

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Case Type: Declaratory Judgment
Court File No. 62-C3-99-010952

Power Line Task Force.

Plaintiffs,

vs.

Minnesota Environmental Quality Board,

Defendant,

and

Northern States Power Company,

Intervener-Defendant.

MEMORANDUM OF MINNESOTA
ENVIRONMENTAL QUALITY BOARD
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR NEW TRIAL/RELIEF
FROM JUDGMENT

IIWRODUCTION

On November 18, 1999, the Minnesota Environmental Quality Board (MEQB) voted not to require an environmental impact statement (EIS) before Northern States Power Company (NSP) upgrades its Southeast Metro transmission line (the Project). Plaintiff challenged the MEQB decision in this Court. On September 7, 2000, this Court entered judgment dismissing Plaintiff's complaint. The appeal period ran on or about November 6, 2000. Plaintiff did not appeal. Instead, Plaintiff now requests that this Court reopen its judgment as provided under Minn. R. Civ P, 60.02 (b) claiming "newly discovered information." Plaintiff's motion should be denied because the information it now brings before this Court is not new, not relevant, and otherwise fails to meet the high standard established for motions to reopen,

FACTS

NSP proposes to reconstruct a transmission line that passes through six cities in the southeastern part of the Metropolitan Area, from NSP's Red Rock Substation in Newport to the Rogers Lake Substation in Mendota Heights, and to the Wilson Substation in Bloomington. The Project is not large enough to require either a certificate of need from the Minnesota Public Utilities Commission, or a routing permit from the Minnesota Environmental Quality Board (MEQB), or environmental review by the MEQB. However, pursuant to petition and with the cooperation of NSP, the MEQB Staff prepared an environmental assessment worksheet (EAW).

The EAW was published on May 31 1999, opening a period for public comment until June 30, 1999. Public comments and the ensuing discussions during the EAW process focused on potential impacts from electric and magnetic fields (EMF). Also, although an EAW is not required to include a discussion of alternatives to the project proposed, as is an EIS, information regarding an alternative route was attached to the EAW. In addition, as will be discussed in more detail below, information on alternatives was discussed with MEQB board members at meetings held on September 16 and November 18, 1999, to deliberate on whether an EIS was warranted.

At the end of the September 16 meeting, a commissioner Board Member moved to positive declaration, i.e., to order preparation of an EIS. R.¹ at 1261. Upon questioning by fellow Board members, the Board Member stated that alternatives was his concern, nor the health issue:

¹ The certified administrative record was filed with the Court. It included an Administrative Record Index (dated March 6, 2000) identifying each record document in chronological order. The MEQB served a copy of the Index on the parties on March 6, 2000. The citations in this memorandum to the record documents are preceded by "R. at " and the page number or numbers.

Mr. Chairman. I did not motion a specific references far scoping guidelines with regard to the health issue. I'm looking at it strictly from an opportunity to have alternatives presented and cost factors presented. *I'm* silent on the health issues.

I'm much more interested in having alternatives and the costs evaluated so that we can have the opportunity to look at the uncertainty of health risks against the certainty of costs.

R. at 1262-63. After more exchanges, the Board Member again stated his position: "I'm asking for a positive declaration to study alternative sites knowing that the static will--the static question will be the EMF exposure." R. at 1269. His fellow Board members rejected his motion, seven voting against the motion and three for it. R. at 1270-71

The Board Member persisted. Near the end of the November 18 Board meeting, he again made a motion for a positive declaration, arguing For consideration of alternatives. R. at 1298. 1300. Again the motion failed. this time with three Board members supporting the motion and ten voting against. R. at 1307.08.

On November 18, 1999, the MEQB board voted 10-3 that an EIS was not required, R. at 1305-09. A copy of the MEQB decision is attached to the Affidavit of Dwight S. Wagenius [Wagenius Affidavit] as Exhibit A. The MEQB's decision was supported by an extensive administrative record including Findings of Fact adopted by the MEQB Board contemporaneously with and in support of its decision. Among other matters, the findings note that potential **environmental** effects, if any, were subject to mitigation by ongoing public regulatory authority, including local conditional use permits. Whether a line can be constructed in a particular location is subject to local zoning and control. Local governmental units potentially impacted by this project testified at the MEQB meeting concerning their authority to control the routing of the line, relating several successful experiences with NSP changing its project to meet local concerns. R, 1281-83.

