58-2901-15002-1

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

In the Matter of the Proposed
Amendments to Permanent Rules
Relating to Power Plant Siting,
Minnesota Rules, Chapter 4400

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Hearings concerning the above rules were conducted by Administrative Law Judge Kathleen D. Sheehy beginning at 10:00 a.m. on September 18, 2002, at the Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota and at 10:30 a.m. on September 25, 2002, at the Douglas County Library, 720 Fillmore, Alexandria, Minnesota. Each hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearings and this report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act[1] before an agency can adopt rules. The legislature has designed this process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications of the rules made after their initial publication does not result in the rules that are substantially different from those originally proposed.

The rulemaking process also includes a hearing, when a sufficient number of persons request a hearing. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Environmental Quality Board ("Board" or "EQB").

Dwight Wagenius, Assistant Attorney General, 445 Minnesota Street, 900 NCL Tower, St. Paul, Minnesota 55101, appeared on behalf of the Board. Alan Mitchell, Manager of the Power Plant Siting Program, Environmental Quality Board, 658 Cedar Street, St. Paul, Minnesota 55155, presented the Board's position and answered questions at each of the hearings. Approximately 25 persons attended the hearings and 12 signed the hearing registers. Four people spoke at the hearings.

Several public comments were submitted before the hearing. After the second hearing ended, the Administrative Law Judge kept the record open for the maximum 20

[1] Minn. Stat. §§ 14.131 through 14.20.

calendar days until October 15, 2002, to allow interested persons and the EQB an opportunity to submit written comments. During this initial comment period the Administrative Law Judge received written comments from the EQB and seven public comments. Following the initial comment period, the Administrative Procedure Act requires that the hearing record remain open for another five business days to allow interested parties and the agency to respond to any written comments. The agency did respond as well as six other individuals and groups. The hearing record closed for all purposes on October 22, 2002.

SUMMARY OF CONCLUSIONS

1. The EQB has failed to establish the reasonableness of the rule concerning payment of permit fees, part 4400.1050, subp. 2.

1. The rules have otherwise been shown to be needed and reasonable.

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

FINDINGS OF FACT

Procedural Requirements

1. On September 10, 2001, the EQB published a Request for Comments on Possible Amendments to Rules Governing Power Plant Siting and High Voltage Transmission Line Routing in the State Register. The request indicated that the EQB was considering changes to the process for site and route permits and to environmental review rules for large electric power generating plants and high voltage transmission lines. The Request for Comments was published at 26 State Register 368.[2]

2. On June 5, 2002, three organizations submitted a petition for a public hearing on the proposed rule changes.[3]

3. By a letter dated July 16, 2002, the Board requested that the Office of Administrative Hearings schedule a rule hearing and assign an Administrative Law Judge. The EQB also filed a proposed notice of hearing, and a copy of the proposed rules and the Statement of Need and Reasonableness (SONAR).[4] The Board asked for prior approval of its additional notice plan.

4. In a letter dated July 25, 2002, the Administrative Law Judge approved the notice of hearing, contingent upon the Board making several changes to the notice as submitted,[5] and the additional notice plan.

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[2] Ex. 4(E).
[3] Ex. 4(X).
[4] Ex. 4.
[5] As this letter is not in the hearing record, the Administrative Law Judge will specify for the record that those changes were: different hearing dates as requested by the Board; addition of contact information

5. On August 12, 2002, the proposed rule amendments and the Notice of Hearing, signed by Gene Hugoson, Chair of the EQB, were published at 27 State Register 205-224.[6]

6. On August 13, 2002, the EQB mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons identified in the additional notice plan.[7]

7. On August 13, 2002, the Board mailed a Notice of Hearing and the Statement of Need and Reasonableness to the legislators specified in Minn. Stat. § 14.116.[8]

8. On August 13, 2002, the EQB mailed a copy of the Statement of Need and Reasonableness to the Legislative Reference Library.[9]

9. On the day of the hearing the following documents were placed in the record:

1) The Request for Comments published in the State Register.

2) A copy of the petition for a rulemaking hearing.

3) A copy of the proposed rule as certified by the Revisor of Statutes.

4) A copy of the Statement of Need and Reasonableness, with Exhibits A-Y attached.

5) A copy of Certificate of EQB Authorizing Resolution.

6) The Notice of Hearing as published in the State Register.

7) A copy of the Notice of Hearing as mailed.

8) The Certificate of Mailing the Notice of Hearing.

9) The Certificate of Accuracy of the Mailing List.

10) The Certificate of Sending the Notice of Hearing and Statement of Need and Reasonableness to Legislators.

11) The Certificate of Mailing the Statement of Need and Reasonableness to the Legislative Reference Library.

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for the Administrative Law Judge and the Campaign Finance and Public Disclosure Board; and a revision to the portion of the Notice referring to notification of filing of the rules with the Secretary of State. All of the changes were made. *See* Ex. 6.

[6] Ex. 6.
[7] Ex. 8.
[8] Ex. 10.
[9] Ex. 11.

12) A copy of the cover letter for the mailing to legislators.

13) A list of the legislators to whom the Board sent the mailing.

14) The Notice of Hearing as published in the EQB Monitor.

15) A copy of the EQB's News Release on Rule Amendment Hearings.

16) Explanation of Proposed Amendment to Definition of "Developed Portion of Plant Site" distributed at the public hearings.

17) Citizen Comment Regarding Proposed Amendment to Rules Chapter 4400 (Laura and John Reinhardt).

Nature of the Proposed Rules

10. These proposed rules relate to the application and implementation of the Power Plant Siting Act,[10] which gives the EQB the authority to provide for site and route selection for large electric power facilities.[11] Some of the proposed amendments bring the rules into conformity with statutory changes made during the 2001 legislative session.[12] This legislation made significant changes to the EQB siting process for large electric power generating plants (LEPGPs) and the routing process for high voltage transmission lines (HVTLs), because of reports that Minnesota was going to need several thousand more megawatts of generation and additional transmission infrastructure within the next decade to supply the increasing demand for electricity. The Legislature was interested in ensuring that review of proposed large energy projects would be conducted expeditiously but comprehensively and with ample opportunities for public involvement.[13]

Statutory Authority

11. The Minnesota Power Plant Siting Act provides as follows with regard to statutory authority:

> The board, in order to give effect to the purposes of sections 116C.51 to 116C.69, may adopt rules consistent with sections 116C.51 to 116C.69, including promulgation of site and route designation criteria, the description of the information to be furnished by the utilities, establishment of minimum guidelines for public participation in the development, revision, and enforcement of any rule, plan or program established by the board, procedures for the revocation or suspension of a site or route permit, and the

[10] Minn. Stat. §§ 116C.51- .69 (2002).
[11] *Id*. § 116C.53, subd. 2.
[12] 2001 Laws of Minnesota, Ch. 212 (Minnesota Energy Security and Reliability Act).
[13] Ex. 4 at 3-4.

> procedure and timeliness for proposing alternative routes and sites.[14]

The EQB has established its general statutory authority to adopt rules in this area. Some commenters have challenged the EQB's authority to exempt certain projects from the permitting requirements. This issue is considered in the findings below.

