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

In the Matter of the Proposed Permanent Rules Governing Environmental Review of Electric Power Generating Plants and High-Voltage Transmission Lines in Proceedings Before the Public Utilities Commission.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Allan W. Klein conducted a hearing concerning these proposed rules beginning at 2:00 p.m. and reconvening at 7:00 p.m. on September 4, 2003, in St. Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act. [1] The legislature has designed the rulemaking process to ensure that State agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are needed and reasonable, that they are within the agency's statutory authority, and that they do not differ substantially from the originally published language in cases where language modifications were made after their initial publication,.

The rulemaking process affords a public hearing when a sufficient number of persons request that a hearing be held. The hearing provides the opportunity for 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.

Alan R. Mitchell, Manager, Energy Facility Permitting, 302 Centennial Building, 658 Cedar Street, St. Paul, MN 55155-0001, appeared on behalf of the Environmental Quality Board (hereinafter "the Board" or "EQB"). Approximately thirty members of the public attended the hearing. Fifteen people signed the hearing register. Twelve members of the public spoke at the hearing.

The Office of Administrative Hearings received several written comments on the proposed rules before the hearing. After the hearing, the record remained open for twenty calendar days, until September 24, 2003, to allow interested persons and the Board an opportunity to submit written comments.[2] A number of comments were received, and the Board proposed a number of changes in response to public comments. Following the initial comment period, the Administrative Procedure Act

requires that the record remain open for an additional five business days to allow interested persons and the Board the opportunity to file written replies to the comments submitted. Reply comments were received from the Board and others. The hearing record closed for all purposes on October 1, 2003.

SUMMARY OF CONCLUSIONS

1. The Board has established that it has the statutory authority to adopt the proposed rules and that the rules as finally proposed are necessary and reasonable in their totality.

2. None of the modifications proposed by the Board cause the final rule to be substantially different from the originally published rules.

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

FINDINGS OF FACT

Procedural Requirements

1. On October 14, 2002, the Board published a Request For Comments on Possible Amendments to Rules Governing Environmental Review of Large Electric Power Generating Plants and High Voltage Transmission Lines at 27 *State Register* 551.[3]

2. On April 29, 2003, the EQB requested that the Office of Administrative Hearings approve its additional notice plan.

3. On May 1, 2003, the Administrative Law Judge approved the additional notice plan.

4. On May 9, 2003, the Board:

   a. Mailed the Dual Notice and the Statement of Need and Reasonableness to certain legislators as specified in Minn. Stat. § 14.116.[4]

   b. Mailed a copy of the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library.[5]

5. On May 12, 2003, the Board published Additional Notice pursuant to the Additional Notice Plan in the *EQB Monitor*, Volume 27, No 10, and mailed copies to persons listed on the Board's Power Plant general mailing list.[6]

6. On May 13, 2003, the Board made available a copy of the notice of intent to adopt rules without public hearing, the Statement of Need and Reasonableness, and a copy of the proposed rules on its website www.eqb.state.mn.us.[7]

7. On May 19, 2003, the Board published its Notice of Intent to Adopt Rules Without a Public Hearing, Unless 25 or More Persons Request a Hearing, and Notice of Hearing if 25 or More Requests for Hearing are Received (Dual Notice), and a copy of the proposed rules and rule amendments at 27 *State Register* 1681-1688.[8]

8. On June 23, 2003, the Board received 29 requests for a hearing in this matter.[9]

9. In a letter dated July 14, 2003, the Board requested that the Administrative Law Judge review of its Notice of Hearing and approval was granted on July 14, 2003.

10. On July 15, 2003, the EQB:

a. Mailed a Notice of Hearing to all those who requested a hearing.[10]

b. Published Additional Notice pursuant to the Additional Notice Plan in the *EQB Monitor*, Volume 27, No 15, and mailed copies to persons listed on the EQB's Power Plant general mailing list.[11]

