

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of the Proposed
Permanent Rules Relating to
Pipeline Routing, Minn. Rules
Parts 4415.0010 to 4415.0215

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on November 16, 1988 and November 23, 1988, in St. Paul, Minnesota.

This Report is part of a controversial rule hearing proceeding held pursuant to Minn.Stat. §§14.01 through 14.28 (1986), to determine whether pipeline routing rules should be adopted by the Environmental Quality Board.

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

Nine persons signed the hearing register. All persons desiring to testify were given an opportunity to do so. The record remained open through December 2, 1988, for the submission of comments. Seven written comments were received prior to the close of the record. The Board submitted no post-hearing written comments. On December 7, 1988, the record finally closed for all purposes.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On September 30, 1988, the Board filed the following documents with the Administrative Law Judge:

- (a) A copy of the proposed permanent rules relating to pipeline routing certified as to form by the Revisor of Statutes.
- (b) An order for hearing signed by the Environmental Quality Board chair, accompanied by a certificate of authority for the chair to order a hearing.
- (c) The notice of hearing for publication in the State Register.
- (d) A statement of the number of people expected to attend.
- (e) The Statement of Need and Reasonableness.

2. On October 3, 1988, a Notice of Hearing and copy of the rules as proposed were published at 13 State Register 802.

3. On September 30, 1988, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.

4. On October 19, 1988, the Board filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Board's certification of mailing list.
- (c) An affidavit of mailing of the notice to all persons on the Board's list.
- (d) An affidavit of additional discretionary notice.
- (e) A photocopy of the State Register notice soliciting outside opinion, 12 State Register 1010, published on November 9, 1987, and all materials received pursuant to that notice.
- (f) The names of Board personnel who will represent the agency at the hearing.
- (g) A photocopy of the State Register in which the notice and proposed rules were published.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

Small Business Considerations

6. Minn.Stat. §14.115 subd. 2 (1986) requires the Board, when proposing rules which affect small businesses, to consider methods for reducing the impact on small businesses. The Board, in its Statement of Need and Reasonableness (SONAR), denied that the proposed rules will have an impact on small businesses. The Administrative Law Judge finds the proposed rules will not have an impact on small businesses and the Board need not take the effects of the rules on small businesses into account.

Agricultural Land Considerations

7. Minn.Stat. §14.11 subd. 2 (1986) requires adherence to Minn. Stat. §§17.80 to 17.84 if the proposed rules have a direct and substantial adverse impact on agricultural land. The Board, in its SONAR, stated that the environmental review rules would be adhered to in the

application of the proposed rules and that the proposed rules would not have a direct and substantial adverse impact on agricultural land. The Administrative Law Judge finds that the proposed rules will not have a direct and substantial adverse impact on agricultural land.

Fiscal Considerations

8. The Board, in its SONAR, stated that the proposed rules do not require that public money will be expended by local public bodies. The Administrative Law Judge finds that the proposed rule does not require expenditures by local public bodies and the Board need not meet the requirements of Minn.Stat. §14.11 subd. 1.

9. The proposed rules contain a fee provision, not set by the authorizing statute. The Board has submitted the memorandum of the Department of Finance authorizing the fee provision. The Administrative Law Judge finds that Minn.Stat. §16A.128 has been met.

Statutory Authority

10. The Board's statutory authority to adopt the rules is set forth in Minn.Stat. §116I.015. The statute requires the Board to adopt rules regulating pipeline routing. The Administrative Law Judge finds that the Board has the necessary statutory authority to adopt the proposed rules.

General

11. Parts of the proposed rules generated some comment, while others generated none. In order to avoid an unnecessarily lengthy report, discussion will be focused on those proposed rules which were controversial, or those which had problems requiring resolution. Although the Board's justification for each rule has been considered, all will not be mentioned. Any rule or subpart which is not mentioned below has been determined to be: a) statutorily authorized; and, b) justified as both reasonable and necessary.

