

Staff Briefing Papers

Meeting Date October 29, 2018

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Company Minnesota Power

Docket No. **E015/AI-17-568**

In the Matter of Minnesota Power's Petition for Approval of the EnergyForward Resource Package

- Issues
1. What action should the Commission take on the October 8, 2018 petition from Honor the Earth requesting preparation of an Environmental Assessment Worksheet (EAW) for the proposed Nemadji Trails Energy Center, a 525 MW combined cycle natural gas plant to be constructed in Superior, Wisconsin?
 2. If the Commission grants the EAW petition, what processes and procedures should be adopted?

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Relevant Documents

Date

Honor the Earth Citizens' Petition for MEPA Review	October 16, 2018
EQB Letter Referring matter to the Commission	October 16, 2018
Minnesota Power Response to Petition	October 22, 2018

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

I. Statement of the Issues

1. What action should the Commission take on the October 8, 2018 petition from Honor the Earth requesting preparation of an Environmental Assessment Worksheet (EAW) for the proposed Nemadji Trails Energy Center (NTEC), a 525 MW combined cycle natural gas plant to be constructed in Superior, Wisconsin?
2. If the Commission grants the EAW petition, what processes and procedures should be adopted?

II. Statutes and Rules

The Minnesota Environmental Protection Act¹ (MEPA) requires an environmental review whenever a state agency, private entity, or local government proposes a major governmental action that could significantly affect the quality of the environment. Governmental actions include activities that are conducted, permitted, assisted, financed, regulated, or approved by units of government.

The Minnesota Environmental Quality Board (EQB) adopted Minnesota Rules Chapter 4410 in part to implement environmental review procedures. Under Minnesota Rule 4410.1100, any person may request the preparation of an EAW² on a project by filing a petition that contains the signatures and mailing addresses of at least 100 individuals who reside or own property in the state. The EQB must determine whether the petition includes the required information and designates the Responsible Governmental Unit (RGU) that will decide on whether or not to grant the petition.

The Commission must order the preparation of an EAW if the evidence presented demonstrates that the project may have the potential for significant environmental effects. The Commission must deny the petition if the evidence presented fails to demonstrate the project may have the potential for significant environmental effects. The Commission must maintain a record, including specific findings of fact, of its decision on the need for an EAW. The Commission has 30 days from the date of the receipt of the petition to decide on the need for an EAW.³

¹ Minnesota Statutes, Chapter 116D.

² An Environmental Assessment Worksheet is a document designed to rapidly assess a proposed project's environmental effects to aid in the determination of whether an Environmental Impact Statement (EIS) is needed. EQB's EAW Form can be found at the following location: <http://www.eqb.state.mn.us/documents/Finalized%20EAW%20Form%20July2013.pdf>.

³ RGUs are typically provided 15 days from the date of receipt of the petition to decide on the need for an EAW. Because the Commission meets only on a periodic basis, this time period may be extended by the Commission for another 15 days (Minnesota Rule 4410.1000, Subp. 7).

In deciding whether a project has the potential for significant environmental effects, Minnesota Rule 4410.1700, subp. 7 requires the following factors to be considered:

- A. Type, extent, and reversibility of environmental effects;
- B. Cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;
- C. The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and
- D. The extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

The Commission must notify the proposer, the EQB staff, and the petitioner's representative of its decision within five days. The EQB staff must publish notice of the Commission's decision concerning the petition in the EQB Monitor.⁴

The process for preparation of an EAW includes the following steps:

1. The project proposer supplies all necessary data to the Responsible Governmental Unit, which is assigned responsibility to conduct the review according to the EQB rules.
2. The RGU prepares the EAW by completing the standard form supplied by the Environmental Quality Board.
3. The EAW is distributed with public notice of its availability for review and comment. The comment period is 30 calendar days. Certain state, federal, and local agencies always receive EAWs for review. Any person may review and comment in writing on an EAW. A public meeting to receive oral comments is optional at the discretion of the RGU, but is not commonly held.
4. The RGU responds to the comments received and makes a decision on the need for an EIS based on the EAW, comments received, and responses to the comments. The RGU and other units of government may require modifications to the project as

⁴ Minnesota Rule 4410.1100, Subp. 8.

part of their permits to mitigate environmental impacts as disclosed through the EAW process.

III. Background⁵

On October 8, 2018, the EQB received a Citizen's Petition from Paul C. Blackburn of Honor the Earth (HTE) requesting the preparation of an EAW for the Nemadji Trails Energy Center (NTEC), a 525 megawatt (MW) combined cycle natural gas power plant, proposed to be constructed in Superior, Wisconsin.

