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December 6, 2002

SUBMITTED BY ELECTRONIC MAIL

Alan Mitchell
Minnesota Environmental Quality Board,
Centennial Office Building – 3rd Floor,
658 Cedar St., St. Paul, MN, 55155

Re: Proposed Amendments to the EQB Rules Governing Environmental Review of Large Electric Power Generating Plants and High Voltage Transmission Lines. Minnesota Rules chapter 4410.7000 to 4410.7500.

Dear Mr. Mitchell:

Minnesota Center for Environmental Advocacy (“MCEA”) hereby submits comments on the proposed amendments to the EQB rules governing environmental review of large electric power generating plants and high voltage transmission lines.

MCEA is a private, nonprofit organization founded in 1974 with the mission to use law, science, and research to protect Minnesota’s natural resources and the health of its people.

MCEA has several concerns with these proposed amendments discussed in detail below. In general, MCEA is concerned with how these proposed rules affect the nature of environmental review during the certificate of need process and the public’s ability to actively participate in the process. The State’s interest in sound decision-making requires a searching and detailed assessment of the environmental impacts of proposed projects and a thorough analysis of potential alternatives. Furthermore, early public involvement in the process improves the quality of the environmental review and typically increases public acceptance of the final decision.

MCEA also has concerns related to the relationship between the certificate of need process and the site and route permitting process that are not discussed in relation to a specific part of the proposed rules. The certificate of need and permitting processes are both components of the administrative review of new energy facilities in Minnesota. The rules regarding these procedures must be carefully drafted to ensure that they are both compatible and sufficient, leaving no regulatory gaps.

When the Public Utilities Commission (PUC) has determined the need for the project, questions of need, including size, type, timing, voltage and system configuration, as well

as the no-build alternative, cannot be considered during the site or route permitting process. Minn. Stat. § 116C .53, subd. 2. This prohibition is premised on the understanding that these issues have been adequately addressed during CON environmental review. To comply with the legislature's intent in creating this regulatory structure, the rules must require analysis during the CON environmental review of all alternatives specifically excluded from consideration during the site and route permitting process.

A second consequence of the regulatory structure created by the legislature is that members of the public most directly affected by the proposed project may be brought into the process after the most critical decisions have been made. Under the existing rules it is possible for the size and type of facility to be determined before neighboring landowners or communities have been notified of the project. Once they are notified during the site or route permitting process, they are no longer allowed to recommend alternatives to the proposed project. This creates an inherently adversarial process wherein the public is forced to seek complete stoppage of the proposal; eliminating the possibility of working for a compromise where the project is developed on a different scale or using a different technology.

This potential for conflict may be decreased through two different methods. First, affected citizens should be notified of the project as soon as possible. An applicant for a CON should be required to provide notice to potentially affected persons whenever it is actively considering specific sites or routes for the proposed project. Early notice allows the public to become engaged in the process while the most critical issues are being determined.

Second, the rules should allow a single process for preparing the environmental review documents for both the certificate of need and site or route permits whenever the applicant is actively considering specific sites or routes for the proposed project. Consolidation of the environmental review would allow the decision by both the PUC and EQB to be based on more complete environmental information and provide greater public access to the environmental review process. This concept was discussed at an EQB meeting held August 28, 2002 and prompted a great deal of interest. The possibility of consolidating the environmental review proceedings merits further consideration by both the EQB and other interested parties.

Comment to Proposed Rule Proposed Rule 4410.4400

This part includes the title "Mandatory EIS Categories". There is no mention of an Environmental Impact Statement in the proposed amendments and this part appears to be incorrectly titled. To be consistent with the proposed rules, this part should be titled "Mandatory categories for EQB Environmental Review."

Additionally, the proposed rules do not adequately describe EQB's role in the environmental review of CON applications. The rules should clearly state that the EQB is preparing the environmental review document to be used by the Public Utilities Commission in determining whether to grant a CON. The rules should also clearly state

the EQB will not merely compile information submitted by interested parties, but rather engage in detailed analysis of the environmental impacts associated with the proposed project.

