

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed Amendments to
Rules Governing the Environmental Review
Program, Minn. R. Ch. 4410, Establishing a
Mandatory EAW Threshold for Greenhouse
Gas Emissions at Minn. Rules, Part
4410.4300, Subpart 15.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Barbara L. Neilson of the Office of Administrative Hearings conducted a hearing in this rulemaking proceeding on Wednesday, March 9, 2011. The hearing commenced at 2:00 p.m. in the Minnesota Pollution Control Agency Board Room, 520 Lafayette Road, St. Paul, Minnesota. The hearing continued until everyone present had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The Minnesota Legislature has designed this process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Jon Larsen, Environmental Quality Board, appeared at the rule hearing on behalf of the Environmental Quality Board (Board). Also presenting for the Board was Barbara Jean Conti, permit writer with the Minnesota Pollution Control Agency. Approximately 30 people attended the hearing. In addition to the Board's representatives, ten members of the public made statements at the hearing.

The Board and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. After the hearing ended, the Administrative Law Judge kept the administrative record open for another 20 calendar days – until March 29, 2011 – to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record remained open for an additional five business days—until April 5, 2011—to allow interested parties and the Board an

¹ See Minn. Stat. §§ 14.131 through 14.20. Unless otherwise specified, all references to Minnesota Statutes are to the 2010 version.

opportunity to reply to earlier-submitted comments.² Numerous comments were received during the rulemaking process, and all of the comments received were read and considered.³ To aid the public in participating in this matter, comments were posted on the website of the Office of Administrative Hearings shortly after they were received. The hearing record closed for all purposes on April 5, 2011.

SUMMARY OF CONCLUSIONS

The Board has established that it has fulfilled all of the applicable procedural and substantive requirements in this rulemaking proceeding and that the proposed rules are needed and reasonable.

NOTICE

The Board must make this Report available for review by anyone who wishes to review it for at least five working days before the Board takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Board must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Board, and the Board will notify those persons who requested to be informed of their filing.

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

FINDINGS OF FACT

Background and Nature of the Proposed Rules

1. Pursuant to the Minnesota Environmental Policy Act of 1973, the Board is authorized to adopt rules that establish standards for the Minnesota Environmental Review Program.⁴ The Board's rules relating to the Minnesota Environmental Review Program are set forth in Minnesota Rules Chapter 4410.

2. The Minnesota Environmental Policy Act and the Board's rules mandate the preparation of an Environmental Assessment Worksheet (EAW) and/or an Environmental Impact Statement (EIS) under certain circumstances.⁵ As defined by

² See Minn. Stat. § 14.15, subd. 1.

³ Public Exhibits 1-3 were received into the record during the hearing. The post-hearing submissions from members of the public have been marked and received into the record as Public Exhibits 4-21.

⁴ Minn. Stat. §§ 116D.04, subds. 2a(a), 4a, and 5a, and 116D.045, subd. 1.

⁵ Minn. Stat. § 116D.04; Minn. R. 4410.1000, 4410.2000. Unless otherwise specified, all references to Minnesota Rules are to the 2009 version.

statute, an 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.”⁶ An EAW is primarily used to “aid in the determination of whether an EIS is needed for a proposed project” and to “serve as a basis to begin the scoping for an EIS.”⁷ In contrast, an EIS is a “detailed” written statement that “describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, . . . explores methods by which adverse environmental impacts of an action could be mitigated” and “analyze[s] those economic, employment and sociological effects that cannot be avoided should the action be implemented.”⁸ An EIS is used to “provide information for governmental units, the proposer of the project, and other persons to evaluate proposed projects which have the potential for significant environmental effects, to consider alternatives to the proposed projects, and to explore methods for reducing adverse environmental effects.”⁹

3. Under the Board’s rules, preparation of an EAW is mandatory for any project that meets or exceeds the thresholds of any of the EAW categories listed in Minn. R. 4410.4300 or any of the EIS categories listed in Minn. R. 4410.4400.¹⁰ Even when the thresholds for a mandatory EAW are not exceeded, the EQB or the governmental unit with approval authority may order the preparation of a discretionary EAW as long as the project is not exempt¹¹ and it is determined that, “because of the nature or location of the proposed project the project may have the potential for significant environmental effects.”¹² The statute and rules also set forth a process under which members of the public may submit a petition seeking a discretionary EAW, along with supporting evidence.¹³ In addition, a governmental unit with jurisdiction may order preparation of a discretionary EAW for any project that does not exceed the mandatory thresholds designated in Minn. R. 4410.4300 or 4410.4400 if it determines that the project is not exempt and the project may have the potential for significant environmental effects due to its nature or location.¹⁴

⁶ Minn. Stat. § 116D.04, subd. 1a(c); see also Minn. R. 4410.1000, subp. 1 (stating that an EAW is “a brief document prepared in worksheet format which is designed to rapidly assess the environmental effects which may be associated with a proposed project”); 4410.1200 (setting forth the required content of an EAW). Once an EAW is completed, the governmental unit that is responsible for preparing and reviewing the environmental documents must publish notice and allow comments to be submitted during the following 30-day period. The decision regarding whether an EIS is needed is to be based on the EAW and the comments received. Minn. Stat. § 116D.04, subd. 2a(b); see also Minn. R. 4410.1600 and 4410.1700.

⁷ Minn. R. 4410.1000, subp. 1; see also Minn. R. 4410.0200, subp. 24.

⁸ Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.0200, subp. 26.

⁹ Minn. R. 4410.2000, subp. 1.

¹⁰ Minn. R. 4410.1000, subp. 2. An EIS is required to be prepared for any project that meets or exceeds the thresholds of any of the EIS categories listed in Minn. R. 4410.4400. Minn. R. 4410.2000, subp. 2.

¹¹ Exemptions are set forth in Minn. R. 4410.4600.

¹² Minn. Stat. § 116D.04, subd. 2a(e); Minn. R. 4410.4500. The proposer of the project may also request that a discretionary EAW be prepared in order to determine if a project has the potential for significant environmental effects. See Minn. R. 4410.1000, subp. 3 D.

¹³ Minn. Stat. § 116D.04, subd. 2a(c); Minn. R. 4410.1000, subp. 3 B; Minn. R. 4410.1100.

¹⁴ Minn. R. 4410.4500.

4. In this rulemaking proceeding, the Board seeks to amend the portion of Part 4410.4300 that describes when a mandatory EAW must be prepared for projects that increase the generation of air pollutants.

