

Minnesota Environmental Quality Board

ORDER ADOPTING RULES

Adoption of Rules Governing the Siting and Permitting of Large Wind Energy Conversion Systems, Minnesota Rules, Chapter 4401

WHEREAS:

1. All notice and procedural requirements in Minnesota Statutes, chapter 14, Minnesota Rules, chapter 1400, and other applicable law have been complied with. Proposal of the rules was authorized by the Environmental Quality Board at its meeting on September 20, 2001, and a quorum was present.
2. The Minnesota Environmental Quality Board received five written comments and submissions on the rules. None of the written comments and submissions requested a public hearing. Therefore, there are not 25 or more outstanding requests for a public hearing. The Minnesota Environmental Quality Board received no requests for notice of submission to the Office of Administrative Hearings.
3. The rule as proposed are modified to read as follows (modifications shown by underlining and strikeout). None of the modifications results in a substantially different rule than proposed.
4. Part 4401.0200, subpart 7 is amended to read:

Subp. 7. EQB. "EQB" means ~~the entire agency, including~~ the board and the board's staff.
5. The Department of Health suggested that a change be made to clarify who is covered by the definition. This definition provides that clarification.
6. Part 4401.0300, subpart 3 is amended to read:

Subp. 3. Expansion of existing system. No person may expand an existing LWECS by any amount or expand an SWECS to exceed 5,000 kilowatts without a site permit from the board. A new project is considered an expansion of an existing WECS if the new WECS is within five miles of any turbine to the existing WECS, both projects are under common ownership, and a permit application for the new WECS is proposed submitted to the EQB less than three years after the existing WECS commenced operation. Two WECS are under common ownership if the proposer of the new project, or a principal of the proposer, has an ownership or other financial interest in the

existing WECS, although two projects are not under common ownership solely because the same person provided equity financing for both projects. The requirements of this subpart shall not apply to any proposed SWECS for which the necessary local approvals were obtained prior to October 1, 2002, and for which construction started prior to December 31, 2002.

7. Paul White, the president of Project Resources Corporation, submitted a comment letter raising a concern about the original language in this subpart. Mr. White was concerned that because it could take longer to obtain a site permit from the EQB than from the local authorities, a developer might not qualify for federal tax production credits in 2002 because the developer could not obtain an EQB permit in time. The addition of the last sentence to the rule addresses Mr. White's concern by essentially grandfathering in those projects for which a developer has already obtained, or will obtain by October 1, 2002, local approval. This will allow a developer who already holds a local permit to avoid the requirement for an EQB permit and proceed with the project in 2002. Also, by extending the time to October 1, 2002, even developers who are presently seeking a local permit should be able to do so by the deadline. In the future, developers will know that if the criteria are met, a state LWECS site permit is required and the developer can allow time to apply for and obtain the permit.
8. As explained in the Statement of Need and Reasonableness, the criteria in this subpart were derived from Minnesota Statutes section 216C.41, although they are not identical. The statute covers projects that are commenced in the same calendar year; the rule uses a three year time frame. While the same calendar year may be appropriate for determining whether a developer qualifies for an annual tax credit, a one year limitation is not appropriate for determining whether a small project (under five megawatts) should be added to another project to require a state permit so the EQB can ensure that the wind resource is being developed in an orderly and efficient manner. It is not unusual for a wind project to take several years to complete. A one year limitation would allow most small additions to proceed without EQB review.
9. Part 4401.0400, subpart 2, is amended to read:

Subp. 2. **Electronic copy.** A person filing an application for a site permit for an LWECS shall provide the EQB with an electronic version of the application suitable for posting on the EQB Web page. An applicant may request that the chair ~~to~~ waive this requirement, completely or in part, ~~of the application~~ if an electronic version of the application is difficult or expensive for the applicant to obtain.
10. This change in the language to subpart 2 was suggested by the Minnesota Department of Health in their comment letter. It is simply a grammatical improvement.

11. Part, 4401.0400 subpart 3 is amended to read:

Subp. 3. ~~Proprietary information~~ Not public data. An applicant for a site permit for an LWECS may certify, according to the Minnesota Government Data Practices Act or other applicable law, that certain information in the application is trade secret information or other protected data or information that is not available to the public. The ~~board~~ chair shall determine if the certified data or information satisfies the requirements for the protected classification and shall advise the applicant of the ~~board's~~ chair's determination before releasing any certified data or information. An applicant may withdraw its application if the ~~chair~~ board determines that the data or information is not entitled to the protected classification. Any person aggrieved by the decision of the chair regarding the status of certain data may request the board to reconsider the chair's decision. The EQB shall ensure that data or information that is entitled to a protected classification is used and disclosed only according to applicable law.