Part 4415.0015 Subpart 2 - Federal Preemption

12. The most controversial issue in this rulemaking proceeding was whether federal law preempts portions of the proposed rules. EQB Exhibits 39, 41, 42, 43, 49, 50, 59, 63, 68 and 72. The Board and the interested parties reached a compromise set forth in the Joint Statement of Resolution of Potential Dispute Over Applicable State and Federal Jurisdiction. EQB Exhibit 77. The Board agreed to exclude interstate natural gas pipelines from the proposed rules, since those pipelines fall under exclusive Federal Energy Regulatory Commission (FERC) jurisdiction and the present federal regulatory scheme includes substantial state involvement. Further, the Board will submit the issue to the Legislature in the upcoming session for clarification. Both the Board and the interested parties reserved the right to brief and argue the issue of preemption in an appropriate forum. That forum is not this rulemaking proceeding. For the issue of federal preemption to be finally decided, the proper tribunal would be a state or federal court.

13. The Board proposes that Part 4415.0015 be modified to remove the words "preempted by federal law or" as being unnecessary in light of the compromise. EQB Exhibit 75. The deletion of this language is appropriate and does not constitute a substantial change.

Part 4415.0020 Subpart 1 - Applicability of Rules

14. The scope of facilities excluded from the rules was raised in the hearings on this matter. Michael Fesen of the Williams Pipeline Company testified that the definition of "associated facilities" raised the possibility that terminal points and other appurtenant devices would fall within the proposed rule, despite those facilities being located on fee-owned property of the pipeline companies. November 16, 1988 Transcript, at 36. The Board and the interested parties resolved this concern by altering the exclusion in proposed rule part 4415.0020 Subpart 1(F) to include associated facilities. EQB Exhibit 76. This inclusion is in accord with the Board's understanding of the extent of the proposed rules. November 16, 1988 Transcript, at 35-37. The change is not a substantial change.

15. Modification was also made to proposed rule 4415.0020 Subpart 1(I), adding language from Minn.Stat. §216B.36. This refers to the municipal grant of a right-of-way for the purpose of pipeline routing. The exclusion of this type of pipeline routing is appropriate to prevent conflicts of jurisdiction with municipalities. The change in language is not substantial, since the new wording merely parallels the statutory grant.

16. A new item is proposed by the Board as 4415.0020 Subpart 1(J), excluding from compliance with this rule any person proposing to construct or operate an interstate natural gas pipeline under the authority of the federal Natural Gas Act. In light of the discussion and compromise between the Board and interstate pipeline companies mentioned above at Finding 12, the addition of this item is necessary and reasonable to clearly exclude the interstate pipeline operators from the rule. The addition is not a substantial change.

Part 4415.0035 - Partial Exemption

16. This part purports to grant to the Board the ability to exempt pipelines from the full route selection procedure. The application for an exemption must be the same as for a routing permit. SONAR, at 12. A determination must be made that there will be no significant impact on humans or the environment. SONAR, at 13. Notice and comment will be available to all affected landowners, lessees and municipalities. SONAR, at 13. Perhaps most importantly, specific criteria are listed in part 4415.0040 to guide the Board in its decision. The combination of procedural and substantive safeguards render the proposed parts reasonable and necessary to accommodate pipeline companies desiring to reduce the nine-month time span for normal pipeline routing, while not granting undue discretion to the Board.

Part 4415.0055 - Citizen Advisory Committees

17. The Board is authorized to establish citizen task forces or subcommittees for examining any particular problem. Minn.Stat. §116C.04 Subd. 4. The scope and authority of such committees is not specified in the enabling statute. The Board has stated that such committees will act in an advisory capacity for those applications which require broad public participation. SONAR, at 16. Interested parties to this proposed rule initially objected to the establishment of such committees. November 16, 1988 Transcript, at 46. This objection has since been withdrawn. EQB Exhibit 76. The Board has the statutory authority to establish citizen advisory committees and the rule has been demonstrated as needed and reasonable.