5. Under the current provisions of Part 4410.4300, an EAW must be prepared for projects that meet or exceed certain thresholds set forth in subparts 2 to 37 for various categories of facilities.¹⁵ Subpart 15 of Part 4410.4300 relates to the category of air pollution. The existing rule requires that, “[f]or construction of a stationary source facility that generates 250 tons or more per year or modification of a stationary source facility that increases generation by 250 tons or more per year of any single air pollutant after installation of air pollution control equipment, the MPCA shall be the RGU [Responsible Government Unit].” The EQB’s rules do not define the term “air pollutant.”¹⁶

6. The MPCA issues air permits under the federal Clean Air Act for facilities in Minnesota. According to the Statement of Need and Reasonableness, the MPCA’s practice has been to apply the mandatory EAW air pollution category to substances that are regulated as air pollutants under the federal Clean Air Act. In the past, GHGs were not regulated as air pollutants under that Act. However, in response to a 2007 ruling by the U.S. Supreme Court, the federal Environmental Protection Agency (EPA) issued a new regulation on May 13, 2010 (the “GHG tailoring rule”) under which GHG emissions will be covered by Clean Air Act permits under certain circumstances, beginning in January 2011. In Minnesota, such permits will be issued by the MPCA. Under the EPA regulation, the permits will cover GHG emissions of carbon dioxide equivalents of at least 75,000 tons per year or 100,000 tons per year, depending on other factors.¹⁷ These levels are much higher than the permitting thresholds that apply to other air pollutants and are intended to cover only the largest types of facilities, such as power plants and refineries.¹⁸

7. In November 2010, the MPCA issued a Notice of Intent to Adopt rules relating to air quality definitions and permits under the good cause exemption set forth in Minn. Stat. § 14.388, subd. 1(2).¹⁹ The MPCA indicated in its Notice of Intent to Adopt that it was proposing to revise its rules to incorporate new federal permit thresholds for GHGs as a regulated pollutant and to adopt a schedule for permit

¹⁵ Minn. R. 4410.4300, subp. 1. The rule also specifies that an EIS must be prepared if the project meets or exceeds any thresholds of part 4410.4400.

¹⁶ SONAR at 2.

¹⁷ The EQB explained in its SONAR that the federal 75,000 ton-per-year threshold will apply until June 30, 2011, only to facilities already requiring a Prevention of Significant Deterioration (PSD) permit due to emissions other than GHGs; if they exceed the 75,000 ton-per-year threshold, they will be required to go through additional analysis of GHG emission controls. After June 30, 2011, expanding facilities that increase GHG emissions by at least 75,000 tons per year will require PSD permits even if their increased emissions of other air pollutants would not otherwise require PSD review. The 100,000 ton-per-year threshold will apply to newly-constructed projects with GHG emissions above that figure and to operating permits for existing facilities. The EQB indicated that the higher, 100,000 ton-per-year threshold will be the more generally applicable permitting threshold for GHGs at least in the early phases of the regulation of GHGs under the Clean Air Act. SONAR at 8.

¹⁸ SONAR at 2.

¹⁹ The proposed rules amended Minn. R. 7005.0100 and Minn. R. 7007.0150, .0200, .0400, .0500, .1105, .1107, .1110, .1125, .1130, .1141, .1146, .1300, and .1450.

applications to be submitted. The MPCA also indicated that it was in the process of developing a permanent rule to replace this temporary rule. The MPCA's proposed exempt temporary rules were approved for legality by the Office of Administrative Hearings on December 13, 2010. The MPCA made minor modifications to the rules after the approval. The rules as adopted were filed with the Secretary of State on January 13, 2011. The MPCA rules were effective upon publication in the State Register on January 24, 2011,²⁰ and will remain in effect for a period of two years. Among other things, the MPCA rules define GHGs in a manner consistent with the EPA's rules²¹ and make it clear that GHGs are "not subject to regulation unless, as of July 1, 2011, the GHGs emissions are at a stationary source emitting or having the potential to emit 100,000 tons per year (tpy) CO₂ equivalent emissions."²²

8. The fact that GHGs will be regulated under the Clean Air Act beginning in 2011 raises the issue of whether GHG emissions that exceed the existing mandatory EAW threshold of 250 tons per year will require preparation of an EAW under the Minnesota Environmental Policy Act and the EQB rules. In its Statement of Need and Reasonableness (SONAR), the EQB indicated that it believes that the 250-tons-per-year threshold in the current rule is too low with respect to GHGs. As a result, it proposes in this proceeding to adopt a separate mandatory EAW threshold for GHGs which is consistent with the new regulatory scheme for GHGs under the Clean Air Act.²³

9. The proposed rule would retain the requirement in subpart 15 that the MPCA prepare a mandatory EAW for construction or modification of a stationary source facility that will generate 250 tons or more per year of any single air pollutant, but would limit the applicability of that threshold to air pollutants other than GHG emissions. The proposed rules would add a new item B that would set a different threshold for preparation of a mandatory EAW for projects that involve the construction or modification of stationary source facilities that emit GHGs. In such instances, the proposed rules would require the MPCA to prepare a mandatory EAW only if the facility would emit 100,000 tons or more of GHGs after installation of air pollution equipment. The proposed rule would define "greenhouse gases" to include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. It would also specify that their combined carbon dioxide equivalents shall be computed by multiplying the mass amount of emissions for each of the six greenhouse gases in the pollutant GHGs by the gas's associated global warming potential (as published in the Federal Register²⁴) and summing the resultant value for each.²⁵

²⁰ 35 State Reg. 1097-1108 (Jan. 24, 2011).

²¹ Minn. R. 7005.0100, subps. 11d and 19 F.

²² Minn. R. 7005.0100, subp. 24a. The rule goes on to state that CO₂ equivalent emissions (CO₂e) "represent an amount of GHGs emitted and . . . are computed by multiplying the mass amount of emissions for each of the six greenhouse gases in the pollutant GHGs, by the gas's associated global warming potential published in [74 Federal Register 56395-56396, as amended, to be codified as Table A-1 to 40 C.F.R. Part 98, subpart A, as amended] and summing the resultant value for each to compute emissions as CO₂e."

²³ SONAR at 2.

²⁴ 74 Fed. Reg. 56395-56396, as amended, to be codified as Table A-1 to subpart A of 40 C.F.R. Part 98 (Global Warming Potentials), as amended.

²⁵ Hearing Exhibit (Ex.) 3, p. 1.

10. The proposed rule amendments would make the mandatory EAW requirements consistent with the federal and state air permitting requirements. Because GHGs are now defined as air pollutants under federal law, failure to amend the rule would mean that the MPCA would be required to prepare an EAW for a stationary source facility that generates 250 tons or more per year of GHGs even though state and federal laws do not require air permits at such levels.

Rulemaking Legal Standards

11. Under Minnesota law, the Administrative Law Judge must determine whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.²⁶

12. To support the need for and reasonableness of a proposed rule, an agency may rely on materials developed for the hearing record, legislative facts (i.e., general facts concerning questions of law, policy and discretion), interpretation of a statute, or stated policy preferences.²⁷ The Board prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the Board primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by comments made by staff and witnesses who spoke on behalf of the Board at the public hearing, and by the Board's written post-hearing submissions.

13. 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.²⁸ A proposed rule will be deemed arbitrary and unreasonable where the agency's choice is based upon whim, is devoid of articulated reasons, or "represents its will and not its judgment."²⁹ In contrast, a rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.³⁰ The Minnesota Supreme Court has further defined an agency's burden in

²⁶ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

²⁷ *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991). Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

²⁸ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

²⁹ See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977). See also *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

³⁰ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

adopting rules by requiring it to “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”³¹

14. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible regulatory approaches so long as the alternative that is selected by the agency is a rational one. It is not the 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 that a rational person could have made.³²

Procedural Requirements of Chapter 14

15. On October 4, 2010, the Board published in the *State Register* a Request for Comments on its proposed amendment to Minn. R. 4410.4300, subp. 15, relating to the mandatory EAW category for air pollution with respect to GHG emissions. The Request for Comments was published in the *State Register* at 35 S.R. 545.³³

16. On January 4, 2011, the Board requested approval of its Dual Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice) and Additional Notice Plan and filed with the Office of Administrative Hearings copies of the proposed Dual Notice, the proposed rules and a draft Statement of Need and Reasonableness (SONAR).

