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**VIA EFILING**

February 13, 2019

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

**Re: Petition for MEPA Review for In the Matter of Minnesota Power's Petition for Approval of Gas Plant Proposal  
E-015/AI-17-568; OAH 68-2500-34672**

Dear Mr. Wolf:

Please find enclosed the following documents:

- Honor the Earth Petition for Reconsideration of Order Approving Affiliated interest Agreements with Conditions for Nemadji Trails Energy Center; and
- The certificate of service for the foregoing.

Thank you for your time and attention.

Very truly yours,

Paul C. Blackburn

enc

**STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION**

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
Katie Sieben	Commissioner
John A. Tuma	Commissioner

<b>In the Matter of Minnesota Power's Petition for Approval of Gas Plant Proposal</b>	<b>E-015/AI-17-568 OAH 68-2500-34672</b>
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**HONOR THE EARTH  
PETITION FOR RECONSIDERATION OF  
ORDER APPROVING AFFILIATED INTEREST AGREEMENTS  
WITH CONDITIONS FOR  
NEMADJI TRAILS ENERGY CENTER**

**February 13, 2019**

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## INTRODUCTION AND SUMMARY

Honor the Earth hereby respectfully petitions the Minnesota Public Utilities Commission (“Commission”) pursuant to Minn. Stat. § 216B.27 that it reconsider its January 24, 2019, Order Approving Affiliated Interest Agreements with Conditions in Commission Docket No. E-015/AI-17-568 (“Final Order”). Honor the Earth specifically requests that the Commission reconsider its decision to not conduct a review of the environmental effects of the its decision pursuant to Minn. Stat. Ch. 116D, the Minnesota Environmental Policy Act (“MEPA”) for the Nemadji Trails Energy Center (“NTEC”) under Minn. Stat. § 216B.48, which consideration is in response to Minnesota Power’s (“MP”) October 24, 2017, Petition for Approval of Gas Plant Proposal in MNPUC Docket No. E015/AI-17-568 (“October 24 Petition”).

Pursuant to Minn. Stat. § 216B.27, subd. 1, a party to a proceeding may apply to the Commission for a rehearing “in respect to any matters determined by the decision” within 20 days of service of any decision constituting an order or determination. Pursuant to Minn. R. 7852.3000, subp. 1, “[a] party or a person aggrieved and directly affected by a commission decision or order may file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served . . . .” A petition for rehearing or reconsideration must set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. Minn. Stat. § 216B.27, subd. 2; Minn. R. 7829.3000, subp. 2. Likewise, a request for an amendment must set forth the particular amendments desired and the reasons for the amendments. *Id.* To be effective, “[a] petition must be served on the parties and participants in the proceeding,” Minn. R. 7829.3000, subp. 3, after which other parties may file answers within 10 days of service of the petition. Minn. R. 7829.3000, subp. 4.

With regard to the effect of an order pending a decision on rehearing, Minn. Stat. § 216B.27, subd. 3, directs that “[n]o order of the commission shall become effective while an application for a rehearing or a rehearing is pending and until ten days after the application for a rehearing is either denied, expressly or by implication, or the commission has announced its final determination on rehearing.” Although Minn. R. 7829, subp. 2, states that “[t]he commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition,” any discretion granted by this regulation with regard to staying an order is limited by the clear language of Minn. Stat. § 216B.27, subd. 3. Thus, the Final Order will not go into effect until the Commission acts on this petition.

Should the Commission grant a rehearing, it may reverse, change, modify, or suspend its original decision if, after rehearing, it finds the original decision to be “unlawful or unreasonable.” Minn. Stat. § 216B.27, subd. 3.

The NTEC is a proposed 525 MW 1x1 combined-cycle, natural gas power plant which is being jointly developed by MP’s affiliate, South Shore Energy, LLC (“South Shore”), and Dairyland Power Cooperative (“Dairyland”) for siting in Superior, Wisconsin.<sup>1</sup> Although this facility would be located in Superior, Wisconsin, approximately 6 miles from Duluth, Minnesota, and approximately two and one-half miles from the nearest land within Minnesota, its proximity to Minnesota means that it nonetheless would have a significant impact on Minnesota’s environment. Since the Commission’s review of the NTEC under Minn. Stat. § 216B.48 is a major governmental action that would have significant environmental effects on the people, air, land, water, and climate of Minnesota, the Commission is required to consider the environmental impacts of its approval of the affiliated interest agreements for this facility in accordance with

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<sup>1</sup> Petition for Approval of Gas Plant Proposal at 1-1, MNPUC Docket No. E015/AI-17-568 (Oct. 24, 2017).

the procedures established by MEPA and its implementing regulations in Minnesota Rules Chapter 4410 (“MEPA Rules”).

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. In the alternative, Honor the Earth requests that the Commission prepare an EIS pursuant to Minn. R. 4410.2000, subp. 3, because the NTEC would have the potential for significant environmental effects. In the alternative, Honor the Earth requests that the Commission prepare an EAW pursuant to Minn. R. 4410.1000, subp. 3(A), because the NTEC may have the potential for significant environmental effects. In the alternative, Honor the Earth requests that the Commission prepare an EAW for the Project in response to the Citizen’s Petition submitted to the Minnesota Environmental Quality Board (“EQB”) on October 8, 2018.

## **BACKGROUND**

Minn. Stat. § 216B.48 requires that the Commission approve affiliated interest agreements between Minnesota public utilities and affiliated entities.<sup>2</sup> This statute, in relevant part, states:

No contract or arrangement, including any general or continuing arrangement, providing for the furnishing of management, supervisory, construction, engineering, accounting, legal, financial, or similar services, and no contract or arrangement for the purchase, sale, lease, or exchange of any property, right, or thing, or for the furnishing of any service, property, right, or thing, other

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<sup>2</sup> Petition for Approval of Gas Plant Proposal at 1-9, MNPUC Docket No. E015/AI-17-568 (Oct. 24, 2017).

than those above enumerated, . . . between a public utility and any affiliated interest as defined in subdivision 1, clauses (1) to (8), or any arrangement between a public utility and an affiliated interest as defined in subdivision 1, clause (9), . . . is valid or effective unless and until the contract or arrangement has received the written approval of the commission.

\* \* \*

The commission shall approve the contract or arrangement made or entered into after that date only if it clearly appears and is established upon investigation that it is reasonable and consistent with the public interest.<sup>3</sup>

The purpose of Minn. Stat. § 216B.48 is to prevent a Minnesota public utility from avoiding Commission review of major expenditures via the expedient of contracting for property or services with a related corporate entity that is not a public utility. It is intended to protect the interests of Minnesota’s ratepayers by ensuring that public utilities enter into contracts that are financially reasonable and in the public interest. It applies to contracts for property or services located either within or outside the State of Minnesota. The statutory requirement for review of affiliated interest agreements is independent of state law requirements for approval by the Commission of integrated resource plans (“IRP”) pursuant to Minn. Stat. § 216B.2422 and Minn. Rules Chapter 7843. Approval of affiliated interest agreements is required regardless of whether or not the subject matter of an affiliated interest agreement is also considered in the context of an IRP.

The above captioned docket is related to *In the Matter of Minnesota Power’s 2015-2029 Integrated Resource Plan*, Docket. No. E015/RP-15-690 (“IRP Docket”), in which docket MP seeks Commission approval of its overall energy plan.<sup>4</sup> In the IRP Docket, MP specifically

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<sup>3</sup> Minn. Stat. § 216B.48, subd. 3.

<sup>4</sup> In the Matter of Minnesota Power’s 2015-2029 Integrated Resource Plan, Docket No. E015/RP-15-690, 2015 Integrated Resource Plan at 16 (Sept. 1, 2015).

requests approval of its EnergyForward Resource Package, which package comprises MP's overall energy plan and provides for acquisition of 250 MW of wind, 10 MW of solar, and approximately 250 MW of dispatchable natural gas capacity.<sup>5</sup>

In a July 28, 2017, combined Compliance Filing in Docket No. RP-15-690 (IRP) and Petition for Approval of the affiliated interest agreements, MP requested that the Commission approve both its IRP and the affiliated interest agreements for the NTEC. By order dated September 19, 2017, the Commission rejected MP's request, instead ordered MP to file an updated petition "limited to those portions relevant to consideration of the proposed gas plant," and referred approval of the NTEC affiliated interest agreements to the Office of Administrative Hearings ("OAH") for a contested case hearing. The Commission required that this hearing consider the following matters:

- an updated forecast of demand;
- costs, including socioeconomic and environmental costs, which would include consideration of the most recent environmental externality values established by the Commission in Docket 14-643;
- alternatives to some or all of the gas plant energy and capacity proposed by MP, including but not limited to alternatives such as additional wind and solar resources (with updated costs), storage, demand response, and additional energy efficiency;
- the renewable resource requirements set forth in Minn. Stat. § 216B.2422, and Minn. Stat. § 216B.243, subd. 3a; and
- consideration of compliance with the affiliated interest statute.

On October 24, MP filed its October 24 Petition, by which it seeks approval specifically of the affiliated interest agreements.

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<sup>5</sup> In the Matter of Minnesota Power's 2015-2029 Integrated Resource Plan, Docket No. E015/RP-15-690, Compliance Filing at 1-1 (July 28, 2017). Specifically, the Company requests approval of (1) Power Purchase Agreements ("PPAs") for 250 MW of wind and 10 MW of solar energy; (2) affiliated interest agreements for approximately 250 MW of dispatchable natural gas capacity; and (3) associated tariff changes/variances.

On February 20, 2018, the Commission provided for a public comment period that ended on March 23, 2018, in Docket No. AI-17-568. In response to this comment period, Honor the Earth first submitted timely comments and raised the issue of MEPA review for the NTEC and requested Commission compliance with MEPA.<sup>6</sup> To date, the Commission has not responded to this request.

The Commission issued its Final Order approving the affiliated interest agreements on January 24, 2019, in which the Commission considered whether MEPA applied to the decision contained in the Final Order and determined that MEPA did not apply, Final Order at 6-7 (“For all these reasons, the Commission will deny the request for MEPA review”), but did not include this decision in its final ordering paragraph. Final Order at 29-30. Regardless, the Final Order contains the Commission’s final decision on the issue of whether MEPA applies to Docket No. AI-17-568, and whether or not to grant the three separate requests presented to the Commission that it comply with MEPA:

- Honor the Earth’s March 23, 2018, Comments;
- Honor the Earth’s June 29, 2018, Petition for Minnesota Environmental Policy Act Review of Minnesota Power’s Petition for Approval of Gas Plant Proposal; and
- The Citizens’ Petition for Review Under Minnesota Environmental Policy Act of Pending Decision by the Minnesota Public Utilities Commission for the Proposed Nemadji Trails Energy Center submitted to the EQB on October 8, 2018, which Petition the EQB forwarded for Commission consideration.

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<sup>6</sup> Comments of Honor the Earth at 21 (March 23, 2018).