On December 10, 1999, Plaintiff filed its Complaint in this Court seeking a declaratory judgment. NSF immediately intervened. Plaintiff told the Court it needed discovery to determine if Intervenor NSP had failed to provide full information on the Project to the MEQB. In its statement, dated February 8, 2000, Plaintiff addressed its need for discovery:

Discovery is not appropriate outside of the administrative record as defined by Plaintiff to include all material and information available to the staff of the MEQB prior to the meeting of the Board on November 18, 1999, but discovery may be appropriate as to the files and information of Defendant-Intervenor NSP as to what NSP knew and did or did not disclose to the MEQB.

Plaintiff's Informational Statement, paragraph 4 at 1 (a copy of the Statement is attached to the Wagenius Affidavit as Exhibit B).

MEQB and NSP stated in their joint informational statement that discovery was not appropriate outside the administrative record, but the Court adopted Plaintiff's position. Based on the Informational Statement Forms filed by the parties, and the file and proceedings in the case the Court ordered that:

2. All discovery shall be noticed so as to be completed by May 26, 2000. This cutoff date for discovery is also the deadline to bring and hear motions to compel discovery. No motion will be heard unless the parties have conferred in an attempt to resolve their differences prior to the hearing. The moving party shall certify to the court in writing, before the time of the hearing, compliance with this rule or any reasons for not complying. (Minn. R. Gen. Prac. 115.10).

Scheduling Order, paragraph 2 (Feb. 17, 2000) (emphasis in original) (a copy of the Order is attached to the Wagenius Affidavit as Exhibit C). There is no evidence in the record of Plaintiff exercising its discovery rights. Wagenius Affidavit, paragraph 7,

On August 24, 2000, this Court issued its Order for judgment. A copy of the Order is attached to the Wagenius Affidavit as Exhibit D. This Court found that the record demonstrated that MEQB's decision not to order an EIS was reasonable and supported by substantial evidence.

This Court granted the MEQB and NSP motions for summary judgment and dismissed Plaintiff's Complaint. Judgment was entered on September 7, 2000.

The period for Plaintiff to file an appeal expired on or about November 6, 2000

Plaintiff has now moved this Court for an order reopening the judgment and remanding the negative declaration on the need for an EIS back to the MEQB in light of "newly discovered information." In its memorandum, Plaintiff claims three categories of newly discovered information. First, the Plaintiff cites to "new information" concerning system alternatives that has been generated as a part of zoning decisions currently being made by local authorities. Second, Plaintiff claims, that there is "new information" with regard to electrical loads that will be handled by the line. Finally, Plaintiff claims that there is "new information" regarding the potential health impacts of EMF.

ARGUMENT

1. **Plaintiff Must Show There Is Evidence That Existed AT The Time Of Trial THAT, With DUE DILIGENCE, Plaintiff Could NOT Have Discovered In Time To Move For A NEW Trial**

Plaintiff's motion relies on Minn. R. Civ. P, 60.02 (b), which provides that the court may relieve a party from a final judgment for the reason of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial."

Rule 60.02 reflects a balance between the need for finality in judgments and the need for relief from judgments under very specific circumstances. The drafters of Rule 60.02 accordingly provided exceptions to the finality of judgments under narrowly defined circumstances. Rule 60.02 can be utilized only if one of the grounds specified in the rule exists. *Anderson v Anderson*, 288 Minn. 514, 518, 179 N.W.2d 718, 721-22 (1970).

Curler v. Anderson, 554 N.W.2d 110, 113 (Minn. Ct. App. 1996).

Rule 60.02 (b) does not provide for the introduction of evidence that was known to exist before judgment was entered. *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 716 (Minn. Ct. App.

1997). A district court's record cannot be supplemented by new evidence after the court grants summary judgment. **Id.** In order for relief from judgment to be granted where there is newly discovered evidence, such evidence must be relevant and admissible at trial, must be likely to have an effect on the result of a new trial, and must not be merely collateral, impeaching, or cumulative. **Regents of University of Minnesota v. Medical Inc.**, 405 N.W.2d 474, 478 (Minn. Ct. App. 1987) (*citing Gruenhagen v Larson. supra* at 459, 246 N.W.2d at 569); **Vibe v. Flaby**, 316 N.W.2d 276, 284 (Minn. 1982). To require a new trial, the new evidence must be such that with diligence it could not have been found and produced at trial: diligence requires the use of available discovery tools as well as reasonable investigation efforts. *Regents*, 405 N.W.2d at 479. *citing Brown v. Bertrand*, **254** Minn.175, 185-185, 94 N.W.2d 543. 550 (1959). Further, the moving party must show that the evidence could not have been discovered through the exercise of due diligence before trial. *Vikse*. 316 N.W.2d at 284.