17. By letter dated January 7, 2011, the undersigned Administrative Law Judge approved the Board’s Dual Notice and Additional Notice Plan.³⁴

18. As required by Minn. Stat. § 14.131, by letter dated January 6, 2011, the Board asked the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefit of the proposed rules on local units of government.³⁵

19. In a memo issued February 14, 2011, MMB reviewed the Board’s proposed rule and concluded that the proposed rule revision “will have minimal fiscal impact on local units of government and the EQB has adequately considered local government costs.”³⁶

20. On January 21, 2011, the Board e-mailed a copy of the SONAR to the Legislative Reference Library as required by Minn. Stat. §§ 14.131 and 14.23.³⁷

³¹ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

³² *Federal Sec. Adm’r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943); *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

³³ Ex. 1.

³⁴ Ex. 5.

³⁵ Ex. 10.

³⁶ Ex. 10.

³⁷ Ex. 4. The SONAR was e-mailed to sonar@lrl.leg.mn and sonars@lrl.leg.mn.

21. On January 21, 2011, the Board sent by U.S. mail a copy of the Notice of Hearing and the proposed rule to all persons and associations on the rulemaking mailing list established by Minnesota Statutes, section 14.14, subdivision 1a.³⁸

22. On January 21, 2011, the Board provided additional notice to persons who had previously contacted the EQB regarding the subject of this rulemaking.³⁹

23. On January 21, 2011, the Board provided additional notice, consistent with the Additional Notice Plan, by placing the Dual Notice of Hearing in the January 24, 2011 issue of the *EQB Monitor*.⁴⁰

24. On January 21, 2011, the Board provided additional notice, consistent with the Additional Notice Plan, by posting the Dual Notice of Hearing, the proposed rules, and the Statement of Need and Reasonableness on the EQB website.⁴¹

25. On January 21, 2011, the Board sent a copy of the Dual Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.⁴²

26. On January 24, 2011, the Board issued a press release regarding the rulemaking consistent with its Additional Notice Plan. As part of its dissemination of the press release, the Board posted the press release on the Board's website at www.admin.state.mn.us/documents/newscenter_110124_eqb_amendment.pdf.⁴³

27. The Notice of Hearing identified the date and location of the hearing in this matter.⁴⁴

28. On January 24, 2011, a copy of the proposed rules and Notice of Hearing were published in the *State Register*.⁴⁵

³⁸ Ex. 6.

³⁹ Ex. 11. Notice to this group of people was not in the Additional Notice Plan, but was an appropriate addition to it.

⁴⁰ Ex. 12.

⁴¹ Ex. 13.

⁴² Ex. 15. The Board inadvertently omitted this Exhibit from the Hearing Exhibits entered into evidence on the day of the hearing. The Board supplemented the record on April 25, 2011, at the request of the Administrative Law Judge, with evidence demonstrating that it did provide timely notice to legislators as required by Minn. Stat. § 14.116. The documentation provided by the Board was received into the rulemaking record as Exhibit 15.

⁴³ Ex. 16. The Board inadvertently omitted this Exhibit from the Hearing Exhibits entered into evidence on the day of the hearing. The Board supplemented the record on April 25, 2011, at the request of the Administrative Law Judge, with evidence demonstrating that it did disseminate the press release. The documentation provided by the Board was received into the rulemaking record as Exhibit 16.

⁴⁴ Ex. 7.

⁴⁵ Ex. 7; 35 State Reg. 1083 (January 24, 2011).

29. At the hearing on March 9, 2011, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Board's Request for Comments as published in the *State Register* on October 4, 2010;⁴⁶
- b. the proposed rules dated January 3, 2011, including the Revisor's approval;⁴⁷
- c. the Board's SONAR;⁴⁸
- d. the certification that the Board mailed a copy of the SONAR to the Legislative Reference Library on January 21, 2011;⁴⁹
- e. the Dual Notice of Hearing as mailed and as published in the *State Register* on January 24, 2011;⁵⁰
- f. Certificate of Mailing the Notice of Hearing and the proposed rules to the rulemaking mailing list on January 21, 2011, and Certificate of Accuracy of the Mailing List;⁵¹
- g. the written comments on the proposed rule that the Board received during the comment period that followed the Notice of Hearing;⁵²
- h. the written comments on the proposed rule that the Board received in response to the preliminary Request for Comments;⁵³
- i. Letter to Minnesota Management and Budget and Response from Minnesota Management and Budget fulfilling the requirements of Minn. Stat. § 14.131;⁵⁴
- j. Certificate of Giving Additional Notice to persons who responded to the preliminary Request for Comments;⁵⁵
- k. Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan by publishing Dual Notice in the *EQB Monitor*;⁵⁶

⁴⁶ Ex. 1.

⁴⁷ Ex. 2.

⁴⁸ Ex. 3.

⁴⁹ Ex. 4.

⁵⁰ Exs. 5 and 7.

⁵¹ Ex. 6.

⁵² Ex. 8.

⁵³ Ex. 9.

⁵⁴ Ex. 10.

⁵⁵ Ex. 11.

⁵⁶ Ex. 12.

- l. Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan by posting Dual Notice, proposed rules and SONAR on the EQB website,⁵⁷ and
- m. Certificate of Mailing Notice of Hearing to Those Who Requested a Hearing.⁵⁸

30. On April 25, 2011, at the request of the Administrative Law Judge, the Board supplemented the record as follows:

- a. Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators, along with a copy of the cover letter to legislators, as required by Minn. Stat. § 14.116.⁵⁹
- b. Copy of press release dated January 24, 2011 as sent to the media and posted on the same date on the Board's website at www.admin.state.mn.us/documents/newscenter_110124_eqb_amendment.pdf.⁶⁰

31. The Administrative Law Judge finds that the Board has met the procedural requirements set forth in applicable law and rules.

Additional Notice Requirements

32. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or, in the alternative, the agency must detail why these notification efforts were not made.

33. On January 4, 2011, the Board submitted an additional notice plan to the Office of Administrative Hearings for approval. In addition to providing the notice required by statute, the Board indicated that it would post the rulemaking notices, the proposed rules, and the SONAR on the EQB's website; publish the rulemaking information in the EQB Monitor (a bi-weekly electronic publication of the EQB concerning events in the environmental review program which the EQB indicated was routinely reviewed by many persons and organizations with a potential interest in environmental review activities); and send a press release about the rulemaking to major circulation newspapers throughout the state.⁶¹ The proposed additional notice plan was approved by the Administrative Law Judge on January 7, 2011.⁶²

34. During the rulemaking proceeding, the Board certified that it had provided additional notice to persons who had previously contacted the EQB regarding the

⁵⁷ Ex. 13.

⁵⁸ Ex. 14.

