociological impacts, of the choices made in that tier.

The EQB states that such a modification would make the language consistent with that used in part 4410.2300, item H, for the effects appropriate to cover in an EIS.

However, the Administrative Law Judge finds that the amendment, as filed, results in an inconsistency with respect to the environmental effects the EIS is to cover. For instance, is the decision maker to be informed of all of the “environmental” impacts or of just the “significant” environmental impacts? The provision, as finally written, is found to be impermissibly vague and ambiguous. To cure this defect, the Administrative Law Judge recommends that the inconsistency be removed, depending on the intent of the provision. The sentence can be amended in either of the following ways:

...The level of detail in earlier tiers need not be as great as that in later tiers, provided that it is sufficient to reasonably inform decision makers of the ~~environmental and other~~ significant environmental, economic, employment and sociological impacts of the choices made in that tier. (This amendment presumes that the intent is to exclude insignificant environmental impacts from the analysis.);

..The level of detail in earlier tiers need not be as great as that in later tiers, provided that it is sufficient to reasonably inform decision makers of the environmental and other significant economic, employment and sociological impacts of the choices made in that tier. (This amendment presumes that all environmental impacts are “significant” for purposes of this subpart and that all environmental impacts must be recognized.);

or

...The level of detail in earlier tiers need not be as great as that in later tiers, provided that it is sufficient to reasonably inform decision makers of the environmental and ~~other~~ significant economic, employment and sociological impacts of the choices made in that tier. (This amendment presumes that all environmental impacts must be recognized, whether they are significant or not.)

The Administrative Law Judge finds that an amendment to cure the inconsistency in what environmental impacts are to be included would be clarifying in nature and does not result in a substantially different rule from that as published. It is also found that the language suggested above is needed and reasonable, whichever of the three alternatives is chosen. If other language is used, the agency must submit the rule finally adopted to the Chief Administrative Law Judge for his review.

4410.4300, subpart 1. Mandatory EAW Categories, Threshold test.

32. In its responsive comments, the EQB is recommending the following modifications to subpart 1, page 16, line 9:

If the proposed project is an expansion or additional stage of an existing project, the cumulative total of the proposed project and any existing stages must be included when determining if a threshold is met or exceeded if construction was begun within three years before the date of application for a permit or approval from a governmental unit for the expansion or additional stage ~~the determination~~ but after the effective date of this amendment, except that any existing stage or component that was reviewed under a previously completed EAW or EIS need not be included.

The EQB states that the amendment addresses the comment by the Minnesota Chamber of Commerce that the term “determination” was vague. The EQB agreed and adopted the recommended language of the Minnesota Chamber of Commerce. The comment pointed out that the date can be easily ascertained by the proposer, the responsible government unit, a project reviewer or other interested party.

In his pre-hearing comments, Mr. Frechette stated that the amendment, as published, fails to recognize that it is difficult to address environmental impacts from an approved completed project after the fact and suggested that the following language be added: Environmental impacts that are identified by the EAW which are related to the previously permitted parts of the project shall be addressed by the developer as a condition for approval of subsequent phases. In the absence of this authority, Mr. Frechette argues that any attempt by an RGU to resolve a problem with the previously permitted portion of the project would likely be challenged. Mr. Frechette also commented that the proposed amendment also will create another problem, that of developers changing their name to complete subsequent phases to avoid this provision. For that reason, the definition or application of “connected actions” needs to be more clear.

33. In its final comments, the EQB responded that it understood Mr. Frechette’s concern that the EQB’s proposed amendment does not help address adverse impacts associated with the existing project stages, but the EQB believes that it has no statutory basis to establish authority over existing project stages. Environmental review is merely a systematic public process to disclose information; it has no regulatory teeth. The EQB also asserts that there is no authority in the sections of the Minnesota Environmental Protection Act that set up the environmental review program to impose permit conditions. Certainly, it is beyond the scope of EQB’s authority under this program to require correction of existing problems.

