Summary of Environmental Quality Board Amendments to Environmental Review Rules

In January 2009, the Minnesota Environmental Quality Board (MEQB) proposed significant amendments to its Environmental Review Rules. On November 23, 2009, these amendments became effective with minor changes published on that date.

The 2009 Amendments affected three major parts of the MEQB Rules: the mandatory EAW and EIS thresholds for projects in shorelands; the treatment of "cumulative impacts" and "cumulative potential effects;" and the Alternative Urban Areawide Review (AUAR) process. Other amendments made more limited but important changes.

This is a summary of the amendments:

New Mandatory EAW And EIS Thresholds For Shoreland Projects.

1.1. Shoreline Project Types and Thresholds.

Prior to the 2009 Amendments, the mandatory EAW and EIS thresholds contained limited references to shorelands. The 2009 Amendments added detailed thresholds for both EAWs and EISs related to:

- nonmetallic mineral mining in shorelands;
- residential shoreland development outside the seven-county Twin Cities metropolitan area;
- resorts, campgrounds, and RV park shoreland development; and
- land conversion in shorelands.

The detailed nature of the multiple EAW and EIS thresholds and triggering conditions precludes an easy summary. But the lowest EAW and EIS thresholds for each category, which usually apply in a "sensitive shoreland area," are shown below. The thresholds in a "nonsensitive shoreland area" are generally higher.

"Sensitive shoreland area" is defined in an amendment to the Definitions section of the MEQB Rules. It includes lakes classified as "natural environment" under shoreland rules or zoning ordinances, trout lakes and streams, designated wildlife lakes, designated migratory waterfowl feeding and resting lakes, and designated outstanding value waters.

A. Lowest EAW Thresholds Under Certain Conditions.

- Nonmetallic mineral mining—20 acres of forested or other naturally vegetated land.
- Residential developments outside the Metropolitan Area—15 residential units either unattached or attached.
- Resorts, campground, and RV park developments—15 units or sites.

- Land conversions—affecting 800 feet of shoreline or 5,000 s.f.

B. Lowest EIS Thresholds Under Certain Conditions.

- Nonmetallic mineral mining—40 acres of forested or other naturally vegetated land.
- Residential developments outside the Metropolitan Area—20 residential units either unattached or attached.
- Resorts, campground, and RV park developments—100 units or sites.
- Land conversions—40 acres of forested or other naturally vegetated land.

1.2. Common Open Space Encouraged.
The 2009 Amendments encourage substantial "common open space" in the shoreland of residential developments by setting lower thresholds for environmental review if less than 50 percent of the shoreland is in common open space.

"Common open space" is defined in an amendment to the Definitions section of the MEQB Rules. It generally includes land in a development permanently set aside for public or private use and owned in common by the individual owners or by a permanently established management entity.

1.3. What This Means for You: Shoreland projects were a continuing source of litigation over when EAWs and EISs should be prepared. These new shoreland thresholds will decrease the litigation by increasing significantly the number of shoreland projects for which developers will have to prepare EAWs and EISs. Whether common open space will be encouraged will depend on economic factors that we cannot predict at this point.

2. NEW EXEMPTION FOR SMALL RESIDENTIAL SHORELAND PROJECTS WITH COMMON OPEN SPACE.
In addition to adding the very detailed EAW and EIS thresholds for shoreland projects, the 2009 Amendments added a specific exemption for construction of less than ten residential units, "provided that all land in the development that lies within 300 feet of the ordinary high water mark of the lake or river, or edge of any wetland adjacent to the lake or river, is preserved as common open space."

What This Means for You: This exemption might encourage common open space in shorelands for small residential projects. If it does, it will further reduce environmental review litigation on shoreland projects.