11. On July 21, 2003, the Board published the Notice of Hearing at 28 *State Register* 60.[12]

12. On July 23, 2003, the EQB made available a copy of the notice of hearing on its website www.eqb.state.mn.us.[13]

13. On the day of the hearing the EQB placed the following documents in the record:

a. The Request for Comments published in the State Register.[14]
b. The proposed rule, as approved by the Revisor of Statutes.[15]
c. The Statement of Need and Reasonableness (SONAR).[16]
d. A copy of the certificate showing that the agency sent a copy of the SONAR to the Legislative Reference Library.[17]
e. The Dual Notice as mailed and published in the State Register.[18]
f. Certificate of Mailing the Dual Notice and the Certificate of Accuracy of Mailing List.[19]
g. Certificate of Mailing to Additional Notice recipients.[20]
h. Written comments on the proposed rule received by the EQB during the comment period.[21]
i. Certificate of Mailing Notice to Legislators.[22]
j. Notice of Hearing sent to those persons who had requested a hearing and the mailing list of those persons.[23]

k. The proposed modifications to the originally published rules and explanation of those changes.[24]

Nature of Proposed Rules and Controlling Time Limit

14. The proposed rules relate to environmental review for large electric generating plants and high voltage transmission lines at the certificate of need stage. At this stage of the overall process an applicant is seeking a certificate of need from the Minnesota Public Utilities Commission (PUC). The rules address: (1) what governmental unit is going to prepare the environmental review document; (2) what document is required to be prepared; and (3) what process is to be followed in the preparation of that document.

Some of the proposed rules are merely clarifications, technical corrections, or relocation of existing language to facilitate notice and compliance. The remaining proposed rules change existing rules in significant aspects.

The PUC must approve or deny a certificate of need within six months of receiving a complete application.[25] The environmental review ("ER") process is just one part of the larger PUC process. The ER process must be completed early enough in the PUC process to allow the PUC to consider environmental factors before the Commission makes its final decision. The stringent six month time limit on the whole PUC process places limitations on many parts of these rules.

Statutory Authority

15. Various Minnesota Statutes provide statutory authority for the EQB to adopt these rules. The statutes relevant to these proposed rules are as follows:

Minn. Stat. § 116D.04, subd. 5a, provides in pertinent parts:

The board shall, by January 1, 1981, promulgate rules in conformity with this chapter and the provisions of chapter 15, establishing:

(1) the governmental unit which shall be responsible for environmental review of a proposed action;

* * * * *

(3) a scoping process in conformance with subdivision 2a, clause (e);

* * * * *

(7) alternative forms of environmental review which are acceptable pursuant to subdivision 4a;

* * * * *

(9) procedures to reduce paperwork and delay through intergovernmental cooperation and the elimination of unnecessary duplication of environmental reviews; [and]

* * * * *

(11) any additional rules which are reasonably necessary to carry out the requirements of this section.

Minn. Stat. § 116C.04, subd. 2(c) provides, in part:

> The board may review environmental rules and criteria for granting and denying permits by state agencies and may resolve conflicts involving state agencies with regard to programs, rules, permits and procedures significantly affecting the environment, provided that such resolution of conflicts is consistent with state environmental policy.

Minn. Stat. § 116C.04, subd. 2(b) provides, in part:

> The board shall review programs of state agencies that significantly affect the environment and coordinate those it determines are interdepartmental in nature, and insure agency compliance with state environmental policy.

Minn. Stat. § 116D.04, subd. 4a. provides, in part:

> The board shall by rule identify alternative forms of environmental review, which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement.

16. The Administrative Law Judge finds that the EQB has established that it has the statutory authority to adopt rules in the areas covered in this rule proceeding.

Impact on Farming Operations

17. Minn. Stat. § 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 rules to the Commissioner of Agriculture 30 days prior to the publication of the proposed rule in the State Register. In this particular case, the EQB did not give this notice to the Commissioner of Agriculture because the EQB concluded that the rules will not directly regulate farming operations and as such, this notice is not required. Moreover, the Commissioner of Agriculture, Gene Hugoson, is a member of the EQB and he has actual knowledge of the possible adoption of these rules. He voted with the Board to proceed with rulemaking to amend these rules. The Administrative Law Judge concludes that the statutory requirement has been satisfied.