The EQB also explained in response to Mr. Frechette’s comment that developers may change the names of their companies to avoid this provision, that it agrees that there will no doubt be attempts to circumvent the amended rule. But, continues EQB, it is questionable whether the EQB has the authority to require RGUs to aggregate projects by different developers for purposes of comparing projects to the mandatory thresholds. Also, the EQB

notes that if an RGU suspects, but cannot prove, that a developer is engaged in deliberate attempts at circumvention of the rule by changing the company name or other similar practices, it can always order a discretionary EAW if there is some reason to believe that there may be potential for significant environmental effects even if it cannot prove that the project falls within a mandatory category.

The Administrative Law Judge agrees with the agency that the EQB cannot go back and correct past mistakes that were not correctly assessed under the current rules and that there are adequate avenues to address the name change problem through the discretionary EAW process. The EQB's proposed amendment and subsequent modifications are found to be needed and reasonable. The proposed rule, as finally modified, is not a substantially different rule than that which was published originally.

4410.4300, subp. 7, item C.

34. Northern Natural Gas Company has requested that the EQB delete the provision in part 4410.4300, subpart 7, item C that applies to the construction of natural gas pipelines subject to regulation under the Natural Gas Act. EQB notes that it has not proposed any changes in this provision in this rulemaking proceeding and does not intend to make changes at this point.

The Administrative Law Judge finds that because the EQB is not proposing any amendments to this section, the agency need not demonstrate the need for and reasonableness of existing rules not affected by the proposed amendments. (Minn. Rule 1400.2070, subp. 1.) Furthermore, the Administrative Law Judge finds that removal of this rule provision would constitute a substantially different rule from that published in the State Register.

4410.4300, subp. 18, items B and C. Wastewater systems.

35. The EQB recommended, in its final comments, that item B be amended to add the phrase "of its average wet weather design flow capacity," after the words "gallons per day" on page 19, line 32. And in item C, the word "of" on page 20, line 2 was changed to "or." These are technical corrections and do not make the rules substantially different than those that were published. The rule as proposed is needed and reasonable.

4410.4300, subp. 21. Airport projects.

36. The EQB recommended in its final comments the following sentence be added on page 22, line 34 and page 23, line 4: "The RGU shall be selected in accordance with part 4410.0500, subpart 5." The insertion of this cross reference is needed and reasonable and is not a substantially different rule than that as published.

4410.4300, subp. 26. Stream diversions.

37. The EQB recommended, in its final comments, that the following phrase on page 23, lines 28 and 29, that was proposed to be deleted be reinstated into the rules: “unless exempted by part 4410.4600, subpart 14, item E, or 17,.” The change was based on a comment by the Department of Transportation. The EQB agreed with the comments and stated that it did not intend to delete the reference to the exemptions and is therefore reinstating the references. The Administrative Law Judge finds that the reinstatement of the reference is needed and reasonable and does not make the rule substantially different than that as published.

4410.4300, subpart 33. Communication towers.

38. The EQB has proposed the following amendment to subpart 33:

Subp. 33. Communications towers. For construction of a communications tower equal to or in excess of 500 feet in height, or 300 feet in height within 1,000 feet of any protected water or protected wetland or within two miles of the Mississippi, Minnesota, Red, or St. Croix rivers or the north shore of Lake Superior, the local governmental unit is the RGU.

In its final comments the EQB recommended that the phrase “the north shore of” on page 24, lines 33 through 34 be stricken. No additional modifications were proposed to this subpart.

In its final and responsive comments, Rural Cellular Corporation and Midwest Wireless Communications LLC (Rural Cellular) strongly object to the EQB’s proposed amendment of lowering the threshold for communication towers to 300 feet in the selected “sensitive areas” listed above. Rural Cellular proposes that the amendment be deleted based on two points. First, Rural Cellular asserts that the additional information presented on the last day of the 20 day comment period should be stricken. Rural Cellular stated that for the EQB and Department of Natural Resources (DNR) to attempt to insert the only evidence in support of the rule change with only five days to respond (particularly in light of Cellular 2000’s™ earlier effort to uncover relevant information) violates the letter and spirit of Chapter 14.