In summary, in order to reopen a judgment on these grounds, the moving party must show: (1) that there exists "new" evidence that existed at the time of trial and that does not merely supplement evidence already in the record; (2) that the evidence, if it had been presented prior to judgment, would have been likely to affect the outcome of the case; and (3) that this new evidence could not have been discovered in time through due diligence David Herr, Roger **Haydock & Jeffrey Srempel, Motion Practice 24:8** (3d ed. 1999).

The MEQB believes that Plaintiff has satisfied none of the applicable criteria, that the issues are all resolved in favor of upholding the Courts judgment, and that the Court should deny the motion. None of the "new" information meets legal criteria for "newly discovered evidence which by due diligence could not have been discovered" in the terms of Rule 60.02 (b).

11. **PLAINTIFF'S REQUEST To REOPEN THE RECORD ON THE BASIS OF DEVELOPMENT OF NEW SYSTEM ALTERNATIVES SHOULD BE REJECTED.**

On pages 1 through 10 of its memorandum, Plaintiff argues that new information was disclosed on October 18, 2000, regarding three system alternatives to the proposed facility and that NSP knew or should have known about the alternatives but withheld the information from the public and the MEQB. Plaintiff argues that it could not avail itself of discovery because the matter was not subject to discovery at the district court. Plaintiff further argues that the alternatives information is directly related to issues raised by MEQB members, and that the feasibility of system alternatives was a "determinate" factor before the MEQB. Plaintiff finally argues that had the MEQB had this information it may have affected its decision. The Court should reject these arguments.

In brief, the reasons to reject the arguments on alternatives are these: Alternatives are not at issue in the EAW process because evidence regarding alternatives is not relevant to the decision whether to order an EIS on a proposed project. Even though alternatives were discussed by the MEQB it was in the context of what ordering an EIS would entail. The new information on alternatives that was created by consultants after the Court's Judgment is not covered by Rule 60.02 (b). The information on alternatives that existed at the time of the summary judgment proceedings in this court was available to Plaintiff by exercise of the discovery rights acknowledged by the Court in its Scheduling Order. The following sections discuss these situations in turn.

A. **Alternatives Are Not Relevant To The Decision Whether To Order An EIS On Project.**

The law is clear that the issue of alternatives to a proposed project arises only after a determination that the proposed facility has the potential for significant environmental effects,

i.e., during the EIS preparation process. Alternatives to the proposed facility are not relevant considerations in determining whether an EIS should be ordered on a proposed facility. The Minnesota Environmental Policy Act, Minn. Stat. ch. 116D, which established the environmental review program in the state, mentions consideration of alternatives in the provision addressing EISs, but not regarding EAWs. “The environmental impact statement should be an analytical rather than an encyclopedic document which discusses appropriate alternatives to the proposed action and their impacts .” Minn. Stat. § 116D.04. subd. 2a.

The environmental review program established in MEQB rules, Minn. R. ch. 4410, includes a long paragraph setting out the consideration of alternatives in an EIS, but does not mention alternatives once regarding EAWs. See Minn. R. 4410.2300 G. See also *Iron Rangers for Responsible Ridge Action v. Iron Range Resources*, 531 N.W.2d 874, (Minn. Ct. App. 1995) (“Because the RGU determined the project does not have the potential for significant environmental effects, a study of project alternatives is not required.”)

The purpose of environmental review is to gather information that addresses the significant environmental issues of a proposed action. The information is intended to be available to governmental units and citizens early in the decision making process. Minn. R. 4410.0300. subp. 3, 4.A. Environmental documents are not intended to be used to justify a decision or to require that a project be disapproved. *Id.* The documents are used as guides in issuing, amending, and denying permits and carrying out other governmental responsibilities to avoid or minimize adverse environmental effects. *Id.* The EAW information is intended to be usable and useful for the local units of government that have to make zoning and land use decisions.

To support an order to vacate a judgment and for a new trial, the newly discovered evidence must have been relevant to the issues and admissible at trial. *Brown v. Bertrand* 94 N.W.2d 543, 548 (Minn. 1959). That is not the case with the alternatives evidence. On this ground alone the alternatives argument should be rejected

B. Alternatives Information Would Not Affect Proceedings Before The MEQB Because The MEQB Knew Alternatives Are Not At Issue In An EAW Process And The MEQB Rejected Development Of Additional Information On Alternatives In Favor Of Local Processes.