On October 16, 2018, EQB notified the Commission it had reviewed the HTE petition. Based on its review, EQB concluded that the Commission's determination of whether or not to approve of the affiliated interest agreements between Minnesota Power and Southshore constitutes a government action and that Minnesota Statutes Chapter 116D.01 and Minnesota Rules Chapter 4410 apply to its decision. EQB also determined that the Commission was the RGU for purposes of determining the need for an EAW.

On October 16, 2018, Honor the Earth filed a Citizens' Petition requesting an environmental review of the NTEC project.

On October 22, 2018, Minnesota Power filed a response to HTE's petition for MEPA review.

IV. Comments Received

Honor the Earth

On March 23, 2018, Honor the Earth filed a public comment in this matter claiming that a MEPA review of the project is required.⁶ In her July 2, 2018 Report and recommendation, Administrative Law Judge Cochran noted the following. "To the extent Honor the Earth wished to raise a legal issue, it could have filed a petition to intervene by the November 17, 2017 deadline and requested that the issue be considered during the prehearing process in early December 2017 when the issues for the proceeding were finalized. As such, the issue was not raised in a timely manner and is outside the scope of this contested case proceeding."⁷

⁵ For a review of prior docket proceedings, refer to Staff's Briefing Paper filed as e-Dockets Number 201810-146951-01, October 11, 2018.

⁶ Although the comment was not e-filed, staff has verified that HTE's comments were received via email address consumer.puc@state.mn.us on March 23, 2018.

⁷ Findings of Fact numbers 515 and 516, *Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation*, e-Dockets Number 20187-144475-01, July 2, 2018.

On June 29, 2018, Honor the Earth filed a petition for MEPA review of the NTEC plant with the Commission asserting that a mandatory EIS or discretionary EAW be prepared for the project. Commission staff advised Honor the Earth that the EQB's rules required such a petition to be filed with the EQB.

Honor the Earth filed its October 16, 2108 Citizen's Petition with the EQB, and the petition includes the signatures and mailing addresses of at least 100 Minnesota residents or landowners requesting that an EAQ be prepared for the NTEC plant, as required under EQB's Rule 4410.1100.⁸ In its petition, Honor the Earth asserts that MEPA does not exempt out-of-state projects and therefore they are subject to MEPA, and noted that both the Commission and Minnesota Power apparently agree that the plant may have significant potential environmental effects in Minnesota because the record in this matter includes information regarding such effects. Honor the Earth also asserts that the Commission's approval of the Affiliated Interest Agreements under Minnesota Statute 216B.248 constitutes a major governmental action subject to MEPA review. According to Honor the Earth, such a review should, at a minimum, include preparation of an EAW.

Honor the Earth notes that the Commission's environmental review of NTEC has been "informal," failing to comply with MEPA information standards and lacking in sufficient detail to assess NTEC's significant environmental effects to the extent required by MEPA. Honor the Earth also asserts that Minnesota should retain jurisdiction to conduct environmental review of Minnesota agency approvals of out-of-state projects near Minnesota's border because of potential direct and significant environmental impacts of such projects on Minnesota's air and water quality.

Environmental Quality Board

In their October 16, 2018 referral letter to the Commission, EQB stated that Honor the Earth's petition was complete, and that based on its review of the facts presented in the petition "it is our opinion that Minnesota Statute[s Section] Statute 116D.01 and Minnesota Rules Chapter 4410 apply to the governmental action being considered by the PUC."⁹ The EQB specifically identified the governmental action as the Commission's "approval authority for Minnesota Power's purchase of approximately 250 MW of the capacity from the approximately 525 MW Nemadji Trail Energy Center; a governmental action related to the project..."¹⁰ Staff's understanding is that the EQB is identifying NTEC as the "project" under MEPA.

EQB provided guidance for evaluating the need for environmental review of NTEC under MEPA, starting with consideration of whether NTEC was subject to a mandatory EAW or EIS, or subject to an exemption from either.¹¹ EQB advised that if an EAW was not mandatory or exempted,

⁸ Honor the Earth's June 29 MEPA review petition submitted to the Commission did not contain the required 100 signatures of Minnesota residents/landowners.

⁹ October 16, 2018 Cover Letter & Petition from EQB to Nancy Lange, at 1.

¹⁰ *Id.*

¹¹ *Id.* at 2.

the Commission “has the option to prepare a discretionary EAW” in accordance with EQB Rule 4410.110, subp. 6. EQB noted that notice of the petition and its assignment to the Commission would be published in the EQB Monitor on October 22, 2018.

Minnesota Power

In its response to petitioners, Minnesota Power (MP) respectfully disagreed with the EQB’s determination that MEPA applies to the Commission’s decision in the NTEC proceeding.

MP noted that the Commission need not accord any deference to EQB’s referral because it was based on a “ cursory review” of Honor the Earth’s petition and does not reflect a full evaluation of the relevant facts.