Regulatory Analysis

18. The Administrative Procedure Act[26] requires an agency adopting rules to address six factors in its statement of need and reasonableness. These factors, and the Board's response, are:

(1) A description of 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 EQB identified affected persons as including those people and organizations that seek a certificate of need before the PUC for proposed large electric generating plants and high voltage transmission lines. These project proposers will bear the costs incurred by the EQB in conducting the environmental review of their proposed projects and will be expected to provide the EQB with certain information regarding their proposals. Additionally, the EQB identified the PUC and other state agencies, including the Department of Commerce, to be affected by these proposed rules. The PUC will no longer be designated as the Responsible Governmental Unit and the Department of Commerce will no longer be assigned the task of preparing an environmental report on proposed large power plants. The EQB also noted that generally, local governments and members of the public would be affected. The EQB stated there would be benefit to the general public and local governments in that they will have an opportunity to participate in the scoping of the environmental report and review the report's analysis. [27]

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

The EQB has asserted that there will be no costs to the PUC or any other state agency as a result of the rules, nor do they affect state revenues. Project proposers will bear the costs incurred by the EQB through the PUC's authority, under Minn. Stat. § 216B.243, subd. 6, to assess fees for the administration of a certificate of need application. Additionally, the proposers must pay the costs of an Environmental Impact Statement under Minn. Stat. § 116D.045, and the proposed rules merely provide an alternative form of review of the Environmental Impact Statement. With respect to current statutory authority, these rules are estimated to impose no additional costs on the EQB or any other state agency because project proposers will continue to bear the costs of the environmental review associated with their specific projects.[28]

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

The EQB has described the proposed changes as more efficient than the current regulatory structure. The EQB has not identified other options because, in part, they feel that the proposed changes are the least costly and intrusive approach given the EQB's expertise and efficiency in conducting environmental reviews in a multitude of other areas and stages. The proposed changes are designed to more effectively utilize the Board's expertise when environmental reviews are required at the certificate of need stage before the PUC. The rules establish a process by which to identify alternatives and issues at the initial stages of the environmental review process, which is likely to result in an earlier identification of those probable alternatives and significant impacts that are to be evaluated.[29]

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

The current PUC rules, regulations, procedures, and requirements for preparing an environmental report at the certificate of need stage was one alternative method considered by the EQB. The EQB asserted that the proposed rules will (1) better utilize the expertise of the EQB, (2) ensure that the Responsible Governmental Unit prepares the actual environmental report, (3) afford the public more defined opportunities to participate in the environmental review process, and (4) provide a more efficient overall process, from the initial application stage to the final granting of permits.[30]

(5) Probable cost of complying with a proposed rule.

The costs of complying with the proposed rules are difficult to estimate because these costs are dependent upon the project under review. These factors include: the quality and quantity of the information required, the size and type of project proposed, and the number of available alternatives. It does not appear that the costs of complying with the proposed rules will be materially greater than those associated with compliance under the existing rules.[31]

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

The EQB noted there are no existing federal regulations that correspond to the proposed rules and further noted that the federal government is not implicated until after the question of need has been determined. Only then, when the EQB is conducting an environmental review of specific sites or routes under a different statutory process[32] will the federal and EQB reviews correspond. Additionally, the EQB noted that the proposed rules as applied to a particular project might impact federal grant funds or some other federal program that triggers a federal environmental review. In such cases, the EQB intends to coordinate its efforts with those of the federal government.[33]

Performance Based Rules

19. Under the Administrative Procedure Act,[34] an agency must 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.[35] By designating the EQB as the Responsible Governmental Unit, the EQB asserts that the proposed rules will provide for meaningful environmental review and at the same time ensure an expeditious determination of the need for new energy infrastructure, which in turn emphasizes superior achievement and maximizes flexibility. Additionally, the EQB asserts that by, requiring an environmental report as opposed to an Environmental Impact Statement, compiling a complete environmental record, and allowing increased public input early on in the process, the proposed rules will provide even greater flexibility to identify quickly those issues and concerns to be addressed. The EQB also states that the proposed rules provide additional flexibility by allowing the Chair of the EQB to exercise some discretion in determining the scope of the environmental report, yet reserving the right to appeal such determinations. Furthermore, the EQB asserts that by combining environmental review for the PUC on the question of need and environmental review required by the Board's own requirements for siting and routing permits when needed, the proposed rules provide even greater flexibility for appropriate projects.

Additional Notice and Public Comment

20. The EQB first prepared draft amendments to parts 4410.7000 to 4410.7500 in the spring of 2002. Draft language was made available to interested persons, including interested citizens, utilities, and state agencies, and the EQB continued to revise the draft language in response to feedback from various persons. In July 2002 the EQB distributed another version of the rule amendments to interested persons and generally to the public by posting the draft on the EQB web page. On August 28, 2002, a meeting that was attended by approximately 40 interested persons to discuss the amendments to the rules. The EQB again made changes in response to comments at the meeting. Notice was published in the State Register on October 14, 2002, that the EQB was considering the amendment of these rules, and the public was invited to submit comments on the proposed rulemaking by December 6, 2002. A number of comments were submitted to the EQB in response to the notice soliciting public input. These comments are identified as SONAR Exhibits C – G. In response to the comments that were received, the EQB prepared yet another version of the rules and distributed that version to interested persons in January 2003. Various parties submitted additional comments, and these comments were considered in crafting the version of the rules that has been proposed and submitted by the Board for adoption.