Comment to Proposed Rule 4410. 7610 Subp. 1

The rules do not require notice to be provided to the persons most likely to be affected by the proposed projects. Property owners and communities located near the proposed locations for a project seeking a CON should be brought into the process as early as possible. MCEA recommends that the rules require that, whenever an applicant for a CON is actively considering a possible site or route, notice be provided to property owners and communities potentially affected by the proposed project. The notice requirements in the EQB's recently proposed rules regarding site and route permit applications can serve as a model for a similar notice requirement under these rules.

Comment to Proposed Rule 4410. 7610 Subp. 3

The environmental review document required under the amended rules should not be referred to as an Environmental Assessment. Minnesota and Federal environmental regulations currently require the preparation of "Environmental Assessment Worksheet" and "Environmental Assessment" respectively. Minn. Stat. § 116D.04 subd. 2a; 40 C.F.R. § 1501.4. The document contemplated in the amended rules is neither an Environmental Assessment Worksheet nor an Environmental Assessment as these terms are currently used.

The addition of a third document with a similar title but quite dissimilar meaning to the body of environmental regulations could lead to confusion. This concern is especially significant because the documents currently required under state and federal laws are preliminary in nature and are used to determine whether further environmental review is necessary. The document required by the amended rules, however, is the only environmental review that is required when considering an application for a Certificate of Need. To avoid confusion, MCEA recommends that the document required in the amended rules have a unique title such as "Environmental Review Document" or "Environmental Review for Certificate of Need."

Finally, the definition of the environmental review document must reflect that it is an analytical, rather than descriptive document. Stating that the document "describes the human and environmental impacts" and alternatives of the proposed project implies that the EQB will not engage in meaningful analysis of the impacts and alternatives. The Minnesota Environmental Policy Act (MEPA) expressly provides that an EIS is "an analytic rather than encyclopedic" document. Minn Stat. § 116D.04 subp. 2a. MCEA recognizes that the environmental review document required under these rules is not an EIS as defined in MEPA. Nonetheless, the two documents serve essentially the same purpose. To be consistent with existing law and to ensure that the environmental review document provides the PUC with substantive analysis of the proposed project, it must be made clear that the EQB will analyze, not merely describe, the impacts and alternatives for the proposed project.

Comment to Proposed Rule 4410.7620 Subps. 2 and 3

These sections require anyone who submits an application for a Certificate of Need or a transmission planning report to submit a copy of the application or report and all accompanying materials to the EQB. The required contents of the application and the report are determined under the PUC's rules. It is possible that the PUC may change the information that must be submitted with a CON application or transmission planning report.

To ensure that it continues to receive the necessary information to conduct meaningful environmental review, EQB should carefully monitor any changes to the PUC rules that affect the information required in a CON application.

Comment to Proposed Rule 4410.7630 Subp. 4

This subpart creates a substantial burden for members of the public wishing to have an impact or alternative included in the environmental review. As drafted, the amended rules require that members of the public demonstrate that analysis of an impact or alternative will assist the PUC in making its decision regarding the CON application. This standard fails to provide an objective basis by which the public or the EQB may determine which alternatives are necessary for inclusion.

The rules should provide a meaningful standard for determining which impacts and alternatives are to be included in the environmental review. Such a standard should also be consistent with the existing body of Minnesota environmental regulation. MEPA provides the general structure for environmental review in Minnesota. The rules implementing MEPA operate on the presumption that an alternative and potentially significant impacts will be included in the EIS and then provide limited bases for exclusion. Minn. Rules 4410.2300 subparts G and H.

An alternative may be excluded from analysis in the EIS if it would not meet the underlying need for or purpose of the project, it would likely not have any significant environmental benefit compared to the project as proposed, or another alternative, of any type, that will be analyzed in the EIS would likely have similar environmental benefits but substantially less adverse economic, employment, or sociological impacts [sic]. Minn. Rules 4410.2300 subpart G.

“For the proposed project and each major alternative there shall be a thorough but succinct discussion of potentially significant direct or indirect, adverse, or beneficial effects generated.” Minn. Rules 4410.2300 subpart H.

