

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Katie J. Sieben
Valerie Means
Matthew Schuerger
Joseph K. Sullivan
John A. Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Application of Elk Creek
Solar, LLC for a Site Permit for the up to 80
MW Elk Creek Solar Project in Rock County,
Minnesota

ISSUE DATE: October 10, 2023

DOCKET NO. IP-7009/GS-19-495

ORDER APPROVING A SITE-PERMIT
AMENDMENT PROCESS

PROCEDURAL HISTORY

On September 13, 2019, Elk Creek Solar, LLC (Elk Creek or Applicant) filed a certificate of need (CN) Application as well as a separate site permit application with the Commission for a proposed 80-MW solar energy generating system in Rock County (the Project).¹

On December 31, 2020, the Commission issued orders granting the CN and issuing the requested site permit. The approved site permit authorized Elk Creek to construct and operate an up to 80-MW alternating current nameplate capacity solar energy conversion system with associated facilities on 976 acres in Vienna Township in Rock County.

On June 2, 2023, Elk Creek submitted an application for a site permit amendment under Minn. R. 7850.4900.

On June 21, 2023, the Department of Commerce Energy Environmental Review and Analysis (EERA) filed comments on Elk Creek's proposed amendment.

On June 28, 2023, the Minnesota Department of Natural Resources (DNR) filed comments on the proposed amendment.

On July 12, 2023, Elk Creek filed reply comments.

On August 31, 2023, the Commission met to consider this matter.

¹ A CN was required at that time because the Project did not qualify for an exemption under Minn. Stat. § 216B.243, subd. 8(7). Legislation enacted in May 2023 exempted the Project from previously applicable CN requirements because it is a solar energy generating system, as defined in Minn. Stat. § 216E.01, subd. 9a, and the Project is developed and permitted by an independent power producer under Minn. Stat. § 216B.243, subd. 8(7). *See* Minn. Laws Ch. 60, art. 12, sec. 22, to be codified at Minn. Stat. § 216B.243, subd. 8.

FINDINGS AND CONCLUSIONS

I. Introduction

A. Original Project Application

Although the Commission provided approval granting the CN and issuing the site permit for the Project in 2020, Elk Creek experienced unanticipated delays in developing the Project because the Midcontinent Independent System Operator (MISO) interconnection queue process took approximately two years longer than expected and caused Elk Creek to withdraw from the power purchase agreement that it had negotiated with Xcel Energy. According to Elk Creek, this delay to the in-service date reshaped the business case of the Project, and Elk Creek determined that it would be advantageous to request modifications to expand the Project's area and increase the nameplate capacity.

B. Elk Creek's Current Proposal

Elk Creek filed a site permit amendment application to (1) double the nameplate capacity of the Project from 80 MW to 160 MW by utilizing more efficient panels in tighter configuration and (2) increase the site area of the Project by 546 acres, from 976 acres to 1,522 acres. Elk Creek's proposal utilizes more efficient panels in tighter configurations throughout the original site and expansion area.

Elk Creek indicated that it currently has interconnection certainty for the proposed amendments to the Project with two executed 80-MW interconnection agreements with MISO. Elk Creek asserted that it is more cost-effective to allocate the required system upgrades for interconnection across 160 MW rather than the originally approved 80 MW.

Elk Creek proposed to construct the project on a schedule that facilitates an in-service date by the end of 2025.

II. Permit Amendment Process

The permit amendment process set forth in Minn. R. 7850.4900. subp. 2, includes opportunity for public comment on proposed permit amendments:

The person requesting an amendment of a condition in a site permit or a route permit shall submit an application to the commission in writing describing the amendment sought and the reasons for the amendment. The commission shall mail notice of receipt of the application to those persons on the general list and to those persons on the project list if such a list exists. The commission shall provide at least a ten-day period for interested persons to submit comments on the application or to request that the matter be brought to the commission for consideration.

III. Positions of the Parties

A. EERA

EERA stated that the Commission has authority under Minn. R. 7850.4900 to “amend any of the conditions” in a site permit for large electric power generating plant facilities; however, EERA also noted that neither the term “condition” nor the permissible scope of an amendment are addressed by the rule. Given the significant scope of the changes requested by Elk Creek, EERA contended that the Commission should review the Applicant’s proposed changes to the site permit as a site permit application for a new solar project.² EERA noted that the Applicant’s preferred process does not include a public scoping meeting or public hearing, both of which are available under Minnesota’s Power Plant Siting Act.³ EERA also asserted that the modified amendment process did not provide substantial time savings when compared to the Alternative Review Process under Minn. Stat. § 216E.04.