21. In addition to the mailed and published notices required by statute, the EQB published the proposed rule, the SONAR, and Notice of Intent to Adopt on its website. It also mailed a Notice of Intent to Adopt to persons listed on the EQB's Power

Plant general mailing list.[36] After it was determined that a hearing would be required, the EQB mailed a Notice of Hearing to all persons who had requested a hearing and those listed on its Power Plant general mailing list. Additionally, the EQB published the notice on their website and in the *EQB Monitor*.[37]

Rulemaking Legal Standards

22. 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.[38] 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 and the comments submitted by interested parties as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by the Board at the public hearing and in written post-hearing submissions. In particular, the Board prepared an "Explanation of Changes Supported by the Staff" dated August 25, 2003. This document accompanied a list of changes which the staff proposed on August 25, before the hearing. Both the list of proposed changes and the Explanation were available on the Board's website, were emailed to interested persons on August 25, and were distributed at the hearing.

23. For a rule to be reasonable, the rulemaking record must demonstrate a rational basis rather than an arbitrary one. Minnesota case law has equated an arbitrary rule with an unreasonable rule.[39] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[40] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing 10 day statute.[41] 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."[42] 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" 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.[43]

24. In addition to need and reasonableness, the Administrative Law Judge must also assess (1) whether the rule adoption procedure was complied with, (2) whether the rule grants undue discretion, (3) whether the Board has statutory authority to adopt the rule, (4) whether the rule is unconstitutional or illegal, (5) whether the rule constitutes an undue delegation of authority to another entity or (6) whether the proposed language is not a rule.[44] In this case, the EQB has proposed changes to the rule after publication of the rule language in the State Register. These changes require

the Administrative Law Judge to determine whether the new language is substantially different from the language originally proposed.[45]

25. Minnesota Statutes section 14.05, subd. 2 contains the standards for determining whether new language in a rule is substantially different from the original published language. Modifications which avoid being substantially different are:

> ...[1] within the scope of the matter announced...in the notice of hearing...[2] in character with the issues raised in that notice...and...[3] a logical outgrowth of the contents of the...notice of hearing and the comments submitted in response to the notice.

Additionally, the notice of hearing must have "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." The Administrative Law Judge must also consider whether:

> ...[1] persons who will be affected by the rule should have understood that the rulemaking proceeding...could affect their interests...and...[2] the effects of the rule differ from the effects of the proposed rule contained in the...notice of hearing.

The EQB presented several modifications at the hearing and during the comment period.[46] Most of the modifications were the result of technical corrections or compromises arrived at after consideration of the comments received. The Administrative Law Judge has concluded that none of the changes result in a substantially different rule.

26. This report limits discussion to portions of the proposed rules receiving significant comment or otherwise needing to be examined. Where either the SONAR or the EQB's oral or written comments adequately support a rule, a detailed discussion of the proposed rule 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 or portions thereof not specifically discussed are authorized by statute and no other problems exist that would prevent the adoption of those rules.

Analysis of Proposed Rules

4410.7010 – Applicability and Scope

27. The EQB originally proposed rule did not expressly incorporate Minn. Stat. sections 216B.243 and 216B.2425 and other applicable rules. The proposed rule was modified on August 25, 2003 to expressly reference these statutes. No objections were raised about the amendment either at the hearing or thereafter. The modification does not result in a substantially different rule since it is a logical outgrowth of the original proposal.

4410.7025 – Commencement of Environmental Review.

28. Subp. 1. Certificate of need application. The purpose of this rule is to allow the EQB to begin the environmental review process immediately upon an applicant's submission to the PUC. Given the short time frame in which the EQB must complete the environmental review, it is necessary and reasonable for the EQB to require the applicant to submit a copy of the application for a certificate of need along with any other information or material pertinent to the application process.

The Sierra Club and the MCEA suggested that an applicant be required to identify particular locations of proposed projects and include these locations with the certificate of need application. These commentators are concerned about the early identification of particular locations in order to provide adjacent landowners sufficient notice of the proceeding.

