

**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

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**Chair
Commissioner
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IN THE MATTER OF XCEL ENERGY'S PETITION FOR APPROVAL TO TERMINATE THE POWER PURCHASE AGREEMENT WITH BENSON POWER, LLC, ACQUIRE THE BENSON POWER BIOMASS PLANT, AND CLOSE THE FACILITY	Docket No. E002/M-17-530 PETITION FOR RECONSIDERATION
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INTRODUCTION

Through the January 23, 2018 Order Approving Petitions, Approving Cost Recovery Proposals, and Granting Variances (“Order”), the Minnesota Public Utilities Commission (“Commission”) approved Northern States Power Company d/b/a Xcel Energy’s (“Xcel”) petition to close the Benson Power Biomass Plant (the “Plant”) because the Commission determined Xcel had satisfied Minn. Stat. § 216B.2424 Subdivisions (a) and (c).

The Commission’s decision was affected by legal errors regarding the Minnesota Environmental Protection Act (“MEPA”), resulting from erroneous arguments presented by Xcel at the November 30, 2017 hearing (the “Hearing”). For this reason, North American Fertilizer, LLC (“NAF”) and Beaver Creek Transport, Inc. (“Beaver Creek”) respectfully request that the Commission reconsider the Order.

LAW AND ARGUMENT

The Commission had discretion to allow Xcel Energy to acquire the Benson Biomass Power Plant (the “Plant”) and to terminate the power purchase agreement (the “PPA”). However, the Xcel-specific statutes did not eliminate the Commission’s responsibility under MEPA.

The Order includes a brief note that NAF and Beaver Creek requested environmental review prior to the Commission making its decision.¹ The Order, however, does not contain any findings related to environmental review or any acknowledgement of the significant potential for environmental effects detailed in the record. Accordingly, NAF and Beaver Creek explain through this Petition that the arguments made by Xcel at the November 30, 2017 hearing, apparently accepted by the Commission, resulted in errors of law.

I. The Commission had a duty to conduct environmental review before approving Xcel’s petition.

Minnesota state policy regarding environmental review is clear. Under MEPA, the Commission, as a state agency, must conduct environmental review before engaging in any major governmental action that creates the potential for significant environmental effects.² As established below, granting Xcel’s request to close the Plant and terminate the PPA is a major governmental action, there are no applicable exemptions from MEPA, and the record before the Commission demonstrates the potential for significant environmental effects. As such, MEPA required environmental review before the Commission approved Xcel’s petition.

¹ Order Approving Petitions, Approving Cost Recover Proposals, and Granting Variances, p. 10, MPUC Docket No. E-002/M-17-530 (January 23, 2018).

² Minn. Stat. § 116D.04, Subd. 2a(a).

A. Xcel's plan to close the Plant is a Project under MEPA.

Environmental review is required by MEPA whenever a major governmental action could result in significant environmental effects.³ During the Hearing, counsel for Xcel argued that Xcel's request to close the Plant and terminate the PPA was not a "project" as that term is defined in MEPA.⁴ This is fundamentally incorrect.

The rules implementing MEPA define a "project" as "a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly."⁵ The Minnesota Court of Appeals has held that for MEPA, a "project" is "a definite, site-specific, action that contemplates on-the-ground environmental changes, including changes in the nature of the use."⁶ The environmental effects, according to MEPA, can be indirect.⁷

Applying these definitions to Xcel's petition is a straightforward exercise. Xcel is requesting permission from the Commission⁸ for a definite site-specific action that contemplates environmental changes, including changing the nature of the use of the Plant,⁹ and evidence in the record indicates that there will be both direct and indirect manipulation of the environment.¹⁰

³ Minn. Stat. § 116D.04, Subd. 2a(a).

⁴ Audio Recording of November 30, 2017 MPUC Hearing, 4:31:36 to 4:32:38, available online at (<https://mn.gov/puc/newsroom/calendar/#2>).

⁵ Minn. R. 4410.0200, Subp. 65. A "governmental action" is defined as "activities including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by governmental units . . ." Minn. R. 4410.0200, Subp. 33 (emphasis added). Accordingly, MEPA requires environmental review for any governmental action with potentially significant environmental effects, not just what is defined as a project.

⁶ *Minnesotans for Responsible Recreation v. Department of Natural Resources*, 651 N.W.2d 533, 540 (Minn. Ct. App. 2002)

⁷ Minn. R. 4410.0200, Subp. 65.

