

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1195
A20-0947**

In the Matter of Freeborn Wind Energy LLC's Application for a Large Wind Energy Conversion System Site Permit for the 84 MW Freeborn Wind Farm in Freeborn County.

**Filed April 19, 2021
Affirmed
Slieter, Judge**

Minnesota Public Utilities Commission
File No. IP-6946/WS-17-410

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Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In these consolidated certiorari appeals, relator Association of Freeborn County Landowners seeks to challenge several orders issued by respondent Minnesota Public Utilities Commission (MPUC), which granted and amended a site permit for a large wind

energy conversion system (LWECS) in Freeborn County. The scope of these appeals is limited to relator's arguments that the MPUC erred by (1) denying relator's petition for an environmental-assessment worksheet (EAW) before approving amendments to the permit; (2) denying relator's request for a contested-case hearing or public hearing before approving the amendments; and (3) failing to take a "hard look" at noise and light issues before approving the amendments. We discern no basis to interfere with the MPUC's decisions and therefore affirm.

FACTS

On December 19, 2018, following a contested-case hearing, the MPUC issued an order that granted Freeborn Wind Energy LLC (Freeborn Wind) a site application permit to construct an LWECS in Freeborn County (the first order). Relator petitioned the MPUC for reconsideration of the first order granting the Freeborn Wind site permit.

On May 10, 2019, the MPUC issued an order that denied reconsideration of the first order and amended the site permit on its own motion (the second order). Relator did not thereafter file a certiorari appeal of the first order but petitioned for reconsideration of the second order (the second petition). On July 2, 2019, the MPUC denied reconsideration of the second order, which relator timely appealed (the first appeal).

In June 2019, respondent Northern States Power, d/b/a Xcel Energy (Xcel), acquired Freeborn Wind. In August 2019, Xcel petitioned to amend the site permit. Its petition to amend the permit included an updated environmental analysis of each proposed change. Relator filed a petition for an EAW.

On March 20, 2020, the MPUC issued an order that determined an EAW was not required and granted Xcel's proposed amendment (the third order). Relator petitioned for reconsideration (the third petition), which the MPUC denied on June 12, 2020. Relator filed an appeal (the second appeal), and we issued an order consolidating the first and second appeals.

DECISION

As a threshold matter, we address the proper scope of this appeal. Pursuant to Minn. Stat. § 216B.52 (2020), an aggrieved party may appeal any order of the MPUC pursuant to the appeal provisions of the Minnesota Administrative Procedure Act (MAPA). *See* Minn. Stat. §§ 14.63-.69 (2020). Pursuant to MAPA, a certiorari appeal must be filed within 30 days after the party receives the final decision and order of the agency. Minn. Stat. § 14.63. But if a request for reconsideration is made within ten days of the agency's decision, the 30-day appeal period runs from service of the order finally disposing of the application for reconsideration. Minn. Stat. § 14.64. Finally, Minn. Stat. § 216B.27, subd. 2 (2020) limits our review to issues that were raised to the MPUC in a petition for reconsideration of a timely appealed order.

Applying these principles, we conclude that the scope of this appeal is limited to issues decided in the MPUC's second and third orders that were also addressed in relator's second and third petitions. Relator raises a number of issues that were addressed and finally

decided by the MPUC in its first order.¹ But because relator did not timely file a certiorari appeal from the first order, issues decided in that order fall outside the scope of our review, and we therefore declined to address them. *See In re Minn. Power for Auth. to Increase Rates for Electric Serv. in State*, 929 N.W.2d 1, 8 (Minn. App. 2019) (determining the scope of appeal did not extend to issues decided in MPUC’s prior order), *review denied* (Minn. Aug. 6, 2019). Relator timely filed these appeals from the second and third orders. Pursuant to Minn. Stat. § 216B.52 and MAPA, we limit our review to the issues decided by the MPUC in those orders.

Pursuant to MAPA, this court may reverse, remand, or modify an agency decision only if the agency’s actions were, among other things, affected by an error of law or arbitrary or capricious. Minn. Stat. § 14.69. “[I]f there is room for two opinions on a matter, the [MPUC]’s decision is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached.” *In re N. States Power Co.*, 775 N.W.2d 652, 658 (Minn. App. 2009).

