

LINDQUIST & VENNUM P.L.L.P.

4200 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402-2274
TELEPHONE: 612-371-3211
FAX: 612-371-3207

IN ST. PAUL:
444 CEDAR STREET, SUITE 1700
ST. PAUL, MN 55101-3157
TELEPHONE: 651-312-1300
FAX: 651-223-5332

IN DENVER:
600 17TH STREET, SUITE 1800 SOUTH
DENVER, COLORADO 80202-5441
TELEPHONE: 303-573-5900
FAX: 303-573-1956

ATTORNEYS AT LAW

www.lindquist.com

TODD J. GUERRERO
612-371-3258
tguerrero@lindquist.com

October 15, 2002

VIA HAND DELIVERY AND EMAIL

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

**Re: Amendment of Environmental Quality Board
Power Plant Siting Rules – Chapter 4400
OAH Docket No. 58-2901-15002-1**

Dear Judge Sheehy:

Below are the comments of the Minnesota Transmission Owners¹ (“MTO”) in the above-entitled rulemaking. Our comments are organized according to the specific rule commented on.

Rule 4400.0650 – Exceptions to Permitting Requirement for Certain Existing Facilities.

Subpart 3 - Notice.

This rule requires that the utility must notify the chair of the EQB in writing at least thirty days before it commences construction on a modification or change, even though the modification or change is not subject to EQB permit requirements.

¹ The Minnesota Transmission Owners consists of the following electric utilities: Dairyland Power Cooperative, Great River Energy, Hutchinson Municipal Utilities, Interstate Power Company, Minnesota Power, Minnkota Power Cooperative, Missouri River Energy Services, Otter Tail Power Company, Southern Minnesota Municipal Power Agency, Willmar Municipal Utilities, and Xcel Energy, Inc. Collectively, these utilities own and operate more than six thousand five hundred miles of transmission lines in the state, representing an investment in the state of more than three-quarters of a billion dollars.

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While the MTO generally agree that such notification is unlikely to be unduly burdensome, we believe it would be helpful that the rule include language to the effect that failure by the utility to provide the required notice does not otherwise prejudice the utility. This is especially important given that the changes/modifications being proposed are specifically excepted from the permitting requirements.

The EQB has adopted similar language at part 4400.1350, subpart 7, dealing with notice to landowners. That rule provides that where the utility has made a bona fide attempt to provide notice to potentially affected property owners, failure to *actually* provide notice to all potentially affected owners does not otherwise invalidate the proceeding.

We suggest that part 4400.0650, subpart 3 be amended to read as follows:

“Any person proposing to move transmission lines structures under subpart 1, item A, or to reconductor or reconstruct a high voltage transmission line under subpart 1, item B, subitem (2), or to implement changes to a large electric power generating plant under subpart 1, item C, subitem (2), (3), (4) or (5) must notify the chair in writing at least thirty days before commencing construction on the modification or change. Failure to provide the written notice within the thirty-day period shall not affect the status of the change or modification.”

Rule 4400.1150 - Contents of Application.

Subpart 1(F) and subpart 2(G).

These sections require the utility to identify the owner of property that may be affected by a project. In the case of HVTLs, the rule requires notice to persons whose land may be “crossed by the [HVTL] within the two routes proposed.”

It would be helpful if the rule clarified whether this list of property owners is supposed to be the same list of persons who are required to be provided notice of a proposed project under part 4400.1350, subpart 2 – “notification to persons on general list, to local officials and to property owners - as provided in EQB’s changes to 4400.1350 dated October 11, 2002.

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Rule 4400.2750 – Preparation of Environmental Assessment.

Subpart 4 – Content of environmental assessment

Part 4400.2750, subpart 4(B) currently provides that an environmental assessment must include a “list of alternatives to the proposed project to be addressed.” Subparts (C)-(E) also require that certain information be provided for “each alternative.” Subpart 4 needs to be clarified.

Subpart 4(B).

Rule 4400.2100 – Contents of Application – makes clear that an applicant under this alternative permitting process (*see* part 4400.2000 – Alternative Permitting Process for Certain Facilities) need not propose alternative sites or routes in addition to the applicant’s preferred site or route. In other words, in this alternative permitting process – as opposed to the “full” permitting process beginning at part 4400.1225 – the applicant only needs to propose one site or route, as the case may be. Rule 4400.2750, subpart 4(B), however, erroneously suggests that the environmental assessment must include a “list of alternatives to the proposed project.”

First, the function of the EQB’s routing/siting rules is to determine where to locate essential public facilities in the most environmentally responsible matter. The EQB rules are not meant to require review of alternatives to the project itself. Deciding on project alternatives that may satisfy the same or similar energy need is the purview of the certificate of need process conducted by the Public Utilities Commission.² As a result, the EQB’s function – and the function of the environmental assessment conducted under this rule – is not to review alternatives to the “proposed project” but rather is limited to review of alternative “sites” or “routes” of the proposed project.

Second, because part 4400.2100 provides that applicants need not include alternative sites or routes as part of their application, it is likewise unnecessary that the environmental assessment automatically require a “list of alternatives.” In many, if not most instances under this alternative permitting process – one that that contemplates smaller, non-controversial projects – it is likely that no alternatives will actually ever be identified. The only place where discussion of alternatives is relevant here appears in part 4400.2750, subpart 2 – the scoping

² “When the public utilities commission has determined the need for the project under 216B.243 or 216B.2425, questions of need, including size, type, and timing; alternative system configurations, and voltage are not within the board’s siting and routing authority and must not be included in the scope of the environmental review conducted under sections 116C.51 to 116C.69.” Minn. Stat. §116C.53, subd. 2.