MCEA recommends that the EQB adopt the standard in Minn. Rules 4410.2300 subp. G and H. Adoption of the existing standard would prevent the creation of a new standard with a more onerous burden for members of the public to overcome in ensuring the adequacy of the content of an environmental review document. Before it is included in these rules, however, an apparent drafting error in Minn. Rule 4410.2300 subpart G must be corrected. The standard should read as follows:

An alternative may be excluded from analysis in the EIS if it would not meet the underlying need for or purpose of the project, it would likely not have any significant environmental benefit compared to the project as proposed, or another alternative, of any type, that will be analyzed in the EIS, or it would likely have similar environmental benefits but not substantially less adverse economic, employment, or sociological impacts.

Comment to Proposed Rule 4410.7635 Subp. 1

The Public Utilities Commission is prohibited by law from granting a certificate of need unless power from the selected alternative is less expensive, including environmental costs, than power generated by a renewable source¹. Minn. Stat § 216B.243 subd. 3a. To facilitate sound decision making and compliance with Minnesota law, the use of renewable energy sources as defined in Minn. Stat § 216B.243 subd. 3a should be included as an alternative in the environmental review document.

Comment to Proposed Rule 4410.7635 Subps. 2 and 3

The use of the word “Generic” in the titles of these subparts is inconsistent with the purpose for which environmental review is conducted and implies that environmental review is cursory in nature. The environmental record should be as complete and carefully tailored to the details of a specific project as possible. MCEA recognizes that there may be situations where the project specifics, such as location, are not known. To the extent that these details are available, however, the record must be fully developed so as to ensure an informed decision by the PUC.

Comment to Proposed Rule 4410.7635 Subp. 2(A)

Environmental review should also consider anticipated emissions of Carbon Mono xide, VOCs (Ozone), and Lead since these pollutants are regulated under §§ 107-111 of the Clean Air Act. 42 U.S.C. §§ 7407-7411.

Comment to Proposed Rule 4410. 7635 Subp. 4

The environmental review document provides the PUC with an analysis of the environmental impacts and alternatives to a proposed project that is used in making the determination of whether construction of the proposed project is in the State’s best interest. For this decision to be sound, the PUC must rely upon scientifically current and

¹ The commission may not issue a certificate of need under this section for a large energy facility that generates electric power by means of a nonrenewable energy source, or that transmits electric power generated by means of a nonrenewable energy source, unless the applicant for the certificate has demonstrated to the satisfaction of the commission that it has explored the possibility of generating power by means of renewable energy sources and has demonstrated that the alternative selected is less expensive (including environmental costs) than power generated by a renewable energy source. For the purposes of this subdivision, “renewable energy source” includes hydro, wind, solar, and geothermal energy and the use of tress or other vegetation as fuel. Minn. Stat. § 216B.243 subd. 3a.

valid analysis of the proposal. MCEA recognizes that the EQB may physically incorporate information produced in previous environmental review documents. This should only be allowed to the extent that such information is directly applicable and valid in light of changed conditions or scientific understandings. MCEA recommends the following change to Proposed Rule 4410.7635 subp. 4.

In preparing an environmental assessment, the EQB may physically incorporate information and data from environmental assessments prepared on earlier projects and from other more generic reports only if the EQB has demonstrated that the information or data is valid and pertinent to the analysis.

Standard and recommendation

As the expert agency engaging in environmental review, the EQB should provide the PUC with a recommendation based upon the environmental review document. The EQB should base such a recommendation upon the standard found in Minn. Stat. § 116D.04 subd. 6. This standard provides:

No state action significantly affecting the quality of the environmental shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution impairment, or destruction. Economic considerations alone shall not justify such conduct. Minn. Stat. §116D.04 subd. 6.

This proposal would simply require that the EQB make a determination whether, in its expert opinion, a less environmentally damaging feasible and prudent alternative to the proposed project exists.

We appreciate your work on this issue and the opportunity to comment.

David Zoll

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