## ARGUMENT

### I. THE FINAL ORDER VIOLATES THE MINNESOTA ENVIRONMENTAL RIGHTS ACT

The Commission's approval of the affiliated interest agreements violates the Minnesota Environmental Rights Act, Minn. Stat. Ch. 116B ("MERA"). Minn. Stat. § 116B.10, subd. 1, allows civil action against the State "where the nature of the action is a challenge to an environmental quality standard . . . order . . . promulgated or issued by the state or any agency or instrumentality thereof . . ." A plaintiff in such action must prove that "the environmental . . . order . . . is inadequate to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction."<sup>7</sup>

MEPA contains "environmental quality standards." The Commission's failure to comply with MEPA is *prima facie* evidence of its failure to issue an order that is adequate "to protect the air, water, land, or other natural resources located within the state from pollution, impairment, or destruction." Therefore, the Final Order is in violation of MERA.

### II. THE FINAL ORDER INCORRECTLY INTERPRETS MEPA

The Commission presents a number of arguments on pages 6 and 7 of the Final Order that have no merit and misinterpret MEPA, including:

- Honor the Earth proposes to expand the Commission's jurisdiction over siting of power plants to include out-of-state plants;
- Environmental review by the Commission would be duplicative of an environmental review by Wisconsin;

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<sup>7</sup> Minn. Stat. § 116B.10, subd. 2 (2019).

- Commission jurisdiction under MEPA is limited to the scope of its geographic jurisdiction to approve the construction of power plants;
- MEPA’s jurisdiction over out-of-state projects is limited to “cross-border projects;” and
- Approval of the Affiliated Interest Agreements does not authorize construction or operation of NTEC, such that MEPA does not apply.

None of the foregoing arguments have merit.

**A. Honor the Earth and the CEOs Do Not Propose that the Commission Take Jurisdiction Over the Siting of a Power Plant in Another State**

The Commission falsely claims “Honor the Earth and the CEOs assert that MEPA expands the Commission’s jurisdiction over power plant siting . . . .”<sup>8</sup> The record shows that neither Honor the Earth nor the CEOs propose that the Commission assert jurisdiction over the location of a power plant in Wisconsin, either under MEPA or any other law. Assessment of the environmental impacts of a Minnesota agency action to financially support construction of a power plant is entirely separate from a decision about where to locate a power plant. An environmental review may inform an agency’s decisions about the location of a power plant, if such agency has the authority to site a power plant and is required to conduct an environmental review to inform such siting authority. However, analyzing the environmental impacts of Commission approval of affiliated interest agreements does not make environmental review tantamount to a siting decision.

Honor the Earth and the CEO’s propose only that the Commission assess the environmental impacts within Minnesota that result from committing Minnesota ratepayer

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<sup>8</sup> Final Order at 6.

dollars to a proposed new power plant located near the border with Minnesota via the formal MEPA process rather than informally through a contested case hearing process. Performing an environmental analysis of the impacts of funding construction of an out-of-state plant is not the equivalent of making a siting decision.

The State of Wisconsin has authority to site a power plant within its borders. Performing a MEPA review of the Commission's approval of the affiliated interest agreements no more sites NTEC than did the Commission's analysis of the environmental impacts of NTEC in its contested case hearing. Environmental review – either via MEPA or in a contested case hearing – does not limit the State of Wisconsin's legal authority to site a power plant wherever it chooses using Wisconsin ratepayer funds.

**B. Wisconsin Environmental Review Will Not Evaluate Impacts of the NTEC Within Minnesota, Such that MEPA Review Would Not Be Duplicative**

The Commission asserts that its compliance with MEPA would be duplicative of Wisconsin environmental review; however, the Commission makes no assessment of what environmental review will be required by the State of Wisconsin, much less whether or not a review by a Wisconsin agency would consider impacts to the people, lands, water, and air within Minnesota.

Wisconsin agencies are limited to consideration of environmental impacts within the geographic boundaries of Wisconsin for the same reasons that Minnesota agencies must evaluate only those impacts to people, land, water, and air within Minnesota. Therefore, a possible environmental review by Wisconsin will not evaluate the impacts of the NTEC on Minnesota and would not be duplicative of a Commission review of the environmental impacts of NTEC on Minnesota's peoples and land.

Both the Commission and MP are careful to use the term “environmental review” by Wisconsin without describing what such review might entail. Nothing in Wisconsin law requires that an EIS be prepared for an electric generation facility.<sup>9</sup> Wisconsin law gives agencies tremendous latitude with regard to whether or not an EIS need be prepared.<sup>10</sup> Wisconsin law does not expressly require the preparation of an environmental assessment or environmental impact statement for power plants.<sup>11</sup> There is no certainty that Wisconsin will conduct any substantial environmental review at all.

The Commission’s concerns about duplicative review ring hollow given that it allowed all parties to include information about NTEC’s environmental impacts within the record and specifically requested such information in its public comment notice. If it were concerned about duplicative review, it would have avoided including such information in the record. The Commission understood during its hearing that the Project would have environmental impacts within Minnesota and that an environmental review by Wisconsin – if any – would not be completed before the Commission made a decision. Whatever review Wisconsin does will not address impacts in Minnesota and it was not completed before Commission approval of the Project, such that Wisconsin review has not and will not provide usable information to the Commission, other Minnesota agencies, other Minnesota governments, or the people of Minnesota about impacts to the people of Minnesota or its land, water, air, and climate.

The Commission has already determined in effect that a review of NTEC’s impacts on Minnesota is relevant, appropriate, and not duplicative; it just doesn’t want to comply with MEPA’s procedural requirements. Further, the State of Wisconsin has no jurisdictional authority to analyze the environmental impacts of NTEC on Minnesota than Minnesota does to analyze its

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<sup>9</sup> See Wis. Admin. Code Ch. NR 150.

<sup>10</sup> Wis. Admin. Code § NR 150.20(4).

<sup>11</sup> See Wis. Stat. § 1.11 (2019); Wis. Stat. Ch. 274 (2019).

environmental impacts on Wisconsin, such that MEPA review would not be duplicative of a possible environmental review by Wisconsin. The Commission's claim that a review by it of impacts within Minnesota would be duplicative of environmental review by Wisconsin is therefore completely specious.

**C. The Existence of In-State Permitting Authority Under Minn. Stat. §§ 216E.02, Subd. 2 and Minn. R. 4410.4300, Subp. 3, Is Irrelevant to the MEPA Jurisdictional Analysis**

The Commission states “the Commission’s siting and certificate-of-need statutes make clear that its jurisdiction over power plants is limited to facilities proposed to be built in Minnesota.” In a footnote, the Commission cites Minn. Stat. § 216E.02, subd. 2, and Minn. R. 4410.4300, subp. 3, to support this argument.

MEPA review is triggered by agency action under many substantive statutes. Minnesota’s agencies “shall . . . utilize a systematic, interdisciplinary approach . . . in decision making which may have an impact on the environment . . . .”<sup>12</sup> “Where 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.”<sup>13</sup> Thus, an EIS must be prepared for all major governmental actions where there is a potential that the action may “result” in potential significant environmental effects. The fact that different statutory and regulatory authorities allow agencies to take actions on similar types of private actions does not limit MEPA jurisdiction over each agency action. MEPA applies to all agency actions that may have “significant environmental effects” regardless of whether or not other agency actions address similar subject matters. The fact that an agency action is triggered under one statute is irrelevant to whether or review is triggered under another

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<sup>12</sup> Minn. Stat. § 116D.03, subd. 2(2) (2019).

<sup>13</sup> Minn. Stat. § 116D.04, subd. 2a(a) (emphasis added) (2019).

statute. Instead, MEPA contains clear standards for determining whether environmental review is required for a particular agency action at all, and if it is, what type of review is required.

Minn. Stat. § 216E.02, subd. 2, grants the Commission authority to “provide for site and route selection for large electric power facilities.” Further, the Environmental Quality Board has determined that the environmental review required by Minn. Stat. Ch. 216E and Minn. Stat. § 216B.243 may serve as an alternative form of review under Minn. R. 4410.3600. These laws apply only to power plants that are proposed to be constructed within Minnesota. This grant of authority is entirely separate from the statutory authority granted to the Commission by Minn. Stat. § 216B.48. The fact that Minnesota law establishes a process for approving the siting and construction of power plants within the state is irrelevant to whether or not the Commission must conduct a MEPA review for its actions under Minn. Stat. § 216B.48. MEPA itself provides a mechanism for making this determination, and the Commission must apply this analysis. The fact that the Commission has jurisdiction under Minn. Stat. § 216E.02, subd. 2, and Minn. R. 4410.4300, subp. 3, over the siting of power plants within Minnesota is irrelevant to whether or not Commission action under Minn. Stat. § 216B.48 would result in significant environmental effects.

**D. MEPA Jurisdiction Over Agency Actions Related to Out-of-State Facilities Is Not Limited to Cross-Border Facilities**

The Commission argues: “While there may be situations in which MEPA’s reach extends into neighboring states, such as cross-border projects, this case does not present such a situation. The NTEC facility will be built entirely within Wisconsin, more than two miles from the Minnesota border. It is therefore subject to that state’s permitting and environmental-review

regulations, not Minnesota's.”<sup>14</sup> It cites an unpublished U.S. District Court case, *Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 2015 WL 2251481, at \*12 (D. Minn. May 13, 2015), to support this proposition.

The *Joint Powers* decision involved a joint flood diversion project planned in the Fargo-Moorhead Region of Minnesota and North Dakota. The local agency responsible for the project was the he Fargo–Moorhead Diversion Board of Authority (“Diversion Authority”), the members of which included both Minnesota and North Dakota agencies.<sup>15</sup> Even though Diversion authority decisions required the approval of Minnesota agencies, the Diversion Authority began construction before completing MEPA review for the diversion project prior to the start of its construction in North Dakota.<sup>16</sup> Although this action was initially brought against the U.S. Army Corps of Engineers, the Court enjoined a separate state court action and accepted jurisdiction to resolve state law matters, including claims that the Diversion Authority violated MEPA and the Minnesota Environmental Rights Act (“MERA”).<sup>17</sup> While the Court based its decision on a finding that the diversion project would “indisputably be constructed and have effects, in part, in Minnesota,” it did not consider the situation where a project indisputably would be funded by Minnesota ratepayers and have environmental effects, in part, in Minnesota.<sup>18</sup> The court found that “These mandates [MEPA and MERA] on Minnesota governmental units do not evaporate when those units take action on portions of cross-border project built outside of Minnesota.”<sup>19</sup> It was concerned that excluding cross-border projects from MEPA review would encourage Minnesota agencies to “build momentum” by passively

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<sup>14</sup> Final Order at 6.

<sup>15</sup> *Joint Powers* at \*1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.*

allowing construction in other states, and that such action would “eviscerate[] the power of MEPA.”<sup>20</sup> It did not hold that a Minnesota agency is prohibited from considering whether a financial commitment to an out-of-state power plant is in the public interest of the Minnesota citizens it serves, whether that interest be financial or environmental.

The Commission cites no precedent supporting its argument that MEPA jurisdiction is limited to only “cross-border projects.” The Commission’s statement that “there may be situations in which MEPA’s reach extends into neighboring states, such as cross-border projects . . .” is an admission that MEPA jurisdiction is not strictly limited to agency approval of projects located at least in part in Minnesota. The Commission indisputably has the authority to determine whether approval of an affiliated interest agreement is in the public interest, and the public’s interest is not limited to the financial impacts of such approval. Therefore, the Commission may consider the environmental impacts of out-of-state facilities subject to affiliated interest agreement approval, including NTEC, to the extent that it has substantial environmental effects on Minnesota’s land, air, water, and climate.