A problem occurs, however, because the CON process is designed to go forward without a specific site or route. It is designed to ask questions of need without regard to location. Difficulties occur in trying to identify all of the possible locations that might be under consideration at the time of the CON application. No one, including the EQB, disputes the value of the earliest possible public notice, especially to those that are directly affected by a proposed project. However, there is nothing unique about the environmental report portion of a certificate of need ("CON") proceeding that warrants giving any broader notice for it than is given for the CON proceeding itself. Requiring an applicant to specify locations at this stage is a fundamental change that must be made by the legislature, or at least by the PUC in its rules.

The Administrative Law Judge concludes that the proposed rule, as finally proposed, has been demonstrated to be reasonable.

4410.7030 – Process For Preparation of Environmental Report.

29. Subp. 1. Notice to interested persons. This rule is intended to provide the public with notice that the EQB is about to begin the process of conducting an environmental review of a proposed project for which a certificate of need application or transmission projects report has been filed with the PUC. Subpart 1, items A through F, specify the persons required to receive direct mail notice from the EQB, including: persons on the EQB's general project list, persons on the utility's list,[47] persons on the PUC's list, persons required to be given notice under the parallel rules of the PUC, local government officials and, finally, persons who own property adjacent to the applicant's specified site or within any preferred route, or a site or route under serious consideration by the applicant if it is known.

Several commentators have expressed concerns regarding the notice requirements relating to potentially affected landowners. The EQB amended item D and added item F to clarify the issues reflected in those concerns. Item D requires notice to be mailed

to "those persons who are required to be given notice of the certificate of need application or the transmission projects report under rules of the PUC." However, the PUC is currently pursuing amendments to the rules governing the notice of certificate of need applications.[48] At the hearing, the Administrative Law Judge expressed concern as to whether the EQB could legally incorporate by reference the existing PUC provisions and rely on the PUC's subsequently amended language to establish the EQB's notice requirements in the future. The EQB has responded by analogy in asserting that is has been held to be permissible to allow state law to change when the federal law changes in situations where there is a need for uniformity between federal and state law.[49] Additionally, the EQB cites to Minn. Stat. § 645.31 subd. 2, which provides "when an act adopts the provision of another law by reference it also adopts by reference any subsequent amendments…except when there is clear evidence to the contrary." The Administrative Law Judge finds that there is an important public policy to be served by having coordination and harmony between this EQB rule and the equivalent CON rule of the PUC. Agencies need to avoid creating unnecessary opportunities for confusion, litigation and delay. Allowing subpart D to provide consistency with the PUC's parallel rule is important, and thus it is permissible for the EQB to adopt a rule incorporating the PUC rule, both at present and into the future.

It is anticipated that the PUC notice rule for power lines will require notice to landowners and all mailing addresses "reasonably likely to be affected" by a proposed transmission line. But that is not yet in force. Moreover, it is unknown at this time what the PUC rules will require for power plants. To deal with these uncertainties, the Board has proposed to add an item F., which would require notice to those who "own property adjacent to any site or within any route identified …as a preferred location for the project or as a site or route under serious consideration by the applicant …if such sites or routes are known to the applicant." The Minnesota Transmission Owners group opposes the addition of item F, asserting that it is duplicative and repetitive of item D., and is only likely to lead to confusion and delay. They say that if the Board's proposed item F is added, then there should be an item G. added as well. This item G. would provide a "harmless error" waiver for a utility which acted in good faith and in substantial compliance with the PUC rule, but failed to give proper notice under the EQB rule.

The Administrative Law Judge finds that the Board has demonstrated the need and reasonableness of its proposed item F, as a temporary measure, until the PUC rules for both lines and plants are in place. Once the PUC's rules are in place, then the Board should delete this item F. to avoid confusion and conflict with the PUC rules. The Board may, but does not have to, add the "harmless error" provision. If the Board desires to add this item, however, the Board should consider rewording it to provide "harmless error" treatment if there has been a good faith effort and substantial compliance with the EQB rule.

30. Subp. 2. Content of Notice. This provision describes the information to be included in the notification and includes such items as: a description of the proposed project, the PUC's jurisdiction in the matter including matters of no build alternatives and issues of size, type, timing, system configuration, and voltage, the EQB's role in the

matter, a statement pertaining to the public meeting including an explanation of the meeting's purpose, a directory of pertinent information, a statement of intent to exercise eminent domain, and a statement describing the manner in which interested persons can obtain future mailings.