Board's Statement of Purpose and Policy

12. The EQB describes the "purpose of the act and the policy of the state" as: "to locate large electric power generating facilities and high voltage transmission lines in an orderly manner compatible with environmental preservation and the efficient use of resources."[15] The Board states that:

> In accordance with this policy, the board shall choose locations that minimize adverse human and environmental impact while ensuring continuing electric power system reliability and integrity and ensuring that electric energy needs are met and fulfilled in an orderly and timely fashion. The board shall provide for broad spectrum citizen participation as a principle of operation.[16]

Impact on Farming Operations

13. Minn. Stat. section 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The statute requires that the agency provide a copy of the proposed rule changes to the Commissioner of Agriculture at least 30 days prior to publication of the proposed rule in the State Register. In this particular case, the Board states that "these proposed rules will not directly regulate farming operations, and this notice is probably not required. However, because power plants and high voltage transmission lines can be located on or cross farm land, farming operations can be impacted when these projects are constructed, and it is appropriate to notify the Commissioner."[17] The Administrative Law Judge finds that the construction and operation of power plants and transmission lines in this state, many of them located in the more rural parts of the state, would likely affect farming operations. In this particular case, there is no evidence that the EQB provided separate notice to the Commissioner of Agriculture prior to publication of the rules in the State Register. However, as the Commissioner of Agriculture is the Chair of the EQB,[18] the Administrative Law Judge finds that the Board has complied with this requirement.

[14] Minn. Stat. § 116C.66.
[15] Minn. R. 4400.0300. This is not new language. *See* Ex. 4 at 14.
[16] Proposed Minn. R. 4400.0300.
[17] Ex. 4 at 9.
[18] *See* Finding 5.

Regulatory Analysis

14. The Administrative Procedure Act requires an agency adopting rules to consider six factors in its Statement of Need and Reasonableness. The first factor requires:

> **(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The Board states that the people who will be primarily affected by the rules are those who seek approval to construct LEPGPs and HVTLs. The Board recognizes that, to a different degree, local government officials, environmental organizations and members of the public will also be affected. Another affected group will be landowners of property along a proposed route for a HVTL or on a proposed LEPGP site. The Board states that the permittees under the rules will both bear the costs and receive the primary benefits of the proposed rule. Project proposers will bear the costs of the rule through fees for permits required to construct the projects. In addition, applicants must pay the reasonable fees incurred by the EQB in processing their application. Permittees will benefit from authorization to proceed with construction of a LEPGP on a specific site or a HVTL along a specific route.

> **(2) The probable costs of the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

The Board is authorized by statute to charge permit applicants for the necessary and reasonable costs incurred by the EQB in processing the permit application and to make a general assessment against utilities in the state to pay the EQB's expenses in promulgating rules and administering permit applications. There will be no effect on state revenues.

> **(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

The Board notes that a major focus of the legislation amending the Power Plant Siting Act was to streamline the power plant siting process, and to the extent that the proposed rules incorporate legislative changes, efforts to identify less costly and intrusive methods have already been taken into account. The EQB considered ways in which to further simplify the process and created exceptions to the permit requirements for that reason.

> **(4) A description of any alternative methods for achieving the purpose of the proposed rules that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rules.**

The agency again states that these considerations went into the enactment of the 2001 energy bill.

(5) The probable costs of complying with the proposed rules.

The most readily identifiable costs of the proposed rules are the fees charged to the applicant for processing the permit application. The amount of these fees will depend on the size of and controversy associated with a project. The EQB estimates that the cost of processing an application for large but relatively noncontroversial projects would be about $50,000. The estimated fees for smaller projects under the alternative review process may be less than $10,000. These are only the costs to the applicant for the work of the EQB; the applicant may incur substantial costs in preparing the application and participating in the review process. The EQB states that applicants may also incur costs for complying with conditions, such as specific mitigating measures, imposed on their permit.

(6) An assessment of any differences between the proposed rules and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

There is no corresponding federal regulation because the federal government does not have jurisdiction over the selection of specific sites for LEPGPs or routes for HVTLs.

The EQB has satisfied the requirements of Minn. Stat. § 14.131, which requires it to ascertain the above information to the extent the agency can do so through reasonable effort.

Performance Based Rules

15. The Administrative Procedure Act[19] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[20] The Board states that there is a "great deal of flexibility built into the rules based on the statutory changes that were adopted by the Legislature in 2001." The Board provides several examples in the SONAR of its efforts to provide further flexibility in the permitting process.[21]

Additional Notice

16. In addition to the mailed and published notice required by statute, the EQB also published notice of the proposed rulemaking in the *EQB Monitor*. Each issue of the *EQB Monitor* is distributed to a large mailing list and published on the EQB webpage. A

[19] Minn. Stat. § 14.131.
[20] *Id*. § 14.002.
[21] Ex. 4 at 8-9.

copy of the notice, the proposed rules and the SONAR were also published on the Board's web page. The EQB has compiled a list of persons who want to be advised of applications submitted to the EQB for site or route permits, and mailed a notice of proposed rulemaking to that list as well.

17. Although the EQB did not convene a rulemaking advisory committee, it provided copies of the first draft of the rule amendments[22] to those persons and organizations that the agency knew would be interested in the matter. The EQB continued to stay in contact with those people and groups who were interested in the rulemaking proceedings. The participants in this rulemaking proceeding unanimously described the efforts of the EQB staff, and its commitment to keeping interested parties informed about rule drafts and proposals, in positive terms.

Rulemaking Legal Standards

18. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[23] The EQB prepared a Statement of Need and Reasonableness in support of the proposed rules. At the hearing, the EQB primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by EQB representatives at the public hearing and in written post-hearing submissions.

19. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[24] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[25] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[26] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[27] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best"

[22] Ex. 4(A).
[23] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[24] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[25] *Greenhill v. Bailey*, 519 F. 2d 5, 19 (8th Cir. 1975).
[26] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[27] *Manufactured Housing Institute*, 347 N.W.2d at 244.

approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.[28]

20. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Board has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[29] In this matter, the Board has proposed changes to the rule after publication of the rule language in the State Register. Because of this circumstance, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.[30]

21. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced … in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the … notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications make the rules substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding … could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the … notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the … notice of hearing."[31] The Board suggested a modification at the hearing[32] and several amendments after the hearing. Any substantive language that differs from the rule as published in the State Register has been assessed to determine whether the language is substantially different. Because some of the changes are not controversial, not all of the altered language has been discussed. Any change not discussed is found to be not substantially different from the rule as published in the State Register. Substantive and controversial changes are discussed in the following discussion of the proposed rules.

Analysis of the Proposed Rules

General

22. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When proposed

[28] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[29] Minn. R. 1400.2100.
[30] Minn. Stat. § 14.15, subd. 3.
[31] *Id.* § 14.05, subd. 2.
[32] Ex. 16.

rules are adequately supported by the SONAR or the EQB's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rules by Subpart

4400.0200, subp. 6 – Definition of Developed Portion of Plant Site

23. The EQB initially proposed repealing this definition on the basis that the phrase "developed portion of the plant site" was not used in the rules.[33] At the hearing, EQB staff pointed out that the phrase was indeed used in the rules, in both part 4400.3310, subp. 4, where limitations are placed on the amount of prime farmland that can be taken for a power plant, and in part 4400.0650, subp. 1, concerning certain exemptions from the permitting process. The existing rule refers to the portion of the site containing structures and facilities that preclude crop production; while this reference to crop production was appropriate when the definition was necessary only for determining limitations on use of prime farmland, a broader definition is necessary to cover the situations arising under part 4400.0650. The EQB proposed defining the phrase to mean "the portion of the LEPGP site that is required for the physical plant and associated facilities."[34] "Associated facilities" means "buildings, equipment, and other physical structures that are necessary to the operation of a large electric power generating plant or a high voltage transmission line."[35] Although the Sierra Club suggested another definition (excluding fuel storage areas, buffers, and setbacks), the EQB prefers the more general definition of "associated facilities" in defining this term as opposed to a list that might be incomplete in some factual scenarios, and because that phrase was defined in the proposed rules. The language proposed by the EQB is needed and reasonable, and it is not substantially different from the rule as published in the State Register.