Secondly, even if all the additional information is allowed into evidence, the additional information and the SONAR lack any demonstration of need or reasonableness that support lowering the height threshold from 500 to 300 feet and that the “sensitive area” zone identified in the rule is tremendously broad and is equally lacking in a showing of need and reasonableness.

Submission of evidence.

39. With respect to the admission of the two articles and the memorandum by the DNR in support of the EQB’s proposed rule, the Administrative Law Judge finds that the information was properly submitted during the 20 day comment period. The Administrative Law Judge understands the frustration of Rural Cellular in its attempts to

obtain relevant information from the EQB in support of its position. In its comments Rural Cellular explained how it had contacted the EQB, and at the EQB's suggestion, the DNR, to obtain more information regarding this rule amendment after the publication of the rules in the State Register, but was not given the information that was produced during the 20 day comment period.

In as much as the EQB had an opportunity to provide all necessary justification in the SONAR and at the hearing, Minn. Rule 1400.2230, subpart 1, provides that written comments may be submitted into the hearing record by the agency and all interested persons for, in this case, 20 days after the hearing ends. Minn. Rule 1400.2230, subpart 2, provides for a five working day rebuttal period to respond in writing to any new information submitted. Therefore, subpart 1, contemplates that new information and evidence may be submitted by the agency and subpart 2 allows for a rebuttal period to respond to any additional evidence. See also Minn. Stat. § 14.15, subd. 1. (1995 Supp.)

Even though the agency could have and perhaps should have provided the information regarding the articles on bird strikes and memorandum from the DNR earlier in the process, the EQB is allowed under Minn. Rule 1400.2230, subp. 1, to submit the additional comments, articles and DNR memorandum during the 20 day comment period in support of its position for the rule amendment under subpart 33. Therefore, all of the information submitted by the EQB regarding subpart 33 is properly submitted in the record as evidence in support of its position. The Administrative Law Judge also notes that the additional information consisted of two articles and a DNR memorandum in addition to the EQB final comments. Such additional information was not such a great amount of information that it could not reasonably be addressed by commentators within the five working day rebuttal period.

40. The Motion of Rural Cellular to Strike the articles and DNR memorandum referring to them is DENIED.

Need and reasonableness.

41. Rural Cellular also asserts that the SONAR, and other additional information submitted by the EQB does not adequately demonstrate the need for or reasonableness of the rule. Rural Cellular asserts that the proposed height threshold is being lowered by 40% with no evidence of a problem nor any causal relationship between the proposed solution and the undefined problem and the SONAR is devoid of any evidentiary support, study or precedent which justifies or rationally defines the extremely broad proposed "sensitive area" zone.

Specifically, with regard to the "sensitive areas" Rural Cellular contends in its October 9, 1996, comments that:

A four-mile wide corridor along the Mississippi, Minnesota, Red and St. Croix Rivers as well as a two-mile zone along the entire length of the North Shore of Lake

Superior is breathtaking in scope but also lacking in any evidentiary support in the SONAR or elsewhere.

Similarly, the SONAR doesn't address the true extent of the "sensitive area" defined by the inclusion of all "public waters" and "public waters wetlands" as defined in Minn. Stat. 103G.005, subds. 15 and 18. However, upon information and belief this definition defines an area that is believed to encompass well over a third or more of the surface area of Minnesota. The establishment of a 1000 foot set back from "public waters wetlands" in all probability completely encompasses the land mass of whole counties and indeed, much of the northern half of the State of Minnesota.