⁸ Minn. R. 4410.0200, Subp. 33.

⁹ 651 N.W.2d at 540.

¹⁰ Minn. R. 4410.0200, Subp. 65.

Accordingly, the Order authorized a project within the scope of MEPA, and environmental review was required. Disregarding MEPA's definitions to avoid addressing environmental review concerns is an error of law.

B. The Project is not exempt from environmental review under MEPA.

Another argument advanced by Xcel is that even if closure of the Plant, and the consequential reduction in biomass burning, was a "project" under MEPA, it would be exempt from environmental review.¹¹ Xcel relied on two exemptions from MEPA at the Hearing.¹² First, Xcel asserted that an exemption for "demolition or removal of buildings and related structures" applied.¹³ Second, Xcel claimed that an exemption for financial transactions also applied. This exemption is for acquisition or disposition of private interests in real property, or purchase of operating or maintenance equipment and operating supplies.¹⁴

Accepting Xcel's arguments was a second error of law. The Minnesota Environmental Quality Board's ("EQB") 1982 Statement of Need and Reasonableness ("SONAR") for Proposed Environmental Review Rules clarifies the purpose of these exemptions.¹⁵ Neither exemption should apply to Xcel's petition.

¹¹ Hearing, 4:31:36.

¹² Hearing, 4:30:13 to 4:31:05.

¹³ Minn. R. 4410.4600, Subp. 21. E.

¹⁴ Minn. R. 4410.4600, Subp. 24.

¹⁵ Minnesota Environmental Quality Board, Statement of Reasonableness for MN Env'tl. Quality Bd. Proposed Env'tl. Program Rules, SONAR-00003, (August 12, 1982) (Adopted as 6 MCAR 3.021-3.056 with Modifications on Sept. 20, 1982, effective Sept. 27, 1982, recodified as Minn. R. 4410) (available online at <https://www.leg.state.mn.us/archive/sonar/SONAR-00003.pdf>) ("SONAR"). Excerpts included as Attachment A.

The exemption for construction activities was revised in 1982. The EQB's reasoning for the revision was "to exclude minor construction activities that do not have the potential for significant impacts. This is needed to focus environmental review on the core proposal . . ."¹⁶ The current text of Minn. R. 4410.4600, Subp. 21 is unchanged since 1982. In the words of the EQB, the categories included in this rule are "necessary to prevent delays relating to projects that *do not have the potential for significant environmental impacts.*"¹⁷ The current exemptions in this subpart were intended to be similar to those excluded under the prior rule, 6 MCAR § 3.041 T. Those categories included, for example: 1) operation, maintenance and repair work with no substantial change in land use; 2) restoration or reconstruction of a structure, or expansion of a limited amount of square footage; 3) construction of pools, garages, and other structures that would not change land use or density; 4) grading or filling 750 cubic yards or less; 5) refilling excavated areas; and 6) accessory signs for buildings unregulated by the state.¹⁸ These are minor changes to existing uses that are a far cry from closing a power plant relied upon for natural resource management.

The exemption for financial transactions was also revised in 1982.¹⁹ The EQB stated that this exemption is intended "to exclude activities that are not the base of environmental concern. This is needed to focus environmental review *on the actual activity* that has the potential for environmental impact."²⁰ Under the prior rule, this exemption applied to: 1) purchase of equipment or supplies; 2) sales or leases of surplus governmental property other than land,

¹⁶ *Id.*, at p. 159

¹⁷ *Id.*, at p. 160 (Emphasis added).

¹⁸ *Id.*, citing 6 MCAR § 3.026.

¹⁹ *Id.*, at p. 162 (included in Attachment A).

²⁰ *Id.*

radioactive material, pesticides, or buildings; 3) loans, mortgages, guarantees, or insurance transactions in connection with structures; and 4) borrowing for purposes other than capital construction or land purchase.²¹ The EQB's intent was to exempt activities without physical impact on the land.²² The record before the Commission demonstrates that terminating the PPA and closing down the Plant will, contrary to the intent of the EQB, result in physical impact on the land without environmental review. Even if Xcel claims that these impacts are indirect, the impacts still fall within the scope of MEPA.²³

Relying on the exemptions cited by Xcel bypasses MEPA and ignores the intent underlying the rules. As stated in the 1982 SONAR, environmental review should focus on the core proposal.²⁴ Here, Xcel is not merely buying or tearing down a building. Nor is it merely buying supplies or equipment or engaging in a simple financial transaction. Instead, Xcel seeks to terminate the PPA, which will have far-reaching environmental impacts throughout Minnesota.