The MPUC has broad authority to regulate public utilities and to review applications for siting and routing permits for large energy facilities. *See generally*, Minn. Stat. §§ 216A.01 to 216H.13 (2020); *see also Computer Tool & Eng’g, Inc. v. N. States Power Co.*, 453 N.W.2d 569, 572 (Minn. App. 1990) (citing Minn. Stat. Ch. 216B), *review denied* (Minn. May 23, 1990). An administrative agency’s decision enjoys a presumption of

¹ These issues include the alleged failure to promulgate rules or siting criteria for LWECs, the ground factor used by the MPUC in modeling, and that the public was excluded from meaningful participation in the Freeborn Wind proceedings.

correctness; appellate courts defer to an agency's expertise and special knowledge in its field. *In re Annandale & Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 514 (Minn. 2007). An appellate court must not substitute its judgment for that of the agency when the agency's findings are adequately supported by evidence. *See In re Denial of Eller Media Co.'s Applications for Outdoor Device Advert. Permits*, 664 N.W.2d 1, 7 (Minn. 2003). Relator, as the party challenging an agency decision, bears the burden of demonstrating error on appeal. *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 118 (Minn. 2009).

I. The MPUC did not err by denying relator's petition for an EAW.

Relator first challenges the MPUC's denial of its petition for an EAW, arguing that Xcel's petition to amend the site permit necessitated environmental review pursuant to the Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2020). Although MEPA generally requires preparation of an EAW or environmental-impact statement (EIS) for projects with the potential to impact the environment, MEPA authorizes the Environmental Quality Board (EQB) to approve alternative forms of environmental review for particular types of projects. Minn. Stat. § 116D.04, subds. 4a, 5a(6) (2020). Pursuant to Minn. R. 4410.4300, subp. 3(D) (2019), environmental review for LW ECS is conducted pursuant to Minnesota Rule 7854. Rule 7854.0500 governs what must be included in a site permit application, including what an applicant must include with respect to a project's environmental impact. Minn. R. 7854.0500 (2019). An applicant must include "an analysis of the potential impacts of the project, proposed mitigative measures, and any adverse environmental effects that cannot be avoided." Minn. R. 7854.0500,

subp. 7. (listing 18 categories to be considered under unavoidable environmental effects). This rule explicitly states, “[t]he analysis of the environmental impacts required by this subpart satisfies the environmental review requirements of chapter 4410, parts 7849.1000 to 7849.2100, and Minnesota Statutes, chapter 116D. No [EAW] or [EIS] shall be required on a proposed LWECS project.” *Id.*

Freeborn Wind filed an environmental analysis as part of its initial application for a LWECS, and Xcel updated its environmental-impact analysis supporting its later petition to amend the site permit. The Minnesota Department of Commerce, Energy and Environmental Review Analysis division (DOC-EERA) considered the environmental impacts of the amendment and determined that Xcel’s proposed amendment only required alteration to the original permit’s description of the project. DOC-EERA determined that an environmental review had already been completed and nothing further was required pursuant to Minnesota Rules. The MPUC adopted DOC-EERA’s analysis and subsequent recommendations.

Relator argues that the project required an EAW and EIS pursuant to MEPA. This argument is unavailing by the plain language of the rules governing environmental review for LWECS. Xcel satisfied the environmental-review requirements by including in its permit amendment an analysis of the potential environmental impacts of the Freeborn Wind project. Because the law requires neither an EAW nor EIS for LWECS, the MPUC did not err in denying relator’s petition for an EAW.

II. The MPUC did not err by denying relator’s request for a second contested-case hearing or by denying public participation before approving the permit amendments.

Relator next challenges the MPUC’s denial of its requests for a contested-case hearing or public hearing before approving amendments to the permit. “Any person may request . . . a contested case hearing be held on an application for a site permit for a proposed LWECS project.” Minn. R. 7854.0900, subp. 5(A) (2019). “The [MPUC] shall order a contested case hearing if the [MPUC] finds that the person requesting the contested case hearing has raised a material issue of fact and that holding a hearing would aid the [M]PUC in making a final determination on the permit application.” *Id.*, subp. 5(B).