MP asserted that the petition is not complete because the NTEC financial agreements at issue here are not “projects” under MEPA, and MP is not proposing to build NTEC. MP argued that, even if the approval of the agreements constituted a project under MEPA, the project’s proposers are South Shore, a Wisconsin corporation, and Dairyland Power Cooperative, a Wisconsin electric cooperative, who are not subject to the Commission’s jurisdiction.

MP noted that the project would be constructed and operated in Wisconsin. As a result, the facility would be subject to environmental review under Wisconsin’s regulations.

MP also noted that the petitioner’s request for preparation of an EAW was already considered and rejected by the Administrative Law Judge, and that granting the request would impose Minnesota statutes and regulations on Wisconsin businesses, facilities, and operations in violation of federal law.¹²

Clean Energy Organizations

As these briefing papers were being finalized, the Clean Energy Organizations (CEOs), who are a party in this matter, filed comments in support of the Commission conducting an environmental review of NTEC pursuant to MEPA. CEOs’ comments address the points raised in MP’s response to Honor the Earth’s petition, and staff recommends that the Commissioners review them in evaluating what action to take on the Petition.

V. Staff Analysis

Staff notes that in EQB’s October 18, 2018 decision it indicated that its decision was based entirely upon information from the petition itself. Staff generally supports MP’s position, especially in relation to the application of the terms “project” and “proposer”. Rather than

¹² MP argued that any application of MEPA to a facility fully outside of Minnesota constitutes extraterritorial reach, is unprecedented, and would violate the legal doctrine of the Dormant Commerce Clause.

provide an extensive legal analysis, staff offers some procedural advice and provides some observations on the filings.

Staff recommends the Commission first consider MP's legal arguments, beginning with EQB's jurisdiction. The Commission should then consider MP's argument that approval of the Affiliated Interest Agreements does not constitute a "project" under MEPA's definitions.¹³ The Commission should then consider whether Minnesota Power is the project proposer under EQB's definition.¹⁴ The Commission should then consider whether petition is timely under the circumstances. The Commission should deny the petition if it decides it is incomplete and/or not properly before it.

If the Commission is not convinced by MP's arguments or takes no position with regard to MP's filing, it may consider whether to direct the preparation of an EAW. In this event, the Commission should individually evaluate the relevant decision criteria of Minnesota Rule 4410.1700, Subp. 7 (pages 2-3 above) to determine whether an EAW is justified based on these factors.

Staff notes that the Commission's decision to approve the Affiliated Interest Agreement is primarily a review of a contractual arrangement for procurement of a share of the plant's output, and is separate from the Commission's siting authority which includes environmental review requirements.¹⁵

In its *Order Referring Gas Plant for Contested Case Proceedings and Order for Hearing*, the Commission provided that certificate of need criteria may be applied to the project including potential human and environmental impacts.¹⁶ There is no dispute that the Commission considers natural and socioeconomic environments, including human health as part of its determination of need for proposed projects. However a need determination is primarily designed to consider whether a project is needed and to determine its size, type and timing relative to other available alternatives including a no-build alternative.

HTE's petition incorrectly states that the Commission prepared an EAW for the Mankato Energy Center Expansion Project, a similar, but smaller project located within Minnesota. The Commission issued an Environmental Assessment (EA) under the Commission's siting authority but did not conduct an EAW analysis. An EA evaluates the potential human and environmental

¹³ Under Minnesota Rule 4410.0100, Subp. 64 "Project" means a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly. The determination of whether a project requires environmental documents shall be made by reference to the physical activity to be undertaken and not to the governmental process of approving the project.

¹⁴ Under Minnesota Rule 4410.0100, Subp. 68 "Proposer" means the person or governmental unit that proposes to undertake or to direct others to undertake a project.

¹⁵ For reference, a Commission siting review of a proposed large energy facility would typically undergo an environmental evaluation (such an Environmental Assessment or Environmental Impact Statement) as provided in Minnesota Statutes Chapter 216E and Minnesota Rules Chapter 7850.

¹⁶ Page 5 of e-Dockets Number 20179-135644-01, September 19, 2017.

impacts of the project and possible mitigation measures but does not, in itself, analyze the need for additional environmental review.

VI. Decision Options

1. Deny the petition for lack of jurisdiction.
2. Grant the Petition pursuant to Minn. R. 4410.1100, subp. 6 and 4410.1700, subp. 7, and:
 - a. approve the Petition and direct MP, in consultation with DOC and other agencies, to prepare an environmental assessment worksheet for the NTEC project.
 - b. direct MP to provide data as required by MR 4410.1400.
 - c. direct staff to establish a comment period on the EAW.
 - d. delegate authority to the Executive Secretary to undertake notice and administrative functions as required to prepare an EAW.
3. Deny the Petition on the merits pursuant to Minn. R. 4410.1100, subp. 6 and 4410.1700, subp. 7.
4. Take some other action.

Staff Recommendation: 1 or 3