

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed  
Amendments to the Rules Governing  
the Environmental Review Program  
JUDGE  
Minn. Rules pts 4415.0010 to  
4415.0215

REPORT OF THE  
ADMINISTRATIVE LAW  
  
(PART\_2)

The above entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on November 1b, 1988 in St. Paul.

This Report is the second part of a controversial rule hearing proceeding held pursuant to Minn. Stat. Sec. □ 14.01 through 14.28 (1986), to determine whether the environmental rules relating to pipelines should be adopted by the Environmental Quality Board. The first portion of this hearing was held on October 12, 1988 and the results of that hearing are embodied in the Report of the Administrative Law Judge (Part 1) which was issued on November 8, 1988. This report deals exclusively with the two subparts omitted from the first report, part 4415.4300, subpart 7 and 4415.4400, subpart 24.

The Board was represented by Eldon G. Kaul, Assistant Attorney General, 520 Lafayette Road, St. Paul, Minnesota 55155. Appearing at the hearing from the Board staff was Larry Bruce Hartman, 380 Centennial Office Building, 685 Cedar Street, St. Paul, Minnesota 55155.

Five persons signed the hearing register. Thirty-five numbered exhibits were received prior to the hearing. All persons desiring to testify were given an opportunity to do so. The record remained open through December 5, 1988, for the submission of comments. Six written comments were received prior to the close of the record. One comment was received late. The late comment merely restated oral comments made at the hearing, so the issues raised in that comment are addressed below. The Board submitted no post-hearing written comments. On December 8, 1988, the record finally closed for all purposes.

This Report must be available for review to all affected individuals upon request for at least five working days before the Board takes any further action on the rule(s). The Board may then adopt a final rule or

modify or withdraw its proposed rule. If the Board makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the Board must submit it to the Revisor of Statutes for a review of the form of the rule. The Board must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural Requirements

1. The first report contains the Findings relating to the procedural requirements met by the Board for promulgation of the proposed rule. This examination will not be repeated here. The hearing on the subparts which are at issue in this report was continued from the October 12, 1988 hearing by the agreement of the participants. Notice of the continued hearing was sent to all persons and associations requesting notice of the proposed adoption of rules by the Board. The Administrative Law judge finds that notice of the continued hearing was proper.

##### Other Considerations

2. The first report dealt with considerations such as the impact of The rules on small businesses, agricultural land fiscal issues and the general background and overview of the rules. The discussion of those issues is incorporated herein.

##### Statutory Authority

3. The Board's statutory authority to adopt the rules is set forth in Minn. Stat. § 116D.04, subd. 2a(a), 4a, 5a, 8 and 9. Further, Minn. Stat. § 116D.045, as amended by Laws of Minnesota 1988, chapter 501, also grants rulemaking authority to the Board which was utilized for these rules. The Administrative Law Judge finds that the Board has the necessary statutory authority to adopt the proposed amendments.

##### General

4. The two subparts at issue in this report regulate the production of environmental assessment worksheets (EAW) and environmental impact statements (EIS) for pipeline projects. Matters concerning both subparts will be resolved first, followed by a discussion of each subpart individually. Reference will be made to a Report being issued concerning pipeline routing rules proposed by the Board. That report is identified as the Pipeline Routing Rules Report issued contemporaneously with this report.

Part 4415.4300 Subpart ,7 and  
Part 4415.4400 subpart 24 Federal Preemption

5. The Board and the interested parties reached a compromise set forth in the Joint Statement of Resolution. of Potential \_ Dispute Over Applicable State and Federal Jurisdiction. EQB Exhibit 36. The Board

agreed to amend Part 4415.4300 subpart 7 (hereinafter "Subpart 1") as will be discussed, infra and the representatives of interstate natural gas pipelines agreed not to oppose that subpart. Both the Board and the interested parties reserved the right to brief and argue the issue of preemption in the appropriate forum. The issue of federal preemption arose in the pipeline routing rulemaking process. As was stated in that rule report, for the issue of federal preemption to be decided, the proper tribunal would be a state or federal court, not this rulemaking process.

#### Part 4410.4300 Subpart 7 -Mandatory EAW Categories - Pipelines

6. This provision requires an Environmental Assessment Worksheet (EAW) be prepared for a project if the any of the stated thresholds are met, unless a more intense review (EIS) is warranted. Controversy was generated by the proposed reduction of the length of tie pipeline project triggering mandatory EAW review from 50 miles to .75 miles. Interested parties argued that this reduction exceeds the statutory authority of the Board. An examination of the authorizing statutes reveals no specific minimum length of pipeline which triggers the environmental review intended by the Legislature. The only specific length mentioned with regard Lo pipelines is in the routing statute, Minn. Stat. § 1161.015 subd. 3(c), which excludes minor relocations of an existing pipeline of less than .75 miles from the routing requirements. The Board has demonstrated that it has the authority to act as it has proposed.

