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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

1990

FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD

In the Matter of Proposed
Amendments to Rules Governing
Environmental Review of Large
Energy Facilities, Minn. Rules,
Parts 4410.7000 to 4410.7800.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on July 26, 1990, at 9:30 a.m. in Room 301, Centennial Building, 658 Cedar Street, St. Paul, Minnesota and on October 4, 1990 at 7:00 p.m. in the Little Theater of the Willmar Senior High School, 824 Southwest Seventh Street, Willmar, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Environmental Quality Board (MEQB) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable. Since the MEQB made no modifications to the rules after their initial publication, there is no issue concerning substantial changes in the proposed rules.

Eldon Kaul, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the MEQB at both hearings. The MEQB's hearing panel included: Bob Cupit, lead staff person; George Durfee, Supervisor of Power Plant Siting; Greg Downing, Staff Coordinator and Mike Sullivan, Executive Director of the MEQB.

Twenty-two persons attended the St. Paul hearing. Seventeen persons signed the hearing register. At the St. Paul hearing, the Administrative Law Judge received the MEQB Exhibits 1-20 and Public Exhibits 1-14. As a result of receiving requests from the Minnesota Catholic Conference, the Countryside Council, and several individuals to conduct an additional hearing more readily available to persons in Greater Minnesota, and owing to the Agency staff's desire to place matters raised at the St. Paul hearing before the MEQB at its next meeting, the Administrative Law Judge recessed the hearing. The hearing was reconvened at Willmar on October 4, 1990. Eight persons attended the Willmar hearing. Seven persons signed that hearing register. At the Willmar hearing, the Administrative Law Judge received MEQB Exhibits 21 and 22. No public exhibits were received at that hearing. Both hearings continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for five business days following the date of the Willmar hearing, to October 11, 1990. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. At the close of business on October 16, 1990, the rulemaking record closed for all purposes. The Administrative Law Judge received no written comments from interested persons during the comment period relating to these proposed rules. The comments made orally, in writing, or on videotape during the hearings related only to the MEQB's proposed rules regarding high voltage transmission line routing (HVTL rules). The MEQB submitted a written comment responding to matters discussed at the hearing in the time between the St. Paul and Willmar hearings, but this comment only dealt with the HVTL rules.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency 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 agency 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 June 5, 1990, the Minnesota Environmental Quality Board (MEQB) contacted the Office of Administrative Hearings (OAH) to inform the Administrative Law Judge assigned to this matter that the MEQB would not be able to meet the filing deadline for documents required by Minn. Rule 1400.0300, because of the absence of the individual authorized to execute the Order for Hearing. The MEQB did transmit an unsigned copy of the proposed Notice of Intent to Adopt Rules to OAH for review pursuant to Minn. Rule 1400.0300.

2. On June 29, 1990, the MEQB filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes;
- (b) The Order for Hearing;
- (c) The Certificate of Agency's Authorizing Resolution;
- (d) The Notice of Hearing proposed to be issued;
- (e) The Statement of Need and Reasonableness (SONAR);
- (f) A letter stating the expected length of the hearing, that additional notice would be given, and the anticipated attendance.

3. On June 15, 1990, the MEQB 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 June 18, 1990, a Notice of Hearing and a copy of the proposed rules were published at 14 State Register 2930.

5. On July 3, 1990, the MEQB filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed;
- (b) A photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules.
- (c) The Agency's certification that its mailing list was accurate and complete;
- (d) The Affidavit of Mailing the Notice to all persons on the MEQB's mailing list; and
- (e) The Affidavit of Mailing the Notice of Hearing to the Discretionary Mailing List; and
- (e) The names of Board personnel who would represent it at the hearing.

6. Minnesota Rules part 1400.0300 requires that the documents listed in Finding 2 be filed with the Administrative Law Judge prior to publishing the Notice of Hearing in the State Register. In this proceeding, the publication occurred before the filing of the required documents. Minnesota Rules part 1400.0600 requires that the documents listed in Finding 4 be filed with the Administrative Law Judge at least 25 days prior to the hearing. In this case, the filing was only 2 days less than the required 25 days prior to the hearing. No one raised this procedural error at any time during the proceeding; and no prejudice or harm has been shown as a result of the agency's error. Failure to comply with these rules constitute procedural error. Under these circumstances, however, the Administrative Law Judge finds that error to be harmless, and does not affect the ability of the Board to adopt the proposed rules. See, City of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980); See also, Handle With Care v. Department of Human Services, 406 N.W.2d 518 (Minn. 1987).

7. In determining whether a procedural error is harmless, one must examine the extent to which the Agency deviated from the requirements, whether the deviation was inadvertent, and the potential impact the procedural irregularity could have on public participation in the rulemaking process. Auerbach, Administrative Rulemaking in Minnesota, 63 Minn. L. Rev. 151, 215 (1979); but see, Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 241-42 (Minn. 1980). Here the documents pre-existed both the late filings and were maintained in the Agency rule file for public inspection. The documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to October 16, 1990, the date the record closed. The failure to file the documents prior to publication of the notice was due to the unavailability of the acting chair of the MEQB. Through its telephone contact with OAH, the MEQB acted to ensure that the preliminary review of the agency's notice of hearing was conducted, albeit in an unusual fashion. At the hearing, no member of the public complained of prejudice resulting from the Board's failure to comply strictly with Minnesota Rules parts 1400.0300 or 1400.0600. The procedural error in this rulemaking proceeding is harmless.