Nor is the rule rendered reasonable by the SONAR's reference to the 1,000 foot Shoreland Zoning Act as support for its "setback requirement". Minn. Stat. § 103F.201 to 103F.221 provides regulatory authority for shoreland development. As drafted, the proposed rule is creating a presumption against or a disincentive from siting any facility within at least 1,000 feet of any public waters or public wetlands. The shoreland zoning statute by contrast merely defines a zone of "land within 1,000 feet from the normal high watermark of a lake, pond or flowage" and "land within 300 feet of a river or stream, or the land ward side of a flood plain delineated by ordinance on the river or stream, whichever is greater." See Minn. Stat. § 103F.205, subd. 4. In the proposed rule, 300 feet is extended to two miles and 1,000 feet creates a preemptive "set back" zone outside of which a tower is to be placed unless a mandatory EAW is to be required. The shoreland zoning act defines the scope within which permissible shoreland zoning may permit facilities such as communication towers.

42. In support of the amendment, the EQB provides the following justification on page 22 of the SONAR:

The current category for communication towers is based on well-documented hazards to birds posed by towers over 500 feet tall. However, tower location can be as much a factor in bird mortality as height, as towers located along migration routes or adjacent wetlands used by waterbirds can be a hazard even if they are less than 500 feet tall. A 300-foot height is proposed for communication towers in sensitive areas to recognize that birds typically fly at heights considerably less than 500 feet in the vicinity of wetlands or along river bluffs.

The river valleys and north shore of Lake Superior identified in this category are significant migration routes used by waterfowl, raptors, and passerine birds. A two-mile distance is proposed because these migration corridors are not narrow or precise. Visual impacts also merit consideration in evaluation of towers proposed along river valleys and bluffs.

Wetland areas support a disproportionately high number of bird species and densities. Protected waters and wetland correspond with areas supporting larger concentrations of waterfowl and shorebirds. Protected waters and wetlands are also

readily identified by local government units and the 1000-foot distance corresponds with the shoreland zone in many cases. Typically, local flights around marshes, and feeding flights to nearby food sources, occur at low elevations within a 1000-foot distance.

At the end of the 20 day comment period, the EQB filed additional written comments which included a copy of a DNR staff memorandum as well as two articles referenced in the DNR memo regarding bird strike issues which responded to Rural Cellular's assertion of a lack of need and reasonableness for the provision.

In its follow up comments, the EQB asked the DNR to further address the need and reasonableness of the provision. In its memorandum to the EQB, the DNR cites the abstract of an article that was given to the EQB that the DNR believes provides a good overview of the issues involved. ("Avian collisions with utility structures: biological perspectives", W. M. Brown, In Proceedings: Avian Interactions with Utility Structures International Workshop, December 1993, Electric Power Research Institute.) (Study.)

The EQB states that the abstract illustrates that there is a need for environmental review of some tower structures and that it is reasonable to set lower thresholds near bodies of water. The abstract states that "Avian collisions with utility structures are a long-standing and well-documented problem... Collisions occur under two common conditions:...(2) when migrants are traveling at reduced altitudes and encounter tall structures." The EQB contends that these statements support the contention made in the SONAR that a lower threshold is appropriate in the vicinity of water bodies, wetlands, and along the major river bluffs, where birds, especially waterfowl, will be flying at reduced altitudes. The rivers and Lake Superior cited in the proposed amendment are all regionally-important flight corridors.

Additional comments by the DNR stress that location is an important factor in evaluating the risk of birds colliding with structures. The DNR proposed the change in this category based on the higher potential for such accidents in bird concentration, or attraction, areas. Studies of collisions of birds with power lines indicate that birds do indeed collide with structures less than 500' tall. The amendment identifies sensitive areas, such as areas adjoining wetlands or lakes that would be used by concentrations of waterfowl, or river valleys that typically serve as daily and seasonal flight corridors for birds.