24. Subpart 6b, concerning the Environmental impact statement or EIS, lacks a quotation mark and needs a technical revision as follows: "Environmental impact statement" or "EIS" means a detailed written statement . . . ." The Administrative Law Judge recommends that the EQB correct this typographical error.

25. Subpart 10 defines a large electric power generating plant (LEPGP) as electric power generating equipment and associated facilities designed for or capable of operation at a capacity of 50,000 kilowatts or more. The Department of Commerce suggested a specific definition of associated facilities here, as exists for HVTLs in subpart 8. The EQB proposes to define associated facilities for this purpose as follows: "Associated facilities shall include, but not be limited to, coal piles, cooling towers, ash containment, fuel tanks, water and wastewater treatment systems, and roads." The

[33] Ex. 4 at 12.
[34] Ex. 16.
[35] *See* proposed Minn. R. 4400.0200, subp. 2a.

language proposed by the EQB is needed and reasonable, and it is not substantially different from the rule as published in the State Register.

4400.0500--Small Projects

26. Subpart 1 proposes that a permit from the EQB is not required to construct a power plant of less than 50 megawatts or a transmission line of less than 100 kilovolts. Proposers of such projects must, however, obtain whatever approvals may be required by local, state, or federal units of government with jurisdiction over the project. Subpart 2 makes clear that proposers of these projects must comply with the environmental review requirements of chapter 4410 and Minnesota Statutes chapter 116D. For example, a power plant of between 25 and 50 megawatts still requires the preparation of an Environmental Assessment Worksheet, as does a transmission line between 70 and 100 kilovolts.[36]

27. The Sierra Club proposes language that would limit the exception to construction of one plant on a single site, to prevent a situation in which a project proposer could develop a series of power plants under 50 megawatts on adjacent sites or the same site. The EQB responds that in such a situation, a permit would be required under Minn. R. 4400.0400, subp. 3, pertaining to expansion of an existing facility. The EQB does not believe that the additional language proposed by the Sierra Club is necessary. The Administrative Law Judge finds that the Board has demonstrated both the need for and reasonableness of its proposed rule.

4400.0650 -- Requirements for Certain Existing Facilities

28. Much of the controversy in this proceeding concerns the exceptions to permitting requirements for existing facilities. This rule is based on the EQB's determination that certain modifications of existing facilities do not constitute "construction" of a LEPGP or HVTL under the Power Plant Siting Act.[37] In the EQB's view, these projects do not involve a siting or routing decision because those decisions have already been made.

Subparts 1(A) and (B); Substations and HVTLs.

29. Under these proposed rules, no permit is required for equipment additions at an existing substation that do not require expansion of the land needed for the substation and do not involve an increase in the voltage or changes in existing transmission lines, except up to the first five transmission line structures outside the substation can be moved to accommodate the equipment additions provided the structures are not moved more than 500 feet from the existing right-of-way. Similarly, HVTLs can be maintained, repaired, reconductored or reconstructed within existing rights-of-way, provided that any new structures that are installed are not designed for or

[36] Minn. R. 4410.4300, subp. 3; *id.* subp. 6.
[37] Minn. Stat. § 116C.57, subd. 1 ("No person may construct a [LEPGP] without a site permit from the board."); *id.* subd. 2 ("No person may construct a high voltage transmission line without a route permit from the board.").

capable of operation at a higher voltage; and HVTLs can be relocated if required by a state or local agency as part of road, street or highway construction. No person objects to any provision of these rules.

Subpart 1(C)(1); Maintenance or Repair of LEPGPs.

30. Subpart 1(C)(1) proposes to exempt maintenance or repair of a LEPGP from the permit requirement. The EQB states that LEPGPs are continuously maintained and repaired, so much so that it would not be practical or reasonable for the EQB to review and authorize all of this type of work before it was done.[38] The agency's practice has been to exempt this type of work from its review in the past.[39]

31. The Minnesota Center for Environmental Advocacy (MCEA) comments that only maintenance and repair that does not increase the generating capacity at a LEPGP should be exempted from the permit requirements under this subpart.[40] MCEA reasons that any project that increases the generating capacity at a plant cannot be accurately described as maintenance or repair and should not qualify for an exemption as such.

32. The EQB responds that it is not necessary to include the phrase "with no increase in generating capacity" because other provisions of the rules, specifically part 4400.0400, subps. 3(C) and (D) and other parts of 4400.0650, subp. 1(C), address modifications that will result in an increase in generating capacity.[41]

33. The Administrative Law Judge finds that the EQB has shown the need for and reasonableness of the language as proposed.

Subpart 1(C)(2); Increases in Efficiency.

34. Subpart 1(C)(2) proposes to exempt from the permit requirement modifications that increase the efficiency of LEPGPs provided that the plant's capacity is not increased more than 10% or more than 100 megawatts, whichever is greater, and the modification does not require expansion of the plant beyond the developed portion of the plant site. This rule is based on the exemption language added to the Public Utility Commission's certificate of need (CON) statute, as amended in the Energy Security Reliability Act of 2001.[42] The EQB maintains that it is reasonable to exempt from the site permit requirements the same kind of efficiency improvements that the legislature exempted from the CON requirement. If the legislature has determined that these types of changes to an existing plant do not require a reassessment of size, type, or timing in the CON process, it would be inappropriate to reassess these aspects in a siting proceeding. In addition, the EQB maintains that other permits may still be required, such as air and water permits from the Pollution Control Agency and the

[38] Ex. 4 at 19-21.
[39] Ex. 4 at 20.
[40] MCEA Comment, Oct. 15, 2002, at 13-14.
[41] EQB Response, Oct. 22, 2002, at 3.
[42] Minn. Stat. § 216B.243, subd. 8(5).

requirement to conduct an environmental review of the project under Minnesota Rules Chapter 4410. The Department of Commerce supports the proposed rule as written.

35. MCEA, the Sierra Club, and Communities United for Responsible Energy (CURE) maintain that this proposed exemption is beyond the statutory authority of the EQB. They argue that there is no express exemption in the Power Plant Siting Act, and that because the legislature provided this exemption only to the CON process, one should infer that the legislature chose not to apply a similar exception for the site permit requirements. The MCEA is concerned about the possible ramifications of the exemptions, because of the potential for "tremendous increases in capacity"[43] without any review of siting concerns. Using figures from the Minnesota Utility Data Book,[44] the MCEA states that the "exemption allows increased capacity nearly equivalent to the addition of two Prairie Island Nuclear facilities with no environmental review."[45] It argues that:

> The site permitting process provides the only opportunity for regulatory and public review of these increases in efficiency which are associated with increases in capacity and therefore the only opportunity for consideration of impacts and alternatives. The Legislature struck a balance between streamlining the process and providing for adequate environmental analysis. It exempted increases in efficiency from the CON requirements, but left the site permitting requirements intact. The proposed exception undermines this balance.[46]

36. The commenters raise legitimate concerns, but their opposition to the rule is legally unsupported. There is no evidence in this record that the legislature even considered, much less declined to provide this exception to the EQB's site permit requirements, nor is there any evidence that the huge capacity increases calculated by MCEA can be achieved without expansions to the developed portion of the plant site. The EQB is authorized to give effect to the purposes of the Minnesota Power Plant Siting Act and to adopt rules consistent with those provisions.[47] A major focus of the amendments to the Act was to streamline the power plant siting process because of projected increases in demand for electricity. The EQB's determination that capacity expansions involving an efficiency improvement up to 100 megawatts should be exempted from the permitting process, provided that these improvements can be made without expanding the developed portion of the plant site, is not inconsistent with any provision of the Power Plant Siting Act. While the Administrative Law Judge might make a different choice than that made by the EQB, the Administrative Law Judge cannot say that the EQB's proposed rule is either arbitrary or unreasonable. The proposed rule is within the agency's statutory authority, and the Administrative Law

[43] MCEA Comment at 6.
[44] Minnesota Department of Commerce, *The Minnesota Utility Data Book*: A reference guide for Minnesota electric and natural gas utilities 1965-2000 (2002).
[45] MCEA Comment at 6.
[46] *Id.* at 7.
[47] Minn. Stat. § 116C.66.

