Subd. 2b. Project prerequisites.
If an environmental assessment worksheet or an environmental impact statement is required for a governmental action under subdivision 2a, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:

1. a petition for an environmental assessment worksheet is dismissed;
2. a negative declaration has been issued on the need for an environmental impact statement;
3. the environmental impact statement has been determined adequate; or
4. a variance has been granted from making an environmental impact statement by the environmental quality board.

EQB Administrative Rules 4410.3100

4410.3100 PROHIBITION ON FINAL GOVERNMENTAL DECISIONS.
Subpart 1. Prohibitions.
If an EAW or EIS is required for a governmental action under parts 4410.0200 to 4410.6500, or if a petition for an EAW is filed under part 4410.1100 that complies with the requirements of subparts 1 and 2 of that part, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:

A. a petition for an EAW is dismissed;
B. a negative declaration on the need for an EIS is issued;
C. an EIS is determined adequate; or
D. a variance is granted under subparts 3 to 7 or the action is an emergency under subpart 8.

To start or begin a project includes taking any action within the meaning of "construction," as defined in part 4410.0200, subpart 10.
Mn Rule 4410.0200 subp 10 defines “construction:

Subp. 10. Construction. "Construction" means any activity that directly alters the environment. It includes preparation of land or fabrication of facilities. It does not include surveying or mapping.

EQB, 2010 “Guide to Minnesota Environmental Review Rules”, Chapter 1 page 5:

“A moratorium is automatically placed on action or project approval and construction whenever environmental review is required or requested by citizen petition (Minnesota Statutes, section 116D.04, subdivision 2b and 4410.3100, subpart 1). Minnesota law requires that when environmental review is being conducted, a project may not proceed and permits authorizing the project may not be issued. Once all review is complete, governmental units with permitting authority or other authority over the project may proceed to make final decisions on the project. This moratorium concept is covered in detail in Chapter 2.”


Prohibition on Governmental Approvals and Construction
Minnesota Statutes, section 116D.04, subdivision 2b, calls for one of the following to occur before a project that requires environmental review can be started or can be approved and before any permits or other authorizations can be granted:

• A petition for an EAW is dismissed;
• A negative declaration on the need for an EIS is made;
• An EIS is determined adequate; or
• A variance is granted by the Environmental Quality Board.

Prohibitions on governmental approvals and construction also begin when a valid petition for an EAW is filed with the board (part 4410.3100). The prohibition on governmental approvals and construction ends with any of the above actions. Once the review process ends, final decisions on permits and other forms of approval can be made at any later time – even at the same meeting.

One of the key purposes of environmental review is to provide information about potential environmental effects and how to avoid or minimize those effects to each of
the governmental units which will approve or conduct the project. For this information to have utility, the governmental units must have the information in mind when they take their actions about the project. **To issue permits or approvals before the information is available undermines the very purpose of the review.** That is the reason why all decisions approving the project (or parts of the project) are prohibited until the review has been completed.

The statute and rule prohibit “final decisions” granting permits or other approvals. In this context, “final” means “not to be altered or undone,” rather than “last.” Any discretionary step in an approval process that conveys rights to the proposer and is not subject to further review or change is a final decision. Examples include preliminary plat approvals, which convey development rights under Minnesota law, as well as final plat approvals and conditional use permits. It may also include zoning or rezoning decisions if associated with a specific project or concept plan approvals if development rights are conveyed under applicable ordinances. 14

Permits and approvals include virtually any discretionary action by a government unit to entitle or assist a particular project to proceed, including financial subsidies or other assistance (see definition of permit, part 4410.0200, subpart 58, which is a very broad definition).

Here are some of the common ways in which governmental units have **misinterpreted** the prohibition against governmental approvals:

§ Governmental units have taken the position that the prohibition only applied to the governmental unit that serves as the RGU for a project. In other words, governmental units have mistakenly believed that they could approve a project before environmental review was complete because some other governmental entity was acting as the RGU for the project. To the contrary, the **statutory wording applies to all governmental bodies, not just the RGU.**

§ Governmental units have taken the position that they could issue authorizations for projects because some other governmental unit would have to act on other permits later. These governmental units took the position that their approvals were not “final” because some other governmental entity would have to issue subsequent approvals before the project at issue could go forward. These RGUs misinterpreted the meaning of “final.” **The law intends that all governmental units take the environmental information turned up through environmental review into account when each makes its decisions about the project.**

§ Governmental units have taken the position that that permits or approvals that did not directly authorize the construction or operation of the project were not subject to the prohibition. To the contrary, the statutory wording applies to all permitting and approval actions that apply to a project for which environmental review is required and not yet completed. Again, **the intent of the law is that all**
project-related governmental decisions benefit from the information disclosed through the process.