**E. The NTEC Approval Is a “Project” Under MEPA Because It is a Governmental Action “the Results of Which Would Cause Physical Manipulation of the Environment, Directly or Indirectly”**

The Commission argues:

MEPA review of NTEC is not authorized for the further reason that there is no MEPA “project” before the Commission. A project is a governmental action, “the results of which would cause physical manipulation of the environment.” Minnesota Power is not seeking a permit to construct or operate NTEC; it is seeking approval of agreements effectuating its purchase of capacity from the plant. The requested “governmental action” pertains only to these agreements, and their approval will not grant permission to construct or operate the plant.<sup>21</sup>

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<sup>20</sup> Id.

<sup>21</sup> Final Order at 6.

The Commission's quotation Minn. R. 4410.0200, subp. 65, excludes the full language of the regulation, which states: "Project" means a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly." Minn. R. 4410.0200, subp. 65.

MEPA projects are not limited to only those that result in a direct physical manipulation of the environment. Instead, the language must be read more broadly to encompass agency actions that indirectly "cause" physical impacts. This interpretation is supported by the definition "government action" in Minn. R. 4410.0200, subp. 33, which states that "government action" includes "activities . . . partially conducted, permitted, assisted, financed, regulated, or approved by governmental units . . . ." Under the Commission's narrow interpretation of the definition of "project," no project that was merely "financed" by a Minnesota agency would be subject to MEPA review, because such financing would not itself result, directly or indirectly, in an approval to physically manipulate of the environment. Likewise, the definition of "governmental action" extends broadly to activities that are "regulated" as well as those that are permitted or approved by Minnesota agencies. The use of the word "regulated" without qualifier indicates that MEPA applies to all types of regulation, not just approvals of construction. Thus, "governmental action" is not limited to activities that directly approve construct and operation of a facilities.

Here, the approval of the affiliated interest agreements is similar to approval of governmental financing of a project. Neither financing a facility nor approval of a contract that supports a facility financially would directly permit or approve construction of a facility. In both circumstances, a facility might or might not be approved by some other entity. The need for other approvals does not exempt an agency that undertakes an activity that finances a facility

from MEPA, if such financing would directly or indirectly cause a physical manipulation of the environment. When read together, the clear intent of the MEPA definitions of “governmental action” and “project” is to require MEPA review for all types of agency actions that “cause,” either directly or indirectly, impacts to the environment, regardless of whether or not an agency actually approves or permits a facility. Thus, the Commission’s understanding of the definition of “project” by the MEPA regulations is overly narrow and not in accordance with MEPA.

### **III. THE COMMISSION MUST CONDUCT AN ENVIRONMENTAL REVIEW FOR THE NTEC PURSUANT TO MEPA**

#### **A. MEPA Environmental Review Requirements**

MEPA requires 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.”<sup>22</sup> The MEPA regulations provide the following relevant definitions:

"Governmental action" means activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government.”<sup>23</sup>

"Approval" means a decision by a unit of government to issue a permit or to otherwise authorize the commencement of a proposed project.”<sup>24</sup>

"Environment" means physical conditions existing in the area that may be affected by a proposed project. It includes land, air, water, minerals, flora, fauna, ambient noise, energy resources, and artifacts or natural features of historic, geologic, or aesthetic significance.”<sup>25</sup>

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<sup>22</sup> Minn. Stat. § 116D.04, Subd. 2a.

<sup>23</sup> Minn. Stat. § 116D.04, subd. 1a(d); see also Minn. R. 4410.0200, subp. 33.

<sup>24</sup> Minn. R. 4410.0200, subp. 4.

<sup>25</sup> Minn. R. 4410.0200, subp. 23.

"Permit" means a permit, lease, license, certificate, or other entitlement for use or permission to act that may be granted or issued by a governmental unit, or the commitment to issue or the issuance of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, by a governmental unit.<sup>26</sup>

"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.<sup>27</sup>

Thus, before a Minnesota government agency takes a major "governmental action" to "authorize the commencement of a proposed project" that might result in "significant environmental effects," such agency must prepare an environmental impact statement ("EIS"). MEPA and its regulations define both "governmental action" and "project" very broadly, indicating that the legislature sought to require MEPA review for all activities undertaken by the State that might significantly affect the environment.

MEPA does not itself define the term "major" in relation to "government action," and neither do its regulations. Instead, the MEPA regulations provide for a three tiered process to determine the degree of environmental review that an agency must undertake:

- first, an agency must decide whether or not a project is exempt from MEPA;
- second, if a project is not exempt, the agency must determine if a project falls within a mandatory MEPA review category for either an EAW or an EIS; and
- third, if a project does not fall within a mandatory review category, the agency must prepare either: (a) an Environmental Assessment Worksheet ("EAW") the purpose of which is to determine whether or not a project has a potential to significantly affect

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<sup>26</sup> Minn. R. 4410.0200, subp. 58.

<sup>27</sup> Minn. R. 4410.0200, subp. 65.

the environment; or (b) an EIS, when the agency determines that an EAW is not necessary, because it is clear that a project would have the potential for significant environmental effects.

The MEPA exemptions are contained in Minn. R. 4410.4600, which contains five standard exemptions<sup>28</sup> and a number of categorical exemptions.<sup>29</sup> The standard exemptions describe five specific procedural circumstances in which a project is deemed to be exempt from MEPA review, regardless of its size or nature.<sup>30</sup> The categorical exemptions identify types of projects that generally do not have a significant effect on the environment such that MEPA review is generally not required,<sup>31</sup> and also identify certain types of governmental activities that are deemed by law to be exempt from MEPA review.<sup>32</sup> Even if a project falls within a categorical exemption (other than that contained in Minn. R. 4410.4600, subp. 26), MEPA contains a savings clause that requires MEPA review should the evidence available to an agency show that a project may nonetheless have the potential for significant environmental effects.<sup>33</sup>

If a project is exempt, then no MEPA review is required.<sup>34</sup> If a project does not fall within one of these exemptions, an agency must prepare either an EAW or an EIS for the project.

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<sup>28</sup> Minn. R. 4410.4600, subp. 2.

<sup>29</sup> Minn. R. 4410.4600, subps. 2-27.

<sup>30</sup> Specifically, projects for which no governmental decisions are required; all governmental decisions have been made; approval has been denied; a substantial portion of construction has been completed; and environmental review under MEPA has been completed or is being conducted pursuant to an approved alternative review process. Minn. R. 4410.4600, subp. 2.

<sup>31</sup> Minn. R. 4410.4600, subp. 2.

<sup>32</sup> Minn. R. 4410.4600, subp. 26.

<sup>33</sup> Minn. R. 4410.4600, subp. 2, recognizes that even categorically exempt projects may have significant effects on the environment such that MEPA review is required (“Projects within subparts 3 to 25 and 27 are exempt . . . unless they have characteristics which meet or exceed any of the thresholds specified in part 4410.4300 or 4410.4400.” This savings clause is not applicable to the exemption contain in Minn. R. 4410.4600, subp. 26.

<sup>34</sup> Minn. R. 4410.4600, subp. 2.

If a project is not exempt from MEPA review, an agency must determine whether it falls within one of the MEPA mandatory review categories, in which case a project is deemed by law to require preparation of either an EIS<sup>35</sup> or an EAW.<sup>36</sup> When a governmental action falls within one of the mandatory EIS categories, the agency must prepare an EIS. When a governmental action falls within a mandatory EAW category, the agency must prepare an EAW, which could lead to preparation of an EIS, should the information in the EAW indicate that a project's environmental impacts would have the potential to significantly affect the environment.

When a project is not exempt and also does not fall within either a mandatory EIS or EAW category, the regulations provide for “discretionary” EAW<sup>37</sup> and EIS<sup>38</sup> processes, in which an agency is required to first prepare a “discretionary” EAW to preliminarily investigate the potential for a project to have a significant effect on the environment.<sup>39</sup> If the information in the EAW shows such effect, then the agency must prepare an EIS,<sup>40</sup> otherwise MEPA review ends with preparation of an EAW.

### **1. Projects Exempted from MEPA Review**

The MEPA regulations identify projects that are exempt from MEPA review under either (a) one of five standard exemptions, or (b) a number of project-specific exemptions.<sup>41</sup> The standard exemptions include:

- A. projects for which no governmental decisions are required;
- B. projects for which all governmental decisions have been made. However, this exemption does not in any way alter the prohibitions on final governmental decisions to approve a project under part 4410.3100;
- C. projects for which, and so long as, a governmental unit has denied a required governmental approval;

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<sup>35</sup> Minn. R. 4410.4400.

<sup>36</sup> Minn. R. 4410.4300.

<sup>37</sup> Minn. R. 4410.1000, subp. 3.

<sup>38</sup> Minn. R. 4410.2000, subp. 3.

<sup>39</sup> Minn. R. 4410.1000, subp. 1.

<sup>40</sup> Minn. R. 4410.2000, subp. 3.A.

<sup>41</sup> Minn. R. 4410.4600.

- D. projects for which a substantial portion of the project has been completed and an EIS would not influence remaining construction; and
- E. projects for which environmental review has already been completed or for which environmental review is being conducted pursuant to part 4410.3600 or 4410.3700 [the alternative review and model ordinance processes, respectively].<sup>42</sup>

Notably, there is no standard exemption based on whether a project is located outside of the borders of the State of Minnesota.

The specific exemptions contained in Minn. R. 4410.4600, subps. 3 to 25 and 27, release an agency from its obligation to perform a MEPA review, unless a project has “characteristics which meet or exceed any of the thresholds specified in part 4410.4300 or 4410.4400.”<sup>43</sup> Thus, categorical exemptions 3 to 25 and 27 are subject to a savings clause under which an agency must consider preparation of an EAW where the evidence available to the agency shows that a project may exceed an impact threshold. The only categorical exemption not subject to this savings clause is that that found in Minn. R. 4410.4600, subp. 26 “Exemption 26”.

The specific exemptions that are possibly relevant to the discussion here include the following:

**Subp. 3. Electric generating facilities.** Construction of an electric generating plant or combination of plants at a single site with a combined capacity of less than five megawatts is exempt.

**Subp. 20. Utilities.** Utility extensions are exempt as follows:

- A. water service mains of 500 feet or less and 1-1/2 inches diameter or less;
- B. local electrical service lines;
- C. gas service mains of 500 feet or less and one inch diameter or less; and
- D. telephone services lines.

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<sup>42</sup> Minn. R. 4410.4600, subp. 2.

<sup>43</sup> Minn. R. 4410.4600, subp. 1.

**Subp. 21. Construction projects.** The following projects are exempt:

- A. 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 is exempt.
- B. Accessory signs appurtenant to any commercial, industrial, or institutional facility are exempt.
- C. Operation, maintenance, or repair work having no substantial impact on existing structures, land use, or natural resources is exempt.
- D. Restoration or reconstruction of a structure is exempt, provided that the structure is not of historical, cultural, architectural, archaeological, or recreational value.
- E. Demolition or removal of buildings and related structures is exempt, except where they are of historical, archaeological, or architectural significance.