⁵⁹ Ex. 15. See footnote 42, above.

⁶⁰ Ex. 16. See footnote 43, above.

⁶¹ See SONAR at 6.

⁶² Ex. 5.

subject of this rulemaking⁶³ and posted the Dual Notice of Hearing, the proposed rules, and the SONAR on the EQB website on January 21, 2011.⁶⁴ The Board also confirmed that it had disseminated a press release regarding this rulemaking to the media and posted the press release on its website on January 24, 2011,⁶⁵ and had included the Dual Notice of Hearing in the January 24, 2011, issue of the *EQB Monitor*.⁶⁶

35. The Administrative Law Judge finds that the Board has fulfilled its additional notice requirements.

Statutory Authority

36. The Board cites Minn. Stat. § 116D.04, subds. 2a(a), 4a and 5a, and Minn. Stat. § 116D.045, subd. 1, as sources of statutory authority for its adoption of these proposed rules.⁶⁷

37. Section 116D.04, subd. 2a(a), requires that the Board “shall by rule establish categories of actions for which . . . environmental assessment worksheets shall be prepared. . . .” Section 116D.04, subds. 4a and 5a, provide additional authority for the Board to adopt rules identifying alternative forms of environmental review and establishing the form and content of EAWs.

38. Section 116D.045 provides authority for the Board to adopt rules regarding responsibility for costs associated with preparation and distribution of an EIS. Section 116D.045 is not directly applicable to this rulemaking, which addresses mandatory EAWs.

39. The Administrative Law Judge concludes that the Department has the statutory authority under Minn. Stat. § 116D.04 to adopt rules establishing a mandatory EAW threshold for greenhouse gas emissions.

Impact on Farming Operations

40. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

41. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture of the proposed rules.⁶⁸

⁶³ Ex. 11.

⁶⁴ Ex. 13.

⁶⁵ Ex. 16.

⁶⁶ Ex. 12.

⁶⁷ SONAR at 2.

⁶⁸ The Board noted in the SONAR that the current Chair of the EQB is also the Commissioner of Agriculture, so the Commissioner was in fact aware of this rulemaking proceeding. SONAR at 6.

Regulatory Analysis in the SONAR

42. The Administrative Procedure Act obliges an agency adopting rules to address seven factors in its Statement of Need and Reasonableness. Each of these factors, and the Board's analysis, are discussed below.

43. The first factor requires "a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule." In its SONAR, the Board states that the following groups will be affected by the proposed rules:

- Under these rules, EAWs will be required of proposers of new or expansion projects with emissions of GHGs of more than 100,000 tons per year, expressed as carbon dioxide equivalents. The kinds of projects likely to be affected include power plants, petroleum refineries and cement manufacturing plants. Many of these projects would already be required to complete EAWs due to other existing EAW mandatory categories in Minn. R. 4410.4300.
- As a result of these rules, proposers of development projects with GHG emissions over 250 but less than 100,000 tons per year carbon dioxide equivalents will benefit because they will not be required to prepare EAWs. This will include a great many types of projects in the commercial, industrial and residential sectors, including something as small as an office of 8,000 square feet.⁶⁹

44. The second factor requires consideration of "the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues." According to the SONAR, the costs to the Board associated with rule implementation and rule enforcement will be negligible. The only cost attributable to the Board will be the cost of editing guidance materials to reflect the amendment. The Board anticipates that there will be increased costs to the MPCA, which will be the Responsible Governmental Unit (RGU) for EAWs prepared pursuant to the rule amendment. The Board estimates that an additional five EAWs will be prepared each year due to the amendment.⁷⁰ Based on 2006 MPCA cost estimates, each additional EAW will cost approximately \$9,400 in additional staff time, and the total estimated costs will be approximately \$47,000 per year (in 2006 dollars).⁷¹

45. However, this cost is far less than it would be without the rule amendments. If the rule is not amended, and mandatory EAWs are required of all projects with an estimated 250 tons per year of GHGs, the Board estimates based on information provided by the EPA that there would be a 140-fold increase in permit applications per year. Because the current average annual number of EAWs required at the 250-tons-per-year threshold is only approximately two, the Board projects that an additional 280 EAWs would be required per year if GHGs were covered by the 250-ton

⁶⁹ SONAR at 3.

⁷⁰ SONAR at 3.

⁷¹ SONAR at 5.

threshold. If the 280 is multiplied by \$9,400 per EAW, the increased cost would be in excess of \$2.6 million dollars in added staff costs.⁷²

46. Because the MPCA charges a fee of about \$20,000 to an air permit applicant if an EAW is required for the project under the air pollutant mandatory EAW rule, there would be an increase in state revenues under these rules. Assuming an estimated five additional EAWs per year, there would be a total of approximately \$100,000 per year in increased revenues as a result of this rule.⁷³

47. The third factor requires “a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.” The Board determined that there are no less costly or less intrusive methods for achieving the purpose of requiring preparation of EAWs for large sources of GHG emissions without requiring review of too many smaller sources.⁷⁴

48. The fourth factor requires a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.”

49. The Board identified two alternative methods to achieve the purpose of the proposed rule, which is to require preparation of EAWs for large sources of GHG emissions without requiring review of too many smaller sources. First, the EQB considered amending the rule to exclude GHGs from coverage by the air pollution category. This could have been accomplished by amending the category to state that it did not apply to GHGs or by defining the term “air pollutant” in a manner that would exclude GHGs. The Board rejected that option because it concluded that GHGs should be covered by the mandatory EAW requirement at some appropriate threshold because GHG emissions are recognized as contributing to important environmental impacts.

50. Second, the Board considered achieving the purpose of the rule by establishing a different threshold for GHGs than the one that has been established by the EPA and the PCA. However, the Board has historically tied its air pollution thresholds to those established by the EPA, and it chose to continue to do so here. The EPA currently has a dual-tier threshold, with a trigger of 75,000 tons per year applying in certain cases. The Board chose the 100,000-tons-per-year threshold because that is consistent with the generally applicable permitting threshold for GHGs set by the EPA and the MPCA. The Board believes that the 100,000-ton threshold will be the more generally applicable permitting threshold for GHGs in the early phases of the regulation of GHGs under the Clean Air Act. The Board also indicated that it decided to propose adoption of a single tier system pegged to the higher number to minimize confusion. The Board noted that the EPA will likely refine its GHG thresholds in the future and stated that the Board anticipates that its will amend its own mandatory EAW requirements as it gains experience with these standards.⁷⁵

⁷² SONAR at 5.

⁷³ SONAR at 4.

⁷⁴ Ex. 3 at 4.

⁷⁵ SONAR at 4, 8-9.