EERA noted that “due to the proximity of the [original site and proposed expansion area], EERA found in its preliminary review of the draft filing that the environmental setting (land use, topography, hydrology, etc.) and human settlement (patterns, public services, demographics, aesthetics, recreation, and infrastructure, etc.) were very similar between the [original site and proposed expansion area].”

But EERA also asserted that the purpose of the Power Plant Siting Act’s required processes (scoping meeting, scoping decision, environmental assessment (EA) development, and public hearing) is to ascertain and evaluate potential issues, and it is unrealistic to expect adequate review to occur within a ten-day comment period contemplated by Minn R. 7850.4900. EERA expressed concern that stakeholder participation may be limited if the Commission reviews the proposed Project modifications without utilizing these procedural safeguards.

B. DNR

Due to the expanded area impacted by the proposed changes that encroaches closer to a public water and a Minnesota Biological Survey site of moderate biodiversity significance, the DNR noted that the updated Project appears to have greater potential natural resource impacts than the area evaluated and approved during the initial site permitting process. The DNR contended that a thorough evaluation is necessary to assess potential natural resource impacts associated with the previously unreviewed area.

Additionally, the DNR stated that Elk Creek’s petition was somewhat unclear due to its incorporation of and comparisons to the 2020 Land Control Area, and it asserted that a site permit application that identifies the Amended Control Area as an independent project would improve the clarity of Elk Creek’s requests.

² EERA also recommended that the Applicant restructure and refile the document as a stand-alone site permit application pursuant to Minn. Stat. § 216E.04. Elk Creek subsequently filed an application for a new site permit for the Project, and EERA opined that the new site permit application was substantially complete with respect to the requirements of Minn. R. 7850.1900.

³ Minn. Stat. § 216E.

C. Elk Creek

Elk Creek argued that the Commission should view the requested changes as a request for an amended site permit under Minn. R. 7850.4900. If the Commission determines that the standard amendment process is insufficient, Elk Creek requested review under a modified site permit amendment process that could include additional opportunity for stakeholder input. The Applicant proposed an addendum or supplement to the EA that considers the environmental impacts of the proposed Project expansion with a comment period, after which EERA would provide a revised scoping decision to address any applicable comments and potential impacts of the modified Project.

Elk Creek recognized that the Commission may find it reasonable to require review of the requested changes to the Project through a new site permit application for a new solar project. Given the extensive process and thorough review that preceded the Commission's ultimate approval of the site permit for the original project and similarities to the current request, Elk Creek argued that it was inappropriate to require duplicative processes that would occur in reviewing a new site permit application for the requested Project modifications, especially when the unreviewed area is similar to the previously approved site.

In light of the unanticipated delays the Applicant encountered developing the Project as authorized by the original site permit, Elk Creek stated that the expected time savings offered by its modified amendment process, when compared to the Alternative Review Process, may be significant to enabling the Project's successful development.⁴ Elk Creek explained that a protracted regulatory timeline may adversely impact the Project by delaying construction into the winter months and creating additional uncertainty that could make it more challenging to enter into a power purchase agreement.

IV. Commission Action

Although the DNR and EERA recommended requiring a new application subject to the alternative permitting process, the Commission is unpersuaded that amending the conditions of this Project require an entirely new application and review process. Elk Creek's proposed changes expand the area of the Project by approximately 50 percent and double the nameplate capacity of the Project, but these modifications are inextricably linked to the Project authorized by the original site permit, as the panels and configuration will become more efficient, and the site's area will increase. Furthermore, the entire modified 160-MW Elk Creek Project will utilize the same point of interconnect, have common ownership and financing, and be constructed in one, continuous construction process. Despite the expanded site area and increased capacity, the requested changes modify the Project authorized by the previously approved site permit and do

⁴ Elk Creek estimated that its proposed modified amendment process would take 230 days to complete. EERA stated that the anticipated timeline under the Alternative Review Process is approximately 270 days, so EERA asserted that a modified amendment process would not provide substantial time savings. Elk Creek stated that its estimated 230-day timeline started running when it filed its application while the 270-day timeline does not start until an application is deemed complete, which would enlarge the discrepancy beyond the 40-day difference noted by EERA. Additionally, Elk Creek noted that over a year passed from submission until Commission consideration of site permit requests for the 460-MW Sherco Solar project and 50-MW Louise Solar project.