**Subp. 24. Financial transactions.** The following projects are exempt:

- A. Acquisition or disposition of private interests in real property, including leaseholds, easements, right-of-way, or fee interests, is exempt.
- B. Purchase of operating equipment, maintenance equipment, or operating supplies is exempt.

**Subp. 25. Licenses.** The following decisions are exempt:

- A. 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, are exempt.
- B. All licenses required under electrical, fire, plumbing, heating, mechanical and safety codes and regulations, but not including building permits, are exempt.

**Subp. 26. Governmental activities.** Proposals and enactments of the legislature, rules or orders of governmental units, adoption and amendment of comprehensive and other plans, zoning ordinances, or other official controls by local governmental units, rezoning actions by a local governmental unit unless the action would be primarily for the benefit of a specific project or projects, adoption and amendment of plans by state agencies, executive orders of the governor or their implementation by governmental units, judicial orders, and submissions of proposals to a vote of the people of the state are exempt.

The nature of the foregoing exemptions indicates that only relatively small projects and state actions with *de minimis* environmental effects are completely exempted from MEPA review. For example, only generation facilities with a capacity of 5 megawatts or less, and gas service mains shorter than 500 feet and one-inch in diameter or smaller, are fully exempt from MEPA. Likewise, government decisions related to licenses granted to individuals and to purchases of real estate are also exempt.

Exemption 26 is also limited, in that it applies only to specifically identified governmental activities including: legislative activities, rule making activities, local planning and zoning activities, planning activities by state agencies, the promulgation of executive and judicial orders, and public referenda.<sup>44</sup> With regard to “adoption and amendment of plans,” this exemption does not apply to approval of specific projects that are elements of plans, because the language of the rule does not so state, and because such interpretation would essentially exempt all projects that comport with any state agency plan.

The nature of the MEPA exemptions indicate that they are specific and must be narrowly construed, both because of MEPA’s broad mandate for environmental review, and because state law forbids agencies from creating new exceptions to a law when the law provides for only specific types of exceptions.<sup>45</sup>

## **2. Mandatory EAW Categories**

The MEPA regulations state that “[a]n EAW shall be prepared for any project that meets or exceeds the thresholds of any of the EAW categories listed in part 4410.4300 or any of the

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<sup>44</sup> Minn. R. 4410.4600, subp. 26.

<sup>45</sup> Minn. Stat. § 645.19 (“Exceptions expressed in a law shall be construed to exclude all others.”)

EIS categories listed in part 4410.4400.”<sup>46</sup> (Emphasis added). In turn, Parts 4410.4300 and 4410.4400 list different types of projects, and for each type of project generally specify: (a) numerical thresholds that trigger preparation of either an EAW or EIS; (b) the responsible governmental unit (“RGU”) for each process; and (c) where an alternative review has been approved under Minn. R. 4410.3600, the applicable process for such review. The EAW threshold for electric power generating plants and associated facilities includes those with a capacity between 25 and 50 megawatts.<sup>47</sup> Although Minn. R. 4410.4300, subp. 3 does not state the threshold capacity that triggers preparation of an EIS, logically, any generation facility larger than 50 megawatts would require preparation of an EIS.

The fact that Minn. R. 4410.1000, subp. 2, references only the “threshold” terms contained in Minn. R. 4410.4300 and Minn. R. 4410.4400, and not the terms related to identification of RGUs and potentially applicable regulatory processes, means that the MEPA regulations require preparation of an EAW for a project within the threshold range even where a particular regulatory process is not identified within Minn. R. 4410.4300 and 4400. Since MEPA applies to all governmental actions that may significantly affect the environment, it makes sense that preparation of an EAW would be triggered when thresholds are exceeded, regardless of whether the regulatory basis for such action is identified in Minn. R. 4410.4300 and 4400.<sup>48</sup>

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<sup>46</sup> Minn. R. 4410.1000, subp. 2.

<sup>47</sup> Minn. R. 4410.4300, subp. 3.

<sup>48</sup> The mandatory EAW categories do not and cannot cite to all possible regulatory bases, present and future, for governmental actions that could significantly affect the environment. For example, MEPA is intended to apply to governmental actions taken under statutes and regulations that were enacted after promulgation of the MEPA Rules.

Thus, an EAW is required before approval of any electric generation project with a capacity of between 25 and 50 megawatts, and by extension an EIS is required before approval of any project with a capacity greater than 50 megawatts.

### **3. The Discretionary EAW Process**

When a project is not exempt from MEPA review but also does not fall within one of the mandatory EAW categories, an agency must determine whether an EAW is nonetheless required by MEPA.<sup>49</sup> The MEPA regulations contain two separate provisions containing this requirement:

#### **4410.1000 PROJECTS REQUIRING AN EAW.**

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**Subp. 3. Discretionary EAWs.** An EAW shall be prepared:

A. when a project is not exempt under part 4410.4600 and when a governmental unit with approval authority over the proposed project determines that, because of the nature or location of a proposed project, the project may have the potential for significant environmental effects;

B. when a project is not exempt under part 4410.4600 and when a governmental unit with approval authority over a proposed project determines pursuant to the petition process set forth in part 4410.1100 that, because of the nature or location of a proposed project, the project may have the potential for significant environmental effects;

C. whenever the EQB determines that, because of the nature or location of a proposed project, the project may have the potential for significant environmental effects (this item shall not be applicable to a project exempt under part 4410.4600 or to a project for which a governmental unit, with approval authority over the project, has made a prior negative or positive determination concerning the need for an EAW concerning the project); or

D. when the proposer wishes to initiate environmental review to determine if a project has the potential for significant environmental effects.

#### **4410.4500 DISCRETIONARY EAW.**

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<sup>49</sup> Minn. R. 4410.1000, subp. 3; Minn. R. 4410.4500.

A governmental unit with jurisdiction may order the preparation of an EAW for any project that does not exceed the mandatory thresholds designated in part 4410.4300 or 4410.4400 if the governmental unit determines that because of the nature or location of the proposed project the project may have the potential for significant environmental effects, and the project is not exempted pursuant to part 4410.4600.

Both of the foregoing provisions reference the same standard: whether or not a project “may have the potential for significant environmental effects.” (Emphasis added.) The first provision, Minn. R. 4410.1000, by virtue of its use of the word “shall,” makes preparation of an EAW mandatory in four circumstances:

- When an agency itself determines that a project “may have the potential for significant environmental effects;”
- In response to a citizen petition for environmental review under Minn. R. 4410.1100, which provides proof that a project “may have the potential for significant environmental effects;”
- When the Environmental Quality Board (“EQB”) finds, in the absence of permitting agency action, that a project “may have the potential for significant environmental effects;” and
- When a project proposer wishes to investigate a project’s environmental effects.

In contrast, Minn. R. 4410.4500 states that an agency “may” prepare an EAW for a project that does not exceed the thresholds in Minn. R. 4410.4300 and 4400, and yet “may have the potential for significant environmental effects . . . .” Together, these regulations create a belt-and-suspenders approach to determination of whether an EAW must be prepared. Minn. R. 4410.1000 identifies four different mechanisms each triggered by different actors that can result in preparation of an EAW (permitting agency action, citizen petition, EQB action, or project

proponent action). What Minn. R. 4410.4500 adds to this analysis is clarification that an agency may prepare an EAW even if a project falls below the Minn. R. 4410.4300 and 4400 thresholds.

Thus, agencies must prepare an EAW for all projects that exceed a threshold contained in Minn. R. 4410.4300. If a project does not exceed a mandatory EAW threshold and it is not exempt under a standard exemption or categorical exemption 26, then an agency must prepare an EAW if a project “may” have the potential to significantly affect the environment.

#### **4. Mandatory EIS Categories**

The mandatory EIS categories are contained in Minn. R. 4410.4400, and the category specifically for electric generating facilities is provided in Subpart 3. This provision, however, does not itself contain a numerical threshold. Regardless, the threshold size is implied by the EAW thresholds in Minn. R. 4410.4300, subp. 3 to be 50 megawatts. Since the EAW threshold for electric power generating plants and associated facilities includes those with a capacity between 25 and 50 megawatts, it is logical to conclude that an EIS is required for any facility that is larger than 50 megawatts.

In addition, the reference in Minn. R. 4410.4400, subp. 3, to Minnesota Rule Chapters 7849 and 7850, indicates that the threshold is 50 megawatts. Chapter 7849 implements the State’s certificate of need statute, Minn. Stat. § 216B.243, which applies to “large energy facilities,” which for electric power generating plants are defined by Minn. Stat. § 216B.2421, subd. 2(1) as “any electric power generating plant or combination of plants at a single site with a combined capacity of 50,000 kilowatts [50 megawatts] or more and transmission lines directly associated with the plant that are necessary to interconnect the plant to the transmission system.” Chapter 7850 implements Minn. Stat. Ch. 216E, which establishes a permitting process for “large electric power generating plants,” which are defined as “electric power generating

equipment and associated facilities designed for or capable of operation at a capacity of 50,000 kilowatts [50 megawatts] or more.”<sup>50</sup> Pursuant to Minn. R. 4410.3600, the EQB approved use of both of these chapters as alternative MEPA review processes that substitute for preparation of an EIS for projects that are subject to review under these specific chapters. The fact that the equivalent of an EIS is required for all electric generation facilities larger than 50 megawatts also indicates that the numerical threshold for electric generation facilities is 50 megawatts.

Accordingly, an EIS or an equivalent approved by the EQB must be prepared for any electric generation project that exceeds 50 megawatts. This threshold quantity must be applied regardless of whether or not approval of a generation facility is proposed under Minn. Stat. § 216B.243, Minn. Stat. Chapter 216E, or another review process, such as that contained in Minn. Stat. Ch. 216B.48.

### **5. The Discretionary EIS Process**

Minn. R. 4410.2000, subp. 3, contains the State’s “discretionary EIS” process. It states that an EIS “shall be prepared” when:

- the EAW shows that a proposed project has the potential for significant environmental effects; or
- when the RGU and proposer of the project agree that an EIS should be prepared.

Although the caption for Minn. R. 4410.2000 describes this process as “discretionary,” it is not. Upon a finding that a project has the potential for significant environmental effects, an agency must prepare an EIS, otherwise the agency would be in violation of Minn. Stat. § 116D.04, subd. 2a.

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<sup>50</sup> Minn. Stat. § 216E, subd. 5; *see also* Minn. R. 7850.1000, subp. 11.

## 6. Criteria for Determining Whether or Not A Project Has the Potential for Significant Environmental Effects

Minn. R. 4410.1700 establishes a process whereby an RGU determines whether or not a project “has the potential for significant environmental effects” such that an EIS is required. In this process an RGU must consider the information contained in an EAW in light of the criteria identified in Minn. R. 4410, 1700, subp. 7, which are as follows:

**Subp. 7. Criteria.** In deciding whether a project has the potential for significant environmental effects, the following factors shall 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.

Essentially, the foregoing criteria require that an RGU consider the type, extent, and reversibility of direct and cumulative environmental impacts in light of possible mitigation measures.

The foregoing criteria are also applicable to whether or not an RGU must prepare an EAW. Minn. R. 4410.1000, subp. 3, provides for four processes whereby preparation of an EAW “shall” be ordered, the first three of which require an EAW when “the project may have the potential for significant environmental effects.” (Emphasis added.) This language indicates that an agency must consider the foregoing criteria when evaluating the need for an EAW. More

particularly, the second of these processes is the citizen petition process established by Minn. R. 4440.1100, Subpart 6 of which expressly requires consideration of the factors listed in part 4410.1700, subpart 7. Accordingly, the Subpart 7 criteria are also applicable to determinations of the need for an EAW.