51. The fifth factor specifies that the agency must assess “the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.” The Board estimated that projects likely to be affected by the 100,000-tons-per-year threshold would probably be technically complex and projected that the costs of EAWs for such projects would be “toward the high end of the range of EAW costs.” For purposes of this analysis, the Board assumed that the cost would be between \$25,000 and \$50,000 per EAW, with most of that cost borne by the project developer.⁷⁶

52. The sixth factor requires a description of “the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.” The Board asserts that, if the amendments are not adopted, GHG emissions would be subject to the existing threshold of 250 tons per year. This would likely result in the preparation of hundreds of additional EAWs per year, at significant cost both to the project proposers and to the State. MPCA staff estimate that the lower threshold would require the developer of a building of only about 8,000 square feet to prepare an EAW.⁷⁷

53. The seventh and final factor requires “an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.”

54. In the SONAR, the Board indicated that there are times when a particular project (typically public projects such as highways, water resources projects, or wastewater collection and treatment projects) requires environmental review under both the federal National Environmental Policy Act and the Minnesota Environmental Policy Act. The Board noted that the federal process is similar in general outline to the state process and requires environmental documents similar to the EAWs and EISs used in Minnesota, but is not identical in every detail. In its SONAR, the Board explained that Minn. R. 4410.1300 and 4410.3900 address situations in which both federal and state environmental reviews are required by permitting joint state and federal review or by allowing the federal environmental document to be substituted for a state EAW. The proposed rule amendments will not affect either of these provisions.⁷⁸

55. The Administrative Law Judge finds that the Board’s SONAR adequately addressed the regulatory factors required by Minn. Stat. § 14.131.

Performance-Based Regulation

56. The Administrative Procedure Act⁷⁹ also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior

⁷⁶ Ex. 3 at 5.

⁷⁷ SONAR at 5.

⁷⁸ SONAR at 6.

⁷⁹ Minn. Stat. § 14.131.

achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁸⁰

57. The Board pointed out in its SONAR that these rule amendments do not alter the Environmental Review procedures but merely adjust one of the thresholds at which review is required. Therefore, the Board contends that this rulemaking proceeding does not offer an opportunity for adopting performance-based rules or providing procedural flexibility. Finally, the Board notes that Environmental Review is not a regulatory program and there are no regulatory objectives in this rulemaking.⁸¹

58. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Consultation with the Commissioner of Minnesota Management and Budget

59. Under Minn. Stat. § 14.131, the agency is also required to consult with the Commissioner of Minnesota Management and Budget (MMB) to "help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

60. The Board provided the proposed rules and the SONAR to MMB on January 6, 2011. In a memo dated February 14, 2011, MMB concluded that local units of government would be impacted by the rule change if the local unit was a proposer of a new or expansion project with GHGs of more than 100,000 tons per year. MMB noted that the impact would be broader if the proposed rules were not adopted because proposers of projects would be required to prepare EAWs when the project generated GHG emissions of more than 250 tons per year. MMB concluded that the proposed amendments would have minimal fiscal impact on local units of government.⁸²

61. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. § 14.131.

Compliance Costs for Small Businesses and Cities

62. Minn. Stat. § 14.127, requires the Board to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."⁸³ The Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁸⁴

⁸⁰ Minn. Stat. § 14.002.

⁸¹ Ex. 3 at 6.

⁸² Ex. 10.

⁸³ Minn. Stat. § 14.127, subd. 1.

⁸⁴ Minn. Stat. § 14.127, subd. 2.

63. The Board concluded that no small business or small city will be required to spend more than \$25,000 in the first year after the rules take effect. The Board made this determination based on the probable costs of complying with the proposed rule. It projects that the 100,000-ton threshold would limit the application of the proposed rule to just a few very large projects, such as petroleum refineries, power plants or cement plants, annually.⁸⁵

64. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Adoption or Amendment of Local Ordinances

65. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁸⁶

66. The Board concludes that the proposed rules do not necessitate local government action because only the MPCA will be required to perform any additional environmental review due to the amendment.⁸⁷

67. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

Analysis of the Proposed Rule Amendment

68. This Report is limited to discussion of the portions of the proposed rule that received 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 all comments, including those made prior to the hearing, have been carefully read and considered.

69. The Administrative Law Judge specifically finds that the Agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Comments in Opposition to the Proposed Rule Amendment

70. Prior to the hearing, a number of individuals and organizations submitted written comments in which they expressed opposition to the proposed rules and requested that a hearing be held. Of the 125 requests for hearing received by the

⁸⁵ Ex. 3 at 3, 4 and 7.

⁸⁶ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

⁸⁷ Ex. 3 at 7.

Board, 117 were essentially identically-worded letters from members of the Sierra Club. The remaining eight letters included one on behalf of the Minnesota Center for Environmental Advocacy (MCEA) and Fresh Energy; one from Audubon Minnesota; and six from individuals. All of these comments challenged the Board's proposal to trigger the mandatory EAW requirement for air pollution from stationary source facilities only if GHG emissions are 100,000 tons or more per year and urged that the threshold be set at a lower level. For example, the MCEA and Fresh Energy suggested that the EQB establish a threshold level of 10,000 tons or more for new sources or projects with direct annual GHG emissions, and a threshold level of 25,000 tons or more for new sources or projects with combined direct and indirect GHG emissions.⁸⁸ The letters from Sierra Club members urged the EQB to establish a threshold level of 10,000 tons of GHGs per year for all projects. Paula Goodman Maccabee and Timothy DenHerder-Thomas recommended that the threshold trigger be set at 5,000 tons per year, and in no event higher than 10,000 tons per year.⁸⁹

71. During and after the hearing, numerous individuals and organizations continued to express opposition to the EQB's proposed threshold.

72. Sarah Risser testified at the hearing on behalf of the Sierra Club, North Star Chapter. She objected to the EQB's proposed 100,000-ton threshold and indicated that the Sierra Club would likely support establishing a 10,000-ton threshold which, based upon preliminary analysis, it believes would be sufficient to address the majority of GHG emissions and also greatly reduce the number of mandatory EAWs that would need to be completed. She emphasized that the goal in Minnesota is to reduce statewide GHG emissions across all sectors to a level at least 15 percent below 2005 levels by 2015, 30 percent below 2005 levels by 2025, and 80 percent below 2005 levels by 2050,⁹⁰ and questioned how the EQB's proposed rule is consistent with that commitment or with the purposes of the Minnesota Environmental Policy Act. She asserted that EAWs provide an important opportunity for citizens to know the impact that projects will have in their communities and ensure that those who propose projects consider how environmental impact can be reduced. She contended that the EQB has not provided an adequate rationale for the proposed increase in the threshold.⁹¹

73. Stephen Gosala, who is the director of operations for OCLT Company and a Sierra Club Volunteer, testified that the EAW process provides Minnesota citizens the opportunity to understand the environmental impacts of proposed projects and become involved in the process. In his opinion, the proposed 100,000-ton threshold is too high to capture the vast majority of pollutants. He urged that the threshold instead be set at 10,000 metric tons of carbon dioxide equivalent to coincide with the MPCA's level for GHG reporting.⁹²

⁸⁸ Ex. 8, MCEA letter (Feb. 23, 2011) at 2.

⁸⁹ Ex. 8. Similar comments were submitted by Bradley Sagen, Julia Frost Nerbonne, Paul Thompson, and Raymond Schmitz.

⁹⁰ Minn. Stat. §§ 216H.02.

⁹¹ Hearing Transcript (T.) at 60-66.

⁹² T. at 36-38; Public Hearing Ex. 1.