7. A further objection was raised that the reduction of length is Arbitrary. The Board responded that: 1) the original 50 mile figure was set merely to conform with existing certificate of need process; 2) the Board had very little experience with environmental review of pipelines in 1982 (when the 50 mile figure was set); 3) projects of much less than 50 miles in length can have severe environmental impacts; and, 4) the length of pipeline triggering environmental review has been, in fact, shorter than 50 miles. EQB Exhibit 35. The Board is not precluded from amending an existing rule once it is promulgated. Minn.Stat. sec.14.05 subd. 1 (1986).

B. The Board's justification for reducing the threshold was set forth in the Statement of Need and Reasonableness (SONAR) and supplemented at the hearing and in its post-notice comments. EQB Exhibit

35. The Board presented supplemental data at the hearing because interested parties had not raised any objection to the .75 mile standard until after preparation of the SONAR. Further. the Board believed that the pipeline companies were in agreement with the board s proposal Lo

conform the length standard with the pipeline routing rules. EQB Exhibit

35. In general, failure to set forth any factual basis for a rulemaking

decision is a defect. G. Beck, E. Bakken & T. Muck, Minnesota Administrative Procedure 389 (1987). in this instance, however, the board has presented enough information in the SONAR and supplemented it at the hearing to demonstrate the need and reasonableness of the rule. Finding 9, infra. The concepts of the justification used were in the SONAR, and thus, available to all interested parties. The Administrative

Law Judge finds that the failure to include all of the data for reducing the threshold from 50 miles to .75 miles in the SONAR is not a procedural defect.

9. The board cannot set standards through rulemaking without the standards being needed and reasonable. *Manufacture -Housing Institute v. I Petersen*, 347 N.W.2d 238, 246 (Minn. 1984). The Board has presented statistical evidence to show that the original rule was not effective in its intended purpose and that, de facto the rule was being enforced at a lower threshold than the 50 mile standard. The Board has shown that the proposed .75 mile standard is consistent with the proposed routing rules. Using a standard identical to another rule, while not in itself reasonable, renders compliance with the two rules easier. The Board has shown the potential for significant environmental impact from pipelines less than 50 miles long. The Board has demonstrated the need and reasonableness of the .75 mile threshold for environmental review.

10. The Board has proposed to modify the provisions of item B and add items C and D to permit flexibility in the rule for natural or synthetic gas pipelines. Common elements of items B and C provide for a 5 mile exemption from the mandatory EAW requirement, under certain circumstances. This exemption is permitted since the exempt pipeline is either federally regulated and on public property or federally regulated and located on existing right of way. If those standards are not met, then the .75 mile threshold for an EAW is required. The Board has demonstrated the need and reasonableness for the Modification. The modification is not a substantial change.

Part 4410.4400 Sub art 24 Mandatory EIS Categories - Pipelines

11. As originally proposed, this provision threatened to supplant the less restrictive standard of Subpart 7. The Board has modified the language of Subpart 24 to clarify that only those pipelines subject to the full routing process require a mandatory EIS. The modification is not a substantial change.

12. At the hearing, objection was made to the establishment of a mandatory EIS requirement for pipelines on the ground that the Board lacks statutory authority to make this change. The objection hinges upon no mention of EIS requirements having been made in the routing statute,

Minn. Stat. § 1161.015 (1987). The statutory authority of the Board in adopting these rules has been cited in the first report and in Finding 3, supra. The objection fails to recognize that the Board has two different grants of authority. The first is the long-standing grant of authority to establish Categories for environmental review. Minn. Stat. § 116.04 (1986). The second grant is to establish permitting authority for pipeline routes. Minn. Stat. § 1161.015 (1987). Although the timing of the Board's revision of its EAW/EIS rules is coincidental with the promulgation of the rating rules, the statutory bases for these two actions are distinctly different. As mentioned above, the Board has the statutory authority to amend the rules as proposed.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. That the Minnesota Environmental Quality Board gave proper notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. SS 14.14, and all other procedural requirements of law or rule .

3. That the Board has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. SS 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn- Rule 1400.1000, Subp. I and 1400.1100.

6. That any Findings which might properly be termed Conclusion and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the rule based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 5th day of January, 1989.

ALLAN W. KLEIN  
Administrative Law Judge