December 12, 2002

TO: MEQB Members

FROM: Alan Mitchell
Manager, Power Plant Siting

SUBJECT: **Adoption of Amendments to the Power Plant Siting Rules Minnesota Rules chapter 4400**

Action:

The Board is requested to adopt final amendments to the Power Plant Siting Rules found in Minnesota Rules chapter 4400.

Background:

In 2001 the Minnesota Legislature passed the Energy Security and Reliability Act, which made significant changes in the Power Plant Siting Act. The Energy Act is Minn. Laws 2001, ch. 212. The Power Plant Siting Act is codified at Minnesota Statutes sections 116C.51 to 116C.69.

Beginning in July 2001, the EQB staff began the process of amending the EQB rules on power plant siting found in Minn. Rules ch. 4400. Working with various interested parties, including the utilities, environmental groups, the general public, and other state agencies, the staff solicited comments and reaction to a number of different drafts of possible amendments to the rules. On October 18, 2001, the Board acted to establish draft amendments as interim guidance. In June 2002 the staff revised the draft rules again in response to public input and prepared a Statement of Need and Reasonableness explaining all the proposed changes in the rules. The Board, at its June 20 meeting, passed a resolution directing the Chair to commence the formal rulemaking process on the proposed rules.

Notice was published in the State Register on August 12, 2002, announcing the Board's intent to amend the chapter 4400 rules and that a public hearing would be held on September 18, 2002, in St. Paul and on September 25 in Alexandria. Notice was also mailed to persons on the EQB's rulemaking list. Administrative Law Judge Kathleen Sheehy presided at the hearing.

At the close of the hearing on September 25, Judge Sheehy provided a twenty day period for the public to submit written comments on the proposed rules. The record

closed on October 22, 2002. A number of written comments, including responses from the EQB staff, were submitted into the record, and these are included in the Board's packet of materials on this item.

During the course of the proceedings, the staff recommended to the Judge that a number of changes be made in the language of the proposed rules. On November 21, 2002, Judge Sheehy issued her Report, finding that the EQB had complied with all procedural requirements, and that the proposed rules, including the changes the staff had recommended, were needed and reasonable and could be adopted by the Board. The Judge also found that in one respect (part 4400.1050, subp. 2 relating to the payment of fees by project proposers), the language the Board had proposed was inconsistent with the statute and would have to be changed. The Judge suggested specific language that would fix the problem, and the final version of the rules the staff is recommending the Board adopt includes the change required by the Judge.

Significant Issues:

There are three issues that the staff would classify as significant. Those issues are (1) the exceptions from the permitting requirement proposed in part 4400.0650, (2) the provisions eliminating certain size, type, and timing issues from EQB consideration when the Public Utilities Commission has issued a certificate of need for a particular project, and (3) the provisions relating to the authority of local government. These matters were discussed in the comments of the various parties and of the staff that were submitted into the record during the final public comment period, and they were also addressed by the Administrative Law Judge in her Report. Each of these issues is discussed briefly below, and the Board can refer to these other documents for more details.

(1) Exceptions.

The proposed language in part 0650, subpart 1 identifies certain modifications of existing large electric power generating plants and high voltage transmission lines (including substations) that can be undertaken by the owner of the facility without a permit from the EQB. The categories that are objected to are the ones that relate to power plants.

a. Efficiency Improvements. One provision allows a utility to modify an existing plant to increase the efficiency by 10% or 100 megawatts without a permit, if the modification does not require expansion of the plant site beyond the developed portion of the site. Several commenters, including the Minnesota Center for Environmental Advocacy, the Sierra Club, and Communities United for Responsible Energy (CURE), object to this language. They assert that the EQB does not have the statutory authority to adopt this language, and that inclusion of this language would allow utilities to construct large increases in capacity without any review of siting concerns.