Judge finds that the EQB has demonstrated both the need for and reasonableness of the rule.

37. In response to comments from the MCEA, the EQB has modified the rule to specifically define an increase in efficiency as "a reduction in the amount of BTUs [British Thermal Units] required to produce a kilowatt hour of electricity at the facility." The proposed rule is not substantially different than the rule as published in the State Register.

Subpart 1(C)(3); Refurbishment.

38. Subpart 1(C)(3) proposes to exempt the refurbishment of a LEPGP from the permit requirement, provided that such refurbishment "does not expand the capacity of the plant or expand the plant beyond the developed portion of the plant site, and the refurbishment does not require a certificate of need from the public utilities commission." The EQB does not specifically define refurbishment in the rule,[48] stating that to do so with specificity is difficult, but maintains that this exception is narrow and is intended to apply only in situations in which capacity is not expanded, the site is not expanded, and a certificate of need is not required from the PUC. Under Minn. Stat. § 216B.2422, subd. 4, the PUC cannot approve a refurbishment unless the utility has demonstrated that a renewable energy facility is not in the public interest.[49] According to the EQB, "[b]etween the PUC and the EQB, no existing plant will be refurbished without review."[50]

39. The Sierra Club comments that the PUC's CON review and the EQB siting review are independent processes, with the siting review providing a unique evaluation of the "local environmental impact, the appropriateness of the site chosen for electric power facilities and the availability of mitigation measures."[51] The Sierra Club is concerned that, under the proposed exemption, a refurbishment or rebuilding could greatly extend the useful life of an old plant without siting review to determine whether there is a more prudent alternative. The Sierra Club proposes to amend the subpart to exempt only those refurbishments that do not extend the useful life of the plant for more than five years.

40. Again, the concerns raised by the commenters are legitimate; the review processes conducted by the PUC and the EQB are different. Nonetheless, the EQB's determination to exempt refurbishment that does not change capacity, does not expand the plant beyond the developed portion of the plant site, and does not require a CON is consistent with the purposes of the amendments to the Power Plant Siting Act. The proposed rule sufficiently distinguishes "refurbishment" from "construction" of a LEPGP, and it is consequently within the statutory authority of the agency. The EQB has

[48] The language in this subpart is taken from Minn. Stat. § 216B.2422, subd. 1(e), which applies to PUC review of utilities' resource plans. The statute defines "refurbish" as "to rebuild or substantially modify an existing electric generating resource . . .."
[49] Ex. 4 at 22.
[50] *Id.*
[51] Sierra Club Comment, Oct. 15, 2002, at 7.

demonstrated the need for and reasonableness of this exemption from the permit requirement.

Subpart 1(C)(5); Start-up of Existing Plant that Has Been Closed.

41. This subpart allows an existing LEPGP "that has been closed for any period of time" to begin operating again, at no more than its previous capacity rating and in a manner that does not involve a change in the fuel or an expansion of the developed portion of the plant site. The EQB maintains that the exception is reasonable because "there does not seem to be a real siting decision to be made when the plant already exists and because historically the EQB has not made a siting decision when a closed, old plant has reopened."[52]

42. The MCEA and the Sierra Club object to this exemption. Both groups propose that only those plants that have been closed for no more than 365 days should be reopened without a permit from the Board. In support of its argument, the Sierra Club maintains there are comparable provisions in municipal law that provide for the review of land use and permitting decisions for nonconforming use if a facility has been closed for more than one year.[53]

43. The EQB does not believe that the length of time an existing plant has been closed should affect its status as long as the other criteria of the rule are met. There is no evidence in the record that would allow the Administrative Law Judge to draw any conclusions as to the environmental consequences of allowing a plant to reopen after closure for 18 months, or five years, or any longer length of time for that matter, with no change in capacity or site, as opposed to the consequences of reopening within the one-year period proposed by the Sierra Club and MCEA. The EQB has carefully considered the rationale for its proposed rule; the proposed rule is consistent with the purposes of the amendments to the Act (streamlining the siting process); and it is not inconsistent with any provision of the Act, which requires permits for "construction" of a LEPGP. The Administrative Law Judge finds that the EQB has demonstrated both the need for and reasonableness of the rule.

Subpart 3; Notice.

44. Subpart 3 requires owners of LEPGPs and HVTLs to advise the EQB at least 30 days before they make modifications to existing facilities that are exempt from the permitting process. MCEA requests that language be added to the rule to require the EQB to publish a summary of all such modifications at least once a month. The EQB intends to include this information on its webpage and to keep its webpage current, but it does not see the need to publish a list on a monthly basis.

45. The Minnesota Transmission Owners (MTO) urge the addition of the following language: "Failure to provide the written notice within the 30-day period shall not affect the status of the change or modification." The reason for the notice provision

[52] EQB Response at 5.
[53] Sierra Club Comment at 6. The Sierra Club has not provided any citations to such ordinances.

is so that the EQB can confirm that a proposed modification qualifies under the exemption language. If the EQB disagrees that the modification is exempt, the EQB will likely stop work on the modification until the permit process can be completed. Consequently, the EQB does not believe the requested language should be included in the rule.

46. The EQB has established that the proposed rule is needed and reasonable without any change.

Subpart 4; Local Review.

47. The EQB originally proposed a subpart 4 providing that projects which do not require a permit from the EQB are exempt from any requirement to obtain site or route approval from local units of government with jurisdiction over the project pursuant to Minn. Stat. § 116C.576. Commenters including the Association of Minnesota Counties (AMC), the Sierra Club, and the Department of Commerce raised concerns that the EQB had exceeded its statutory authority in limiting local government powers of regulation in this area. The AMC argued that the provision should be deleted because the legislative intent was not to limit local government authority when the local government has jurisdiction over the land that is proposed to host a route or site.[54] The Sierra Club was also concerned with the effort to exempt LEPGP and HVTL projects from review and approval by local units of government in the absence of legislative authority to do so.[55]

48. Great River Energy (GRE) filed rebuttal comments regarding the Sierra Club's argument concerning local review. GRE stated that the exemption should be retained as proposed because "one intent of the 2001 provisions to the Power Plant Siting Act was to expedite the environmental review of smaller projects. By giving local units of government the opportunity to open a project that the State has determined to be minor will make the review process highly uncertain and slow."[56]

49. In response to the AMC and Sierra Club comments, the EQB proposes to delete this subpart so that local units of government can determine, with input from interested parties, whether a local permit is required. The Administrative Law Judge finds that the EQB's decision to delete this subpart is needed and reasonable. In addition, the deletion of this subpart does not make the rule substantially different than the rule as published in the State Register.

4400.1050 – Permit Fees

50. Subpart 1 of this rule requires applicants for a site or route permit to pay a fee that is determined in accordance with Minn. Stat. § 116C.69. Subpart 2 requires the applicant to submit with the application "50 percent of the total estimated fee or another lesser portion that the chair deems satisfactory." The existing rule requires a payment

[54] AMC Comment at 2.
[55] Sierra Club Comment at 9.
[56] GRE Rebuttal.

of 25% of the estimated fee with the application. The EQB proposed increasing the amount of the up-front fee to reduce the administrative burden of asking for additional payments within a short period of time.