Several commentators advocated for the inclusion of a provision that clarifies that the certificate of need stage is the only stage in which matters relating to no build alternatives and issues of size, type, and timing are to be considered. The EQB included such a provision in item B. At least one commentator recommended the inclusion of a statement describing the manner in which the public may obtain future mailings regarding the proposal. The EQB included such a provision in item G.

The Administrative Law Judge finds that the EQB has demonstrated the need for and reasonableness of this rule.

31. Subp. 3. Public meeting. This provision is intended to provide the Board with a chance to hear public concerns and also to provide the public with an opportunity to learn more about a proposed project.

The time frame in which to provide notice of the meeting was shortened by the EQB from 20 to 15 days in order to accommodate an extended comment period following the meeting from 10 to 20 days as proposed in subpart 4. This trade-off is an example of the challenges posed by the statutory deadline noted earlier.

In light of the various statutory timelines pertaining to the application process at the certificate of need stage, the Administrative Law Judge concludes that this rule has been shown to be reasonable.

32. Subp. 7. Chair decision. This provision gives the EQB Chair 10 days after the close of the public comment period following the public meeting to determine what matters should and should not be included in the environmental report. This provision also specifies the items that the Chair must address. These items include: alternatives addressed in the environmental assessment including those required by part 4410.7035, subp. 1(B), specific potential impacts, a schedule of completion for the environmental report, and others matters to be included in the environmental report.

At least one commentator has expressed concern regarding the Chair's discretion in this area especially within the limited time frame of 10 days. It is asserted that this provision has a potential to undermine the public trust by limiting public access in this regard, allowing the utility the final comment, allowing impermissible political influences, and limiting the examination of alternatives. The Board has noted in the SONAR that the items to be considered are identical to those considered in the scoping decision on an environmental assessment when the applicant has applied for an EQB permit for a specific project that has come through the PUC certificate of need or transmission projects report process.[50] Additionally, the EQB has added language to item A to emphasize that the EQB will at a minimum address those alternatives identified under

part 4410.7035, subpart 1(B). Finally, in response to the concerns of the chair's discretion, the Board has added an appeal process, whereby a person dissatisfied with the chair's scoping decision may request the chair to bring the matter before the full Board.

Given the need for regulatory efficiency, the six-month time frame in which the PUC is required to complete the determination of need process, and the added emphasis to specific items that must be addressed by the Chair, the Administrative Law Judge concludes that the Board has demonstrated its proposal to be both needed and reasonable.

4410.7035 – Content of Environmental Report.

33. Subp. 1. Content of environmental report. The intent of this provision is to set forth the minimum requirements for what must be included in an environmental report. The provision stipulates that an environmental report shall include the following:

- A general description of the project,
- A general description of alternatives to include no-build alternatives, demand side management, purchased power, different plant sizes and energy sources, upgrading of existing facilities, transmission versus generation, the use of renewable resources, and other alternatives identified by the Chair,
- An analysis of human and environmental impacts of the proposed projects and any identified alternative,
- An analysis of reasonable mitigative measures to be taken in order to lessen any identified adverse impact,
- A list of permits required, and
- A discussion of other matters identified by the Chair.

In addition to that list, the rule also provides two more specific lists: one for plants, the other for lines.

In response to a suggestion from John and Laura Reinhardt (and others) and in order to provide further conformity with the PUC rules,[51] the EQB added language to require consideration of the alternative of upgrading an existing facility. The only remaining objection pertains to the use of the "human and environmental impacts" terminology. It is asserted that this terminology is too broad. Commenters favored explicitly including "economic or employment impacts arising out of the proposed project." In its response, the EQB has noted that "human and environmental impacts" would be broad enough as to not exclude those impacts, if it has been determined that those effects are at issue in the current matter.

The Reinhardts, and others, oppose the "human and environmental effects" language on a number of grounds. First of all, they say it is so broad that it is impermissibly vague. Secondly, they point to several parts of Minn. Stat. § 116D.04, the statute that

contains many of the central provisions of the Minnesota Environmental Policy Act, and claim that the statute requires that the ER include economic impacts.