Building a large energy facility, such as the Plant, is subject to significant environmental review.²⁵ There is no logical reason that terminating the PPA and decommissioning the Plant should be treated differently, especially when significant environmental impacts will result.

²¹ *Id.*, citing 6 MCAR § 3.026.

²² *Id.*

²³ Minn. R. 4410.0200, Subp. 65.

²⁴ SONAR, p. 159.

²⁵ *See* Minn. R. 7850.2500.

C. The record contains ample evidence of significant environmental effects that were not analyzed prior to issuing the Order.

The record contains substantial information that indicates closing the Plant will produce significant environmental effects across Minnesota. Indeed, an entire system of environmental management techniques for Minnesota agricultural businesses, and natural resource and environmental regulatory agencies will be disrupted if the Order is not reversed.

Comments submitted by NAF and Beaver Creek in their request for environmental review provided significant details of these environmental impacts. The Order, as noted previously, does not address these impacts in a manner that satisfied MEPA. Instead of repeating these arguments here, NAF and Beaver Creek will briefly address the scope of impacts unleashed by the Order.

The Minnesota Turkey Growers Association (“MTGA”) relies on the Plant to process turkey litter generated by its members. The MTGA commented that its members “cannot simply spread the poultry litter anywhere; they need to find fields that can accept the nutrients and phase-in a land application program over a period of years.”²⁶ One turkey farm alone sends 9,000 tons of turkey litter to the Plant every year.²⁷ This equals 90,000 tons of manure from a single farm over the ten years from 2018 to the scheduled expiration of the PPA in 2028. As the MTGA indicated, the Minnesota Pollution Control Agency (“MPCA”) will not allow the manure to be spread anywhere. Rather, it must be spread at agronomic rates on fields that can accept the

²⁶ MTGA Comments in Opposition to Xcel Energy’s Petition for Approval to Terminate the PPA with Benson Power, LLC, Acquire the Benson/Fibrominn Plant, and Close the Facility, August 29, 2017, MPUC Docket No. M-17-530 (“MTGA Comments”).

²⁷ Rothfork Comments in Opposition to Xcel Energy’s Petition for Approval, August 30, 2017, MPUC Docket No. M-17-530 (“Rothfork Comments”).

nutrients under a phased-in land application program.²⁸ The manure may become a source of pollution for lakes and streams if not dealt with properly.²⁹ Improper spreading of poultry litter can also increase the risk of avian flu outbreaks like the one that occurred in 2015.³⁰

The Minnesota Department of Natural Resources (“DNR”) also relies on the Plant’s use of biomass fuels to enable forest management. According to the DNR:

The potential disruption to existing biomass markets has a range of possible implications that should be thoroughly understood and considered before the PUC makes any decision to alter Xcel’s existing obligations. DNR is concerned that the PUC does not have sufficient information on which to base an informed decision on terminating Xcel’s PPA with [Benson Power].³¹

The DNR is concerned that disruptions to the timber markets will affect forest health and recreation in Minnesota.³² These impacts, according to the DNR, may include “lost forest management opportunities, including hazardous fuel reduction and forest health sanitation efforts.”³³ The United States Department of Agriculture also indicated in a letter from the Superior National Forest Supervisor’s Office that the Commission’s actions with respect to the biomass mandate could result in adverse environmental impacts.³⁴ The Order is silent on these issues.

²⁸ MGTA Comments, p. 3-4; Minn. R. 7020.2225.

²⁹ Rothfork Comments.

³⁰ MGTA Comments, p. 4.

³¹ Comments of the Minnesota DNR, In the Matter of Xcel Energy’s Petition for Approval to Terminate the Power Purchase Agreement with Benson Power, LLC, Acquire the Benson Power Biomass Plant, and Close the Facility, September 6, 2017, MPUC Docket No. M-17-530, p. 1 (“DNR Comments”).

³² DNR Comments, p. 2.

³³ *Id.*

³⁴ Comments of the Superior National Forest Supervisor’s Office, In the Matter of Xcel Energy’s Petition for Approval to Terminate the Power Purchase Agreement with Laurentian Energy Authority I, LLC, MPUC Docket No. M-17-551 (“USFS Comments”).

