

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0688
A19-0704**

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

**Filed December 23, 2019
Reversed and remanded
Bjorkman, Judge**

Public Utilities Commission
File No. E-015/AI-17-568

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Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and

Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

SYLLABUS

The Minnesota Public Utilities Commission (commission) shall prepare an environmental assessment worksheet (EAW) before approving an affiliated-interest agreement if a petition under Minn. Stat. § 116D.04, subd. 2a(e) (2018), demonstrates that, because of the nature or location of the action proposed in the agreement, there may be potential for significant environmental effects.

OPINION

BJORKMAN, Judge

In these consolidated appeals, relators challenge an order by the commission denying a petition for an EAW and approving respondent-utility's affiliated-interest agreements related to a proposed natural-gas power plant in Wisconsin. Relators argue that (1) the commission erred by concluding that the Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2018), does not apply to the agreements and (2) the decision to approve the agreements is arbitrary and not supported by substantial evidence. Because the commission erred by denying the EAW petition, we reverse and remand.

FACTS

In July 2017, respondent Minnesota Power petitioned the commission for approval of its *EnergyForward* Resource Package, including the proposed natural-gas resource that is the focus of this appeal—a 525 megawatt natural-gas combined-cycle power plant in Superior, Wisconsin, known as the Nemadji Trail Energy Center (NTEC). Minnesota Power seeks to (1) construct, (2) operate, and (3) purchase approximately half the capacity

of NTEC, through three agreements with its Wisconsin affiliate, South Shore Energy LLC.¹ Affiliated-interest agreements are not effective unless the commission approves them as “reasonable and consistent with the public interest.” Minn. Stat. § 216B.48, subd. 3 (2018).

The commission referred the issue of whether “the proposed gas plant resource” is necessary and reasonable for a contested-case proceeding before an administrative law judge (ALJ). The ALJ received public comments, extensive testimony and documentary evidence, and multiple rounds of argument from the parties, including various “clean energy organizations” that intervened in the contested case to oppose Minnesota Power’s petition. Based on that record, the ALJ concluded that Minnesota Power failed to demonstrate a need for NTEC, making the affiliated-interest agreements not reasonable and consistent with the public interest, and recommended that the commission not approve the agreements. The ALJ also noted that relator Honor the Earth (HTE) submitted public comment requesting an environmental impact statement (EIS) but declined to rule on the need for an EIS as outside the scope of the contested-case proceeding.

HTE then filed a petition with the Minnesota Environmental Quality Board (EQB) requesting that an EAW be prepared with respect to the proposed project. The EQB forwarded the petition to the commission.

Consequently, the commission was presented with two issues: (1) whether to grant the petition for an EAW and, if not, (2) whether to approve the affiliated-interest agreements. The commission denied the EAW petition, reasoning that MEPA does not

¹ Minnesota Power cannot obtain a permit to operate NTEC except through a Wisconsin affiliate. Wisc. Stat. Ann. § 196.53 (West 2018).

apply to the affiliated-interest agreements and it lacks jurisdiction to order an EAW for a power plant outside of Minnesota. And the commission approved the affiliated-interest agreements with conditions.

Relators Minnesota Center for Environmental Advocacy, Union of Concerned Scientists, and Sierra Club (collectively MCEA) appealed by writ of certiorari. HTE filed a separate certiorari appeal, and this court consolidated the appeals.

ISSUES

- I. Does MEPA apply to the affiliated-interest agreements?
- II. Can the commission order an EAW for a project outside of Minnesota?