With regard to vagueness, the ALJ believes the language must be weighed in the context of its use. This proposed rule sets forth eight items which must be included in any ER. Later provisions establish additional lists of items that must be considered for plants or lines. An earlier rule allows the chair to decide what specific impacts are to be addressed. In this context, the phrase"human and environmental impacts" is not impermissibly vague. In practice, it will be defined by the type of facility being proposed, and the alternatives identified. The chair will further define the scope of the term of Order. If a person is dissatified with the Chair's Order, they may ask for the entire Board to review their issue. The problem with including a list of some impacts (such as economic impacts) but not others also defeats the purpose of the scoping process. There is no showing of need for the analysis of economic impacts where such impacts are not at issue for a particular project.

The Reinhardts maintain that statutes and case law require that economic impacts be analyzed in every case. They point to Minn. Stat. § 116D.04, subd. 2a, and other subdivisions of that statute that refer back to subd. 2a. However, 116D.04, subd. 2a deals with environmental impact statements (EISs) and environmental assessment worksheets (EAWs). It provides, in pertinent part:

> The EIS shall be an analytical rather than an encyclopedic document… It shall also analyze those economic employment and sociological effects that cannot be avoided should the action be implemented.

The Board responds to the Reinhardts that the ER is not an EIS. The Board states that an EIS will likely be prepared at the permitting stage, when specific sites or routes are known, but that at the need stage, an EIS is not required, and thus the statute and rules for EIS's are not applicable to the ER.

The ALJ finds that the Board has justified the "human and environmental effects" language as needed and reasonable. Given the context of the rule, and the need for flexibility to allow for a wide variety of impacts defined by the scoping process, the language is not impermissibly vague.[52] The rule need not include various factors required to be included in an EIS.

34. Subpt. 2. This provision identifies the basic environmental information that will be examined as part of the environmental report for any large power plant. Items A through J were developed primarily from comments submitted by the Minnesota Pollution Control Agency (PCA).[53]

At the hearing, Russell Pangerl suggested that it would be helpful to further define hazardous air pollutants under item B and add a source of water consideration to item G. The EQB has noted that it agrees with the source of water requirement if a specific site is known to the applicant and has added a clause in item G to reflect that

requirement. Additionally, the Board noted that matters relating to the source of water would be addressed in the site-specific environmental review conducted under Minn. Rules chapter 4440 when a site permit is sought. With respect to defining hazardous air pollutants in item B, the Board would consider all 189 chemicals listed as hazardous air pollutants under the federal Clean Air Act, plus any additional ones suggested by the scoping process.[54]

The Administrative Law Judge concludes that it is reasonable for the EQB to add a source of water clause to item G, if a plant site is known. Furthermore, it is reasonable for the EQB not to further define hazardous air pollutants under item B given the variety of projects and emissions that may be reviewed. It is reasonable for the EQB to look to the Clean Air Act and the PCA in determining what constitutes a hazardous air pollutant at the scoping stage.

4410.7050 – Environmental Report to Accompany Project.

35. Subp. 1. PUC decision. This provision requires the environmental report to be completed before the PUC can hold a public hearing (except for preliminary matters), or make a final decision regarding a certificate of need or transmission projects report. The EQB supports this requirement, asserting that it is relying on the PUC hearing process to gather public responses to the ER and create a full record for the PUC's consideration of environmental factors.

Perhaps the most problematic provision of this entire proceeding relates to the Board's proposal for obtaining and responding to comments on the ER. Under the existing rule, (which has different provisions for lines and plants), the initial ER is called a draft. There is a procedure for allowing public comments on the draft, and then responses to these comments. The draft, the comments and the responses are then put together and the combined package is labeled the final ER.

The Board proposes to add a significant scoping procedure at the front end of the ER process. This scoping procedure takes time. The Board is also proposing that it will write the ER itself. That too will take time.

The Board's proposed rule requires that the ER be completed and submitted to the PUC before the PUC can conduct any public hearings on the CON. The Board's rule goes on to require the Board staff to participate in the PUC proceeding and be available to respond to comments about the ER. But the Board's new rules do not require the Board staff to reply in writing to substantive comments, nor do they require the assembling of the comments and the replies into a final document.

The Sierra Club, CURE (Communities United for Responsible Energy) and the Reinhardts oppose the Board's proposed rule. The Sierra Club and CURE appear to be more concerned about the practical difficulties of locating and organizing all the environmental information in the PUC's large CON record. The Reinhardts appear to be more concerned about the willingness of the staff to respond to public concerns.

They see the proposed change as a serious diminution of the public's right to meaningfully participate in the CON process, because the public relies on the EQB for expert investigation and analysis of the public's concerns.