Following Freeborn Wind’s original site permit application, the MPUC referred the matter to the Office of Administrative Hearings for a contested-case hearing, and a contested-case hearing was held over three days. After Xcel acquired Freeborn Wind and petitioned the MPUC for an amended site permit, relator requested a second contested-case hearing. The MPUC relied on environmental analysis from DOC-EERA in denying a second contested-case hearing. The MPUC in the third order adopted DOC-EERA’s conclusion that the anticipated impacts of the proposed permit amendment were “comparable to, or less than, the consequences anticipated from the existing site permit.” The MPUC noted that DOC-EERA “evaluated the consequences of Xcel’s proposed changes for noise—both from the operation of the turbines themselves, and when that noise would be combined with ambient noise—and found support for the proposition that the revised project would be able to comply with the site permit’s requirements.” Likewise, the MPUC noted DOC-EERA agreed “with Xcel’s analysis that the project could be

expected to cause six residences to experience more than 30 hours of shadow flicker per year, arguably triggering the need for remedial measures.” The MPUC accordingly denied appellant’s petition for a contested-case hearing, “find[ing] no significant issues of material fact that require resolution before acting on Xcel’s petition.”

Relator contends that the MPUC’s denial of a contested-case hearing before granting Xcel an amended permit is “contrary to the [MPUC]’s responsibility to address material issues of fact,” citing “thousands of pages of new filings,” including “compliance filings.” Relator argues the compliance filings, filed after the permit was granted, raise material issues of fact regarding both noise modeling and shadow flicker modeling. Nearly all of the fact issues to which relator points—including lack of production of noise modeling and the failure to consider modeling results of shadow flicker—were addressed in the contested-case hearings on the site permit application. As to these issues, relator therefore alleges no new material facts beyond those raised at the first contested-case hearing.

Relator contends that “[n]ew shadow flicker modeling admittedly shows impacts, with methodology for tallying total number of hours [being] inconsistent and not explained.” However, relator again does not assert any new issues of material fact which would assist the MPUC in determining whether to grant the permit amendment. Additionally, relator argues that Xcel’s compliance filings “claim[] to demonstrate predicted impacts, and admit[] that there would be impacts,” but does not cite what those impacts would be. Relator also argues Xcel’s compliance filings demonstrate the turbines are “larger [and] noisier,” but does not otherwise support its assertion.

In denying relator's request for a second contested-case hearing, the MPUC noted the case had an extensive history, that there had already been a contested-case proceeding, that the project did not present a potential for significant environmental effects, and that it had previously addressed noise concerns. It also noted it solicited and received public comments on the amended permit. Finally, the MPUC noted that "whether Xcel will actually comply with these requirements in the future is not a matter that can be established via a contested case proceeding." On this record, we cannot conclude that a second contested-case hearing was required.

Relator separately asserts that the MPUC "fail[ed] in its duty to the public" by failing to allow for public participation. Minn. R. 7854.0900 governs public participation requirements before issuance of a wind siting permit. The MPUC, before the third order, noticed a public-comment period for the Xcel permit amendment. *See* Minn. R. 7854.0900 subp. 1. The MPUC solicited comments on: "Xcel's petition to amend the site permit to change the number, type, and layout of the turbines to be used, and to incorporate additional land" (the amendments eventually granted by the third order) "and Xcel's supplemental environmental impact analysis offered in support of its proposed amendments." A public-comment period was required by Minn. R. 7854.0900 subp. 3. The MPUC noted the "comments received from the public expressed concerns regarding potential impacts of the project similar to those received and considered prior to issuance of the site permit" and that "commenters raised concerns about the health effects of noise, shadow flicker and the selection of an appropriate ground factor for noise analysis." Further, the MPUC considered information "presented at public information meetings" in denying relator's

petition for an EAW and EIS. This meeting was also required pursuant to Minn. R. 7854.0900, subp. 4. Because the MPUC complied with the public-participation requirements of Minn. R. 7854.0900, we reject relator's assertion that the MPUC erred by failing to allow for public participation.

III. The MPUC did not act arbitrarily or capriciously in approving the permit amendments.

Relator next challenges the MPUC's decision to grant permit amendments. An amendment to a LWECS site permit may be granted "at any time for good cause." Minn. R. 7854.1300, subp. 2 (2019). The MPUC also has "inherent authority to correct its prior decisions." *In re Applications for Auth. to Provide Alternative Operator Servs. in Minn.*, 490 N.W.2d 920, 925 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). So long as the MPUC engaged "in reasoned decision making" appellate courts will affirm, even if it "may have reached a different conclusion had it been the factfinder." *Cable Commc 'ns Bd. v. Nor-West Cable Commc 'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984). Appellate courts "will intervene . . . where there is a 'combination of danger signals which suggest the agency has not taken a 'hard look' at the salient problems' and the decision lacks 'articulated standards and reflective findings.'" *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)). Relator has the burden on appeal "of proving that [the agency's] findings are unsupported by the evidence as a whole." *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 381 (Minn. App. 2009) (citing *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty Bd. of Comm 'rs*, 713 N.W.2d 817, 833 (Minn. 2006)).