ANALYSIS

The denial of an EAW is subject to judicial review by writ of certiorari. Minn. Stat. § 116D.04, subd. 10. In a certiorari appeal, our review is “generally deferential.” *In re Env'tl. Assessment Worksheet for 33rd Sale of State Metallic Leases*, 838 N.W.2d 212, 216 (Minn. App. 2013), *review denied* (Minn. Nov. 26, 2013). We will affirm unless the commission’s decision is unreasonable, arbitrary or capricious, unsupported by substantial evidence, or contrary to law. Minn. Stat. § 14.69 (2018). But we will consider whether the commission has “taken a hard look at the problems involved, and whether it has genuinely engaged in reasoned decision-making.” *In re Enbridge Energy*, 930 N.W.2d 12, 21 (Minn. App. 2019), *review denied* (Minn. Sept. 17, 2019). And we review questions of law de novo. *Metallic Leases*, 838 N.W.2d at 216.

Minnesota recognizes that human activity, including “energy production and use,” impacts the environmental resources that are critical to the welfare of current and future

generations of Minnesotans and has committed, through MEPA, to protecting and preserving those resources. Minn. Stat. § 116D.02, subs. 1, 2(9). MEPA requires governmental agencies to administer all state laws and rules in accordance with that commitment, and to proactively, systematically, and cooperatively consider and minimize negative impacts on the environment. Minn. Stat. § 116D.03, subd. 1.

MEPA also specifically requires governmental agencies to consider environmental consequences when deciding whether to approve a proposed “project.” *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm’rs*, 713 N.W.2d 817, 823 (Minn. 2006). MEPA contemplates preparation of two principal categories of project-specific review reports—an EAW and an EIS. An EAW is a brief preliminary report that sets out the basic facts necessary to determine whether the proposed project requires the more rigorous review of an EIS.² Minn. Stat. § 116D.04, subd. 1a(c).

An EAW is required for certain types of projects, or upon a conforming citizen petition. Minn. Stat. § 116D.04, subd. 2a(b), (e); Minn. R. 4410.1000, subs. 2-3 (2017). A citizen petition requesting preparation of an EAW must demonstrate that, “because of the nature or location of a proposed project, there may be potential for significant environmental effects” that a Minnesota governmental agency should consider. Minn. Stat. § 116D.04, subd. 2a(e); *see* Minn. R. 4410.1100 (2017) (establishing rules for EAW petition process). If the agency deciding whether to approve the project—the responsible

² An EIS “describes the proposed project in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated.” Minn. Stat. § 116D.04, subd. 2a(a).

governmental unit (RGU)—determines that this standard is met, it “shall order the preparation of an EAW.” Minn. R. 4410.1100, subp. 6. If the petition “fails to demonstrate the project may have the potential for significant environmental effects,” the RGU “shall deny” it. *Id.*

Here, the commission did not deny the EAW petition because it failed to demonstrate that NTEC may have the potential for significant environmental effects. Rather, the commission concluded that (1) MEPA does not apply to the affiliated-interest agreements because NTEC is not a MEPA “project,” and (2) the commission lacks jurisdiction to order an EAW for a power plant in Wisconsin. Relators challenge both conclusions.

I. MEPA applies to the affiliated-interest agreements.

“Because the EAW requirement applies to ‘projects,’ determining whether an action is a ‘project’ is a threshold issue.” *Metallic Leases*, 838 N.W.2d at 216. Deciding that issue requires interpretation of MEPA and the MEPA rules, which present questions of law that we review de novo. *Id.*

The definition of “project” is “somewhat circular.” *Minnesotans for Responsible Recreation v. Dep’t of Nat. Res.*, 651 N.W.2d 533, 539 (Minn. App. 2002) (*MRR*). MEPA does not define the term but uses it to define “governmental action” as “activities, including *projects* wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government.” Minn. Stat. § 116D.04, subd. 1a(d) (emphasis added). The MEPA rules define “project” as “a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly.” Minn. R.

4410.0200, subp. 65 (2017). But the rules clarify that “[t]he 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.” *Id.* In synthesizing these definitions, we have determined that a MEPA “project” is a “definite, site-specific, action that contemplates on-the-ground environmental changes.” *Metallic Leases*, 838 N.W.2d at 217 (quoting *MRR*, 651 N.W.2d at 540).