Part 4415.0065 - Public Adviser

18. In addition to the citizen advisory committees established under the proposed rule, the Board requires that a public adviser be available to any person wishing assistance in participating in the route process. SONAR, at 17. Objections had been raised that the Board lacked the authority to establish a public adviser position, since the statute was silent as to such a post. November 16, 1988 Transcript, at 40. That objection has since been withdrawn, upon the Board's assurance that the public adviser will act only in routing hearings and not provide legal representation. EQB Exhibit 76. In any event, the establishment of a post for a public adviser, which does not involve the delegation of authority or provide legal representation to the public is within the Board's inherent authority. The Board's rule has been demonstrated to be reasonable and necessary.

Part 4415.0080 - Analysis of Alternatives

19. As part of the regulatory scheme for routing pipelines, the Board will accept more than one proposed route and select one from among the choices. To provide an adequate factual basis for Board consideration, part 4415.0080 Subp. 1 requires a comparative environmental analysis of all pipeline routes considered at public hearings. Interested parties objected to the cost of comparative environmental analyses being levied against the pipeline company, which usually is arguing in favor of a single route. November 16, 1988 Transcript, at 50. The Board has responded to this objection by altering the language of the part to provide for either Board staff or applicant preparation of such analyses. The objection has been withdrawn in light of the altered language. EQB Exhibit 76. The preparation of comparative analyses is necessary and reasonable for informed decision-making by the Board. The change is not substantial, insofar as the parties interested in this rule-making had ample opportunity to comment and suggest alternatives. A further change is proposed in this section to further specify the analysis to be submitted. This change is for clarification, affects no substantive rights and is not substantial.

20. Gene R. Sommers, Senior Attorney for Northern States Power, suggested that part 4415.0080 Subp. 2 was an inappropriate requirement for the Board, since the effect of the rule would be a "need" review. EQB Exhibit 67. This review requirement is governed by Minn.Stat. §216B.243. The Board agrees that it does not have the authority to impose this review when the statute does not. EQB Exhibit 74. Accordingly, the Board will delete Subpart 2. This change is not substantial.

Part 4415.0105 Subpart 6 - Application Distribution

20. Objection was raised at the hearings to the proposed requirement that anyone making a request was entitled to receive a copy of the application. The objections cited were cost, unlimited scope of the requests, potential harassment and redundancy. November 16, 1988 Transcript, at 54-57. The Board responded by clarifying that the landowners who did receive a copy of the application did so under the partial exemption process, while the full route process did not provide for each adjoining landowner to receive a copy automatically. November 16, 1988 Transcript, at 55. The Board did modify the language of the proposed rule to provide for restrictions on the form and time that such requests must be honored. Under the modified language, the request must be in writing and made within 10 days of the first day of the first public hearing. EQB Exhibit 76. This modification meets the concerns of the those parties who objected and their objection was withdrawn. EQB Exhibit 76. The proposed rule, as modified, is necessary and reasonable to provide landowners and other interested parties with information about the proposed route, while allowing the pipeline company the economy of scale possible through a fixed deadline for requests. The change is not substantial.

Part 4415.0120 Subpart 1 - Pipeline Design Specifications

Part 4415.0160 - Operation and Maintenance

21. Concern was expressed that the Board may, under the guise of providing public information, attempt to preempt or duplicate the safety oversight of pipelines being routed. EQB Exhibit 69. The Board has addressed this concern by proposing to modify the language of Part 4415.0120 Subpart 1 and Part 4415.0160 to remove the requirement of compliance with state and federal regulations and assuming compliance instead. Further, the Board cannot act to deny a routing permit on specification grounds unless the state or federal agency having jurisdiction for the specification enforcement determines there is non-compliance. The modification is appropriate. It is not a substantial change.