Additionally, the DNR states that portions of the Minnesota, Mississippi, and St. Croix are designated as state wild and scenic rivers. The lower St. Croix also is designated a National Scenic Riverway. Tower construction in their corridors has the potential to affect the aesthetic recreational resources originally warranting their protection, and should be evaluated through environmental review.

In addition, the EQB states that it disagrees with Rural Cellular and that the amendment is not trying to set some form of disincentive against towers within shorelands; it is simply proposing a lower threshold for an EAW to check out the possibility of more significant environmental impacts in areas known to have a high concentration of bird flights. Also in response to this issue, the DNR asserts that in most cases, environmental review

does not progress past the EAW stage, which, by rule, is “a brief document, which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed project...”, limited in scope, duration, and cost to the project proposer. Mandatory environmental review is not preemptive.

43. In its responsive comments, Rural Cellular contends that the articles do not set forth any basis for the reduction in tower height from 500' to 300' and do not establish the need for and reasonableness of the expansive “sensitive area” defined by the proposed rule revision. Rural Cellular asserts that the articles do not deal with the many differing varieties of communication towers and that the proposed rules treat all types of towers the same. A review of the 1993 article by Brown confirmed, in Rural Cellular’s view, that this article dealt almost exclusively with power lines and related equipment and had little relevancy to the topic of single communication towers.

44. The Administrative Law Judge finds that the EQB has demonstrated the need for and reasonableness of the proposed rule amendment. As addressed above, the EQB has identified two reasons for lowering the height threshold of communication towers in the sensitive areas; location and visual impacts. Locating communication towers near migration routes or adjacent wetlands, can be a potential hazard for bird strikes where birds fly at reduced altitude and there are a higher concentration of birds. Additionally, the placement of communication towers along and near the sensitive areas has the potential to affect aesthetic recreational resources.

The identified needs listed above fit into the overall purpose and policy of the enabling legislation under chapter 116D. The purpose of the act under Minn. Stat. § 116D.01 is:... to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment; ... to promote efforts that will prevent or eliminate damage to the environment and biosphere...

Under Minn. Stat. § 116D.02, subd. 1, the legislature recognized the profound impact of human activity on the interrelations of all components of the natural environment, particularly new and expanding technological advances and declared it the policy of the state to use all practicable means and measures to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations. Under subdivision 2, the state has a responsibility, among other things; to assure for all people of the state aesthetically pleasing surroundings; discourage ecologically unsound aspects of technological growth, and develop and implement a policy such that growth occurs only in an environmentally acceptable manner; and define, designate, and protect environmentally sensitive areas.

Under Minn. Stat. § 116D.03, subd. 1, the legislature directs that the rules of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06. This includes the rules of the EQB. As the EQB points out, the EAW is a brief document which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed action. Therefore, the EQB is proposing in the rule that

basic facts be gathered about the impacts of communication towers located in sensitive areas.

45. The study and memorandum of the DNR submitted into evidence by the EQB does support the conclusions of the EQB that a reduced height threshold is necessary in the sensitive areas. As noted by the EQB, the study concludes that bird collisions can occur with utility structures, which includes towers. Collisions occur when a utility structure transects a daily flight path used by concentrations of birds flying at a high speed and low altitude (such as in wetlands), and when migrants are traveling at reduced altitudes and encounter a tall structure (such as in or near rivers). Brown, p. 12-1, 12-3. (parentheticals added.)

The study further states that “[t]opographical features influence local and migratory movements of birds. Features such as...river valleys, and shorelands that are traditional flight corridors should be considered during planning for utility lines and structures to avoid primary flight paths.... Beaulaurier describes a study by Renssen ... in which bird collisions in a wetland were apparently reduced at a non-traditionally constructed tower and power line. The ‘portal tower’ was 22 m (approximately 72 feet) high instead of the typical 48 m (approximately 160 feet) for a high voltage ... line....” Brown, p. 12-6.