The affiliated-interest agreements contemplate Minnesota Power undertaking two physical activities: (1) constructing NTEC and (2) operating NTEC.³ These are definite, site-specific actions that will affect not only the plant’s immediate location but also its surrounding environment, most notably through the large quantities of carbon dioxide that the plant will emit. The impact of such emissions on air quality is precisely the type of environmental effect that MEPA addresses. *See* Minn. R. 4410.0200, subp. 23 (2017) (defining “environment” as “physical conditions existing in the area that may be affected by a proposed project,” including “land, air, water, minerals, flora, fauna, ambient noise, energy resources, and artifacts or natural features of historic, geologic, or aesthetic significance”); *see also* Minn. R. 7849.1500, subp. 2 (2017) (requiring review of a proposed power plant’s “anticipated emissions,” including carbon dioxide). And it is undisputed that, were NTEC to be constructed in Minnesota, MEPA would require review

³ It is undisputed that the third activity contemplated under the affiliated-interest agreements—Minnesota Power purchasing half of NTEC’s output—is not itself a physical activity.

of those and other anticipated environmental effects. Minn. Stat. § 216E.03, subd. 5(a) (2018); Minn. R. 4410.4400, subp. 3 (2017).

The commission nonetheless concluded that the affiliated-interest agreements do not involve a MEPA project because their approval will not “cause” the construction and operation of NTEC. The commission reasoned that the necessary causal connection is absent because construction and operation of NTEC cannot occur without further review and approval by Wisconsin authorities. Relators argue that approval of the affiliated-interest agreements will indirectly cause the definite, site-specific, environmental changes because, but for the approval, NTEC will not be constructed and they will not occur. We agree with relators for two reasons.

First, relators’ position is more consistent with the directive that when determining whether to order an EAW, the RGU must focus on the proposed physical activity itself. *See* Minn. R. 4410.0200, subp. 65. An EAW is warranted if the physical activity being approved may, because of its “nature or location,” create a “potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e); *see* Minn. R. 4410.1100, subp. 6. The commission did not substantively analyze either NTEC’s nature or location. But the record suggests that both are significant. As noted above, Minnesota law recognizes that construction and operation of a large power plant are environmentally significant events. And while Minnesota Power proposes to construct NTEC in Wisconsin, the power plant will be only 2.5 miles from Minnesota and similarly close to Lake Superior.

Second, MEPA requires only an indirect causal connection between the governmental approval and the physical activity. *See* Minn. R. 4410.0200, subp. 65

(defining a “project” to include governmental action that “indirectly” causes manipulation of the environment); *see also* Minn. Stat. § 116D.04, subd. 1a (defining “governmental action” to include projects “partially” approved by units of government). It also recognizes that multiple governmental approvals may be necessary for a physical activity to occur. Minn. R. 4410.0500, subp. 5 (2017). Any governmental approval that is necessary for a physical activity to occur is an indirect cause of the activity. *See Black’s Law Dictionary* 265 (10th ed. 2014) (defining “but-for cause” as “[t]he cause without which the event could not have occurred” and “contributing cause” as “[a] factor that—though not the primary cause—plays a part in producing a result”). Because Minnesota Power cannot construct and operate NTEC without the commission’s approval of the affiliated-interest agreements, the approval of the agreements will indirectly cause those physical activities.

The commission contends that existing caselaw does not endorse this “but for” standard. But the limited caselaw on whether a MEPA “project” exists focuses less on causation and more on whether the matter under consideration is sufficiently mature for environmental review. *See Metallic Leases*, 838 N.W.2d at 217 (holding that an EAW was premature at the time mineral leases were sold because the sale itself did not contemplate any definite exploration plans, which would be subject to environmental review “if and when [they] coalesce”); *MRR*, 651 N.W.2d at 540 (holding that trail system “plans” are not “projects” because they are “too broad and speculative to provide the basis for meaningful environmental review,” whereas “several of the trails identified in the system plans satisfy the definition of a project”).