The use of the word “may” in the EAW standard changes how an RGU uses these criteria in the context of an EAW. An RGU may refuse to prepare an EAW only when the evidence shows that there is no reasonable possibility that a project has the potential for significant environmental effects. If the available evidence shows that it is possible that a project may have significant environmental effects, but there is doubt about the type, extent, and reversibility of possible environmental effects; doubt about possible cumulative potential effects; doubt about possible mitigation; or doubt about possible control of environmental effects, then an RGU must prepare an EAW.

In the context of a Minn. R. 4410.1100 citizens’ petition for MEPA review, this means that the evidence necessary to trigger preparation of an EAW does not need to prove that a project has the potential to have significant environmental effects (which evidence would require preparation of an EIS). Instead, a citizen’s petition need only include sufficient information to prove the possibility of potential significant environmental effects.

## **B. Neither MEPA Nor the MEPA Rules Exempt the NTEC from MEPA Review**

### **1. The MEPA Regulations Do Not Exempt Projects Located Outside of the State’s Geographic Boundaries**

MEPA and its regulations do not expressly or impliedly exempt projects located in other states from review under MEPA. Instead, Minn. Stat. § 116D states that an EIS must be prepared “[w]here there is potential for significant environmental effects resulting from any

major governmental action . . . .” In turn, Minn. R. 4410.0200, subp. 23, defines “environment” broadly and without reference to state boundaries:

"Environment" means physical conditions existing in the area that may be affected by a proposed project. It includes land, air, water, minerals, flora, fauna, ambient noise, energy resources, and artifacts or natural features of historic, geologic, or aesthetic significance.

In particular, the use of the term “in the area,” which is very broad, indicates that MEPA’s jurisdiction includes not just the particular locus of a proposed project, but rather it extends to any area that “may be affected by a proposed project.”

The MEPA regulations also define the word “project” without reference to geographic location. Instead, “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.” Again, MEPA is triggered by the potential for Minnesota state agency action (a “project”) to impact the environment.

Further, nothing in Minn. R. 4410.1700, related to RGU decisions on the need for an EIS, implies that MEPA’s reach is limited to in-state projects. This rule states that “[a]n EIS shall be ordered for projects that have the potential for significant environmental effects.”<sup>51</sup> Once again, state agencies are directed to apply MEPA without reference to state boundaries, and instead with reference to whether or not an agency “project” impacts the environment.

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<sup>51</sup> Minn. R. 4410.1700, subp. 1.

MEPA’s jurisdictional reach should be interpreted to the maximum extent allowed by law. MEPA’s purpose provision is expansive and speaks to protection and understanding of the “biosphere” and “ecological systems” that are “important to the state and to the nation.”<sup>52</sup> MEPA’s declaration of environmental policy requires that the state government “use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state’s people.”<sup>53</sup> State agencies are provided with a list of 19 responsibilities, 16 of which are not limited by reference to the State’s boundaries or to narrow state interests.<sup>54</sup> The three that mention state interests require state agencies to:

- “assure for all people of the state safe, healthful, productive, and aesthetically and culturally pleasing surroundings . . . ;”<sup>55</sup>
- “develop and implement land use and environmental policies, plans, and standards for the state as a whole and for major regions thereof through a coordinated program of planning and land use control;”<sup>56</sup>
- “establish and maintain statewide environmental information systems sufficient to gauge environmental conditions;”<sup>57</sup>

The language in MEPA’s purpose and policy sections indicates that the legislature sought to expand MEPA’s reach to the maximum extent allowed by law.

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<sup>52</sup> Minn. Stat. § 116D.01.

<sup>53</sup> Minn. Stat. § 116D.02, subd. 1.

<sup>54</sup> Minn. Stat. § 116D.02, subd. 2.

<sup>55</sup> Minn. Stat. § 116D.02, subd. 2(2).

<sup>56</sup> Minn. Stat. § 116D.02, subd. 2(6).

<sup>57</sup> Minn. Stat. § 116D.02, subd. 2(8).

Such broad interpretation of MEPA does not mean that it contains no jurisdictional limits. The language and structure of MEPA show that its jurisdictional bounds are coterminous with the jurisdictional reach of the state's agencies and the interests of the state in evaluating impacts to Minnesota's environment. MEPA is intended to broadly investigate the impacts of decisions by Minnesota agencies that substantially effect the environment of "all of the people of the [State of Minnesota]." Thus, any decision by a Minnesota state agency that potentially has a significant impact on Minnesota's environment is subject to MEPA.

If the Minnesota legislature or the EQB wanted to limit MEPA jurisdiction to only those projects located within the boundaries of Minnesota, it would have been a simple matter to include such language in either MEPA or its regulations. But they didn't. Instead, the legislature and the EQB have made clear that what is important under MEPA is not the particular location of a project, but rather whether a decision by a state agency might have significant adverse environmental and socioeconomic impacts within Minnesota. Moreover, a blanket exemption of out-of-state projects from MEPA would create an incentive for Minnesota regulated entities to locate facilities just across the border in order to avoid MEPA review. Since neither the legislature nor the EQB have acted to exempt all out-of-state projects from MEPA review, neither should the Commission.

Making MEPA jurisdiction coterminous with Minnesota state agency jurisdiction means that MEPA's statutory structure avoids jurisdictional conflicts with neighboring states. While this line may not be clear in every circumstance, it is unclear to the same extent that the underlying Minnesota state agency jurisdiction is unclear. Such jurisdictional limitation means that an investigation by a state agency of its impacts on Minnesota's residents and environment does not impinge on the sovereignty of any other state. Here, the State of Wisconsin is free to

permit and build a power plant in Superior. Wisconsin, however, has no right to expect that Minnesota ratepayers must support such plant regardless of its impacts on them, be they financial or environmental. Under Minn. Stat. § 216B.48, the Commission has the legal right and obligation to protect the financial interests of Minnesota ratepayers, as well as the public interests of Minnesotans as regards a financial investment in an out-of-state power plant. Therefore, under MEPA the Commission also has the right and obligation to protect the public environmental and socioeconomic interests of Minnesota residents that would be impacted by such investment.

As a procedural statute, MEPA does not require that any Minnesota state agency – much less an agency of another state – take a particular action, nor does such investigation prejudice interstate commerce by imposition of a regulatory burden on an out-of-state entity. Here, a Commission order to prepare an EIS would not require that Dairyland or any Wisconsin state agency participate in Minnesota’s process, nor would it in any way direct any decision by a Wisconsin state agency. Performing an investigation of the environmental impacts of the NTEC on Minnesota’s residents has no more regulatory impact on Wisconsin than evaluating the financial impacts of the NTEC on Minnesota ratepayers.

Where a proposed project is too far from Minnesota to have a particular type of impact on state interests, such impact would not be relevant to MEPA review and could be excluded from an EIS via scoping. The MEPA scoping regulations require that the Commission use the scoping process to “reduce the scope and bulk of an EIS, identify only those potentially significant issues relevant to the proposed project, define the form, level of detail, content, alternatives, . . . and to determine the permits for which information will be developed concurrently with the EIS.” This language provides authority for the Commission to identify only those environmental effects of

the NTEC that could impact Minnesota interests and focus a state EIS on just these impacts. Other impacts resulting from construction and operation of the NTEC could be excluded from MEPA analysis.

For example, noise impacts from construction and operation of the NTEC and related traffic likely would not significantly impact Minnesota, because the closest Minnesota land (in Park Point) is approximately 2.5 miles from the project. Similarly, the impacts of construction on wetlands would not impact Minnesota interests, because such wetlands would be within Wisconsin. These types of localized impacts could be excluded from a Minnesota EIS via the scoping process<sup>58</sup> thereby allowing the Commission to focus a Minnesota EIS exclusively on only those impacts to Minnesota interests that may potentially be significant.

Accordingly, the Commission should not find that MEPA includes an implied exemption for projects located outside the state. Instead, it should interpret MEPA broadly to include consideration of the environmental impacts of its decision on the affiliated interests agreement under Minn. Stat. § 216B.48 on Minnesota's environmental and socioeconomic interests, even where the subject matter of these agreements is located outside the state.

## **2. None of the MEPA Exemptions Apply to the NTEC**

MEPA Part 4410.4600 provides both standard and project-specific exemptions from MEPA review. Given the detailed nature of this list, other exemptions should not be implied.<sup>59</sup> As discussed below, none of the standard or project-specific exemptions apply to the NTEC, such that the Commission must complete a MEPA review for this project.

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<sup>58</sup> Minn. R. 4410.2100, subp. 1, subp. 5(F).

<sup>59</sup> Minn. Stat. § 645.19 (“Exceptions expressed in a law shall be construed to exclude all others.”)

**a. The MEPA Standard Exemptions Do Not Apply to the NTEC**

None of the standard exemptions contained in Minn. R. 4410.4600, subp. 2 apply to the NTEC. Standard Exemption 2A does not apply because a government decision on the affiliated interest agreements is required for construction of the Project. Standard Exemption 2B does not apply because the Commission has not yet issued its decision on the affiliated interest agreements, such that not all governmental decisions have been made. Standard Exempt 2C does not apply because no governmental unit has of yet denied a required governmental approval. Standard Exemption 2D does not apply because a substantial portion of the NTEC has not been constructed. Standard Exemption 2E does not apply because no state agency has yet completed an environmental review for the NTEC. Accordingly, none of the MEPA standard exemptions apply to the NTEC.

**b. The MEPA Project-Specific Exemptions Do Not Apply to the NTEC**

None of the MEPA Rule's project-specific exemptions apply to the NTEC. Possibly applicable specific exemptions were identified previously. Each of these exemptions is provided below and is followed by an explanation in brackets for why it does not apply.

**Subp. 3. Electric generating facilities.** Construction of an electric generating plant or combination of plants at a single site with a combined capacity of less than five megawatts is exempt.

[Does not apply because the NTEC would generate far more than five MW.]

\* \* \*

**Subp. 21. Construction projects.** The following projects are exempt:

A. 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 is exempt.

B. Accessory signs appurtenant to any commercial, industrial, or institutional facility are exempt.

C. Operation, maintenance, or repair work having no substantial impact on existing structures, land use, or natural resources is exempt.

D. Restoration or reconstruction of a structure is exempt, provided that the structure is not of historical, cultural, architectural, archaeological, or recreational value.

E. Demolition or removal of buildings and related structures is exempt, except where they are of historical, archaeological, or architectural significance.

[Does not apply because construction of the NTEC would not be for an appurtenant structure or signs; would have substantial impacts on natural resources; is not related to restoration or reconstruction of an existing structure; and is not related to the demolition or removal of a structure.]

\* \* \*

**Subp. 24. Financial transactions.** The following projects are exempt:

A. Acquisition or disposition of private interests in real property, including leaseholds, easements, right-of-way, or fee interests, is exempt.

B. Purchase of operating equipment, maintenance equipment, or operating supplies is exempt.

[Does not apply to the NTEC because the Commission approval is not sought for acquisition or disposition of real property, and is not related only to purchase of operating equipment, maintenance equipment, or operating supplies.]