not create a new, separate project that the Commission must review under Minn. Stat. § 216E. Accordingly, the Commission will review Elk Creek's proposal as a request for an amendment of permit conditions, subject to record development of the issues raised in comments on the proposed changes and their potential for impacts that may warrant further action, as well as the opportunity for additional comment and record development as set forth below.⁵

The Commission's notice of comment period on Elk Creek's request to amend the site permit asked whether commenters were aware of any potential human/environmental impacts, mitigation measures, and other concerns related to Elk Creek's request. While commenters generally agreed that the conditions related to environmental setting and human settlement were likely very similar between the original and previously unreviewed area of expansion, the expansion places the Project closer to a public water and site of moderate biodiversity significance. Therefore, the Commission agrees with the DNR that the potential environmental impacts of the Project on unreviewed areas warrant thorough evaluation.

To facilitate and ensure the adequacy of this review during the site permit amendment process, the Commission will require supplementation of the EA developed during the initial review process that addresses the impacts of the additional land included, the closer proximity to Elk Creek (the public water), the reduced row spacing, and the more efficient solar panels. The Commission will also require a public hearing in the vicinity of the Project and comment period with a summary of public comments to be submitted by an Administrative Law Judge. Additionally, by September 7, 2023, Elk Creek shall file its updated, standalone site permit application that incorporates the amended application with modifications to the application attachments at the Rock County Soil and Water Conservation District Land Management Office for public viewing.

Finally, the Commission shares the concern expressed by EERA that the ten-day timelines contemplated by Minn. R. 7850.4900, subp. 3, are insufficient to allow for the identification and evaluation of potential issues related to the requested site permit amendment. Accordingly, the Commission will grant a rule variance to extend those timelines. Under Minn. R. 7829.3200, the Commission shall grant a variance to its rules when it determines (1) enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule, (2) granting the variance would not adversely affect the public interest, and (3) granting the variance would not conflict with standards imposed by law.

As applied to Elk Creek's requested amendments, enforcing the ten-day timeline would impose an excessive burden on the stakeholders involved in reviewing potential impacts of the proposed site permit amendments because the record may not be sufficiently developed to adequately inform the Commission's decision. Extending the timelines will increase opportunities for stakeholder participation while providing time to investigate potential impacts of the requested site permit modifications, which will serve the public interest. Granting this variance to extend the timelines is consistent with standards imposed by law.

⁵ Minnesota Rule 7850.4900 provides authority for the Commission to amend any of the conditions of an existing site permit for a large electric power generating plant.

For the reasons stated above, the Commission finds that the requested changes to the Elk Creek Project are appropriately evaluated under Minn R. 7850.4900's site-permit-amendment process modified to require a public meeting, a supplemental EA, and an extension of the ten-day decision timelines in subpart 3.

ORDER

1. The Commission approves review of Elk Creek's requested site permit modifications through the site permit amendment process with the following modifications:
 - a. The Commission varies the ten-day decision timelines in Minn. R. 7850.4900, subp. 3;
 - b. The Applicant shall file its updated standalone site permit application that incorporates the amended application and modifications to the application attachments at the Rock County Soil & Water Conservation District Land Management Office by September 7, 2023, for public viewing;
 - c. The Commission requires a supplement to the EA developed during the initial permit review process that addresses the impacts in particular, but not limited to, the additional acres included, the closer proximity to Elk Creek (the public water), the reduced row spacing, and more efficient solar panels; and
 - d. The Commission requires a meeting or hearing in the area of the project to take in-person comments from the public and local units of government and a summary of those comments by an Administrative Law Judge from the Office of Administrative Hearings.
2. This order shall become effective immediately.

BY ORDER OF THE COMMISSION



Will Seuffert
Executive Secretary



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CERTIFICATE OF SERVICE

I, Mai Choua Xiong, hereby certify that I have this day, served a true and correct copy of the following document to all persons at the addresses indicated below or on the attached list by electronic filing, electronic mail, courier, interoffice mail or by depositing the same enveloped with postage paid in the United States mail at St. Paul, Minnesota.

Minnesota Public Utilities Commission

**ORDER APPROVING MODIFIED SITE PERMIT AMENDMENT PROCESS TO
REVIEW PROPOSED CHANGES TO ELK CREEK SOLAR PROJECT**

Docket Number **IP-7009/GS-19-495**

Dated this 10th day of October, 2023

/s/ Mai Choua Xiong

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