74. Dick Ottman, a retired environmental electrical engineer and member of the Sierra Club Clean Air Renewable Energy Committee, commented that a 10,000-tons-per-year threshold would improve projects and save money in the long run by requiring a valuable focus on GHG emissions beginning at an early stage in the project.⁹³

75. Boise Jones, a member of the Environmental Assessment Committee of the Twin Cities Metro Central Area Corps, urged the EQB not to raise the threshold to 100,000 tons per year. He argued that there was no clear identifiable need to do so and asserted that it would reflect a backward step in the state's progress on GHG reduction. He also expressed concern that the mandatory EAW threshold in the proposed rule would cause current GHG reduction strategies in Minnesota to stagnate.⁹⁴

76. Kathryn Hoffman, Staff Attorney with the MCEA, provided hearing testimony and post-hearing submissions on behalf of the MCEA, Fresh Energy, and the Midwest Office of the Izaak Walton League of America.⁹⁵ Ms. Hoffman urged that the EQB's proposed 100,000-ton threshold be rejected, and recommended that the threshold instead be set at 10,000-25,000 tons per year, to ensure that environmental review is conducted regarding each new Minnesota facility that meaningfully contributes new greenhouse gases to the atmosphere. She indicated that, at a 10,000-ton threshold, a mandatory EAW would be triggered for 25 percent of facilities and 98 percent of CO₂ emissions and, at a 25,000-ton threshold, a mandatory EAW would be triggered for 13 percent of facilities and 97 percent of CO₂ emissions.⁹⁶ Ms. Hoffman argued that the proposed rule should be disapproved for four primary reasons:

- First, she contended that the proposed rule is not rationally related to the objectives of the Minnesota Environmental Policy Act and “sacrifices environmental protection in the name of administrative convenience.” She maintained that the EQB's proposed 100,000-ton threshold would exempt the vast majority of facilities that emit GHGs in Minnesota from environmental review and is contrary to the Act's declaration that it is the policy of the State to “promote efforts that will prevent or eliminate damage to the environment and biosphere” and “use all practicable means and measures . . . to create and maintain conditions under which human beings and nature can exist in productive harmony. . . .”⁹⁷ Ms. Hoffman also indicated that the Minnesota Environmental Policy Act requires that environmental review take place where there is “a potential for significant environmental effects resulting from any major governmental action,”⁹⁸ and asserted that GHG

⁹³ T. at 29-31.

⁹⁴ T. at 32-36.

⁹⁵ T. at 38-54; Public Exs. 2, 16.

⁹⁶ T. at 52-53; Public Ex. 2, attachment 1; Public Ex. 16.

⁹⁷ Minn. Stat. §§ 116D.01 and 116D.02.

⁹⁸ Ms. Hoffman relied on Minn. Stat. § 116D.04, subd. 2a, for this proposition. As discussed in more detail below, this portion of the Act discusses only when an EIS must be prepared, and does not address when an EAW must be prepared.

emissions pose a direct threat to the environment and public health and welfare.⁹⁹

- Second, Ms. Hoffman argued that the EPA's tailoring rule under the Clean Air Act is irrelevant to Minnesota's requirements for environmental review and does not justify the EQB's selection of the 100,000-ton threshold. She contended that the EQB's proposed threshold is too high to help avoid significant environmental effects or meet the requirements of Minnesota's Next Generation Energy Act. While adopting the Clean Air Act permitting standards might make sense for other air pollutants, she asserted that it does not make sense to adopt the very high threshold for GHGs in light of the pressing need to sharply reduce such emissions. She further maintained that the EQB is not obligated to adopt the EPA's permitting threshold.¹⁰⁰

- Third, Ms. Hoffman asserted that the EQB's SONAR does not support the need for or reasonableness of the proposed rule. She pointed out that the SONAR does not assess the impact of GHGs, state the need to steeply reduce emissions of those gases, or state that the purpose of environmental review is to calculate, disclose and discuss ideas for mitigating those emissions before the facility is built. She also argued that the SONAR failed to discuss any alternatives other than the 100,000-ton threshold or address the potential environmental advantages of adopting a lower threshold. She maintained that the threshold selected by the EQB is so high that it will affect no projects other than those that would already have to undergo environmental review.¹⁰¹

- Finally, Ms. Hoffman argued that state and federal law provide guidance for a threshold of 10,000 to 25,000 tons, rather than the proposed 100,000 tons per year. She pointed out that Minn. Stat. §§ 216H.11 and 216H.021 require that the MPCA establish a system for reporting and maintaining an inventory of GHG emissions that includes "facilities whose annual carbon dioxide equivalent emissions . . . exceed a threshold set by the commissioner [of the MPCA] at between 10,000 tons and 25,000 tons" and further require a reporting threshold at 10,000 metric tons or more carbon dioxide equivalent for certain "high global warming potential" GHGs. Ms. Hoffman also pointed out that the federal Council on Environmental Quality (the EQB's federal counterpart) has indicated that a 25,000-ton threshold "provides comprehensive coverage of emissions with a reasonable number of reporters, thereby creating an

⁹⁹ T. at 45-48; Public Ex. 16 (Outline of Oral Remarks) at 1-2.

¹⁰⁰ T. at 48-49; Public Ex. 16 (Supplemental Remarks) at 1-3; Public Ex. 16 (Outline of Oral Remarks) at

3.

¹⁰¹ T. at 49-50; Public Ex. 16 (Outline of Oral Remarks) at 3-4.

important data set useful in quantitative analyses of GHG policies, programs and regulations.”¹⁰²

77. Attorney and former St. Paul City Council Member Paula Goodman Maccabee also objected to the threshold set in the proposed rules. In her view, the 10,000-ton threshold set in Minn. Stat. § 216H.11 for high global warming potential GHGs should be considered the appropriate level at which significant environmental effects could occur. She emphasized that only a few types of projects are likely to have sufficiently high GHG emissions to meet the threshold proposed by the EQB and argued that the proposed rule will have no impact at all on the stated objective of environmental review. She also noted that requiring a mandatory EAW at a lower threshold could allow developers, citizens and local governments to negotiate project changes that will reduce the project’s carbon footprint.¹⁰³

78. Reed Aronow emphasized the detrimental economic impact of climate change and suggested that a lower threshold between 250 and 100,000 tons per year could create jobs and save the state billions of dollars in the future.¹⁰⁴ Amy Blumenshine also urged that the EQB’s 100,000-ton threshold be rejected in favor of a lower threshold that will better protect the environment.¹⁰⁵

79. In his testimony at the hearing, and in his post-hearing submission, Christopher Childs stressed the serious environmental implications of rising global carbon dioxide emissions and climate shift. He indicated that the proposed threshold of 100,000 tons is unjustifiable, and recommended that a 250-ton threshold be set for GHGs, similar to the threshold applicable to non-GHGs.¹⁰⁶ Andy Pearson also suggested that the threshold be set below 100,000 tons per year, in keeping with Minnesota’s recognized leadership role on climate change issues.¹⁰⁷

80. Don Arnosti, Policy Director of Audubon Minnesota, filed a post-hearing comment on behalf of 13,000 members of the National Audubon Society in Minnesota. He supported a mandatory EAW threshold of 10,000 tons per year for GHG carbon dioxide equivalent and asserted that the EQB’s proposed 100,000-ton threshold was unwarranted. He argued that an EAW is not a permit, and should not be tied to the EPA’s permitting threshold. In his view, the first step in any reasonable process to abate climate change will be to gather the information provided as part of the preparation of an EAW.¹⁰⁸

81. Several other individuals submitted post-hearing comments in which they objected to the proposed rules and supported designating a lower threshold. For

¹⁰² T. at 50-52; Public Ex. 16 (Outline of Oral Remarks) at 4. Minn. Stat. § 216H.10, subd. 7, defines “high global warming potential” GHGs to mean “hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, nitrous trifluoride, and any other gas the agency determines by rule to have a high global warming potential.”