The NTEC plan is mature. And the commission's consideration of the affiliated-interest agreements is its sole opportunity to address Minnesota Power's construction and operation of NTEC. Unlike in *Metallic Leases* and *MRR*, there is no later time when MEPA review of NTEC's anticipated environmental effects will be more appropriate. Indeed, it is undisputed that there will be no other opportunity for such review at all. MEPA requires all state agencies to consider "to the fullest extent practicable" the environmental consequences flowing from their actions. Minn. Stat. § 116D.03, subd. 1. Given this broad directive, we conclude that MEPA applies to the governmental action of approving the NTEC affiliated-interest agreements.

II. The commission can order an EAW for a project outside of Minnesota.

MCEA and HTE argue that the commission erred by concluding that it lacks jurisdiction to order an EAW because its "jurisdiction over power plants" is limited to those built in Minnesota. They emphasize that nothing in MEPA limits its application to projects within Minnesota. The commission and Minnesota Power contend this reading of MEPA violates the principle that state statutes are presumed not to have extraterritorial effect. We address the issues of jurisdiction and extraterritoriality in turn under a *de novo* standard of review. *Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 94 (Minn. 2015) (extraterritoriality); *In re N. States Power Co.*, 775 N.W.2d 652, 656 (Minn. App. 2009) (jurisdiction).⁴

⁴ MCEA and HTE suggest that the EQB determined jurisdiction by designating the commission as the RGU for the EAW petition, and that the commission and now this court should defer to that determination. We disagree. The EQB's role regarding an EAW petition is plainly limited. *See* Minn. Stat. § 116D.04, subd. 2a(e); Minn. R. 4410.1100,

A. Jurisdiction

The commission’s jurisdiction “is limited to that which has been expressly authorized by the legislature.” *N. States Power*, 775 N.W.2d at 656. But the legislature did not define the commission’s jurisdiction in terms of geographical boundaries; the legislature defined it in terms of the entities the commission regulates—Minnesota public utilities. Minn. Stat. § 216B.08 (2018) (stating that the commission is “vested with the . . . jurisdiction to regulate . . . every public utility”); *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 286 (Minn. App. 2010) (stating that the commission “has jurisdiction over public utilities”); *see also* Minn. Stat. § 216B.02, subd. 4 (2018) (defining “public utility”). Minnesota Power is a public utility subject to the commission’s regulation.

In regulating Minnesota Power, the commission has jurisdiction to regulate the company’s siting and construction of power plants in Minnesota. *See* Minn. Stat. §§ 216B.243, subd. 2 (requiring an entity proposing to site or construct a “large energy facility . . . in Minnesota” to obtain “a certificate of need [from] the commission”), 216E.02, subd. 3 (authorizing the commission to provide for site selection for large energy facilities) (2018). It also has jurisdiction over the precise situation presented here—Minnesota Power’s proposed agreements with its Wisconsin affiliate. *See* Minn. Stat. § 216B.48 (2018). The legislature broadly defined “affiliated interests,” charging the commission with determining whether a public utility’s agreements with affiliated interests

subps. 5, 8. And even if we construed its RGU’s designation as a determination that the commission has jurisdiction, we do not defer to an agency on legal questions such as jurisdiction. *See N. States Power*, 775 N.W.2d at 656.

are “reasonable and consistent with the public interest.” *Id.*, subds. 1, 3. The legislature imposed this regulatory duty without regard to the affiliate’s state of residence or the location where the agreements will be performed. *Id.*

The commission’s express authority to regulate construction of power plants in Minnesota, and to order environmental review before approving their construction, does not negate its authority to approve or reject Minnesota Power’s agreements with its Wisconsin affiliate regarding the construction, operation, and output of NTEC. Nor does it negate the commission’s authority to order an EAW to inform that decision. To conclude otherwise would read into the affiliated-interest statute terms the legislature did not enact. *See Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604 (Minn. 2014) (stating that a court does not “add words or phrases to unambiguous statutes”). And restricting the commission’s regulatory role because a public utility proposes to act through an affiliate would prevent the commission from undertaking its core functions, including assessing how the utility’s action will affect the environment. We decline to interpret the affiliated-interest statute to reach that result.