12. The proposed language provides that just because a permit applicant certifies that certain information or data are not public does not make it so. The Board must make its own decision on whether the certification is proper under the applicable law. The Minnesota Department of Health suggested that the EQB might want to allow the Chair, rather than the Board, to make the decision whether information and data certified by a permit applicant are actually entitled to the requested protection under the law. This is a good suggestion that should help to avoid delay in processing a permit application. However, it is also appropriate to allow any person aggrieved by the Chair's decision to ask the Board to review the decision. If the permit applicant is upset that the Chair rejected the request for not public treatment, the applicant could ask the Board to review the decision. On the other hand, if a member of the public disagrees that the information is entitled to not public treatment, that person could ask to have the matter brought to the Board. In any event, the rule also provides that an applicant shall have the opportunity to withdraw an application if the Chair (or Board) should reject the request for not public treatment before the EQB makes the information available to the public. Also, the EQB will ensure that the not public treatment of information required by such status is maintained.
13. Subpart 3 applies only to information in a permit application. Sometimes a permittee is also required to submit information as a condition of a permit, and the same concern over the not public treatment of such information could arise at that time as well. In the past the EQB has addressed this matter in the permit language. For example, the Navitas Energy and the Chanarambie Power Partners permits issued in May 2001 both contain language addressing this issue. This is a satisfactory way to address the concern over information submitted by a permittee after the permit is issued, and no additional rule language is required.

14. A new rule, part 4401.0710, is added to read as follows:

4401.0710 TRANSFER OF PERMIT

Subpart 1. Request for transfer. A permittee of a site permit for a LWECS may apply to the EQB for the transfer of its permit. The permittee must provide the name of the existing permittee, the name and description of the person to whom the permit is to be transferred, the reasons for the transfer, a description of the facilities affected, and the requested date of the transfer. The person to whom the permit is to be transferred shall provide the EQB with such information as the EQB shall require to determine whether the new permittee can comply with the conditions of the permit. The permittee shall provide notice of the request to those persons identified by the EQB as persons interested in the matter.

Subp. 2. Approval of transfer. The board shall approve the transfer if the board determines that the new permittee will comply with the conditions of the permit. The board, in approving the transfer of a permit, may impose reasonable additional conditions in the permit as part of the approval. The board may hold a public meeting to provide the public with an opportunity to comment on the request for the transfer prior to making a decision.

15. The purpose of this new rule is to recognize in the rules that a site permit can be transferred and to spell out the process and criteria for doing so. The EQB did not include language addressing this matter in the proposed rules, because it was felt that the general language on permit conditions was satisfactory to allow the EQB to provide for the transfer in the individual permits that were issued. In the past each LWECS site permit contained language recognizing the possibility of a permit transfer. However, it now seems preferable to include language in the rules so that both permittees and the public are more aware of the possibility and so that a more definitive process and criteria are established.
16. Part 4401.0710, subpart 1 sets forth what is required to be included in a request by a permittee for approval to transfer ownership of a LWECS site permit. The information is intended to allow the Board to learn why the transfer is being requested and the qualifications of the new permittee. The rule provides that the EQB can request additional information from the intended new permittee so the Board can be assured that the new person is capable of complying with all applicable permit conditions. In addition, the rule requires the permittee to notify persons who have been interested in the wind project previously so they know that a permit transfer has been requested. Once the matter is brought to the Board for a decision, the general public will also have notice of the requested transfer through distribution of the EQB agenda and other related documents.

17. Subpart 2 sets forth the criteria for approving a permit transfer. The basic test is whether the new permittee is capable of complying with the conditions of the permit. If so, the Board will approve the transfer. This is a reasonable standard to apply. The rule does recognize that the Board could impose new conditions on the new permittee if the record supports the need for additional conditions. Also, the rule recognizes that if a proposed transfer is controversial, the Board could elect to schedule a public meeting to allow the public an opportunity to comment on the matter before the Board makes a decision.
18. The addition of this new language does not constitute a substantial change. The subject of permit conditions was part of the initial rulemaking notice. The same people are affected. The new rule is in character with comments received pursuant to the notice of the intent to adopt rules.
19. Several wind developers also raised questions about how the EQB would address a merchant wind power plant that did not have a power purchase agreement. The rules do not require a power purchase agreement. Part 4401.0450, subpart 2.C. provides that a permit applicant must simply inform the EQB of what the developer intends to do with the power that will be generated. Part 4401.0610, subpart 3 then goes on to provide that if the applicant does not have a power purchase agreement or other enforceable mechanism for sale of the power by the time the permit is issued, the permit will be issued but the permittee cannot commence construction until a power purchase agreement or some other mechanism for selling the power is obtained. This is exactly what the EQB provided in the two site permits that were issued in May 2001, to Navitas Energy and Chanarambie Power Partners. It is reasonable to grant a permit to a developer who is still finalizing the purchase arrangements, but not allow construction until the EQB (and other state agencies and local government) are assured that there is a customer for the power. This will help promote the efficient and expedient development of the wind resource.
20. The rules are needed and reasonable.
21. The rules were adopted by the board at its meeting on February 21, 2002, a quorum was present, and the undersigned was authorized to sign this order.

IT IS ORDERED that the above-captioned rules, in the form set out in the Revisor of Statutes draft, file number AR3248, dated February 7, 2002, are adopted pursuant to authority vested in the Minnesota Environmental Quality Board by Minnesota Statutes, section 116 C.695.

February 21, 2002

Gene Hugoson, Chair
Environmental Quality Board