¹⁰³ T. at 54-60.

¹⁰⁴ T. at 65-71.

¹⁰⁵ T. at 78-80.

¹⁰⁶ T. at 71-77; Public Ex. 4.

¹⁰⁷ T. at 82.

¹⁰⁸ Public Ex. 20.

example, David Howd, a retired architect, filed a post-hearing comment in which he opposed the proposed 100,000-ton threshold and urged that the threshold instead be set at no higher than 10,000 metric tons of carbon dioxide equivalent. In his view, the lower threshold would confirm the state's commitment to address climate change and ensure that new sources of emissions are reasonably mitigating their carbon footprint.¹⁰⁹ Elanne Palcich commented that the proposed 100,000-ton threshold flies in the face of climate change concerns and suggested that a 10,000-ton threshold would be a reasonable starting point.¹¹⁰ Carol Greenwood also supported a 10,000-ton threshold for mandatory EAWs and argued that the costs associated with accumulated GHG emissions vastly outweigh the costs that businesses would incur by having to complete an EAW.¹¹¹ Alan Muller¹¹² and Theresa McNamara¹¹³ similarly objected to the threshold proposed by the EQB and suggested that the threshold be set at 10,000 tons per year or lower. Jan Greenfield also submitted written comments recommending that the threshold be set at 10,000 tons or lower if possible.¹¹⁴

Comments in Support of the Proposed Rule Amendment

82. In contrast, a number of organizations and corporations expressed support for the EQB's proposed rule amendments and the 100,000-ton threshold. For example, a joint comment filed by the Minnesota Asphalt Pavement Association, the Associated General Contractors of Minnesota, and the Aggregate and Ready Mix Association of Minnesota on behalf of approximately 700 affiliated companies noted that the current EQB rule thresholds match those set in federal rules for other air pollutants and supported the EQB's proposed 100,000-ton threshold because it is consistent with the major source level set in the federal GHG tailoring rule. These organizations were critical of proposals to reduce the threshold to 10,000 tons per year. They indicated that many commercial establishments, such as "big box" stores, strip malls, and schools, could have heating and ventilation equipment burning natural gas that would meet or exceed that threshold. They also emphasized that the MPCA rules¹¹⁵ provide that potential emissions of carbon dioxide equivalents of 10,000 tons per year or less are "insignificant activities" for permitting purposes.¹¹⁶

83. Similar post-hearing comments expressing support for the EQB's proposed 100,000-ton threshold for mandatory EAW applicability and opposing thresholds of 10,000-tons or lower were filed by Allete, Incorporated,¹¹⁷ The Toro

¹⁰⁹ Public Ex. 6.

¹¹⁰ Public Ex. 19.

¹¹¹ Public Ex. 18.

¹¹² Public Ex. 15.

¹¹³ Public Ex. 14.

¹¹⁴ Public Exs. 5, 21.

¹¹⁵ Minn. R. 7007.1300, subp. 4D.

¹¹⁶ Public Ex. 10. They also indicated that they supported the remarks contained in November 3, 2010, letter from the Minnesota Asphalt Pavement Association and the Aggregate and Ready Mix Association of Minnesota regarding the proposed rules. That letter suggested as a further alternative that the term "air pollutant" be defined in a manner that excludes GHGs and expressed the opinion that it would be unreasonable and contrary to the purpose of the environmental review program to apply "incredibly low" limits such as 250 tons per year to GHG emissions.

¹¹⁷ Public Ex. 17.

Company,¹¹⁸ the Metropolitan Airports Commission,¹¹⁹ Northstar Agri Industries,¹²⁰ Spectro Alloys Corporation,¹²¹ the Minnesota Soybean Processors (on behalf of more than 2,350 members),¹²² and the Minnesota Chamber of Commerce (on behalf of more than 2,600 Minnesota businesses).¹²³

84. The MPCA supported the EQB's proposal to change the EAW threshold to be consistent with the permit threshold adopted by the MPCA under its exempt temporary rules. During the rulemaking hearing, Barbara Jean Conti of the MPCA testified that approximately 42 states have now implemented new permit thresholds following the lead of the EPA tailoring rule. She acknowledged that the EPA rule is being challenged, but indicated that it will take a lengthy period of time to resolve these challenges, and due diligence requires that state agencies work with the EPA rule as it currently exists. Ms. Conti noted that the EPA found that it would not be feasible to issue permits to facilities emitting 100 or 150 tons per year of GHG carbon dioxide equivalents. She pointed out that a 3,200 square foot structure would require a major source permit under such an interpretation, and indicated that the Clean Air Act was not intended to regulate buildings of that size. The MPCA agrees with the EQB's view that the Environmental Review Program serves as a support function for permitting, and believes that there is no reason to extend a mandatory EAW requirement to smaller sources of carbon dioxide equivalent emissions when such projects are not subject to permitting requirements. In response to questions, Ms. Conti indicated that approximately 100 facilities in Minnesota would have emissions that would meet or exceed the EQB's proposed 100,000-ton threshold. She acknowledged that it is likely that smaller manufacturing facilities and larger commercial buildings would meet or exceed a 25,000- or 10,000-ton threshold.¹²⁴

EQB's Response to Comments

85. In its SONAR, during the hearing, and in its post-hearing response, the EQB maintained that it is appropriate to amend the rule to trigger preparation of a mandatory EAW when construction or modification of a stationary source facility generates a combined 100,000 tons or more per year of GHG carbon dioxide equivalents. The EQB emphasizes that environmental review in Minnesota is meant to be a basic fact-gathering activity for the purposes of better-reasoned permitting decisions on the part of governmental units that have permits, approvals, or other governmental participation decisions to make. In the Board's view, to remain credible and effective, the mandatory EAW rule should be changed to be compatible with the levels selected for GHG enforcement and permitting adopted by the EPA and the MPCA. The Board noted that, if the 250-ton level remained in place for such emissions, it would lead to absurd results and "create an unmanageable administrative burden on MPCA to prepare hundreds of additional EAWs, with very little environmental benefit."

¹¹⁸ Public Ex. 9.

¹¹⁹ Public Ex. 8.

¹²⁰ Public Ex. 7.

¹²¹ Public Ex. 11.

¹²² Public Ex. 12.

¹²³ Public Ex. 13.

¹²⁴ Hearing Transcript at 22-29.

