

November 13, 2003

TO: MEQB Members

FROM: Alan Mitchell  
Manager, Energy Facility Permitting

SUBJECT: **Adoption of Amendments to the Rules Governing Environmental Review of Large Energy Facilities in Proceedings before the Public Utilities Commission, Minnesota Rules, Chapter 4401 and Technical Amendments to the Power Plant Siting Rules, Minnesota Rules, Chapter 4400**

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**Action:**

The Board is requested to adopt final amendments to the rules governing environmental review of large energy facilities in proceedings before the Public Utilities Commission. Minnesota Rules parts 4410.7010 to 4410.7070. The amendments also contain some minor technical amendments to the power plant siting rules in chapter 4400.

**Background:**

In the spring of 2002 the EQB began meeting with other agencies and interested persons to discuss amendment of the existing rules relating to environmental review of large energy projects at the time the Public Utilities Commission is considering the need for the facility. The Legislature in 2001 significantly expanded the law regarding the requirement for a certificate of need for new large energy facilities from the PUC and for a site or route permit from the EQB. In addition, a number of large energy facilities, both new power plants and new high voltage transmission lines, were being talked about by various project proposers. At the same time the EQB was working on amendments to the power plant siting rules in chapter 4400.

There were three major questions to be addressed: (1) who should prepare the environmental review document at the need stage; (2) what document should be prepared; and (3) what process should be followed in preparing the document. Under the existing rules, the Department of Commerce prepares an environmental report on large power plants and the applicant prepares an environmental report on high voltage transmission lines. Under the rules up for adoption, the Environmental Quality Board will become the responsible governmental unit that will prepare an environmental report on all large energy projects after holding a public meeting and affording the public an opportunity to participate in the scoping of the report.

Over the past year and a half, the staff has provided a number of opportunities for the public to be involved in the development of these rules. A public meeting was held in August 2002, a formal comment period was established in October 2002, and the rules have gone through several iterations in response to comments of the interested parties.

The Board authorized formal rulemaking on the rules on March 2, 2003. Notice of the proposed adoption without a public hearing was published in the State Register on May 19, 2003. More than 25 people requested a public hearing on the rules, and after renoticing, the hearing was held on September 4, 2003. Administrative Law Judge Allan W. Klein presided at the hearing and heard testimony from a number of persons. The record was kept open for twenty days after the hearing ended and several persons submitted written comments to the Judge. The following persons or organizations submitted written comments into the record:

- Minnesota Environmental Quality Board staff
- Minnesota Public Utilities Commission
- Minnesota Department of Commerce
- Sierra Club Air Toxics Campaign
- Minnesota Center for Environmental Advocacy, Izaak Walton League, and Minnesotans for an Energy Efficient Economy (joint comments)
- John and Laura Reinhardt (Minneapolis residents)
- Communities United For Responsible Energy
- Minnesota Transmission Owners
- Tim Spitzack (Dakota County resident)
- Jerry and Phyllis Faulkner (Dakota County residents)
- Terrence Flower (Chair, Dakota County Citizens for Environmental Health)

The EQB staff also submitted a written response to the comments that were filed. The EQB staff recommended a number of changes in the language as proposed, in response to the public comments, and the Judge has approved all of these changes.

The staff has not included copies of all these comments in the Board packet. They are all available on the EQB webpage.

<http://www.eqb.state.mn.us/Docket.html?Id=3049>

Also, the staff can quickly provide a copy of any of these comments upon request, and copies will be available at the Board meeting. The one comment that has been included in the packet is the comment from the Minnesota Transmission Owners because MTO has indicated it may appear at the Board meeting to object to one particular provision in part 4410.7030 relating to who gets notice of a certificate of need application. This issue is discussed below.