8. On September 17, 1990, the MEQB mailed additional discretionary notice of the Willmar hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons or associations known to have an interest in these rules. The additional discretionary notice contained a brief description of the proposed rules; the purpose of the rulemaking proceeding; the time, date, and place of the hearing; and a map directing interested persons to the hearing location.

9. On September 19, 1990, the MEQB filed the additional discretionary notice of the Willmar hearing with the Administrative Law Judge. On October 4, 1990, the MEQB filed the Affidavit of Mailing the additional discretionary notice of the Willmar hearing with the Administrative Law Judge.

Nature of the Proposed Rules.

10. The proposed rules modify the existing environmental review system for large electric power generating plants (LEPGP) by requiring environmental review only in the siting process. The existing system requires two environmental reviews, one at the siting stage and another as part of this review system. The changes in the proposed rules eliminate the environmental review as part of these rules, while the substance of the review is transferred to the siting process. The effect of this change is to require only one environmental review and eliminate potential timing conflicts between the two reviews. Additionally, the statutory exemption of certain LEPGPs from the full environmental review process is referenced in the amendments to the rule. All other changes in the rules are intended to promote clarity and update citations to other newly altered rules. Some of the new citations are to the modifications are being made to the HVTL rules in a companion case to this rulemaking. A report on those rules is being issued contemporaneously with this report and reference to the HVTL rules or the contents of that report will be made where appropriate.

Statutory Authority.

11. In its Statement of Need and Reasonableness (SONAR), the MEQB cites Minn. Stat. § 116C.66 (1988) as authorizing the amendment or adoption of the proposed rules. The statute referred to in the SONAR grants general rulemaking authority to the MEQB, subject to the proviso that the rules be consistent with the statutory provisions governing the MEQB's responsibilities. Minn. Stat. § 116C.66. The MEQB has statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

12. Minn. Stat. § 14.115, subd. 2 (1989), provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The proposed rules in this proceeding are either procedural in nature, for clarification, or are intended to comply with a specific statutory exemption. None of the utilities potentially affected by these rules are small businesses. No other entity claimed an adverse impact by operation of these rules. The MEQB noted that complying with the statute

regarding small businesses affected by the proposed rules would be "contrary to the statutory objectives of Minnesota Statutes, sections 116C.51 to 116C.705, therefore the requirements of Minnesota Statutes, section 14.115 (1986) do not apply." MEQB Notice of Hearing. Since no small businesses were identified as affected by the proposed rules, the MEQB's claim need not be examined.

Fiscal Note.

13. Minn. Stat. § 14.11, subd. 1 (1988), requires the preparation of a fiscal note when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The note must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules will not require any expenditures by local governmental units or school districts, and thus no note is needed.

Impact on Agricultural Land.

14. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state". The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. However, Minn. Stat. 17.82 expressly exempts actions "reviewed as required by Chapter 116D and the environmental review rules adopted under that chapter. . . ." MEQB indicated that the proposed rules fall under the exemption and, therefore, no statement is required. The Administrative Law Judge agrees with the agency's view on this issue. In addition, since the proposed rules are procedural in nature and have no substantive effect, the proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Proposed Rule 4410.7000 - Special Rules for LEPGP.

15. This proposed rule part amends the environmental review rules of this chapter to merge the EIS requirement at the site certification stage into the "Environmental Impact Assessment" (EIA) requirement of the HVTL rules at the site certification stage of the process. The possibility of a statutory exemption is also recognized in new language of this proposed rule part. When that exemption is applicable, the new rule language requires the utility to follow the process established in the HVTL rules for such situations. The proposed change removes a second layer of procedural review which the MEQB considers redundant and makes the process of review more efficient. No adverse comments were received regarding this proposed rule part. The MEQB has shown that proposed rule part 4410.7000 is needed and reasonable.

Proposed Rule 4410.7100 - Environmental Report at Certificate of Need Stage.

16. Proposed rule 4410.7400 amends the existing language of the rule to specify that the Public Utilities Commission (PUC), which is responsible for preparing an environmental report regarding an LEPGP, must prepare that report at the certificate of need stage. The only other amendment to this rule part is to update a citation to another rule in subpart 4. No adverse comments were received regarding this proposed rule part. The MEQB has shown that proposed rule part 4410.7100 as amended, is needed and reasonable.

Proposed Rule 4410.7400 - Special Rules for HVTL.

17. The amendments to this proposed rule part are virtually identical to those in proposed rule 4410.7000, discussed at Finding 15, above. The only difference is that the statutory exemption language is already in this rule part, so that addition is not made here. As with proposed rule part 4410.7000, no adverse comments were received regarding this proposed rule part. The MEQB has shown that proposed rule part 4410.7400 is needed and reasonable.

Proposed Rule 4410.7500 - Environmental Report at Certificate of Need Stage.

18. Proposed rule 4410.7500 contains amendments which specify that the PUC environmental report is to be performed at the certificate of need stage. It also updates several rule citations. The amendments are consistent with other changes made throughout these proposed rules. No adverse comments were received regarding these provisions and they have been shown to be needed and reasonable.

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

CONCLUSIONS

1. The Minnesota Environmental Quality Board (MEQB) gave proper notice of this rulemaking hearing.
2. The MEQB has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The MEQB 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 MEQB 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. No additions or amendments to the proposed rules were suggested by the MEQB after publication of the proposed rules in the State Register, and therefore, the rules are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.
6. Any Findings which might properly be termed Conclusions and any Conclusions which 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 MEQB from further modification of the proposed 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 6th day of November, 1990.

Phyllis A. Reha

PHYLLIS A. REHA
Administrative Law Judge

Reported: Tape Recorded; No Transcript Prepared.