The Board further indicated that the mandatory EAW threshold “has long been based on permitting thresholds under the Clean Air Act,” referencing rules it adopted in the air pollution EAW category between 1982 and 2006. In determining the appropriate threshold level for GHGs, the Board asserted that it is reasonable to use the same rationale and similarly choose a federal permitting threshold as the basis of a new EAW threshold for GHGs. In this instance, it chose the higher federal number (100,000 tons per year) because that will be the more generally applicable permitting threshold for GHGs at least during the early phases of regulating GHGs under the Clean Air Act.¹²⁵

86. In its post-hearing response, the Board stressed that the general policies set forth in the Minnesota Environmental Policy Act (for example, to “promote efforts that will prevent or eliminate damage to the environment and biosphere” and “use all practicable means and measures . . . to create and maintain conditions under which human beings and nature can exist in productive harmony”)¹²⁶ are directed to *all* of state government. The Act does not require that the EQB itself implement those policies, regulate GHGs in any way, or enforce the statutory requirements. The Board believes that many of those objecting to the proposed rules misunderstood the basis of this rulemaking and confused the MPCA’s regulation of GHG emitters with the EQB rules. It underscored that the Environmental Review Program, and review by EAW, is not a monitoring, incentive, or prevention program.¹²⁷

87. The Board indicated that individual EAWs are merely designed to suit the environmental information needs of specific projects, and are not intended to fulfill overarching policy objectives. It also asserts that environmental review in Minnesota is only intended to apply to projects requiring governmental decisions, and situations that do not meet those conditions are exempt from review.¹²⁸ The Board contends that the issuance of a permit is essential to mandatory EAW review of individual projects. Its argues that its selection of a threshold that corresponds to the permitting threshold “merely declares an outside limit beyond which it is believed that projects of that magnitude should be required to prepare an EAW without further evidence of a potential for significant environmental effects.”¹²⁹ The Board believes that the permit-required level establishes a cogent limit to require mandatory review. It underscores that no facility is “exempted” from review, since any project of any size may be ordered to prepare a discretionary EAW in response to a citizen petition or where the governmental unit with approval authority over the proposed project determines that, because of the nature or location or a proposed project, the project may have the potential for significant environmental effects. The Board thus contends that “[e]stablishing the proposed threshold does not close the door on the ability of those in authority or concerned citizens to make the case that any individual project should be reviewed.”¹³⁰

88. The Board further argues that it has demonstrated the need for and reasonableness of the 100,000-ton threshold for mandatory EAWs by showing that that

¹²⁵ Hearing Transcript at 17-20; SONAR at 8.

¹²⁶ Minn. Stat. §§ 116D.01 and 116D.02.

¹²⁷ Board’s April 4, 2011, Post-Hearing Submission at 1-3, 5.

¹²⁸ *Id.* at 1-3.

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 4.

threshold is commensurate with the permitting requirements adopted by the EPA and the MPCA. It asserts that it “need not engage in original science or elaborate scientific review to determine what level of GHG is ‘significant’” and points out that it has never done so for any other threshold it has established under the Environmental Review Program.¹³¹

89. Finally, the Board argues that it would not be appropriate to apply the lowest reporting threshold cited in Minn. Stat. § 216H.021 (the 10,000-ton threshold for certain GHGs) to its mandatory EAW rule. The Board contends that it would be contrary to the purposes of the environmental review program to require new sources that simply have to report their emissions to also complete a mandatory EAW.¹³²

Conclusion of Administrative Law Judge

90. Based upon a careful review of the statutes, rules, and entire record of this rulemaking proceeding, the Administrative Law Judge concludes that the Board has shown that it has statutory authority to adopt the proposed amendment to Minn. R. 4410.4300 and that the proposed amendment has a rational relationship to the objectives set forth in the Minnesota Environmental Policy Act. The Administrative Law Judge finds that the Board has also adequately demonstrated the need for and the reasonableness of the proposed amendment in its SONAR, testimony at the rule hearing, and post-hearing response.

91. The Minnesota Environmental Policy Act authorizes the EQB to adopt rules which, among other things, establish the categories of actions for which EAWs shall be prepared and prescribe the required form and content of EAWs.¹³³ The Act and the existing rules adopted by the EQB contemplate that environmental review will be conducted when governmental *decisions* regarding proposed projects are involved.¹³⁴ And the thresholds adopted by the Board in the past for non-GHG air pollutants have been based upon the levels at which permits are required under the Clean Air Act. For these reasons, the Board’s proposal to use the GHG emission level at which Clean Air Act permits will be issued by the EPA and the MPCA to establish the threshold for mandatory EAWs involving GHG emissions is consistent with the Minnesota Environmental Policy Act and the Board’s rules under that Act. The reporting requirements set forth in Chapter 216H do not require a contrary approach.

92. Contrary to the contentions of the MCEA and others, it is not accurate that the Minnesota Environmental Policy Act requires that environmental review take place where there is “a potential for significant environmental effects.” This assertion was drawn from the initial sentence in Minn. Stat. § 116D.04, subd.2a. That sentence provides in its entirety: “Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit.” Based on the plain language of the statute, it appears that this standard applies

¹³¹ *Id.*

¹³² *Id.* at 4-5.

¹³³ Minn. Stat. §§ 116D.04, subds. 2a(a), 4a, and 5a.

¹³⁴ See, e.g., Minn. R. 4410.0300, subp. 3 and 4.

only to the preparation of an EIS, and not the preparation of a mandatory EAW. In any case, in instances where a permit is not required to be issued under the Clean Air Act, it is doubtful that environmental effects could properly be viewed as “resulting from any major governmental action” within the meaning of the statute.¹³⁵

93. The rule amendment was prompted by significant changes in the interpretation of the Clean Air Act and federal and state permitting levels. Because GHG emissions are now to be treated as “air pollutants” under the Clean Air Act and the EPA and the MPCA have adopted permitting levels for GHG emissions that are much higher than those applied to other types of air pollutants, the Board has shown that it is needed and reasonable to amend its existing rule to provide for a separate, higher threshold for preparation of a mandatory EAW for GHG emissions. The Board’s selection of a threshold that coincides with the Clean Air Act permitting levels is consistent with its interpretation of the Minnesota Environmental Policy Act and the existing EQB rules adopted under that Act, as well as the Board’s past practice. The Board has explained its reliance on the EPA and MPCA permitting levels and has shown a rational relationship between that information and the approach it has chosen to take in the proposed rules. It is important to note that projects involving lesser GHG emissions may still be subject to discretionary EAWs.

94. As noted above, an agency is legally entitled to make choices between possible regulatory approaches so long as the alternative that is selected by the agency is a rational one. Although it is evident from the record in this proceeding that reasonable minds are divided about the wisdom of the approach selected by the Board, it is equally apparent that the choice made by the Board is one that a rational person could have made. Accordingly, the Administrative Law Judge concludes that the Board has fulfilled all of the applicable procedural and substantive requirements in this rulemaking proceeding and that the proposed rules have been shown to be needed and reasonable.

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

CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The 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).

3. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii).

¹³⁵ “Governmental action” is defined in Minn. R. 4410.0200, subp. 33, to mean “activities including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by governmental units, including the federal government.”

4. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

5. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rule amendment be adopted.

Dated: May 9, 2011.

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

Transcript Prepared by Barbara J. Carey, RPR, Kirby A. Kennedy & Associates (one volume).