\* \* \*

**Subp. 25. Licenses.** The following decisions are exempt:

A. 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, are exempt.

B. All licenses required under electrical, fire, plumbing, heating, mechanical and safety codes and regulations, but not including building permits, are exempt.

[Does not apply to the NTEC because its decision does not relate to licensing of an individual person or to licenses required under construction codes.]

\* \* \*

**Subp. 26. Governmental activities.** Proposals and enactments of the legislature, rules or orders of governmental units, adoption and amendment of comprehensive and other plans, zoning ordinances, or other official controls by local governmental units, rezoning actions by a local governmental unit unless the action would be primarily for the benefit of a specific project or projects, adoption and amendment of plans by state agencies, executive orders of the governor or their implementation by governmental units, judicial orders, and submissions of proposals to a vote of the people of the state are exempt.

[Does not apply to the NTEC because approval of the affiliated interest agreements are not enactments of the legislature; are not rules or orders of the Commission; are not local government land use or zoning actions; are not adoption of a plan by a state agency; are not executive or judicial orders; and are not subject to a vote by the people of Minnesota.]

Although approval of an IRP could be deemed to be an approval of a plan and therefore exempt under Minn. R. 4410.4600, subp. 26, here the specific action requested of the Commission is approval of the affiliated interest agreements, which are not themselves a plan. Rather, MP has requested approval of a specific construction project in accordance with a plan. Since every major action of a public utility for which the Commission must approve an IRP would ultimately be implemented in accordance with such IRP, application of the “plan exemption” to approval of all specific projects that are in accordance with such IRP would expand the exemption regulation to the point that it could be used to exempt all major projects undertaken by public utilities.

Also, the MEPA regulations related to approval of large electric generation facilities<sup>60</sup> and high voltage transmission lines<sup>61</sup> make clear that the “plan exemption” does not apply to approval of specific generation projects. While approval of MP’s plan may be exempt from MEPA, approval of the affiliated interest agreements that are one part of implementation of the plan are not.

Nothing in MEPA itself expressly or impliedly exempts projects located outside of the boundaries of the State of Minnesota from MEPA review. Further, none of the standard or project-specific exemptions in the MEPA regulations expressly or impliedly exempt all projects located outside of the geographic boundaries of Minnesota. If MEPA and its regulations do not exempt out-of-state projects from review, then neither may the Commission. Accordingly, the Commission must complete a MEPA review of the NTEC prior to any final decision on the affiliated interest agreements.

**C. MEPA requires that the Commission Prepare an EIS for Its Review of the NTEC Affiliated Interest Agreements, Because the Capacity of the NTEC Exceeds the Mandatory EIS Threshold of 50 MW**

MEPA requires that the Commission prepare an EIS for approval of electric generation facilities with a capacity greater than the 50 megawatt threshold established by Minn. R. 4410.4300, subp. 3, and Minn. R. 4410.4400, subp. 3. Since the NTEC would have a generation capacity of 525 megawatts, of which 48 per cent or 252 megawatts would be dedicated to Minnesota ratepayers, its capacity exceeds the 50 megawatt threshold, such that the Commission must prepare an EIS before making a final decision on the NTEC affiliated interest agreements.

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<sup>60</sup> Minn. R. 4410.4400, subp. 3.

<sup>61</sup> Minn. R. 4410.4400, subp. 6.

**D. Even if the Mandatory EIS Threshold Does Not Apply to the NTEC, a Discretionary EIS Is Nonetheless Required Because the NTEC Would Have the Potential to Significantly Affect the Land, Water, Air, and Climate of the State, as Well as the Socioeconomic Wellbeing of the Citizens of Minnesota**

Even if the Commission finds that the mandatory thresholds contained in Minn. R. 4410.4300 and 4400 do not mandate preparation of an EIS, the Commission must nonetheless prepare a “discretionary” EIS, because the NTEC would have the potential to produce significant environmental effects on Minnesota’s land, water, air, climate, and also on the socioeconomic wellbeing of the people of Minnesota.

When determining whether the NTEC has the potential for significant environmental effects, according to Minn. R. 4410,1700, subp. 7, the Commission must consider:

- the type, extent, and reversibility of environmental effects potentially created by the NTEC;
- the significance of the NTEC’s cumulative potential effects relative to other contributors of impacts in the areas, and possible mitigation measures to minimize its impacts;
- the extent to which the NTEC’s effects are subject to specific mitigation efforts by public regulatory authorities; and
- the extent to which the NTEC’s effects are controllable by public agencies or the MP.

As discussed below, the hearing record in Docket 17-568 contains limited information about the design of and potential emissions from the NTEC. Further, to Honor the Earth’s knowledge, MP has not released more detailed information in other for a or to the public. Since there is little

public information about the NTEC's potential emissions, the Project's potential effects can be assessed only by reference to similarly sized natural gas generation facilities.

**1. The NTEC Would Have Significant Environmental Effects Considering Their Type, Extent, and Reversibility**

Honor the Earth asserts that the NTEC would have significant environmental effects to Minnesota's environment in the form of air and water pollution, due both to direct emissions from the NTEC itself, but also via indirect emissions from natural gas fugitive emissions resulting from the production and transmission infrastructure needed to provide the NTEC with its fuel.

**a. Similarly-Sized Electric Generation Facilities Have Required the Preparation of EIS, Which EISs Show the Potential for Significant Environmental Effects**

Honor the Earth is not aware of other new large natural gas generation facilities permitted by the Commission. It has, however, prepared EISs for other large electric power generating plants, including the Mesaba Energy Project, which comprised two 606 MW generation units.<sup>62</sup> The State has also prepared EAWs for natural gas-fired power plants of less than 50 MW in size, for example the Flint Hills Resources Combined Heat and Power (CHP) Cogeneration Project.<sup>63</sup> Further, there are multiple examples online of federal and state EISs prepared for similarly sized natural gas-fired electric generation facilities, including but not limited to:

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<sup>62</sup> Docket No. PUC Docket No. E6472/GS-06-668; FEIS available at: [https://mn.gov/commerce/energyfacilities/documents/16573/Mesaba-FEIS-Vol-1\(page%201-341\).pdf](https://mn.gov/commerce/energyfacilities/documents/16573/Mesaba-FEIS-Vol-1(page%201-341).pdf)

<sup>63</sup> EAW available at: <https://www.pca.state.mn.us/sites/default/files/p-ear2-64a.pdf>

- Deer Creek Station, a 300 MW natural gas facility in Brookings County, South Dakota;<sup>64</sup>
- Canal Unit 3 Project, a 350 MW natural gas peaking facility in Sandwich, Massachusetts;<sup>65</sup>
- Luyster Creek Energy Project, a 235 MW combustion turbine combined cycle project near Astoria, New York;<sup>66</sup>
- CPV Valley Energy Center, a 650 MW natural gas-fired combined cycle facility in Orange County, NY;<sup>67</sup> and
- Plymouth Generating Project, a 307 MW natural gas, combined cycle facility near Plymouth, Washington.<sup>68</sup>

The footnotes for these projects provide links to the EISs for them. These EISs describe the types of air, water, and socioeconomic impacts that typically result from construction and operation of large natural gas-fired electric power generation plant. These include significant impacts to air/climate, land, and water, as well as to human health and socioeconomic wellbeing. Honor the Earth asserts that the environmental effects of the NTEC would be similar to those for the foregoing listed projects. As such, the EISs for these projects are evidence of the potential

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<sup>64</sup> FEIS available at: [https://www.rd.usda.gov/files/UWP\\_ND45-Basin\\_DeerCreek\\_FEIS.pdf](https://www.rd.usda.gov/files/UWP_ND45-Basin_DeerCreek_FEIS.pdf)

<sup>65</sup> FEIS available at: [http://clients.tetrattech.com/canal\\_unit\\_3/Shared%20Documents/Canal%20Unit%203%20Final%20Environmental%20Impact%20Report.pdf](http://clients.tetrattech.com/canal_unit_3/Shared%20Documents/Canal%20Unit%203%20Final%20Environmental%20Impact%20Report.pdf)

<sup>66</sup> DEIS available at: [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=89&ved=0ahUKEwjI4I-40Z\\_bAhWkITQIHTRMDnM4UBAWCFMwCA&url=https%3A%2F%2Fwww.easterngeneration.com%2F%3Fdl\\_name%3DDraft\\_Environmental\\_Impact\\_Statement.pdf&usg=AOvVaw1p-9NzbQVNxiGispnWfiQe](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=89&ved=0ahUKEwjI4I-40Z_bAhWkITQIHTRMDnM4UBAWCFMwCA&url=https%3A%2F%2Fwww.easterngeneration.com%2F%3Fdl_name%3DDraft_Environmental_Impact_Statement.pdf&usg=AOvVaw1p-9NzbQVNxiGispnWfiQe)

<sup>67</sup> FEIS available at: <http://www.nyenergyhighway.com/Content/documents/81.pdf>

<sup>68</sup> FEIS available at: [https://www.energy.gov/sites/prod/files/nepapub/nepa\\_documents/RedDont/EIS-0345-FEIS-2003.pdf](https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/EIS-0345-FEIS-2003.pdf)

significant environmental effects of the NTEC. Rather than attach the voluminous EIS's prepared for these other projects, Honor the Earth incorporates them by reference.

The environmental impacts of the NTEC would be long-term and irreversible, and approval of the affiliated interest agreements would be contrary to Minnesota's statutory greenhouse gas goals.<sup>69</sup> Although the projected emissions from the NTEC are in the record, they have been treated by the Commission as trade secret information, such that these estimates are not known to Honor the Earth or the public, making comment on their accuracy and impacts impossible. Nonetheless, it is undisputed that if this facility is built it would likely continue to operate for decades and cumulatively emit a large amount of air and water pollution into Minnesota's environment. Much of this pollution would be in the form of CO<sub>2</sub> and other greenhouse gases that remain in the atmosphere for hundreds or even thousands of years, but many of the other types of air and water emissions that would be emitted by the NTEC would also have a cumulative adverse impact on Minnesota's environment, particularly through land deposition of air emissions.<sup>70</sup>

A commitment to construction of a natural gas generation facility would also result in increased demand for natural gas, the production of which would result in fugitive methane releases, which is an even more powerful greenhouse gas than CO<sub>2</sub>. MP did not provide an estimate into the hearing record of such indirect greenhouse gas emissions. According to a Union of Concerned Scientists summary of studies of fugitive methane emissions, the range of natural gas production that escapes into the atmosphere is between 1 and 9 percent, and methane is 34

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<sup>69</sup> Direct Testimony of Hamilton at 3-4.

<sup>70</sup> Direct Testimony of Sommer at 30-32.

times more potent than CO<sub>2</sub> at trapping heat.<sup>71</sup> Further, the U.S. Environmental Protection Agency estimates that in 2016 methane emissions comprised 10% of all greenhouse gas emission.<sup>72</sup> According to an August 2015 study by the Joint Institute for Strategic Energy Analysis entitled *Estimating U.S. Methane Emissions from the Natural Gas Supply Chain*<sup>73</sup> (“JISEA Study”), approximately 33 percent of natural gas methane emissions are released during natural gas production, gathering, and boosting; approximately 14 percent result from natural gas processing; approximately 33 percent result from transmission and storage; and approximately 20 percent result from natural gas distribution systems.<sup>74</sup> Approximately 80 percent of the sources of methane emissions are relevant to the NTEC, including those from upstream natural gas production, processing, and transmission facilities, all of which are necessary to deliver natural gas to the NTEC. Thus, consumption of natural gas by the NTEC would likely result in the release of substantial fugitive methane emissions that would harm our climate.