§ Governmental units have taken the position that they could issue so-called “conditional approvals.” Conditional approvals typically involve a governmental unit issuing an approval with the caveat that the approval does not become effective until the environmental review process is complete. These approvals are also sometimes referred to as “spring-to-life” approvals. Such approvals are not permitted under the environmental review rules. If a governmental unit issues an approval that requires no further action by that governmental unit before environmental review is complete, then that approval is in violation of the prohibition on final governmental approvals. The governmental unit has made its decision about the project without benefit of the environmental review information.

§ It should be noted that the prohibition on final governmental decisions does not preclude a governmental unit from reviewing permit applications, working on permits, preparing draft permits, or otherwise processing a requested approval during the environmental review process. In fact, having access to the terms and conditions of a draft permit or approval can often aid in the environmental review process because the draft permit or approval may include mitigation measures that the RGU must understand in order to reach a reasoned decision on the environmental review. The prohibition on final approvals simply precludes governmental units from taking the final step of issuing permits or approvals until after the environmental review process is complete.

Public project proposers may not take any action to prejudice the ultimate decision prior to a completed environmental review (part 4410.3100, subpart 2). Prejudicial actions are those that limit alternatives or mitigative measures or predetermine subsequent development. In other words, actions that make one option, including the option of not building the project, more or less likely to be chosen are prohibited. This prohibition includes the acquisition of property, if prejudicial to the ultimate decision. If property is acquired prior to completing the review, the governmental unit cannot use the ownership or possession of a property as a justification for choosing one alternative or design over another.

A variance allows limited approval and construction to begin prior to a completed environmental review. Requirements and procedures for the EQB to grant a variance are discussed at part 4410.3100, subparts 4 to 8. Specifically, the project proposer must demonstrate evidence of the conditions in subpart 6. In addition, the RGU must concur with the variance request. Anyone considering requesting a variance should consult with Environmental Quality Board staff in advance.
Subp. 4. **Variance.** Construction may begin on a project if the proposer applies for and is granted a variance from subparts 1 and 2. A variance for certain governmental approvals to be granted prior to completion of the environmental review process may also be requested. A variance may be requested at any time after the commencement of the 30-day review period following the filing of an EAW. The proposer shall submit an application for a variance to the EQB together with:

A. a detailed explanation of the construction proposed to be undertaken or the governmental approvals to be granted;

B. the anticipated environmental effects of undertaking the proposed construction or granting the governmental approvals;

C. the reversibility of the anticipated environmental effects;

D. the reasons necessitating the variance; and

E. a statement describing how approval would affect subsequent approvals needed for the project and how approval would affect the purpose of environmental review.

Subp. 5. **Variance applications.** The EQB chair shall publish a notice of the variance application in the EQB Monitor within 15 days after receipt of the application. The EQB chair shall issue a press release to at least one newspaper of general circulation in the area where the project is proposed. The notice and press release shall summarize the reasons given for the variance application and specify that comments on whether a variance should be granted must be submitted to the EQB within 20 days after the date of publication in the EQB Monitor.

Subp. 6. **Granting variance.** At its first meeting more than ten days after the comment period
expires, the EQB shall grant or deny the variance. A variance shall be granted if:

A. the RGU consents to a variance;

B. on the basis of the variance application and the comments, construction is necessary in order to avoid excessive and unusual economic hardship, or avoid a serious threat to public health or safety. Unusual economic hardship is hardship caused by unique conditions and circumstances which are peculiar to the project and are not characteristic of other similar projects or general economic conditions of the area or state. It does not include hardship caused by the proposer's own action, or inaction, if the hardship was reasonably foreseeable;

C. on the basis of the variance application and the comments, the construction for which the variance is sought will not have a serious adverse effect on the environment; and

D. on the basis of the variance application and the comments, the construction for which the variance is sought is separable from the remainder of the project and would not have the effect of eliminating from consideration any feasible and prudent alternatives or mitigation measures likely to be presented in an EIS.

Subp. 7. Written notice. The EQB shall set forth in writing its reasons for granting or denying each request for a variance.