



**Minnesota Center for
Environmental Advocacy**

October 24, 2018

Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

VIA ELECTRONIC FILING

*Re: In the Matter of Minnesota's Power Petition for Approval of the EnergyForward
Resource Package*
Docket No.: E-015/AI-17-568

The Clean Energy Organizations (CEOs) submit this letter in advance of the Minnesota Public Utilities Commission (Commission)'s determination of what action it should take with respect to Honor the Earth's request to comply with the Minnesota Environmental Policy Act (MEPA).

Honor the Earth petitioned the Commission on June 29, 2018 to complete Environmental Review (either an Environmental Assessment Worksheet (EAW) or an Environmental Impact Statement (EIS)) before making a final decision on the approvals required for construction of the Nemadji Trail Energy Center (NTEC).

As stated in that petition,

In particular, Honor the Earth requests that the Commission comply with Minn. R. 4410.2000, subp. 2, which requires that the Commission prepare an Environmental Impact Statement ("EIS") for any electric generation project, such as the NTEC, with a capacity of greater than 50 megawatts, which is the numerical threshold established by Minn. R. 4410.4300, subp. 3, and Minn. R. 4410.4400, subp. 3.¹

As CEOs stated in our Reply Brief, we agree with Honor the Earth that approval of the affiliated interest agreement as a prerequisite to construction of NTEC is a governmental action subject to MEPA.² Unfortunately, the Commission did not respond to Honor the Earth's petition or request comments on the petition. Instead, the Commission apparently concluded (despite the above-quoted language) that the petition was for a discretionary EAW pursuant to Minn. R. 4410.1000

¹ Honor the Earth Petition for Minnesota Environmental Policy Act Review of Minnesota Power's Petition for Approval of Gas Plant Proposal, June 29, 2018.

² CEOs' Post-Hearing Reply Brief at 24-25.

subp. 3(A) and that Honor the Earth must go through the Environmental Quality Board (EQB) in order for the Commission to consider the request.³ The Administrative Law Judge (ALJ) subsequently declined to address the issue in her recommendation stating that it was not within the scope of issues agreed to by the parties.⁴

CEOs disagree that Honor the Earth was required to go through the EQB when the Commission's application of MEPA is mandatory rather than discretionary. And CEOs disagree that Honor the Earth was required to be a formal party in order to point out the Commission's statutory duty. Nevertheless, Honor the Earth complied with the Commission's directive and submitted a petition for an EAW with 129 signatures to the EQB on October 8, 2018.⁵ In response, the EQB notified the Commission on October 16, 2018 that "[b]ased on a review of the facts that EQB staff were presented in the petition, it is our opinion that Minnesota Statute 116D.01 and Minnesota Rules Chapter 4410 apply to the proposed governmental action being considered by the PUC."⁶

We agree. MEPA states that "[w]here there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit."⁷ EQB has established categories of actions for which an EIS or EAW is mandatory,⁸ and construction of a large electric power generating plant meets the threshold for a mandatory EIS.⁹ A large electric power generating plant is defined as "any electric power generating plant or combination of plants at a single site with a combined capacity of 50,000 kilowatts or more."¹⁰ The gas plant for which Minnesota Power is seeking approval of the affiliated interest agreements certainly meets this definition.

Minnesota Power claims that approval of the affiliated interest agreements are not "projects" under MEPA,¹¹ but this is a misunderstanding of MEPA. A "project" is defined as:
a governmental action, the results of which would cause physical
manipulation of the environment, directly or indirectly. The

³ Staff Briefing Papers October 18, 2018 Meeting Agenda efiled October 11, 2018 at 48.

⁴ Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation at 102-03.

⁵ Citizens' Petition for Review Under Minnesota Environmental Policy Act Review of Minnesota Power's Petition for Approval of Gas Plant Proposal, October 8, 2018 to EQB filed in edockets on 10/16/18.

⁶ Letter from EQB to PUC re Petition for an Environmental Assessment Worksheet for the proposed Nemadji Trails Energy Center at 1.

⁷ Minn. Stat. § 116d.04, subd. 2a(a).

⁸ *Id.* at subd. 2a(b).

⁹ Minn. R. 4410.4400, Subp. 3.

¹⁰ Minn. R. 4410.0200, Subp.41; Minn. R. 7849.1100.

¹¹ See Letter from Minnesota Power to Dan Wolf e-filed October 22, 2018.

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.*¹²

This definition is clear that the “project” is the governmental action, i.e., the Commission’s approval of the affiliated agreement. The project here occurs in Minnesota and the *result* of the project, if approved, is the construction of a gas plant. There is no question that constructing a gas plant causes “physical manipulation of the environment.” And there is therefore no question that this proceeding constitutes a “project” according to MEPA.