a. *The Second Order*

The MPUC, on its own motion in the second order, adopted changes to the site permit that it determined were reasonable, correcting language in section 7.4.1. that conflicted with section 6.1.² In addressing the permit's conflicting provisions, the MPUC retained a 47 dB(A) standard for noise modeling as opposed to a 45 dB(A) modeling standard. However, the 47 dB(A) retained standard did not change the MPUC's requirement that the Freeborn Wind project's turbines comply with a 50 dB(A) limit. Additionally, expert testimony and testimony of MPUC officials provide evidence supporting the provision retained, and the MPUC's amendment, as supported by evidence, is entitled to deference. *See Annandale*, 731 N.W.2d at 514.

Further, the MPUC's clerical changes to sections 6.1, 6.2, and 7.4 were rational decisions supported by evidence. These sections contained duplicative and potentially conflicting material, which the MPUC had inherent authority to correct. *See Applications for Auth. to Provide Alternative Operator Servs. in Minn.*, 490 N.W.2d at 925. The MPUC's actions in its second order correcting conflicting provisions and correcting clerical errors were not arbitrary or capricious.

² Section 6.1 explicitly controlled Special Conditions and Noise Modeling. Section 6.2 controlled Post-construction Noise Modeling. Section 7.4 governed Noise Studies, and 7.41 and 7.42 initially covered Pre-Construction Demonstration of Compliance with Noise Standards and Post-Construction Noise Monitoring, respectively. Additionally, regulation of a wind farm's pre-construction noise modeling and post-construction noise monitoring is an area of agency expertise to which we give deference.

b. The Third Order

The MPUC in its third order granted Xcel's petition to amend the Freeborn Wind site permit, after DOC-EERA determined that Xcel's proposed amendment only required alteration to the original permit's description of the project. The department of commerce, through DOC-EERA, provides technical expertise and other assistance to the MPUC in LWECs proceedings. Minn. Stat. § 216E.03, subd. 11 (2020). The MPUC's adoption of DOC-EERA's environmental analysis is entitled to the same deference. *Minn. Ctr. For Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002) (holding environmental effects analysis is a determination of fact that necessarily requires application of agency expertise).

In its third order, the MPUC noted Xcel's petition to amend the site permit involved only authorization of the "installation of a different turbine model and updating the project layout." Supporting its petition, Xcel raised, and the MPUC considered, 18 factors on the potential environmental impacts resulting from Xcel's proposed amendment, as required pursuant to the Minnesota Rules. *See* Minn. R. 7854.0500, subp. 7. Based on Xcel's submitted evidence, DOC-EERA determined the proposed amendment demonstrated the same or similar economic impacts, while continuing to meet the permit's conditions. The MPUC received comments on the proposed amendments, reviewed the extensive record of this case, and reviewed Xcel's submissions. The MPUC relied on DOC-EERA's analysis of those submissions to determine the permit would, as amended, meet its conditions, and so found good cause to amend the permit.

Relator contends that the MPUC failed to scrutinize “material facts regarding changes in the project and potential impacts.” In so contending, relator argues the MPUC “fail[ed] to verify” Xcel’s claims in support of the permit’s amendment, and that DOC-EERA’s requests for information demonstrates that the record is insufficient to “support granting a permit in compliance with Minnesota law.”

The Minnesota Rules do not require the MPUC to perform any independent verification of the information submitted in a petition, *see* Minn. R. 7854.0500 subp. 7, and, by statute, DOC-EERA provides technical expertise to the MPUC in LWECs proceedings. Minn. Stat. § 216E.03, subd. 11. The MPUC’s third order amending the description of the Freeborn Wind project was supported by the required environmental analysis, and, as noted above, this analysis was supported by DOC-EERA. The MPUC therefore reasonably relied on the analysis conducted by DOC-EERA, based upon the required information submitted by Xcel. The MPUC did not act arbitrarily or capriciously by granting Xcel’s permit amendment.

Affirmed.