Once pollution from the NTEC is emitted to Minnesota’s land, water, and air, it would be difficult if not impossible to reverse the environmental damage it would cause. Approval of the NTEC would result in extensive, long-term, irreversible impacts to Minnesota’s environment and its would potentially frustrate Minnesota’s policy directives to reduce its greenhouse gas emissions.<sup>75</sup> As such, the evidence shows that the NTEC has the potential to produce significant adverse effects on Minnesota’s environment.

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<sup>71</sup> [https://www.ucusa.org/sites/default/files/attach/2015/03/climate-risks-of-natural-gas-fugitive-methane-emissions\\_methodology.pdf](https://www.ucusa.org/sites/default/files/attach/2015/03/climate-risks-of-natural-gas-fugitive-methane-emissions_methodology.pdf)

<sup>72</sup> <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks>

<sup>73</sup> <https://www.nrel.gov/docs/fy16osti/62820.pdf>

<sup>74</sup> JISEA Study at Executive Summary page vi.

<sup>75</sup> Direct Testimony of Hamilton.

**b. The Hearing Record Indicates that the NTEC Would Have Impacts on Minnesota’s Socioeconomic Environment, But It Does Not Describe Such Impacts to Any Significant Degree**

A commitment by Minnesota to construct and operate the NTEC would reduce demand for cleaner renewable energy facilities, particularly those that might be located within the State of Minnesota. As such, approval of the affiliated interest agreements would likely also have a long-term impact on the socioeconomic wellbeing of Minnesota. The hearing record shows that construction of the NTEC and its related transmission upgrades would cost approximately \$700 million.<sup>76</sup> MP, and by extension its ratepayers, would be responsible for 48 percent (\$336 million) of this amount via a monthly capacity payment.<sup>77</sup> In addition, MP’s ratepayers would also pay for 48 percent of project costs, which include costs related to “planning, permitting, design, construction, acquisition and procurement, completion, renewal, addition, replacement, modification, operation, maintenance, repair, or decommissioning” of the NTEC, as well as its fuel commodity and transportation costs and MISO market costs.<sup>78</sup> Over the project life of the NTEC, post-construction costs would add hundreds of millions of dollars more to the financial commitment of MP’s ratepayers, thereby producing significant socioeconomic effects. MP asserts that its “[r]egional economic impacts are expected to exceed \$1 billion over NTEC’s first twenty years of operation,”<sup>79</sup> which also is a significant socioeconomic effect. However, it does not appear that any detailed data about socioeconomic impacts to Minnesota residents has been included in the hearing record. Further, the limited amount of socioeconomic impact information included in the record was provided by MP, such that the record contains no independent analysis of the socioeconomic impacts of the NTEC or alternatives to it.

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<sup>76</sup> October 24 Petition at 4-44.

<sup>77</sup> October 24 Petition at 4-45.

<sup>78</sup> October 24 Petition at 4-47.

<sup>79</sup> October 24 Petition at 4-27.

Regardless, it is beyond dispute that approval of the affiliated interest agreements would have the potential to create substantial socioeconomic impacts on Minnesota residents and ratepayers, such that an EIS is required to ensure that such impacts are adequately assessed.

## **2. The NTEC Would Have Significant Cumulative Potential Effects Relative to Other Contributors of Impacts, Which Could Not Be Fully Mitigated**

Since neither MP nor the Commission have released any estimates of the future emissions from the NTEC, it is not possible for Honor the Earth to assess the size of these emissions relative to existing emissions in the Duluth-Superior air quality region. Nonetheless, the capacity of the NTEC indicates that it may have potential cumulative effects on air quality in the Duluth-Superior area, including within the State of Minnesota, particularly given the NTEC's proposed proximity to the Husky Superior Refinery and the Enbridge Superior Terminal, both of which are large point sources of air pollution. In addition, the lack of public information about the design of the NTEC, its proposed emission control equipment, and its possible future emissions, make estimation of the cumulative impact of the NTEC on water and lands within Minnesota impossible for Honor the Earth. Regardless, Honor the Earth asserts that operation of a electric generation facility of the size of the NTEC would result in the deposition of significant amounts of pollution on the land and water of Minnesota, due to precipitation of such pollution on the State's land and water resources. Accordingly, the evidence available to the Commission shows that the NTEC would have the potential to create significant cumulative effects on Minnesota's environment.

## **3. The NTEC's Environmental Effects Could Not Be Fully Mitigated**

Once air pollution from the NTEC is released into the air, water, and land of Minnesota, it cannot be readily recovered. Further, it is unlikely that MP could fully mitigate the impacts of

such a large fossil fuel power plant. Although various federal and state agencies have attempted to implement large-scale carbon capture technology, it has not proven to be commercially viable. Likewise, state and federal Clean Air Act standards do not eliminate the environmental impacts of large natural gas generation facilities. Instead, air emission control efforts minimize emissions to the extent allowed by economically viable technology. Such control efforts would not necessarily reduce the impacts of the NTEC to the point that they would be insignificant. Therefore, the environmental effects of the NTEC likely could not be fully mitigated.

#### **4. The NTEC's Environmental Effects Are Not Controllable by Public Agencies or MP**

No amount of study or research is likely to identify methods that can economically control the impacts of the NTEC, should it be built. Both federal and state agencies have studied the possibility of carbon capture technology, but adoption of large-scale carbon capture technology has not proven to be commercially viable. Therefore, it is unlikely that additional studies will allow any public agency to control the environmental effects of the NTEC to the point that they are no longer significant.

Since the NTEC would have potential significant direct and cumulative environmental and socioeconomic effects that could not be mitigated or made subject to adequate control by a public agency, the Commission must prepare an EIS pursuant to MEPA.

#### **E. If the Commission Is Uncertain About the Potential Environmental Effects of NTEC, It Must Prepare an EAW to Investigate Such Potential Effects**

In the event that the Commission determines that the mandatory EIS threshold for electric generation facilities does not apply to the NTEC, and that the potential significant environmental effects are uncertain, such that the Commission is not required to prepare a discretionary EIS, then Honor the Earth requests that the Commission prepare a EAW because:

- the NTEC exceeds the threshold capacity contained in Minn. R. 4410.4300, subp. 3., such that an EAW is required under Minn. R. 4410.1000, subp. 2;
- the EIS's prepared for similarly sized natural gas-fired electric generation facilities referenced above provide ample evidence that electric generation facilities of the capacity provided by the NTEC may have potentially significant environmental and socioeconomic effects within Minnesota, such that an EAW is required by Minn. R. 4410.1000, subp. 3(A); and
- the hearing record in this matter provides ample evidence that the NTEC would have substantial environmental and socioeconomic impacts within Minnesota, such that an EAW is required by Minn. R. 4410.1000, subp. 3(A).

Moreover, if the record in this matter or the evidence provided by Honor the Earth indicate that the NTEC may have the potential for significant environmental effects, but the Commission determines that the evidence is insufficient to make a determination, then the Commission must expressly find that the information is insufficient and postpone a decision on the need for an EAW for no more than 30 days in order to acquire the additional information it needs to make a determination.<sup>80</sup>

Finally, if the Commission is uncertain about the degree of the NTEC's impacts to Minnesota's environment, due to the NTEC's location, the Commission must prepare an EAW to assess whether the impacts within Minnesota may be significant.

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<sup>80</sup> Minn. R. 4410.1700, subp. 2a(B).

**F. The Evidentiary Hearing Record Includes Limited Technical Information About the Specific Design of the NTEC or the Pollution Impacts of the NTEC, Except with Regard to CO<sub>2</sub>, Making MEPA Review Necessary, Particularly so that Citizens May Participate Fully in the Commission’s Evidentiary Hearing Process**

Although the Commission provided a public comment period for its decision under Minn. Stat. § 216B.48, Honor the Earth and the public were hindered in their ability to comment on the environmental effects of the NTEC, because the hearing record contains very limited information about: the estimated emissions of pollution from the project; the specific design of the project; any emissions control equipment proposed for the project that might mitigate its impacts; and the environmental merits of alternatives to the project. Such information is necessary to allow meaningful comments on the environmental effects of the NTEC and on the relative merits of alternatives to the NTEC.

Minn. Stat. § 116D.03, Subd. 2(6), Minn. R. 4410.0300, Subp. 3, Minn. R. 4410.0300, Subp. 4, and Minn. R. 4410.2000, Subp. 1, state that the purpose of an EIS and its precursor documents is to benefit not just the RGU, but also “individuals,” “citizens,” “the public,” and “other persons,” as well as “other governmental bodies” and “institutions.” Further, the information provided through the MEPA process must be “useable”<sup>81</sup> and “useful”<sup>82</sup> to citizens, so that they may participate meaningfully in governmental action. Therefore, the need for a MEPA review may also be demonstrated where a hearing record fails to provide adequate information to citizens about a project’s potential environmental effects, as well as the environmental merits of reasonable alternatives to a project. A failure by an RGU to provide such information is evidence that an agency is in violation of MEPA’s public participation requirements.

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<sup>81</sup> Minn. R. 4410.0300, Subp. 4

<sup>82</sup> Minn. Stat. § 116D.03, Subd. 2(6).

Here, the hearing record contains almost no information with regard to the impacts of the NTEC on air and water quality, except with regard to CO<sub>2</sub> emissions. The October 24 Petition and the Direct Testimony of Julie Pierce, an employee of ALLETE, Inc., states that the NTEC would release emissions of NO<sub>x</sub>, CO, SO<sub>2</sub>, VOCs, and PM<sub>10</sub>, but does not provide any public estimate of what these emissions might be.<sup>83</sup> In addition, Ms. Pierce's Direct Testimony also includes a simple one page graphic on page 8 of Schedule 1 showing water demand and waste water disposal from the NTEC. Otherwise, it does not appear that any party has entered any evidence into the record about the potential air and water pollution impacts of the NTEC. Although MP claims that all of its water pollution would be discharged into the local water treatment plant, MP does not account for water pollution resulting from the deposition of NO<sub>x</sub> and SO<sub>x</sub> and other air pollutants into surface waters either directly or indirectly via transport from land. Further, the hearing record contains no discussion of the relative pollution impacts of the NTEC and clean energy alternatives, except with regard to CO<sub>2</sub>.

Thus, the hearing record demonstrates that the Commission has very limited environmental impact information before it, and that the Commission has provided almost no information to citizens, with regard to the potential environmental impacts of the NTEC or the alternatives to it. As a consequence, neither the Commission nor interested citizens are currently capable of considering the impacts of the NTEC on Minnesota's natural and socioeconomic environments to the extent required by MEPA.

The lack of information in the hearing record here is an example of exactly the type of approval process that MEPA was intended to eliminate: a public comment period for a project about which the public has little to no technical, environmental impact, and alternatives

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<sup>83</sup> October 24 Petition at 4-9.

information. More to the point, the Commission's failure to provide adequate environmental impact information to citizens would violate MEPA's public participation requirements.