3. CUMULATIVE IMPACTS AND CUMULATIVE POTENTIAL EFFECTS AMENDMENTS.

The MEQB Rules contain a definition of ‘”cumulative impacts” that was used to determine the extent of analysis for all types of environmental review—EAWs, EISs, Generic EISs, AUARs, etc. The rules also used the term “cumulative potential effects,” which was undefined but generally considered by MEQB staff and practitioners to have the same meaning as “cumulative impacts.” But a recent Minnesota Supreme Court case overturned this understanding by tying the term “cumulative impacts” to Generic EISs, defining “cumulative potential effects,” and tying the latter definition to all other types of environmental review. The 2009 Amendments adopt this decision by defining a new term—“cumulative potential effects”—and by amending other sections to incorporate this term into the MEQB Rules.

3.1. Cumulative Potential Effects Defined.

The new definition of cumulative potential effects reads as follows:

> “Cumulative potential effects” means the effect on the environment that results from incremental effects of a project in addition to other projects in the environmentally relevant area that might reasonably be expected to affect the same environmental resources, including future projects actually planned or for which a basis of expectation has been laid, regardless of what person undertakes the other projects or what jurisdictions have authority over the projects. Significant cumulative potential effects can result from individually minor projects taking place over a period of time. In analyzing the contributions of past projects to cumulative potential effects, it is sufficient to consider the current aggregate effects of past actions. It is not required to list or analyze the impacts of individual past actions, unless such information is necessary to describe the cumulative potential effects. In determining if a basis of expectation has been laid for a project, an RGU must determine whether a project is likely to occur and, if so, whether sufficiently detailed information is available about the project to contribute to the understanding of cumulative potential effects. In making these determinations, the RGU must consider: whether any applications for permits have been filed with any units of government; whether detailed plans and specifications have been prepared for the project; whether future development is indicated by adopted comprehensive plans or zoning or other ordinances; whether future development is indicated by historic or forecasted trends; and any other relevant factors.”

Key portions of this definition include:

- A description of the geographic limits of cumulative potential effects analysis, that is, “projects in the environmentally relevant area that might be reasonably expected to affect the same environmental resources.”
- A description of the temporal limits of cumulative potential effects analysis, that is, “future projects actually planned or for which a basis of expectation has been laid.”

- A listing of factors to be used in assessing whether "a basis of expectation has been laid" for future action, that is, whether permit applications have been filed, whether detailed plans have been developed, what development is indicated by adopted plans or zoning, what development might be expected based on historic or forecasted trends, and other relevant factors.

  What This Means for You: As to the last item, we often consider the proposer's reputation for building its proposed projects once announced, whether the project is a build to suit with a prospective owner or tenant under contract, whether and how many tenants have signed leases, and similar real estate factors.

- The authority to use "current aggregate effects" to account for the effects of "past projects" rather than having to analyze the impacts of each individual past project.

3.2. Cumulative Potential Effects Analysis Added To Key Rules.

A. Cumulative Potential Effects Must Be Analyzed. The 2009 Amendments retained the definition of "cumulative impacts" for use when preparing Generic EISs and added language requiring that "cumulative potential effects" be addressed in EAWs, EISs, and AUARs.

B. How To Consider Cumulative Potential Effects When Deciding On Need For EIS Described In More Detail. The MEQB Rules simply listed cumulative potential effects as one factor to be considered when deciding whether a project had the potential for significant environmental effects. The 2009 Amendments added the following descriptive sentence to this factor: "The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specially designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project."

3.3. What This Means for You: While smart practitioners spent time on "cumulative impact" analysis under the previous rules, these changes assure that all future preparers of EAWs, EISs. And AUARs will spend more time (and more money) analyzing "cumulative potential effects" and developing mitigation measures to reduce them."

4. AUAR PROCESS AMENDMENTS.

4.1. Scoping Process Required For Large Specific Project.

The AUAR process has been shorter than the EIS process in large part because no Scoping EAW had to be prepared as part of the AUAR process. That changed with the 2009 Amendments. If a specific project that is being reviewed by using the AUAR process would otherwise require preparation of an EIS or comprises at least 50 percent of the geographic area to be reviewed, then the RGU must conduct a public scoping process that includes preparing a draft review order, making it available for public comment for 30 days, publishing notice in the *EQB Monitor* of the draft order and comment period, and considering all comments when finalizing the order.