In sum, the record before the Commission details the potential for significant environmental effects across Minnesota if the PPA is terminated. The effects range from massive quantities of turkey manure building up at turkey farms across the state in violation of MPCA rules and regulations to the potential for significant harm to Minnesota's forest resources and forest health. These potential effects should not be ignored.

D. The Commission retained its discretionary power to order preparation of environmental review documents.

The Order does not acknowledge the Commission's authority to address these impacts and fulfill its obligations under MEPA. Instead, the Order only appears to consider the factors outlined in the Xcel-tailored Minn. Stat. § 216B.2424, Subd. 9.³⁵ Notably, the Legislature did not exempt the Commission's decision regarding the Plant from environmental review.

The Legislature, acting through Minn. Stat. § 216B.2424 left termination of the PPA in the Commission's discretion. The Commission should now use that discretion to order further environmental review, as allowed by Minn. R. Parts 4410.1000, Subp. 3. B and 4410.4500. The very purpose of the discretionary authority given to the Commission under MEPA is to allow thorough environmental review in situations where such review is not explicitly required, but the potential for significant environmental effects flows from governmental action. The Legislature was aware of that authority when the statute mandating biomass generation was amended in Xcel's favor. The Commission should now exercise its authority under MEPA to fulfill state policy.

³⁵ Order, p. 3.

CONCLUSION

The enactment of the biomass mandate by the state of Minnesota, and Xcel's subsequent agreement to purchase biomass power, resulted in a complex and interrelated system of environmental management across the state. The destruction of this intricate system will most certainly negatively impact Minnesota's natural environment, particularly its farms and forests.

Under Minnesota law, a final decision, such as the Order, cannot be rendered by the Commission until it has either issued a negative declaration on the need for an Environmental Impact Statement ("EIS") or an EIS has been completed and determined to be accurate.³⁶ The Commission did not engage in any environmental review prior to issuing the Order. NAF and Beaver Creek respectfully request the Commission remedy that error by reconsidering the Order and conducting environmental review.

Respectfully submitted,

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³⁶ Minn. Stat. § 116D.04, Subd. 2b.

5. Activities for which environmental review has already been initiated under the prior rules or for which environmental review is being conducted pursuant to 6 MCAR § 3.034 or 3.035 of these rules.

DISCUSSION: These exemptions are substantively the same as the general exemptions found at 6 MCAR § 3.026 A. of the current rules. They are repeated at this point to facilitate public understanding of the scope of these rules. These exemptions are a summarization of the statutory language relating to activities that are subject to environmental review.

Environmental review is effective only if it is done early enough to guide construction. If the project is already substantially completed and further information could not mitigate impacts, the basic purpose of environmental review is defeated.

Alternative review procedures and the model ordinance provisions are designed to substitute for the provisions in these rules. If substitute review procedures have been approved by the EQB, specific activities covered are no longer subject to these rules.

The explicit statement of these conditions is necessary to facilitate proper interpretation and implementation of these rules.

Category Area: Utilities

This is proposed as an exemption only category area to exclude minor activities related to the servicing of existing facilities or proposed projects. This is needed to focus environmental review on the core proposal and to ensure review occurs at an early stage in the proposal. The proposed exemption within this category area is:

Exemption 6 MCAR § 3.041 S. Utilities.

Utility extensions as follows: water service mains of 500 ft. or less and one and a half inches diameter or less; sewer lines of 500 feet or less and eight inch diameter or less; local electrical service lines; gas service mains of 500 ft. or less and one inch diameter or less; and telephone service lines.

DISCUSSION: Under the current rules, the following category was included to cover this need:

Exemption - 6 MCAR § 3.026

13. Utility extensions as follows: water service mains of 500 feet or less and one and a half inches diameter or less; sewer lines of 500 feet or less and eight inch diameter or less; electrical service lines of 500 feet or less and 240 volts or less; gas service mains of 500 feet or less and one inch diameter or less; and telephone service lines of 500 feet or less.

The thresholds proposed were established as reasonable pursuant to the public meeting process. The thresholds established are designed to exclude minor distribution lines and services lines. Environmental review should be focused at the initial stages of proposal, as opposed to the stage of providing basic service to existing development.

