

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed)
Adoption of Amendments to)
the EQB Power Plant Siting Rules)

OAH Docket No. 58-2901-15002-1

COMMENTS OF THE MINNESOTA DEPARTMENT OF COMMERCE

The Minnesota Department of Commerce offers the following comments on the proposed adoption of amendments to the power plant siting rules (Minnesota Rules 4400) of the Minnesota Environmental Quality Board (EQB). We appreciate the opportunity to provide these comments and are available to answer any questions the Administrative Law Judge may have.

- *MN Rules Part 4400.0650, subp. 1 (c)*
Basing exceptions to the permitting requirement on the limits of capacity additions rather than on limits on pollutant emission levels may not be the ideal manner in which exceptions should be identified. Nonetheless, using capacity levels as a threshold criterion is consistent with existing EQB and Public Utilities Commission (PUC) rules. It is appropriate to include the exemption thresholds found in Minn. Stat. § 216B.243 here. Issues regarding a generating plant's size, type and timing are determined through the Certificate of Need process. The Legislature has decided that certain changes to an existing generating plant do not require a reassessment of size, type or timing. Obviously, it would be inappropriate to reassess these aspects in a siting proceeding.

The evaluation of environmental effects is but one of the many complex factors the PUC considers when faced with a Certificate of Need decision. The EQB does not have the expertise nor the authority to determine issues of size, type and timing. The environmental effects of a change to a facility qualifying for an exemption will be evaluated through the facility's various other permits.

- *MN Rules Part 4400.0650, subp. 4*
The proposed rules state “Any project that does not require a permit from the EQB under this part is also exempt from any requirement to obtain site or route approval from local units of government with jurisdiction over the project pursuant to Minnesota Statutes, section 116C.576.” However, local units of government must be allowed to assert jurisdiction over these types of projects through conditional use permits. It is not clear whether local conditional use permits are site approvals. This issue merits further legal review.
- *MN Rules Part 4400.1350*
It would be appropriate for these rules to work with the notice provisions being developed through the PUC’s MN Rules Chapter 7850 rulemaking procedure. MN Rules Chapter 7850

are being developed to guide the PUC's biennial Transmission Projects Reports process. EQB's proposed 4400 rules apply to applicants who have filed a Transmission Projects Report seeking to add their project(s) to a certified list maintained by the PUC. There may be process efficiencies to be gained, paperwork reductions achieved and/or notice effectiveness enhanced by recognizing the interrelationship between the two rule parts.

- *MN Rules Part 4400.1800, subp. 2*
The intent of the subpart is to prevent a rehearing of a matter in the siting process that is more properly or has already been addressed in the need proceeding. However, there is no need to list, as the proposed language does, the type of issues the PUC determines since it is presumed that the PUC will only determine issues appropriate to its own proceeding. Further, EQB's proposed wording implies that the PUC will have made its determination before the project enters the siting process or that those issues can be addressed in the siting process only if the PUC has not yet made a final determination. Though it is true the PUC must make a determination of need before the EQB can issue a site permit, both PUC and EQB rules allow for a joint hearing to consider need and siting issues. We recommend replacing this subpart with the following: "Issues determined by the Public Utilities Commission in the Certificate of Need proceeding shall not be addressed in EQB's site permit proceeding."
- *MN Rules Part 4400.2750, subp. 2 (B)*
The second to the last sentence in subpart 2(B) of the July 11, 2002 version of the rules should be edited to replace the word "person" with the word "record" to more clearly indicate that the Chair will consider all the information before him/her to determine whether an alternative should be included in the scope of the environmental assessment. EQB Staff's October 11, 2002 change to this subpart is less optimal because, if the scoping decision were to be challenged in a court of law, the record could be more objectively reviewed than could the personal judgement of the chair.
- *MN Rules Part 4400.2850, subp. 4*
As discussed above regarding MN Rules Part 4400.1800, subp. 2, we recommend replacing this subpart with "Issues determined by the Public Utilities Commission in the Certificate of Need proceeding shall not be addressed in EQB's site permit proceeding."

NONSUBSTANTIVE EDITS

In addition to the above comments, we recommend the following editorial changes. These are likely to be addressed by the Revisor's Office; however, we list them here in the interest of being thorough.

- *MN Rules Part 4400.0200, subp. 10*
Add the sentence, "Associated facilities shall include, but not be limited to, water and fuel tanks, water and waste water treatment systems, and roads" to the end of the subpart, making it parallel to subpart 8.
- *MN Rules Part 4400.0200, subp. 11a*

“Mail” means either the United States mail or electronic mail by e-mail, unless another law ~~shall~~ requires a specific form of mailing.

- *MN Rules Part 4400.1700, subp. 12*
The phrase “large electric generating power plant” should be changed to “large electric power generating plant.”
- *MN Rules Part 4400.5000, subp. 2*
Change the word “facilities” in the title and first sentence of subpart 2 to “projects.” MN Statutes Section 216B.164 uses the term “qualifying facilities.” This term in existing statutes has a specific meaning in the realm of electric generation that is not consistent with the way it is used in MN rules Part 4400.5000.