B. Extraterritoriality

Likewise, the plain language of MEPA contains no geographical limitation—an RGU must order an EAW if a petition demonstrates that, “because of the nature or location of a proposed project, there may be potential for significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(e); *see* Minn. R. 4410.1100, subp. 6. MCEA and HTE suggest that it would improperly modify the plain language of the statute to exclude from this mandate projects outside of Minnesota that nonetheless may have potential for significant

environmental effects in this state. *See Walsh*, 851 N.W.2d at 604. The commission and Minnesota Power counter that a limitation must be implied in MEPA to prevent improper extraterritorial effect in violation of the Commerce Clause of the United States Constitution.

The Commerce Clause reserves to Congress the power to regulate commerce “among the several States.” U.S. Const. art. I, § 8. The Supreme Court has held that the “negative or dormant implication” of this reservation “prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.” *Swanson*, 870 N.W.2d at 93 (quotation omitted). Under the dormant Commerce Clause, “states may not enact laws that have a wholly ‘extraterritorial effect’—that is, laws that control ‘commercial activity occurring wholly outside the boundary of the State.’” *Id.* at 94 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 337, 338, 109 S. Ct. 2491, 2500 (1989)). We presume the legislature does not intend statutes to have unconstitutional extraterritorial application. *See McLane Minn., Inc. v. Comm’r of Revenue*, 773 N.W.2d 289, 298 (Minn. 2009).

Minnesota Power contends application of MEPA here would constitute prohibited regulation of conduct entirely outside of Minnesota because it would have “the practical effect of regulating the siting, construction, and operation of a facility beyond the boundaries of Minnesota.” The commission asserts that requiring construction in Wisconsin “to satisfy the requirements of MEPA” would impermissibly impose Minnesota’s environmental regulations on our neighboring state. They both point to *North Dakota v. Heydinger*, 825 F.3d 912, 919-22 (8th Cir. 2016), in which the Eighth

Circuit Court of Appeals struck down on extraterritoriality grounds a Minnesota statute that prohibited new agreements to import or purchase power from a source outside the state that would contribute to or increase statewide power-sector carbon-dioxide emissions. We are not persuaded.

Heydinger involved a statute that, like MEPA, sought to protect the environment, but it did so by barring certain kinds of commercial transactions. That is precisely the type of regulation that implicates the dormant Commerce Clause. *See Swanson*, 870 N.W.2d at 95 (stating that, “[i]n addressing the scope of the Commerce Clause, the Supreme Court has made clear that commerce is ‘economic activity’”). By contrast, MEPA does not regulate commerce in Wisconsin or impose Minnesota’s environmental policies on Wisconsin. It does not dictate whether Minnesota Power constructs, operates, or purchases power from NTEC. MEPA is a process-focused statutory scheme; it merely provides a mechanism for informing the commission’s decision whether the affiliated-interest agreements are reasonable and consistent with the public interest with reference to environmental impact. Accordingly, the extraterritoriality doctrine does not preclude MEPA’s application here.

In sum, the affiliated-interest agreements involve a project within the scope of MEPA, and the location of that project outside Minnesota does not prevent the commission from conducting MEPA review to inform its decision whether to approve those agreements.⁵

⁵ Because the commission must evaluate the EAW petition under Minn. R. 4410.1100, subp. 6, before it can decide anew whether to approve the affiliated-interest agreements,

DECISION

The commission erred by denying the EAW petition and approving the affiliated-interest agreements without substantively addressing the criteria that govern whether an EAW is necessary. We therefore reverse and remand for the commission to determine whether NTEC may have the potential for significant environmental effects and, if so, to prepare an EAW before reassessing whether to approve the affiliated-interest agreements.

Reversed and remanded.

we decline to address relators' other arguments regarding the commission's approval of the agreements.