The Board's response, which is supported by the PUC and the Department of Commerce, is that there is simply not enough time to have a public meeting, a meaningful scoping process, a good ER, plus time for the public to digest and respond to the ER, followed by staff responses to the public comments.

The PUC firmly opposes adding any additional procedures that might cause the ER to be delayed and, in turn, cause the PUC to miss its statutory deadline.

The Sierra Club, mindful of the PUC's concerns, proposed a compromise process whereby the staff would be required to respond, in writing, to those substantive written comments which were submitted at least 20 calendar days before the PUC hearing record is closed.

The Administrative Law Judge has considered all of the comments and suggestions, and has attempted to work with the Board's timeline (Exhibit 9) to devise a schedule that can satisfy all these concerns. He concludes that the Board has demonstrated that its proposal has a rational basis, and is reasonable. Unfortunately, if the public is to be given a meaningful opportunity to participate in the scoping process, and if the Board staff is to prepare the ER itself, then there just is not enough time to allow for the public to respond and the staff to investigate and prepare written responses to public concerns. The only way that even the Sierra Club's compromise would work is if the ER were released earlier than presently contemplated. The only way to do that would be to shorten the scoping period, or shorten the time for the EQB staff to prepare the ER. The Board has explained and justified its choice not to cut into either of those periods, and the Administrative Law Judge agrees with the PUC that the ER process cannot be so lengthy that it will, or is even likely to, cause the Commission to miss its statutory deadline.

The Board may adopt the rule without further changes.

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, and all of the 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, 14.15, and 14.50.

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).

5. The additions to the rules, which were suggested by the EQB after publication of the proposed rules in the State Register, do not result in rules that are substantially different from the proposed rules as published, within the meaning of Minn. Stat. § § 14.05, subd. 2 and 14.15, subd. 3.

6. Any findings that might properly be termed conclusions and any conclusions that might properly be termed findings are hereby adopted as such.

7. 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 as 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.

Dated this 31st day of October 2003.

/s/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded
No Transcript Prepared

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the Board takes any further action on the rule(s). The Board may then adopt a final rule or modify or withdraw its proposed rule. If the Board makes changes in the rule other than those recommended in this report, it must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The Board must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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[1] Minn. Stat. §§ 14.131 through 14.20 (2002).
[2] Minn. Stat. § 14.15, subd. 1.
[3] Ex. 5(h); Minn. Stat. § 14.101.
[4] Ex. 10-11.
[5] Ex. 12.
[6] Ex. 17.
[7] Ex. 17.
[8] Ex. 20.
[9] Ex. 30
[10] Ex. 30.
[11] Ex. 47.
[12] Ex. 37.
[13] Ex. 47.
[14] Ex. 5(h).
[15] Ex. 8.
[16] Ex.5.
[17] Ex. 12.
[18] Ex. 20.
[19] Ex. 14-15.
[20] Ex. 17.
[21] Ex. 22-29.
[22] Ex. 42.
[23] Ex. 40-41.
[24] Ex. 50-51.
[25] Minn. Stat. 216B.243, subd. 5
[26] Minn. Stat. § 14.131.
[27] SONAR, p. 9.
[28] *Id.*
[29] *Id.*
[30] *Id.*, p. 10.
[31] *Id.*
[32] Minn. Rules chapter 4400.
[33] SONAR, p. 11.
[34] Minn. Stat. § 14.131.
[35] Minn. Stat. § 14.002.
[36] Ex. 47.
[37] *EQB Monitor*, Volume 27, No 15.

[38] 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).
[39] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[40] Greenhill v. Bailey, 519 F. 2d 5, 19 (8th Cir. 1975).
[41] 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).
[42] Manufactured Housing Institute, 347 N.W.2d at 244.
[43] Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233 (1943).
[44] Minn. Stat. § 14.131
[45] Minn. Stat. § 14.15, subd. 3.
[46] Ex. 50-51.
[47] Minn. Rules part 7829.0600.
[48] Minn. Rules chapter 7849.
[49] Minnesota Recipients Alliance v. Noot, 313 N.W.2d 584, 586, (Minn. 1981).
[50] Minn. Rules 4400.2750, subp. 3.
[51] Minn. Rules 7849.0260, subp. 3(B).
[52] Can Manufacturers Institute v. State, 289 N.W. 2d 416 (Minn. 1979).
[53] Ex. 5(d).
[54] 42 U.S.C. 7412(b).