Category Area: Construction Activities

This is proposed as an exemption only category area to exclude minor construction activities that do not have the potential for significant impacts. This is needed to focus environmental review on the core proposal and to prevent potential abuse of the intent of environmental review by "nuisance" petitions. Specific exemptions proposed within this category area include;

Exemptions - 6 MCAR § 3.041 T. Construction activities.

1. Construction of accessory appurtenant structures including garages, carports, patios, swimming pools, agricultural structures, excluding feedlots, or other similar buildings not changing land use or density.
2. Accessory signs appurtenant to any commercial, industrial, or institutional facility.
3. Operations, maintenance, or repair work having no substantial impact on existing structures, land use or natural resources.
4. Restoration or reconstruction of a structure provided that the structure is not of historical, cultural, architectural, archeological, or recreational value.
5. Demolition or removal of buildings and related structures except where they are of historical, archeological, or architectural significance.

DISCUSSION: Under the current rules, the following categories were included to cover this need:

Exemptions -6 MCAR § 3.026

1. Operation, maintenance, or repair work involving no substantial change in existing structures, land uses, or water quality.
4. Restoration or reconstruction of a structure in whole or in part being increased or expanded by less than 25 percent of its original size, square footage, or capacity, and aggregating less than 5,000 square feet, provided that such structure has not been designated to be of historical, cultural, archeological, or recreational value by a public agency.
14. Construction of accessory appurtenant structures including garages, carports, patios, swimming pools, fences, barns, or other similar agricultural structures, excluding feedlots; or other similar buildings not changing land use or density.
15. Grading or filling of 750 cubic yards or less.
18. Filling of earth into previously excavated land with materials compatible with the natural material on the site.
21. Accessory signs appurtenant to any commercial, industrial, or institutional facility not regulated by an agency of the State.

The proposed categories were established pursuant to the public meeting process as being necessary to prevent delays relating to projects that do not have the potential for significant environmental impacts. These categories are substantially the same as the current rules, however, the wording has been changed to avoid "impact exemptions."

Category Area: Land Use

This is proposed as an exemption only category area to exclude minor land use actions that do not have the potential for significant impacts. This is needed because these activities may be controversial in the immediate vicinity and failure to specifically exempt these activities could result in "nuisance" petitions. Specific categories proposed within this category area include:

Category Area: Financial Transactions

This is proposed as an exemption only category area to exclude activities that are not the base of environmental concern. This is needed to focus environmental review on the actual activity that has the potential for environmental impact. Specific categories proposed within this category area include:

Exemptions - 6 MCAR § 3.041 W. Financial transactions.

1. Acquisition or disposition of private interests in real property, including leaseholds, easements, right-of-way, or fee interests.
2. Purchase of operating equipment, maintenance equipment, or operating supplies.

DISCUSSION: Under the current rules, the following categories were included to cover this need:

Exemptions: 6 MCAR § 3.026

8. Purchase of operating equipment, maintenance equipment, or operating supplies.
9. Sales or lease of surplus governmental property other than land, radioactive material, pesticides, or buildings.
10. Loan, mortgage, guarantee, or insurance transactions in connection with now or existing structures or uses as defined in subparagraphs 6 MCAR § 3.026 C.2., 3. or 4.
11. Borrowing for purposes other than capital construction or land purchase.

These proposed categories represent minor revisions to the current categories. These rules apply only to activities that impact the environment. The activities included in this category area do not have a physical impact on the environment and, therefore, are not within the scope of the rules. Comments received at public meetings however, demonstrated a desire for express language exempting these transactions. This was regarded as reasonable to insure proper interpretation and implementation of these rules.

Category Area: Licenses

This is proposed as an exemption only category area to exclude routine projects which are generally minor and have minimal environmental impacts. Specific categories proposed within this category area include:

Exemptions - 6 MCAR § 3.041 X. Licenses.

1. Licensing or permitting decisions related to individual persons or activities directly connected with an individual's household, livelihood, transportation, recreation, health, safety, and welfare, such as motor vehicle licensing or individual park entrance permits.
2. All licenses required under electrical, fire, plumbing, heating, mechanical and safety codes and regulations, but not including building permits.

DISCUSSION: Under the current rules, the following categories were included to cover this need:

Exemptions: 6 MCAR § 3.026

7. Licensing or permitting decisions relating to individual persons or activities directly connected with an individual's household, livelihood, transportation, recreation, health, safety, and welfare,