This exception is based on statutory language that exempts such efficiency expansions from the PUC certificate of need requirements. Moreover, the exception applies only if the existing plant site does not have to be expanded. Further, the Pollution Control Agency will always have to review the proposed modification to determine compliance with applicable air and water quality requirements. The staff recommended to the Judge that language be added to the rule to clarify what an efficiency improvement is. This additional language will help clarify what kind of changes at an existing power plant might fit within this category. With all these qualifications, the staff believes that it is reasonable to include this exception in the rules.

Judge Sheehy found that the EQB did have the statutory authority to adopt the exception, and that while she "might make a different choice than that made by the EQB," the proposed rule was neither arbitrary nor unreasonable. ALJ Report, Finding No. 36 at p. 13.

b. Refurbishments. This proposed language would except from permit review a refurbishment of an existing power plant that does not expand the capacity of the plant or the developed portion of the site and does not require a certificate of need from the Public Utilities Commission. The Sierra Club is concerned that a utility could extend the useful life of an old plant without siting review, and has suggested that only those refurbishments that do not extend the useful life of a plant more than five years be exempt.

The rationale for the exception is that with inclusion of the qualifying language, only certain refurbishments that do not affect the footprint of the plant or the capacity of the plant and do not undergo certificate of need review are exempt. Without some kind of change in the plant besides just the refurbishment, there is no siting decision to make. Even when a certificate of need is not required, the utility must still obtain PUC approval of the refurbishment, and the PUC can only approve a refurbishment if the utility has demonstrated that a renewable energy facility is not in the public interest. There will always be some review of a proposal to refurbish an old plant by the PUC. Also, the Pollution Control Agency will have to review the proposal for any potential impacts on air and water quality.

The Administrative Law Judge recognized that the commenters had raised legitimate concerns, but that the language is consistent with the purposes of the Power Plant Siting Act and the EQB has established the need and reasonableness of the exemption. ALJ Report, Finding No. 40 at pp. 14-15.

c. Start-up of Closed Plant. The Minnesota Center for Environmental Advocacy and the Sierra Club also objected to the exception for old plants that had been closed for a period of time and now were going to be put back into operation. They want the EQB to conduct a site review if the plant has been closed for more than one year. The EQB reasoned that as long as the capacity of the plant was not increasing and there was no change in fuel or any expansion of the developed portion of the site, there was no siting decision to be made. Historically, the EQB has not issued a

site permit when an old, closed plant reopened. The ALJ found that the EQB had demonstrated the need for and reasonableness of this provision of the rules. ALJ Report, Finding No. 43, p. 15.

(2) Size, Type, and Timing Issues

In several places in the rules (parts 4400.1700, subp. 5, 4400.1800, subp. 2, 4400.2750, subp. 7, 4400.2850, subp. 4, 4400.3250, and 4400.5000, subp. 7), the EQB has provided that when the Public Utilities Commission has issued a certificate of need for a particular power plant or high voltage transmission line, questions relating to size, type, and timing of the project, and questions of system configuration and voltage, will not be included in environmental review and will not be considered by the Board. The Sierra Club and the Minnesota Center for Environmental Advocacy want the language to read that these issues are off the table only if the Public Utilities Commission has decided them.

The reason for this language in the rules is because the statute provides that when the Public Utilities Commission has issued a certificate of need, the EQB is not to consider these issues. Minn. Stat. § 116C.53, subd. 2. The Administrative Law Judge agreed. She found:

> 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 supart 5. The Administrative Law Judge finds that the EQB has necessarily and reasonably declined to do so.

ALJ Report, Finding No. 77 at p. 22.

(3) Local Review

There are two provisions in the proposed rules relating to projects that will undergo review at the local level. One is part 4400.0650, subp. 4, and the other is part 4400.5000.