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process. Rule 4400.2750, subpart 2 provides that the chair of the EQB shall include in the environmental assessment any alternative “sites or routes” proposed by the citizen advisory task force, any member EQB agency, or person if the alternative will assist in the Board’s permit decision. Again, however, it is by no means certain that any alternative site or routes will actually be proposed and its mandatory inclusion in the environmental assessment is improper.

To address this concern, part **4400.2750, subpart 4(B)** should be amended as follows:

“a list of any site or route alternative to the proposed project to be addressed included by the chair under part 4400.2750, subpart 2(B);”

Subparts 4(C) - (E).

For similar reasons – i.e., the EQB does not review alternatives to the project itself but rather alternative sites or routes for the project, and because it is possible (if not likely) that no alternative sites or routes will be identified in the environmental assessment scoping process – the following provisions should likewise be amended, as follows:

“C. a discussion of the potential impacts of the proposed project and each site or route alternatives considered, if any;

D. a discussion of mitigative measures that could reasonably be implemented to eliminate or minimize any adverse impacts identified for the proposed project and each site or route alternative analyzed, if any;

E. an analysis of the feasibility of each site or route alternative considered, if any;

Jumping back a subpart, rule **4400.2750, subp. 3** – scoping decision – should likewise be amended for the same reason. As amended, part 4400.2750, subp. 3 should read as follows:

“The chair shall determine the scope of the environmental assessment within ten days after close of the public comment period and shall mail notice of the scoping decision to those persons on the project contact list within five days after the decision. Once the chair has determined the scope of the environmental assessment, the scope shall not be changed except upon a decision by the chair or the board that substantial changes have been made in the project or substantial new information has arisen significantly affecting the potential environmental

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effects of the project or the availability of reasonable alternatives sites or routes. The chair shall also determine as part of the scoping process a reasonable schedule for completion of the environmental assessment. The scoping decision by the chair must identify:

- a. the alternative sites or routes to be addressed in the environmental assessment, if any;
- b. any specific potential impacts to be addressed;
- c. the schedule for completion of the environmental assessments; and
- d. other matters to be included in the environmental assessment.”

4400.5000 – Local Review of Proposed Facilities.

Subpart 6 – No local authority.

In its SONAR, the EQB acknowledges that it is entirely up to the local government to employ the appropriate land use controls when exercising jurisdiction over HVTLs and power plants upon application from utilities for local approval. Local governments of course have a wide array of land use controls that can be used to review utility permit applications – e.g., conditional use permits, special use permits or other appropriate municipal land use controls. As a result, the EQB rightly recognized the dual-track nature of review for certain HVTLs established by the 2001 Energy Security and Reliability Act.

As part of that Act, the legislature established two possible forums for utilities seeking routing permits for an HVTL – (1) the EQB or (2) local units of government. Specifically, Minn. Stat. § 116C.576 subd. 1 provides part: “[n]otwithstanding the requirements of sections 116C.57 and 116C.575, an applicant who seeks a site or route permit for one of the projects identified in this section shall have the option of applying to those local units governments that have jurisdiction over the site or route for approval to build the project. If local approval is granted a site or route permit is not required by the [EQB].”

The difficult question is who gets to determine whether the local unit of government has “jurisdiction” over the proposed project – is it the EQB or the local unit of government? Clearly the utility can choose to apply for route approval from the local government. In that case, it seems axiomatic that the local government, in the exercise of its sound discretion, should decide whether it has the wherewithal and procedures in place to review the application. While the local government may or may not employ review procedures that look and feel exactly like the

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EQB rules, that really should be up to the local government to decide.

In most cases, of course, it will be clear that the local unit of government has appropriate review procedures in place – e.g., an “essential public facilities” ordinance, unambiguous conditional use provisions, etc. But what about when it is not so clear? Who determines that Lake County’s proposed resolution adopting comprehensive review of a proposed project is any less environmentally “thorough” than Grant County’s newly enacted high voltage transmission line ordinance, etc.? Where a utility seeks approval from local government instead of from the EQB, the question over which entity has jurisdiction should not be left open to such ambiguity, as it presently is under the current rule.

Similarly, the rule lacks rationality by providing that matters “must” be brought to the EQB for review where the local unit of government “has no capability of preparing an environmental assessment?” Again, who decides whether the local unit of government is “capable” of preparing an environmental assessment? Surely the local unit of government is in the best position of making this decision.

There is an easy way to correct this problem. We suggest that the rule be clarified so that the determination of whether a local unit of government has jurisdiction over an HVTL project submitted to it, and whether it can perform an environmental assessment, be decided in the first instance by the local unit of government exercising its sovereign, policy power authorities.

The MTO proposes that part **4400.5000, subpart 6** be amended to read as follows:

“In the event a local unit of government that might otherwise have jurisdiction over a proposed large electric power generating plant or high voltage transmission line has no ordinances or other provisions for reviewing and authorizing the construction of such project, in the discretion of the local unit of government, or has no capability of preparing an environmental assessment, in the discretion of the local unit of government, the matter must be brought to the EQB for review.”

Thank you for the opportunity to provide comments on this important rulemaking. We look forward to reviewing any comments submitted by other parties and providing reply comments, as appropriate.

Should you have any questions regarding these comments, please do not hesitate

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to contact me.

Last, the MTO wishes to express thanks to Alan Mitchell and the entire MEQB staff for their efforts throughout this long rulemaking process. The EQB's effort in seeking active involvement from all stakeholders early on is greatly appreciated, and hopefully, has resulted in a better rule.

Very truly yours,

LINDQUIST & VENNUM P.L.L.P.

Todd J. Guerrero
Attorneys for the Minnesota Transmission Owners

TJG/sma

c: Alan Mitchell, Environmental Quality Board (by email and regular mail)
MEQB Service List (by email)