51. The MCEA has requested a change to the SONAR, and presumably to the rule itself, to the effect that the chair may reduce the amount of the up-front payment only where payment of 50% of the estimated fee would cause undue financial hardship. The total amount of the fee is determined by Minn. Stat. § 116C.69, subd. 2, which provides in part as follows:

> The board shall specify the time and manner of payment of the fee. If any single payment requested by the board is in excess of 25% of the total estimated fee, the board shall show that the excess is reasonably necessary. The applicant shall pay within 30 days of notification any additional fees reasonably necessary for completion of the site evaluation and designation process by the board.

The change proposed by the MCEA is not consistent with the statute, which refers to payment that is reasonably necessary to complete the board's site evaluation and designation process, as opposed to the applicant's financial ability to pay.

52. The statute gives the EQB the discretion to determine the time and manner of payment, but places the burden on the EQB to show that any amount over 25% of the total estimated fee is reasonably necessary. The EQB's rule establishes a presumption that 50% of the estimated fee should be paid at the time the application is filed, and it is not consistent with the statute. The EQB could remedy this defect by phrasing the rule as follows: "The applicant shall submit with the application 25% of the total estimated fee, or up to 50% of the total estimated fee if the board determines that the additional percentage is reasonably necessary to complete the site evaluation and design process."

4400.1150 – Contents of Application

53. Subpart 1 sets out the information that must be contained in an application for a site permit for a LEPGP, which includes the following: a statement of proposed ownership; the precise name of any person or organization to be initially named as permittee and the name of any person to whom the permit may be transferred if transfer of the permit is contemplated; at least two proposed sites for the proposed LEPGP and the reasons for preferring one site over the other; a description of the proposed LEPGP and all associated facilities; the environmental information required under subpart 3; the names of the owners of the property for each proposed site; the engineering and operational design for the LEPGP at each of the proposed sites; a cost analysis for each proposed site; an engineering analysis of each proposed site; identification of transportation, pipeline, and electrical transmission systems that will be required to construct, maintain, and operate the facility; a listing and brief description of federal, state, and local permits that may be required for each site; and a copy of the CON from

the PUC or documentation that an application for a CON has been submitted or is not required. In subpart 2, the information required for a route permit for an HVTL is similarly identified.

54. Subpart 3 requires that applicants for a site or route permit include the following environmental information for each proposed site or route to aid in the preparation of an environmental impact statement: a description of the environmental setting for each site or route; a description of the effects of construction and operation of the facility on human settlement, including, but not limited to, public health and safety, displacement, noise, aesthetics, socioeconomic impacts, cultural values, recreation, and public services; a description of the effects of the facility on land-based economies, including agriculture, forestry, tourism, and mining; a description of the effects of the facility on archaeological and historic resources; a description of the effects of the facility on the natural environment, including effects on air and water quality resources and flora and fauna; a description of the effects of the facility on rare and unique natural resources; identification of human and natural environmental effects that cannot be avoided if the facility is approved at a specific site or route; and a description of measures that might be implemented to mitigate the potential human and environmental impacts and the estimated costs of such mitigative measures.

55. The Department of Natural Resources (DNR) requested that the EQB add more specificity to subparts 1 and 3 prescribing the information concerning water quality and availability that must be submitted by the applicant to aid in the preparation of the EIS.[57] The DNR suggests that the applicant for a site permit for a LEPGP also be required to submit information concerning "water requirements to supply average and peak demands and hydrologic analysis documenting the adequacy of proposed water sources at each site." The DNR requests that subpart 3 require the applicant to include "identification of potential resource impacts from water appropriations, a monitoring plan to evaluate water resource impacts, and a list of water conservation measures that will be employed."

56. The EQB responded that, rather than attempt to list in the rule the specific pieces of information any agency might need to evaluate the proposed project, the EQB prefers to keep the language as proposed in more generic form so that it retains flexibility to seek whatever information is needed.[58] The Power Plant Siting Act provides that the application "shall contain such information as the board may require."[59] The EQB does not disagree that this specific type of information might be required of an applicant if it is necessary for the DNR to review the project.

57. The Administrative Law Judge finds that the EQB has established that the general nature of the items on the list of information required is needed and reasonable.

[57] DNR Comment, Oct. 14, 2002, at 2. The DNR actually cites to proposed Part 4400.1500, but it is clear from the context and rule headings provided that the agency intended to refer to 4400.1150.
[58] EQB Response at 6.
[59] Minn. Stat. § 116C.57, subd. 2a.

58. The MCEA has proposed changing subpart 1 of the rule to require that applicants for a LEPGP propose at least two "non-contiguous" sites for the plant. The EQB understands these concerns, but contends that the law does not prohibit a proposer from proposing two sites that are contiguous. The EQB maintains that this concern can be effectively addressed through the scoping process, in which alternative sites can be identified for evaluation. The Administrative Law Judge finds that the EQB has established the need for and reasonableness of its language in subpart 1.

59. Finally, the MTO has requested clarification as to whether the names of property owners affected by a proposed HVTL route under subpart 2(G) is the same list of persons who will receive notice under part 4400.1350, subp. 5. The EQB agrees that the list of persons should be the same and proposes to clarify subpart 2(G) to read as follows: "the names of each owner whose property is within any of the proposed routes for the high voltage transmission line." This clarification is necessary and reasonable, and it is not substantially different than the rule as published in the State Register.

4400.1250 -- Review of Application

60. This rule provides deadlines for the EQB's determination of whether an application is complete or should be rejected. In subpart 3, the proposed rule provides that the chair shall not reject an application if the missing information can be obtained from the applicant within 60 days and the lack of information will not interfere with the public's ability to review the proposed project.

61. The Sierra Club maintains that the rule should be revised so that the public will receive notice of any draft application that is submitted to the EQB, in the same manner that the public will receive notice of an accepted application under part 4400.1350. The EQB does not support adding language to require public notice of draft applications, as applications are often submitted piecemeal and sometimes several drafts are submitted before the final application is completed. The EQB is considering ways to most effectively use its webpage to convey such information to the public. The Administrative Law Judge agrees that it would be impractical and administratively burdensome to require public notice of draft applications.

62. The Sierra Club also maintains that the language in subpart 3 should be changed to clarify that the applicant has the burden to show that an incomplete application can be supplemented within 60 days and the public will not be prejudiced. As the EQB points out, the decision whether to accept an incomplete application rests with the chair[60]; what matters is whether the chair is convinced that the matter should go forward. The EQB does not support the language change suggested by the Sierra Club.

63. The EQB has demonstrated that the proposed rule is needed and is reasonable.

[60] *Id.* ("The chair of the board shall determine whether an application is complete and advise the applicant of any deficiencies within ten days of receipt.").

4400.1350 – Notice of Project

64. Subpart 1 of the proposed rule requires the EQB to maintain two notification lists. The first is a list of persons who want to be notified of the acceptance of applications for site or route permits. Any person may request to have his or her name or an organization's name included on the list. The second is a project contact list for each project for which an application has been accepted; this list must contain the names of persons who want to receive notices regarding the project.