Part 4415.0195 - Permit Conditions

22. Mr. Fesen, of the Williams Pipeline Company, raised an objection to the permit conditions with respect to meeting other state or federal permit rules. November 16, 1988 Transcript, at 68. The original wording of the rule placed the pipeline company in the position of potentially violating other permit rules (e.g., Department of Natural Resources Shoreland Management Rules) to comply with the Board routing rule. The modification proposed by the Board places the permit condition of Part

4415.0195 (C) in the alternative with any conditions required by state or federal permits or laws. This modification is reasonable and necessary to accommodate a pipeline company's meeting the conflicting needs of different agencies. The modification is not a substantial change.

23. Part 4415.0195 (M) was objected to on the basis that landowners would use the provision for delay and attempt to claim additional damages on the basis of the rule. November 16, 1988 Transcript, at 72. The Board agreed with the interested parties that the Board's function was not to adjudicate property disputes and that the matter was covered by other sections of this part. The Board agreed to delete 4415.0195 (M). This deletion is reasonable and necessary to carry out the intended purpose of the rule, and is not a substantial change.

24. Part 4415.0195 (N) was objected to as being too difficult to carry out in view of maintenance and safety concerns. November 16, 1988 Transcript, at 80. This section requires the pipeline company to protect shelterbelts and trees. The Board modified the language of the proposed rule to require the protection of the shelterbelts and trees to the extent possible with safe operation, maintenance and inspection of the pipeline. This modification meets the objection raised at the hearings. EQB Exhibit 76. The modifications are needed and reasonable and do not constitute a substantial change.

25. Objections were raised to the reporting of certain complaints to the Board, as required by Part 4415.0200. The essence of the objection was that 10 days is insufficient time for pipeline companies to independently resolve complaints. November 16, 1988 Transcript, at 88. The Board modified the language of this part to increase the time limit to thirty days before reporting to the Board and clarified that the complaints under this part were complaints arising under Part 4415.0195. The Board demonstrated that the rule is necessary and reasonable to ensure resolution of complaints arising from pipeline routing. The change is not substantial.

26. The Board has recognized that another forum may have jurisdiction to resolve a dispute between a landowner and a pipeline company. In the event that such jurisdiction has been invoked, the Board may decline to act against the routing permit of the company. In the Joint Statement of Resolution of Objections Concerning Pipeline Routing Rules, EQB Exhibit 76, the Board and interested parties agreed to the addition of a new item to Part 4415.0205 subpart 2, labelled as (A). This new item explicitly permits the Board to decline to act on a complaint, provided that arbitration or court action has been initiated. The new item also clarifies that no new rights are being created on behalf of landowners. The Board has included standards for whether discretion will be exercised. The Board has demonstrated that the new item is necessary and reasonable. The addition is not a substantial change.

27. As part of the Joint Resolution, EQB Exhibit 76, the Board and interested parties agreed that a specific procedure should be in place to terminate the Board's jurisdiction over any particular project. The Board has proposed a new provision, Part 4415.0207, to resolve this matter. The provision requires a permittee to file a certification of completion with the Board, to be considered with 60 days of filing. If

any deficiencies remain, the permittee will be notified and the problem corrected. Any financial adjustments needed will be completed together with the certification of completion. The Board has demonstrated that the proposed part is necessary and reasonable. The addition is not a substantial change.

28. The Board also proposes to modify Part 4415.0215, to better define the general responsibilities of the Board with respect to these rules. The modification merely clarifies the limits of Board responsibility and is not a substantial change. The part is necessary and reasonable.

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

CONCLUSIONS

1. That the Minnesota Environmental Quality Board gave proper notice of the hearing in this matter.
2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.
3. That the Board has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15 subd. 3 and 14.50 (i) and (ii).
4. That the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 subd. 2 and 14.50 (iii).
5. That the additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.
6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.
7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification if the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

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

Dated this 5th day of January, 1989.



Allan W. Klein
Administrative Law Judge