4.2. AUAR Boundary Does Not Limit Impact Analysis.

In a 2006 case interpreting the MEQB Rules, the Minnesota Court of Appeals ruled that RGUs did not need to consider impacts or impact sources outside the geographic boundaries set in a review order. The MEQB staff and most practitioners considered this to be a mistake by the Court. The 2009 Amendments make explicit that the geographic extent of impacts and sources is not limited to the boundaries set in a review order.

4.3. Small Project Can Be Allowed To Proceed Within An AUAR's Boundaries.

The 2009 Amendments add a process for dropping a small project during the AUAR process, that is, allowing it to proceed without waiting for completion of the AUAR. If a project proposed within the boundaries of an ongoing AUAR is small enough that it would not otherwise require review under the MEQB Rules, then an RGU may decide to drop the project and give notice of that intent in the *EQB Monitor*. If no comments are received within 10 working days after notice is published, then the project is automatically dropped and may proceed. If comments are received, then the RGU must consider them before making a decision on whether or not to drop the project from the AUAR.

4.4. What This Means for You.

This scoping process change will eliminate most of the time advantage in preparing an AUAR rather than an EIS for a specific project. When faced with a mandatory EIS, this probably means the AUAR will be substituted less frequently, since the AUAR process is subject to an objection by State agencies or the Metropolitan Council. Objections have both substantive results—more regulatory requirements—and time delays—up to six months in practice—that developers will view as negative.

The option to allow small projects to proceed within the geographic boundaries of an ongoing AUAR provides welcome flexibility for developers who may need to proceed immediately with a small project after an AUAR process commences.

5. MISCELLANEOUS AMENDMENTS.

The 2009 Amendments made numerous changes to specific rule provisions. The changes of consequence are summarized below.

5.1. Material Evidence Must Accompany EAW Petition.

The material evidence to support an EAW petition must now accompany the petition, not just be cited in the petition. If the petition does not comply with this or the other petition requirements, it can be returned to the petitioner by the MEQB chair.

What This Means for You: This change will deter few, if any, petitions. It should force petitioners to be more specific about the evidence relied on rather than citing general treatises and web sources that cannot be found later. This will help proposers respond to petitions and give RGUs a sounder basis for accepting or rejecting petitions.

5.2. Mitigation Measures Must Be Specific If Relied On When Deciding On Need For EIS.

The MEQB Rules list a number of factors to consider when determining whether a project has the potential for significant environmental effects, including "the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority." The 2009 Amendments added the following sentence to this factor: "The RGU may rely only on mitigations measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project."

What This Means for You: We have always advised clients that mitigation measures proposed in a project plan or an EAW: (a) be described specifically; (b) have their effectiveness supported by good data; and (c) have the government authority to include them in approvals and enforce them spelled out. This addition underscores this advice.

5.3. Drafts Of Permits May Be Reviewed Before Completion Of An Environmental Review.

In the past, the MEQB staff had advised that government units could request and receive public comment on draft permits before completion of an environmental review process. The 2009 Amendments add explicit language allowing this.

What This Means for You: This change will give comfort to City and County attorneys who have been reluctant sometimes to advise their clients to proceed with hearings on permits and other approvals. However, government action on a draft permit must still follow completion of the environmental review process.

5.4. EIS Required For Release Of Genetically Engineered Wild Rice.
In 2007, the Legislature directed that any release of genetically engineered wild rice be subject to an EIS. The 2009 Amendments add any release of genetically engineered wild rice as a mandatory EIS threshold.

5.5. Additional Government Activities Made Exempt From Review.
The list of government activities exempt from environmental review was expanded by adding:

- Approval or amendment of comprehensive plans, other plans, zoning ordinances, rezoning, or other official controls by local governments (unless primarily for the benefit of a specific project or projects); and
- Adoption and amendment of plans by state agencies.

What This Means for You: State agencies and local governments generally took the position that these activities were exempt. The practical effect here will be to reduce litigation claiming environmental reviews were required for these activities.