65. On October 11, 2002, in response to comments made by the Sierra Club, MCEA, the Reinhardts, and the Department of Commerce during and after the first public hearing, the EQB proposed revisions to the notification procedure and content of the notice in subparts 2 and 3. Under the rules currently proposed, the applicant must mail written notice of the submission to the persons on the EQB's general list; each regional development commission, county, incorporated municipality, and township in which any part of the site or route or any alternative is proposed to be located; and each owner whose property is adjacent to any proposed site for a LEPGP or within any of the proposed routes for a HVTL. The notice must contain the following information: a description of the proposed project, including a map showing the general area of the proposed site or route and each alternative; a statement that a permit application has been submitted to the EQB and information regarding how a copy of the application may be obtained; a statement that the EQB will consider the application under the provisions of these rules and the Power Plant Siting Act, and a description of the time periods for the EQB to act; a statement that the EQB will hold a public meeting within 60 days and date of the meeting if it is known at the time of the mailing; the manner in which the EQB will conduct environmental review, including the holding of a scoping meeting at which alternatives to the project may be proposed; the name of the EQB staff member appointed to serve as the public advisor; the manner in which a person may register his or her name on the project contact list; a statement that a public hearing will be conducted after the environmental impact statement (EIS) is prepared; a statement indicating whether a CON or other authorization from the PUC is required, and the status of the matter if such authorization is required; a statement indicating whether the applicant may exercise the power of eminent domain to acquire the land necessary for the project and the basis for such authority; and any other information requested by the chair to be in the notice.

66. No person objects to these revisions. MCEA suggests an additional revision to the content of the notice, providing that the notice "shall also describe the procedures and purpose for having one's name placed on the project contact list." The EQB maintains that this additional language is not necessary, as the notice must contain both information about "the manner in which a person may register his or her name with the EQB on the project contact list" and the name of an EQB staff member appointed as a public advisor or general contact person.

67. The rule as proposed by the EQB is both necessary and reasonable. The revisions to the rule do not make it substantially different from the rule as published in the State Register.

4400.1550 – Public Meeting

68. The proposed rule states that the EQB shall give at least ten days notice of the public meeting to provide information about the proposed project. The MCEA and Sierra Club maintain that ten days is too short a time period and that 15 days (MCEA) or 20 days (Sierra Club) would be more appropriate.

69. Minn. Stat. § 116B.57, subd. 2d, provides that notice of the hearing shall be given by the board at least ten days in advance but no earlier than 45 days prior to the commencement of the hearing. The proposed rule is consistent with the statute. The EQB is reluctant to provide a longer notice period because of the relatively short periods of time allocated for decision on permit applications. The EQB has demonstrated that the proposed rule is both needed and reasonable.

4400.1700 – Preparation of Environmental Impact Statement

70. Minn. Stat. § 116C.57, subd. 2c, requires the EQB to prepare an EIS on LEPGPs and HVTLs, unless the project qualifies for alternative review or local review. The proposed rule incorporates this statutory requirement.[61]

71. Subpart 3 of the rule provides that during the scoping process, a person may suggest alternative sites or routes to evaluate in the EIS. The EQB proposes additional clarifying language that the chair "shall include the suggested site or route in the scope of the environmental assessment only if the chair determines that evaluation of the proposed site or route will assist in the board's decision on the permit application."[62]

72. No person objects to this revision. Under Minn. Stat. § 116C.57, subd. 2d, the board "shall study any site or route proposed by an applicant and any other site or route the board deems necessary that was proposed in a manner consistent with rules adopted by the board concerning the form, content, and timeliness of proposals for alternate sites or routes." Subpart 3 of the proposed rule is consistent with the statute, and the EQB has demonstrated that it is needed and reasonable.

73. Subpart 4 of the rule provides in part that the scoping process "must be used to reduce the scope and bulk of an environmental impact statement by identifying the potentially significant issues and alternatives requiring analysis and establishing the detail into which the issues will be analyzed." MCEA proposes deleting the language insofar as it suggests that the scoping process is properly used "to reduce the scope and bulk" of the EIS. Minn. Stat. § 116D.04, which defines the EIS, provides expressly that "an early and open process shall be utilized to limit the scope of the environmental

[61] The EQB has inadvertently left out the word “power” from subpart 1. The subpart should be revised to read: “The EQB shall prepare an environmental impact statement on each proposed large electric power generating plant . . ..”

[62] It appears that the reference to “environmental assessment” in the revision to part 4400.1700, subp. 3, should be changed to “environmental impact statement,” as this rule concerns the EIS to be performed under the full permitting process.

impact statement to a discussion of those impacts, which, because of the nature or location of the project, have the potential for significant environmental effects."[63] The rule language proposed by the EQB in subpart 4 is consistent with the statute and is both needed and reasonable.

74. Subpart 5 eliminates certain issues from consideration by the EQB when the PUC has determined the need for the facility. It provides as follows:

> When the Public Utilities Commission has issued a Certificate of Need for a large electric power generating plant or high voltage transmission line or placed a high voltage transmission line on the certified HVTL list maintained by the commission, the environmental impact statement shall not address questions of need, including size, type, and timing; questions of alternative system configurations; or questions of voltage.

75. The Sierra Club and the MCEA object to the statement in this subpart, and also elsewhere in the rules,[64] suggesting that the language should be amended to read: "When the PUC has determined questions of need, including size, type, and timing, questions of system configuration, and questions of voltage" in issuing a CON, the EIS shall not address these issues.[65]

76. The EQB responds that review of such issues by the EQB is precluded by statute when the PUC has determined the need for the facility.[66] The Power Plant Siting Act expressly states that **"**When the public utilities commission has determined the need for the project under section 216B.243 or 216B.2425, questions of need, including size, type and timing; alternative system configurations; and voltage are not within the board's siting and routing authority and must not be included in the scope of environmental review conducted under sections 116C.51 to 116C.69."[67]

77. With this clear statutory directive that the EQB shall not consider these issues if the PUC has determined the need for the facility, the EQB would be acting contrary to statutory mandate if it were to make the amendments suggested to subpart 5. The Administrative Law Judge finds that the EQB has necessarily and reasonably declined to do so.

78. Subpart 12 of this rule clarifies that the requirements of chapter 4410 (the environmental review provisions) do not apply to the preparation or consideration of an EIS for a LEPGP or HVTL except as provided in this chapter. The Sierra Club proposes adding an additional sentence that reads "Environmental reports and assessment at the certificate of need stage shall be performed in accordance with the requirements of Minnesota Rules, 4410.7000 to 4410.7700."

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[63] Minn. Stat. § 116D.04, subd. 2a(e).
[64] Including 4400.1800, subp. 2, and 4400.3250.
[65] Sierra Club Comment at 4.
[66] EQB Response at 9 (*citing* Minn. Stat. § 116C.53, subd. 2).
[67] Minn. Stat. § 116C.53, subd. 2.

79. The EQB agrees that this language makes sense, but it proposes adding it in a new part, 4400.0350, which reads as follows:

> Minnesota Rules chapter 4400 establishes the requirements for the processing of permit applications by the Environmental Quality Board for large electric power generating plants and high voltage transmission lines. Requirements for environmental review of such projects before the Public Utilities Commission are established in the applicable requirements of Minnesota Rules chapter 4410.

80. The EQB's clarification in part 4400.0350 is both necessary and reasonable. It is not substantially different than the rule as published in the State Register.

4400.2750 – Preparation of Environmental Assessment

81. The EQB prepares an Environmental Assessment, as opposed to an EIS, under the alternative permitting process in parts 4400.2000 to 4400.2950. The MTO suggest some changes to subparts 3 and 4, to clarify that in the alternative process an applicant is not required to propose alternative sites or routes, but others may propose alternative sites or routes. In addition, the MTO would like to clarify that alternative sites or routes will be evaluated, not alternatives to the power plant or transmission line.

82. The EQB agrees that clarification would be appropriate, and it proposes changes to subparts 3 and 4 clarifying that alternative sites or routes may be addressed in the EA.[68] The EQB has established that its proposed rule is reasonable and necessary, and the revisions to subparts 3 and 4 do not make the rule substantially different than the rule published in the State Register.