The question of when a governmental action rises to the level of a project was addressed in *In the Matter of the Petition for an Environmental Assessment Worksheet for the 33rd Sale of State Metallic Leases in Aitkin, Lake, & St. Louis Counties*.¹³ In *Metallic Leases*, the court distinguished between governmental actions that might not result in physical manipulation of the environment (such as approving planning documents or approving lease sales) such that they were not “projects,” and governmental actions where the results were “sufficiently definite” and “site-specific” (such as approving a proposed trail) such that the governmental action was a “project” and Environmental Review was required.¹⁴ Here, the proposed gas plant is not merely a plan, but is sufficiently definite and site specific. The Commission’s approval of the affiliated interest agreement is therefore a project.

Minnesota Power also misunderstands how MEPA applies when the physical manipulation of the environment might occur partially or wholly outside of the state but for which the governmental action (or “project”) clearly occurs in Minnesota.¹⁵ The fact that NTEC is proposed to be constructed in Wisconsin and owned by Wisconsin companies is irrelevant to the application of MEPA and would not violate the dormant commerce clause.

First, no language in MEPA suggests that Minnesota government entities can avoid their responsibilities simply by crossing the border and building a controversial or environmentally-damaging project in another state.¹⁶ Moreover, Minnesota courts have stated that MEPA’s “mandates on Minnesota governmental units do not evaporate when those units take action on

¹² Minn. R. 4410.0200, Subp. 65.

¹³ 838 N.W.2d 212 (Minn. Ct. App. 2103) rev. denied (Nov. 26, 2013).

¹⁴ *Id.* at 217 (relying on *Minnesotans for Responsible Recreation v. Dep’t of Natural Res.*, 651 N.W.2d 533 (Minn. Ct. App. 2002))

¹⁵ See Letter from Minnesota Power to Dan Wolf at 3.

¹⁶ See Minn. Stat. Ch. 116D.

portions of cross-border project built outside of Minnesota.”¹⁷ This same approach is used for projects subject to the National Environmental Policy Act (NEPA).¹⁸

The CEOs emphasize that MEPA applies to the Commission’s decision about whether or not to approve NTEC and that Environmental Review must be completed before the Commission can make a “final governmental decision” about the project.¹⁹ Approving the affiliated interest agreement would constitute a final governmental decision to grant a permit, which is defined as any “certificate or other entitlement for use or permission to act that may be granted or issued by a governmental unit”²⁰ and would violate MEPA.

There is an exemption to MEPA that could potentially apply in this situation, however. “[P]rojects for which, and so long as, a governmental unit has denied a required governmental approval” receive a standard exemption from Environmental Review.²¹ Accordingly, if the Commission denies Minnesota Power’s affiliated interest agreement approval, the Commission is exempt from complying with MEPA. Otherwise MEPA applies and the Commission must complete an EIS before it re-considers NTEC on the merits.²²

The purpose of MEPA is

- (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment;
- (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and (c) to enrich the understanding of the ecological

¹⁷ *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Engineers*, No. 13-2262, 2015 WL 2251481 *1, *12 (D. Minn. May 13, 2015), *aff’d*, 826 F.3d 1030 (8th Cir. 2016).

¹⁸ *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 536–37 (D.C. Cir. 1993) (holding that NEPA’s environmental impact statement requirements applied to the National Science Foundation’s plans to incinerate food wastes in Antarctica because NEPA applies to the decisionmaking process itself, which was occurring in the U.S., even though the incineration occurred on another continent); *see also Minn. Ctr. for Env’tl Advocacy v. Minn. Pollution Control Agency*, 644 N.W. 2d 457, 468 (Minn. 2002) (nothing that Minnesota courts look to NEPA case law for guidance).

¹⁹ Minn. Stat. § 116D.04, subd. 2b; *see also In re North Dakota Pipeline Co. LLC*, 869 N.W. 2d 693, 698 (Minn. Ct. App. 2015) (“[B]ased on the plain language of subdivision 2b [of MEPA], the MPUC’s issuance of a certificate of need constitutes a final governmental decision that is prohibited until the required environmental review is completed.”).

²⁰ Minn. R. 4410.0200, Subp. 58.

²¹ Minn. R. 4410.4600, Subp. 2C.

²² *See In re North Dakota Pipeline Co. LLC*, 869 N.W.2d at 698 (Minn. 2002) (“Finally, we point out that requiring an EIS during the initial certificate of need proceedings affirms the emphasis MEPA places on conducting environmental review early on in the decision-making process.”).

systems and natural resources important to the state and to the nation.²³

CEOs urge the Commission to recognize the purpose and parameters of MEPA and either complete the required Environmental Review or deny Minnesota Power's request to approve the affiliated interest agreement for all of the reasons laid out in this robust record. CEOs welcome the opportunity to discuss this issue further at the hearing on October 29, 2018.

Sincerely,

/s/ Leigh Currie
Staff Attorney

LC/el

cc: eDocket Electronic Service Recipients

²³ Minn. Stat. § 116D.01.