**G. MEPA Review Is Consistent with the Public Interest Review Required by Minn. Stat. § 216B.48**

Minn. Stat. § 216B.48, subd. 3, requires that the Commission determine if approval of the affiliated interest agreements is "consistent with the public interest." This broad language is appropriate because approval of an affiliated interest agreement could impact the public interest in many ways regardless of the location of a project. It would be inconsistent and arbitrary for the Commission to investigate whether approval of the agreements is in the public interest with regard of its economic impacts on Minnesota ratepayers, and then refuse to consider whether the NTEC is in the public interest in terms of its impacts to the health and wellbeing of Minnesotans and their environment. Accordingly, compliance with MEPA here would support and be consistent with the Commission's public interest determination under Minn. Stat. § 216B.48, subd. 3.

**H. The Commission and MP Have Impliedly Agreed that Commission Review of the NTEC's Environmental Impacts Is Appropriate**

The Commission has already impliedly admitted that the NTEC would impact the environment in Minnesota via its Notice, which requests comment on whether there are "environmental and human impacts of the project."<sup>84</sup> Presumably, the Commission would not request comments on environmental and human impacts if it had determined that the NTEC would have no impacts within Minnesota that are within the Commission's jurisdiction to consider.

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<sup>84</sup> Notice at 2.

MP has also in effect admitted that environmental review by the Commission is appropriate. Specifically, MP's October 24 Petition on page 1-10 recommends that the Commission apply the criteria set forth in Minn. R. 7849.0120 to the Commission's public interest decision under Minn. Stat. § 216B.48. Minn. R. 7849.0120 includes consideration of whether the NTEC would "provide benefits to society in a manner compatible with protecting the natural and socioeconomic environments, including human health . . . ." Thus, assuming that MP is not recommending that the Commission evaluate impacts to Wisconsin's natural and socioeconomic environments, it is reasonable to conclude that MP has recommended that the Commission evaluate whether the NTEC would adversely impact Minnesota's natural and socioeconomic environments and the health of Minnesotans. While the EQB has expressly approved the regulatory process in Minn. R. Ch. 7849 as an alternative review process for power plants subject to this chapter, the EQB has not approved the use of this chapter for projects subject only to Minn. Stat. § 216B.48. As such, it would be illegal for the Commission to informally use Minn. R. Ch. 7849 as an alternative to full compliance with the MEPA Rules.

Further, both the Commission and MP tacitly agree that the NTEC would have quantifiable adverse environmental impacts on Minnesota via the Commission's decision in its September 19, 2017, order, and MP's agreement<sup>85</sup> with this order, that the Commission should consider socioeconomic and environmental costs pursuant to the Commission's externality order contained in Docket No. E999/CI-14-643. The purpose of the externality process is to put a dollar figure on environmental costs of a project to Minnesotans. Obviously, it is logically necessary to agree that a project would have an environmental impact in Minnesota before assigning a dollar value to such impact. Thus, the Commission's order requiring application of

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<sup>85</sup> October 24 Petition at 3-2, 3-5.

its externality analysis to approval of the NTEC, and MP's discussion of such analysis, are tacit admissions that the NTEC would have environmental impacts within Minnesota that may be reasonably assessed by the Commission.

MP also apparently agrees that carbon emissions and the impacts resulting from such emissions are appropriate environmental impact for Commission consideration. In its October 24 Petition, MP argues that the NTEC would reduce such emissions, at least relative to coal-fired power plants, and that the project, specifically, would help Minnesota meet "potential future CO<sub>2</sub> regulations . . . and State greenhouse gas goals."<sup>86</sup> Presumably, MP would not make these arguments if it believed that the Commission had no jurisdiction to consider such impacts.

MP's tacit agreement that the Commission has jurisdiction to consider the environmental effects of the Project are also demonstrated by Section 4.2.4 of its October 24 Petition, in which MP evaluates the socioeconomic and environmental impacts of the NTEC.<sup>87</sup> Initially, MP asserts a number of socioeconomic benefits, without discussing any possible downsides of the project.<sup>88</sup> It then provides a description of the project's air impacts, which is provided below in total:

NTEC is a less carbon-intense resource than Minnesota Power's existing baseload generating resources – emitting about 65 percent less carbon dioxide than a coal unit. NTEC's other air emissions, such as NO<sub>x</sub>, CO, SO<sub>2</sub>, VOCs, and PM<sub>10</sub> are even lower, at a collective 97 percent less than traditional baseload coal resources, and NTEC will not have mercury emissions. NTEC will be constructed with the best available control technology for air

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<sup>86</sup> October 24 Petition at 3-6, 3-8.

<sup>87</sup> October 24 Petition at 4-26 to 4-27.

<sup>88</sup> October 24 Petition at 4-26 to 4-27.

emissions, as approved as part of the Wisconsin regulatory process.<sup>89</sup>

In this discussion, MP includes a very brief description of the NTEC's impact on water quality:

Although the project is still working on detailed design, current estimates are that the water needed to operate NTEC will be available from on-site wells, such that surface water will not need to be disturbed. The majority of the water used will be lost through evaporation, thereby remaining in the hydrologic cycle. The remaining wastewater is expected to be able to be discharged to the local wastewater system.

Thus, MP has not objected to the Commission's requirement that it address environmental impacts to Minnesota's air and water quality, and instead has entered information, albeit extremely cursory information, into the record regarding such impacts to Minnesota.

The actions of both the Commission and MP indicate that consideration of environmental impacts to Minnesota resulting from construction and operation of the NTEC in Wisconsin are an appropriate part of the record for this matter. It would be illogical and inconsistent to argue that the location of the facility in Wisconsin means that the Commission's hearing on the NTEC affiliated interest agreements would not be subject to MEPA review, the purpose of which would be to fully assess these same impacts. If the Commission believes that it may consider the NTEC's environmental impacts, then it must use MEPA to do so and may not make up an alternative environmental review process of its own liking, because only the EQB may approve an alternative review process under MEPA.

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<sup>89</sup> October 24 Petition at 4-27.

#### **IV. THE LOCATION OF THE PROJECT IN WISCONSIN DOES NOT MAKE MEPA REVIEW IMPRACTICAL**

##### **A. The Commission May Use the MEPA Scoping Process to Focus Environmental Review on Impacts Within Minnesota**

MEPA requires that the Commission conduct an environmental review for its NTEC decision, but this does not mean that the Commission must conduct this review to the same extent required for a generation project located in Minnesota. Instead, MEPA requires consideration of the NTEC's impacts only to the extent of its impacts to the land, water, air, and people of Minnesota. The Commission need not assess the impacts of the Project on other states, because doing so would overreach into another state's jurisdiction.

Minnesota's jurisdictional limits can be implemented through the scoping process required by Minn. R. 4410.2100, subp. 1. This process would allow the Commission to limit the scope of its MEPA review to "only those potentially significant issues relevant to the proposed project, [and to] define the form, level of detail, content, [and] alternatives . . . ." appropriate to the circumstances. Thus, the Commission has broad discretion to conduct a MEPA review tailored to this particular situation. For example, the Commission could limit its analysis to the following and similar types of impacts:

- the effects of air pollution on Minnesota;
- the extent of CO<sub>2</sub> emissions resulting from generation of electric power for Minnesota customers; and
- the socioeconomic impacts of the NTEC within Minnesota.

Fortunately, MEPA’s drafters created a flexible process that can be tailored to all types of environmental review circumstances, including those that arise when a project is located outside of Minnesota.

**B. The Commission’s MEPA Review Must Evaluate the Environmental Effects of Alternatives to the Project for the Portion of the NTEC Capacity that Would Serve Minnesota Ratepayers**

Both the Large Power Intervenors (“LPI”) and the Clean Energy Organizations (“CEO”) proposed alternatives to the NTEC, such that the Commission is likely to consider whether an economically superior alternative exists. Assuming that the Commission agrees with MP that it should adopt the analysis provided by Minn. R. 7849.0120 in its evaluation of whether the NTEC is in the public interest, then presumably it would apply criterion B therein (considering whether a “more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record,” and particularly Criterion B(3) “considering . . . the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives . . . .”) Since the Commission will consider the economic merits of alternatives to the NTEC, it makes sense that, to complete its public interest analysis, the Commission must also compare the environmental and socioeconomic impacts of such alternatives to those of the NTEC. In fact MEPA requires such analysis.

**SUMMARY AND REQUEST FOR RELIEF**

Honor the Earth asserts that:

- a) Commission approval of the affiliated interest agreements would authorize construction of a large electric power generating plant to serve Minnesota customers of Minnesota Power;

- b) such plant if constructed would have the potential for significant environmental and socioeconomic effects within Minnesota;
- c) MEPA requires analysis of the environmental and socioeconomic impacts that would occur within Minnesota resulting from Minnesota agency action;
- d) the Commission is likely to consider the merits of alternatives to the NTEC;
- e) MEPA requires comparison of the environmental effects of reasonable alternatives to a proposed action;
- f) the location of the project in Wisconsin does not exempt the Commission's decision on this matter from MEPA review;
- g) no other provisions of MEPA or its regulations exempt the Commission's decision under Minn. Stat. § 216B.48 from MEPA review; and
- h) a failure to comply with MEPA is a violation of MERA.

Therefore, the Commission is required by law to prepare an EIS for its hearing on the October 24 Petition for approval of the affiliated interest agreements. To the extent that the Commission has any doubt about the need for an EIS or the scope of environmental review required for this hearing, the Commission must prepare an EAW to investigate the potential for the NTEC to significantly impact Minnesota's environment.

Until the Commission fully complies with MEPA it may not approve the affiliated interest agreements.<sup>90</sup> Therefore, approval of the affiliated interest agreements without MEPA review would be in violation of law and subject to judicial appeal.<sup>91</sup>

For the foregoing reasons, Honor the Earth requests that the Commission reconsider its Final Order and prepare an EIS for its action in the above captioned docket related to approval of

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<sup>90</sup> Minn. Stat. § 116D.04, subd. 2a; Minn. R. 4410.3100, subp. 1.

<sup>91</sup> Minn. Stat. § 116D.04, subd. 10.

the affiliated interest agreements for the NTEC. In the alternative, if the Commission is uncertain about the scope of environmental review required here, the Commission may prepare an EAW for the project so that the Commission can evaluate the need for an EIS.

Dated: February 13, 2019

Respectfully submitted,

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**STATE OF MINNESOTA  
PUBLIC UTILITIES COMMISSION**

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**In the Matter of Minnesota Power's Petition  
for Approval of the Energy Forward Resource  
Package**

**MPUC Docket No. E015/AI-17-568  
OAH Docket No. 68-2500-34672**

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**CERTIFICATE OF SERVICE**

I, Paul Blackburn, hereby certify that I have this day, served a true and correct copy of the following documents for the above captioned matters to all persons at the addresses 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 Minneapolis, Minnesota.

**HONOR THE EARTH  
PETITION FOR RECONSIDERATION OF  
ORDER APPROVING AFFILIATED INTEREST AGREEMENTS  
WITH CONDITIONS FOR  
NEMADJI TRAILS ENERGY CENTER**

Dated this 13<sup>th</sup> day of February, 2019.

/s Paul Blackburn  
Paul Blackburn

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