4400.2950 – Final Decision

83. Subpart 4 of this proposed rule contains a typographical error. The EQB should amend the third sentence to read: "The EQB shall mail notice of its final permit decision . . .."

4400.3050 – Standards and Criteria

84. This rule provides that no site permit or route permit shall be issued in violation of the site selection standards and criteria established in Minn. Stat. §§ 116C.57 and 116C.575, and in rules adopted by the board. As originally published, the rest of the rule provided as follows:

> The board shall issue a permit for a proposed facility when the board finds that the facility is consistent with state goals to conserve resources, minimize environmental impacts, and minimize human settlement and other land use conflicts and ensures the state's electric energy security

[68] EQB Response at 11.

through efficient, cost-effective power supply and electric transmission infrastructure.

85. MCEA comments that the EQB's proposed standard for issuing permits "is open to subjective interpretation and provides no concrete basis by which the EQB may deny a permit application."[69] MCEA requests that the EQB incorporate the substantive standard from the Minnesota Environmental Policy Act (MEPA)[70] to provide "clarity and regulatory certainty."[71]

86. Sierra Club similarly requests that this subpart contain some reference to the MEPA and the Minnesota Environmental Rights Act (MERA).

87. In their rebuttal comments, the MTO argues that it would be inappropriate to include reference to MEPA and MERA in this subpart.[72] They contend that the laws referenced would not provide a substantive standard for issuing permits, but rather lead to more ambiguity. The MTO is concerned that incorporation of the Acts by reference into the EQB rules could increase litigation surrounding the permit process. They raise several other problems with incorporation of the statutes by reference.

88. The EQB agrees with MCEA and the Sierra Club that the "Minnesota Supreme Court has specifically held that both MEPA and MERA apply to EQB decisionmaking."[73] The EQB states that whether or not there is any reference to these statutes in the rule, the requirements of both of the statutes will apply to any permit decision by the EQB.[74] Nonetheless, the EQB proposes to amend this subpart to read in relevant part: "The board shall issue a permit for a proposed facility when the board finds, in keeping with the requirements of the Minnesota Environmental Policy Act, Minnesota Statutes chapter 116D, and the Minnesota Environmental Rights Act, Minnesota Statutes chapter 116B, that the facility is consistent with state goals . . . ."

89. The EQB is correct that both MEPA and MERA apply to its permit decisions. The Administrative Law Judge finds that it is needed and reasonable to acknowledge that reality in the rules. The revisions to this rule do not make it substantially different than the rule as published in the State Register.

[69] MCEA Comment at 5.
[70] Minn. Stat. § 116D.04, subd. 6.
[71] MCEA Comment at 4.
[72] MTO Comment at 2.
[73] EQB Comment, Oct. 11, 2002, at 15 (*citing No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 327 (1977) and *People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council*, 266 N.W.2d 858 (Minn. 1978).
[74] MEPA states, in a section entitled "Action by state agencies" that the "legislature authorizes and directs that, to the fullest extent practicable, the policies, rules and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06." Minn. Stat. § 116D.03, subd. 1.

4400.3150 – Factors Considered

90. This rule contains a lengthy list of factors the EQB should consider in determining whether to issue a permit for a LEPGP or an HVTL, including "effects on the natural environment, including effects on air and water quality resources and flora and fauna." The DNR advocates the incorporation of specific references to certain water impacts, as it did with regard to part 4400.1150 – Contents of Application. The EQB maintains that these impacts are included within the more general language of the rule. The EQB has established that the general nature of the items on the list of factors is needed and reasonable.

4400.3450 – Prohibited Sites

91. Subpart 1 of this rule lists prohibited sites in which no LEPGP may be located, including national parks, historic sites and landmarks, wildlife refuges, monuments, wild, scenic and recreational riverways; state wild, scenic, and recreational rivers and their land use districts, state parks, nature conservancy preserves, scientific and natural areas, and state and national wilderness areas. Subpart 3 of the rule provides in part that no LEPGP may be located in certain areas, including designated trout streams, unless there is no feasible and prudent alternative.

92. The DNR maintains that trout streams ought to be included among the prohibited sites listed in Subpart 1, rather than characterized as site exclusions under Subpart 3.[75] The DNR argues that trout streams are more appropriately characterized as prohibited sites because it can issue only temporary water appropriation permits (two years maximum) for trout streams pursuant to Minn. Stat. §103G.285, subd. 5.[76]

93. The EQB responds that staff have not considered this issue prior to receiving the DNR comment, and notes that if water appropriation permits for trout streams are only temporary, developers may be precluded from building plants in such an area whether or not they are specified as prohibited sites in the rule.[77] The EQB would like more time to consider this issue.

94. Subpart 1 of the rule as proposed by the EQB is necessary and reasonable.

95. Subpart 2 of the rule provides that the areas identified in subpart 1 must not be permitted as a site for a LEPGP except for use for water intake or discharge facilities. It further provides that, if the board includes any of these areas within a site for use for water intake or discharge facilities, it may impose appropriate conditions[78] in the permit to protect these areas for the purposes for which they were designated.

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[75] DNR Comment at 2.
[76] *Id.*
[77] EQB Response at 12.
[78] Minn. Stat. § 116C.57, subds. 8(a),(b) (Board shall issue a site permit or route permit "with any appropriate conditions" not in violation of standards and criteria in this section and in the rules).

96. The DNR contends that this language is confusing in that it suggests that the EQB is responsible for issuing water appropriation and discharge permits. In response to this comment, the EQB proposes to clarify that it is an EQB "site" permit that can be conditioned. The EQB's proposed rule is needed and reasonable, and the revision does not make subpart 2 of the rule substantially different than the rule as published in the State Register.

97. Subpart 5 of the rule as originally proposed by the EQB provides that no site may be designated that does not have reasonable access to a proven water supply sufficient for plant operation, and it further provides that no use of groundwater may be permitted where removal of groundwater results in material adverse effects on groundwater in and adjacent to the area, as determined in each case. The use of groundwater for high consumption purposes, such as cooling, must be avoided if a feasible and prudent alternative exists.

98. The DNR suggests that the rule should be changed to state expressly that a DNR permit is required. The EQB believes this is unnecessary because the Power Plant Siting Act already provides that state agencies must participate in the EQB permitting process and determine whether a proposed project is permittable on the site proposed.[79] Nonetheless, the EQB recommends adding the additional language requested by the DNR to read "No use of groundwater may be permitted where removal of groundwater results in material adverse effects on groundwater, groundwater dependent natural resources, or higher priority users in and adjacent to the area, as determined in each case."

99. In addition, MCEA suggests that the rule should be changed to provide that the Board "shall," as opposed to "may," impose appropriate conditions. As noted above, the statute provides that in granting a site or route permit, the board "shall" impose any appropriate conditions. Under the statute, however, the board has complete discretion to determine what those conditions might be. The board could decide, under appropriate circumstances, not to condition a permit.

100. The rule as proposed by the EQB is needed and reasonable. The revision to subpart 5 does not make the rule substantially different than the rule as published in the State Register.

4400.3650 – Permit Conditions

101. Subpart 1 of the rule provides that the Board shall impose in any site permit or route permit "such conditions as the board deems appropriate and are supported by the record." This rule is consistent with the statute, which expressly

[79] Minn. Stat. § 116C.61, subd. 3, provides that state agencies authorized to issue permits required for construction or operation of LEPGPs or HVTLs "shall participate during routing and siting at public hearings and all other activities of the board on specific site or route designations and design considerations of the board, and shall clearly state whether the site or route being considered for designation or permit and other design matters under consideration for approval will be in compliance with state agency standards, rules or policies."

delegates broad discretion to the EQB to impose any appropriate conditions that it deems necessary.[80] The rules adopted under the authorizing statute are not required to be more restrictive.