Part 4400.0650, subp. 4 is part of the exception provision discussed above, and subpart 4 as proposed provided that if a project is exempt from EQB review, it is also exempt from local review. The Sierra Club and the Department of Commerce and the Association of Minnesota Counties commented that this provision should be deleted, so that local units of government could make their own decisions on whether certain modifications of existing facilities are subject to local permitting. Great River Energy filed a comment in support of the provision. The EQB staff recommended to the ALJ that the provision be deleted from the rules in order to preserve the right of local units of government to decide for themselves whether they would maintain jurisdiction over projects that are exempt from EQB permitting. Deletion of the language simply postpones the decision until such time as the issue arises.

The Judge found that deletion of this provision was needed and reasonable. ALJ Report, Finding No. 49 at p. 16.

The other provision relating to local review is Part 4400.5000. This is the rule that imposes certain requirements on both applicants and local government when a utility opts to seek local approval rather than EQB approval for a project that qualifies for local review. The Minnesota Transmission Owners objected to the language in subpart 5 that requires a local unit of government to prepare an environmental assessment as part of the local review process. The Transmission Owners preferred that the rule allow local units of government to decide on the appropriate mechanism for environmental review instead of requiring an environmental assessment.

The reason for requiring an environmental assessment is to require the same kind of review of projects that are permitted at the local level as is conducted when the EQB handles the permitting. The Administrative Law Judge found that the "EQB's proposed rule interprets the statute in a manner that is consistent with [the statute's] terms, and it has demonstrated both the need for and reasonableness of this provision." ALJ Report, Finding No. 111 at p. 29.

(4) Other Areas of Disagreement

While the issues discussed above are the ones the staff would consider to be the significant issues, there are other provisions of the rules for which certain commenters would prefer to see other language if they had their druthers. A reading of the Judge's Report will quickly identify these other provisions where commenters sought different language than what the staff has recommended and the Judge approved. The staff will be prepared to discuss any of these other provisions with the Board at the meeting on December 19 if any Board member should like additional discussion or if any person should urge the Board to make further changes in the language.

Procedural Requirements

The Administrative Law Judge has determined that the rules as proposed, with all the changes suggested by the staff during the course of the proceedings, are supported by the record and are needed and reasonable. The Judge found that none of the changes constitutes a substantial change from what was proposed so the Board can adopt the rules with the changes without further hearings. ALJ Report, Conclusion No. 5 at p. 30.

The Judge also found that in one regard, relating to the payment of fees, a change was required to be consistent with the statute. ALJ Report, Finding Nos. 50 - 52 at pp. 16-17 and Conclusion No. 4 at p. 29. The Judge determined that part 4400.1050, subp. 2 as proposed, which required payment of 50% of the estimated fee at the time a permit application was submitted unless the Chair determined that a lesser amount was sufficient, had to be changed to read that the initial fee would be 25% of the estimated fee unless the Chair determined that a higher amount was necessary. The Chief ALJ agreed with the Judge. See the Report of the Chief ALJ.

The staff recommends that the Board include the Judge's recommended language in the final rules. However, under state law, it is necessary to submit the final rule language to the Chief Administrative Law Judge for a determination that the agency has made the necessary change.

The Order Adopting Rules that the staff has prepared for the Board's consideration would adopt the ALJ's Report in its entirety with additional language adopting the language recommended by the Judge and explaining the reason for making the change.

Once the Board adopts the rules it will also be necessary to submit the final rules to the Governor for approval. The Governor's Office has two weeks to complete its review. After the approval of the Governor, the rules will be published in the State Register. The rules will become effective five days after publication in the State Register. We anticipate that the rules can be published sometime late in January 2003.

Staff Recommendation

The staff recommends that the Board adopt the Power Plant Siting Rules with all the changes from what was published in the State Register that are shown in the attached version of the rules. These changes include all those that were recommended to the Administrative Law Judge by the staff and approved by the Judge, and the one change required by the Judge. The staff recommends that the Board adopt the attached Order Adopting Rules, which adopts the ALJ's Report with some additional language explaining the change required by the Judge. A proposed resolution has been prepared for the Board's consideration that would implement the staff recommendation.