Based on the information contained in the study and the information provided by the DNR, the Administrative Law Judge agrees with the EQB that the proposal to reduce the height threshold from 500 feet to 300 feet in the sensitive areas is reasonable. The study specifically stated that flight corridors should be considered in planning for utility lines and structures to avoid primary flight paths such as river valleys and shorelines. The study establishes 160 feet as the height of a standard high wire utility structure. If bird strikes are a major problem at 160 feet, it is reasoned that the problem is greater yet at 300 feet. Therefore, requiring an assessment of the environmental impact of utility structures 300 feet high or higher along flight corridors such as the shore of Lake Superior, the river valleys mentioned and the shorelines of wetlands, has a rational basis in the record.

46. Rural Cellular also contended that the sensitive area identified by the rule was overly broad. However, in its memorandum the DNR explains that the sensitive areas, such as areas adjoining wetlands or lakes were chosen because they are used by concentrations of waterfowl, and river valleys were chosen because they typically serve as daily and seasonal flight corridors for birds. The specific rivers and shorelines identified in the rule were chosen because they are regionally-important flight corridors. As quoted above, the studies support these facts.

47. Rural Cellular also disagrees with the parameters established by the EQB to outline and identify the sensitive areas. The EQB explained that the two-mile distance is proposed because the migration corridors are not narrow or precise. The 1,000 foot distance corresponds with the shoreland zone in many cases and recognizes that local flights around marshes, and feeding flights to nearby food sources (wetlands and rivers) occur at low elevations within a 1,000-foot distance. The Administrative Law Judge finds the parameters set by the EQB to be reasonable. The EQB has to set

some limits on what the exact borders will be that surround the sensitive areas. As the EQB has explained it has chosen a two-mile wide corridor because the flight patterns are not precise, and the 1,000 foot figure was chosen as a figure that local government units already use for other government uses and one that they would be familiar with. Such parameters are found to be necessary and reasonable and have a rational basis.

48. In addition, the EQB asserts that visual impact is another reason for the establishment of a lower threshold. This issue was not addressed by Rural Cellular. As previously stated, one of the policies specified in chapter 116D is to assure aesthetically pleasing surroundings for all people of the state. Therefore, as the DNR notes, tall structures located near certain watercourses, especially near rivers designated in part as "wild and scenic", deserve further evaluation through environmental review.

49. In conclusion, the Administrative Law Judge finds that the agency's explanation presented by the EQB on this proposed amendment states how the evidence rationally relates to the choice of action taken. The explanation explains the circumstances that created the need for the rulemaking and why the proposed rulemaking is a reasonable solution for meeting the need. The Administrative Law Judge finds the EQB has demonstrated the need and reasonable of the proposed rule.

4410.4600 Exemptions.

50. The EQB staff has not recommended any modifications to the rules as proposed. The Minnesota Chamber of Commerce suggested that the exemption provision be re-evaluated and redefined to account for outdoor warehousing because the EQB amendment to add warehousing and modify the word "industrial" with "light" would presume adverse impacts and penalize all heavy industry.

The EQB staff responded that it is necessary to remove from exempt status heavy industrial operations. The EQB does not characterize it as "penalizing" such industries, rather it is a recognition that heavy industry uses have more potential for environmental effects than lighter industries. In its SONAR, the EQB states that it was a mistake to include all "industrial" activities in this exemption when the category was established in 1982 and that heavy-type industrial operations should never have been included. Heavier industrial facilities in general, the EQB asserts, must be considered to have potentially greater overall environmental impacts than similarly-sized light industrial, warehousing, commercial or institutional facilities because the industrial processes may generate wastes, emissions, noise and other impacts in addition to those more closely related to building size.

The EQB states that past experiences, such as the case of Carl Bolander & Sons Co. v. City of Minneapolis, 488 N.W.2d 804 (Minn. App. 1992), aff'd. 502 N.W. 2d 203 (Minn. 1993). (Proposed asphalt and cement recycling facility was not exempt from completing an EAW under 4410.4600, subp. 10.), demonstrates that heavy industrial operations can cause environmental impacts worthy of an EAW regardless of the amount of indoor gross floor space.