For the most part, the interested parties, including MTO, are satisfied with the new rules. There was no objection to any of the technical amendments to chapter 4400 or to the minor changes in other parts of chapter 4410. There are a couple of issues for

which the public would like to see different language in parts 4410.7010 to 4410.7070 but the Judge found that the proposed language was needed and reasonable. Those issues are discussed briefly below.

**Notice Requirements.** Several members of the public wanted utilities to provide more notice to landowners who live along or near proposed projects. The difficulty with this proposal is that at the certificate of need stage, a utility does not always have a proposed site or route identified. The staff suggested that a new provision be added to the notice requirements to require that notice be given to landowners adjacent to a proposed site or within a proposed route if such sites or routes are known to the applicant at the time the application is submitted to the Public Utilities Commission. This new language is found in part 4410.7030, subp. 1.F.

The Minnesota Transmission Owners object to the addition of this new provision. They are concerned that this requirement is duplicative of a requirement to give notice to those persons required to be notified under PUC rules and will lead to confusion. MTO would like subpart F be deleted or another paragraph G added to clarify that an environmental report will not be delayed if a good faith effort has been made to notify adjacent landowners.

Judge Klein found that the new requirement in subpart 1.F. is needed and reasonable, but that the EQB should delete this requirement after the Public Utilities Commission amends its rules to expand its notice requirements for certificate of need applications. The Judge also found that the Board may, but does not have to, include another new paragraph excluding noncompliance if the applicant has acted in good faith. See Finding No. 29 in the Judge's Report.

The staff continues to recommend inclusion of the new paragraph 1.F. and to not include the good faith language suggested by MTO. The reason for not accepting MTO's suggestion is that, as the Judge determined, the Board should consider deleting this provision after the PUC promulgates its new rules on notice. At that time, the Board can consider whether any conflicts actually exist. Further, this rule imposes the obligation to give notice on the EQB, not the applicant, so it is the EQB that will decide what notice is appropriate in any specific case. A specific provision relating to whether the EQB made a good faith effort to comply is unnecessary. The EQB will always determine whether proper notice has been given.

**Content of Environmental Report.** Several commenters wanted to expand on what must be included in an environmental report. Some wanted more specific references to economic impacts, and others wanted a longer list of hazardous pollutants. The staff believes that the proposed language is sufficient to allow the EQB to include all pertinent issues that are identified in the scoping process, and the Judge found this to be reasonable also. See Findings No. 33 and 34.

**Timing.** The public would like more time to participate in the scoping process and to review the environmental report. The PUC has by statute only six months to

complete the certificate of need process, and it is not possible to expand on some of the timeframes. The Judge recognized in Finding No. 36 that perhaps the most problematic provision is the one that says that once the environmental report is prepared, the EQB will not prepare a written response to the comments and issue a second, final environmental report. Instead, comments will have to be addressed in the public hearing that the PUC will hold. The Judge found that this approach has a rationale basis, given the tight time schedule the PUC must adhere to.

### **Procedural Requirements:**

Once the Board adopts the rules, the staff will provide the Governor's Legislative Coordinator with a copy of the final rules and direct the Coordinator's attention to the changes that have been made in the rules from what was proposed and explain why a hearing was held. Upon approval of the final rules by the Governor's Office, the staff will submit the rules to the Office of Administrative Hearings. The OAH will then file the rules with the Secretary of State's Office. The Governor's Office will have 14 days from the time the rules are filed with the Secretary of State to officially veto the rules. If the rules are approved by the Governor's Office, the staff will arrange to have the rules as adopted published in the State Register. The rules will go into effect five days after publication. Staff anticipates that if the rules are adopted by the Board on November 20, the rules will become effective in January.

### **Staff Recommendation**

The staff recommends that the Board adopt Minnesota Rules parts 4410.7010 to 4410.7070 with all the changes recommended by the staff during the hearing process and approved by Administrative Law Judge Allan W. Klein. The staff recommends that the Board adopt the attached Order Adopting Rules, which adopts the ALJ's Report in its entirety. A proposed resolution has been included in your packet.