4400.4050 – Emergency Permit

102. Subpart 1 of this rule allows a utility whose electric power system requires the immediate construction of a large electric power generating plant or HVTL "due to a major unforeseen event" to apply to the board for an emergency permit. Subpart 3 of the rule requires the board to make a final decision within 195 days and to grant the emergency permit if it finds that a demonstrable emergency exists; the emergency requires immediate construction; adherence to the procedures and time schedules specified in Minn. Stat. § 116C.57 would jeopardize the utility's electric power system or the utility's ability to meet the electric needs of its customers in an orderly and timely manner; the utility will implement mitigating measures to minimize the human and environmental impacts of the facility; and the utility will carry out the project in an expeditious manner consistent with the emergency.

103. The MCEA and Sierra Club propose amending subpart 3 to provide that a utility may not receive an emergency permit if the emergency was attributable in any way to the utility. As the EQB points out, the statute makes no reference to the cause of the emergency,[81] and it matters not to the customers whose electrical service is threatened what the cause of the emergency is. The EQB has established that its rule is consistent with the statute and is needed and reasonable.

4400.5000 – Local Review of Proposed Facilities

104. For certain eligible and generally smaller projects, an applicant may seek approval from a local unit of government that has jurisdiction over the site or route for approval to build the project. If local approval is granted, a site or route permit is not required of the EQB. Subpart 3 of the rule provides that within 10 days of submission of an application to a local unit of government for approval of an eligible project, the applicant shall notify the chair in writing that the applicant has elected to seek local approval of the proposed project. The EQB proposes to add the following revision to the rule:

> Within the same ten day period, the applicant shall mail notice to those persons on the general notification list that a permit has been applied for from the local unit of government for the project and shall provide a description of the project and the name of a person with the local unit of government to contact for more information.

105. The Reinhardts have commented that subpart 3 should incorporate the requirements for the content of the notice that are contained in part 4400.1350, subp. 3, for an application made to the EQB. The EQB points out that the statute authorizing

[80] Minn. Stat. § 116C.57, subd. 8(a), (b); *id.* § 116C.575, subd. 9(a), (b).
[81] Minn. Stat. § 116C.577.

local review of these projects, Minn. Stat. § 116C.576, does not specify how notice is to be given.[82] The EQB's position is that if local units of government are going to assert jurisdiction over these projects, the local units of government should determine the content of any notice provision. Once notice is given to persons on the EQB's general notification list, interested persons can contact the local unit of government regarding their desire to be involved in future proceedings.

106. The EQB could require an applicant, as opposed to a local unit of government, to provide the type of notice that would be required of an application made to the EQB. The EQB has made the policy determination that it will not do so, and its proposed rule is not inconsistent with the statute. The Administrative Law Judge cannot say that the EQB's failure to fully incorporate the language proposed by the commenters makes the rule irrational or unreasonable. The EQB has established that its proposed rule is necessary and reasonable, and the revisions made to subpart 3 do not make the rule substantially different than the rule as published in the State Register.

107. Subpart 5 of the proposed rule originally read that a local unit of government that maintains jurisdiction over a qualifying project shall prepare an environmental assessment on the project "in accordance with the requirements of part 4400.2750." The MTO did not object to this proposed rule in its initial comments. In its response, dated October 22, 2000, the EQB proposed revisions to subpart 5, which delete the reference to "the requirements of part 4400.2750," substituting a list of basic procedural steps ensuring that the public has an opportunity to participate in the development of the scope of the EA before it is prepared, and that upon completion of the EA the local unit of government shall publish notice in the *EQB Monitor* that the EA is available for review and how the public may comment upon it. It further provides that the local unit of government may not make a final decision on the permit until at least ten days after the notice appears in the *EQB Monitor.* In its reply comments dated October 22, the MTO objects for the first time to the proposal that local units of government be required to conduct an environmental assessment.

108. Subpart 5 of the rule continues to require a local unit of government to prepare an "environmental assessment." The authorizing statute provides that, notwithstanding the requirements of sections 116C.57 (which describes application procedures for the EQB's full permitting process) and 116C.575 (describing application procedures for the EQB's alternative review process), an applicant shall have the option of applying to local units of government that have jurisdiction over the route for approval of the project.[83] If local units of government maintain jurisdiction over the project, the board shall select the appropriate local unit of government to be the responsible governmental unit to conduct "environmental review" of the project.[84] There is no definition in the statute of the type of "environmental review" a local unit of government must provide.

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[82] The statute provides only that within ten days of submission of an application to a local unit of government for approval of an eligible project, the applicant shall notify the EQB that the applicant has elected to seek local approval of the proposed project. Minn. Stat. § 116C.576, subd. 3.
[83] Minn. Stat. § 116C.576, subd. 1(a).
[84] *Id*., subd. 1(b).

109. The MTO contends that the EQB should clarify that the "environmental review" by local units of government constitutes preparation of an "environmental assessment" as described in the proposed rule. The EQB has not had an opportunity to respond to this proposed change.

110. The EQB interprets the statutory reference to "environmental review" by local units of government to be an environmental assessment, as defined in part 4400.2750, subp. 4, but which contains only the basic procedural requirements contained in part 4400.5000, subpart 5.[85] In support of its interpretation, the EQB points out that the types of projects that are eligible for local review are essentially the same as those that qualify for the alternative review process before the EQB. Projects subject to the alternative review process must undergo an environmental assessment. To interpret the law in the manner suggested by the MTO would create the situation in which certain projects proceeding under the local review provisions could undergo no environmental review (if the local ordinances did not require it), whereas smaller projects not subject to the Power Plant Siting Act would still be subject to the general environmental review requirements of Minn. R. 4410.4300. For example, a 75 MW coal-fired plant could be permitted locally without preparing an EA, but a 49 MW natural gas-fired plant would have to undergo analysis under Minn. R. 4410.4300, subp. 3.

111. The authorizing statute does not define the type of environmental review that local units of government must provide, but it expressly requires some level of environmental review. The EQB's proposed rule interprets the statute in a manner that is consistent with its terms, and it has demonstrated both the need for and reasonableness of this provision. The revisions made to the rule do not make it substantially different than the rule as published in the State Register.

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

CONCLUSIONS

1. The EQB gave proper notice of the hearings in this matter.

2. The EQB has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, 1b and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. The EQB has demonstrated 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. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. The EQB has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Finding of Fact No. 52.

[85] EQB Comment at 19-20.

5. The amendments and additions to the proposed rules which were suggested by the EQB 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. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. The Administrative Law Judge has suggested action to correct the defect cited in Conclusion No. 4 as noted in Finding of Fact No. 52.

7. Due to Conclusion No. 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 or 4.

8. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the EQB from further modification of the proposed rules based upon an examination of the public comments, 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, except where specifically otherwise noted above.

Dated this 21st Day of November 2002.

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape Recorded, Three Tapes,
No Transcript Prepared.

NOTICE

The EQB must wait at least five working days before taking any final action on the rules. During that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minnesota Rules, part 1400.2100, and Minnesota Statutes, section 14.15, subdivisions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects. If the EQB elects to make any changes to the rule, it must resubmit the rule to the Chief Administrative Law Judge for a review of those changes before adopting the rule.

However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the EQB may either follow the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the EQB does not elect to follow the suggested actions, it must submit the proposed rule to the Legislative Coordinating Commission, and the House of Representatives and Senate Policy Committees with primary jurisdiction over state governmental operations for the advice of the Commission and Committees.

When the rule is filed with the Secretary of State, the EQB must give notice on the day of filing to all persons who requested that they be informed of the filing.