The Administrative Law Judge agrees that the EQB has established a rational basis for the proposed amendment and finds the provision needed and reasonable.

4410.6100, subp. 1. Determining EIS cost.

51. The EQB proposed that subpart 1, beginning on page 32, line 1, be modified as follows: If an agreement cannot be reached, the RGU or the proposer shall so notify the EQB.

The Administrative Law Judge finds that the amendment is needed and reasonable and that the rule is not a substantially different rule than that as proposed.

4410.6410, subps. 2 and 3. EIS cost disagreements

52. In subpart 2, on page 34, line 17, the EQB proposes adding the phrase “contested case” before the word “hearing.” The EQB agreed with the comment at the hearing that they were referring to a contested case hearing in this provision. In subpart 3, on page 34, line 25, the EQB has inserted the word “draft” before “EIS” for clarification, based on a comment at the hearing. The Administrative Law Judge finds that these modifications do not make the rule substantially different than as proposed and the proposed amendment is needed and reasonable.

4410.6500, subp. 1, items C and D. Payment of EIS assessed costs.

53. The EQB published the following amendments to items C as follows:

C. ~~At least three fourths~~ 90 percent of the proposer’s cash payment shall be paid ~~within 30 days after~~ prior to the distribution by the RGU of the draft EIS ~~has been submitted to the EQB.~~

The EQB proposed in its responsive comments that the published provision be modified as follows:

C. The remainder at least 90 percent of the proposer’s cash payment shall be paid on a schedule agreed to by the RGU and proposer prior to the distribution by the RGU of the draft EIS.

Under item D, the EQB proposes deleting the first sentence of item D on page 35, lines 25 through 30. On page 36, line 5, the EQB proposes the following modification: “The refund shall be paid within 30 days of completion by the RGU of the accounting of the EIS costs as expeditiously as possible.”

In its final comments, the Minnesota Chamber of Commerce raised concerns over the prepayment recommendation of a fixed prepayment percentage regardless of actual costs; specifying that on a large project, this could cost tens of thousands of dollars. In her final comments, Sherilyn Young also pointed out that the proposed

change to require a final cash payment to the RGU be paid within 30 days of the determination of the adequacy of the EIS assumes that the EIS will always be adequate. Ms. Young suggested that the rule should be changed to include a schedule of payment in cases when an EIS is never found adequate.

In its responsive comments, the EQB agreed with the comments and proposed the above amendments to resolve the problems. Under the revised provisions, the second half of the EIS assessed cost would be paid based on an agreement between the RGU and the proposer. The EQB explains that this would provide the flexibility needed to accommodate many different RGUs and types of EISs. The interests of the public (the RGU) would still be protected ultimately by: (1) the retained authority to appeal cost disputes to the EQB; and (2) subpart 6 which prohibits the project from obtaining needed permits until the EIS costs are paid. If an RGU had questions about a proposed cost agreement, the EQB staff could provide advice.

The Administrative Law Judge agrees, and finds that the rule as finally proposed is needed and reasonable and is not substantially different from the rule as published.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Environmental Quality Board gave proper notice of the hearing in this matter.
2. That the Environmental Quality Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.
3. That the 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. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding No. 31.
4. That the 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. §§ 14.14, subd. 4 and 14.50 (iii).
5. That the amendments and additions to the proposed rules which were suggested by the 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. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. That the Administrative Law Judge has suggested action to correct the defect cited in Conclusion No. 3 as noted at Finding No. 31.

7. That due to Conclusions 3 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

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 Environmental Quality Board from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

RECOMMENDATION

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

Dated this _____ day of December, 1996,

Richard C. Luis
Administrative Law Judge

Reported: Transcript Prepared (One Volume)
Jill Benson, Court Reporter
Janet Shaddix & Associates