Notwithstanding that alternatives are not a relevant consideration, two system alternatives were proposed for inclusion in the EAW, one by NSP and the other by Plaintiff. MEQB staff member Bob Cupit addressed in his affidavit filed with the Court in the summary judgment proceeding why he attached NSP's alternative to the EAW and did not include Plaintiff's.

16. In the third full paragraph on page 13, Plaintiff questions MEQB's inclusion of the NSP alternative route in the EAW. but not Plaintiff's alternative route. From my knowledge of the law it is clear that consideration of alternatives is not required in an EAW, One of the essential differences between EAWs and EISs is that while preparation of EISs includes alternatives, preparation of EAWs does not. When NSP filed its data submission it included a partial alternative route. I told NSP I would not include it in the EAW. NSP requested a meeting. NSP's representative argued that ***past Board consideration of EAWs had always included questions to proposers about whether they had looked at possible alternatives before proceeding with the project as proposed.*** I conceded that that invariably happens with NSP, and with other project proposers as well, notwithstanding that consideration of alternatives is not an EAW issue. NSP argued that ***it would be useful have an alternative in the record for consideration by local*** permitting jurisdictions. I agreed to include NSP's ***alternative*** route in the EAW as an informational attachment with a qualifying disclaimer. See R. at 0254. I did not review the alternative at all, or make any changes before attaching it to the EAW. R. at 0312-0339.

11. Roger Conant called to ask me if he could file an EAW data submission as well. There being no prohibition in rule and intending to use any useful content, I said OK. The Conant submission came in and I reviewed it hoping to find something useful, but I could not. The submission was fraught with hyperbole and opinion and ***lacked*** basis in fact. The Conant submission also included an alternative route. I did not review it or evaluate its feasibility. I concluded that I could not ***include*** the alternative ***in*** the EAW.

Affidavit of Bob Cupir (Cupit Affidavit), paragraphs 16 and 17, at 4 (emphasis added) (the Cupit Affidavit is **attached** as Exhibit E to the Wagenius Affidavit).

The Board members were clear that consideration of alternatives is appropriate only at the EIS stage, and that a finding of the potential for significant environmental effects is **necessary** to order an EIS. See the statements of Board Members Minn, Bomier and **Enzler**. R. at 1248, 1261-63, 1269. 1299-1301, 1305-06. Note **further** that the Board members placed reliance on the proposed facility being subject to the further approvals of local units of government. R. at 1293-94, 1305-06.

At the end of the September 16 meeting, as reported in the Facts above: a Board Member moved a positive **declaration**, i.e., to order preparation of an **EIS**. R. at 1761. Upon questioning by fellow Board members, the Member stated **that** alternatives was his concern, not the health **issue**:

Mr. Chairman. I did not **motion** a specific references fur scoping guidelines with regard to the health issue. I'm looking at it strictly from an opportunity to have **alternatives** presented **and** cost factors presented. I'm **silent** on the health issues.

I'm much more interested in having **alternatives** and the costs evaluated so that we can have the **opportunity** to look at the uncertainty of health risks **against** **the** certainty of costs.

R. at 1262-63. After more exchanges, the Member restated his position: "I'm asking for a **positive declaration** to study **alternative** sites **knowing** that the static will--the static question will be the **EMF** exposure." R. at 1269.

His fellow Board members understood **his** position:

DIRECTOR DUNN: Thank you, **Mr.** Chairman. What I think the issue is here, we would like to have an **alternative** route examined. Is that what we would like to have, And the only way we can da that, under the law, is to have **an** Environmental Impact Statement. The **bottom** line.

R. at 1266. The Board members understood his position and rejected it, seven voting against the motion and three for it. R. at 1270-71.

The Board Member persisted. At the November 18 Board meeting, he again made a motion for a positive declaration, arguing for consideration of alternatives. R. at 1298-1300. Again the motion failed, this time with three Board members supporting the motion and ten voting against. R. at 1307-08.

The Board understood the significance of the consideration of alternatives. The Board knew it could truly take alternatives into consideration only by ordering an EIS. It directly rejected two motions to do so. The practical and legal result of the Board's decision was that NSP next went to the local units of government to seek appropriate approvals to proceed with its proposed facility.

The Minnesota Power Plant Siting Act provides by direct implication that the proposer of a facility that is exempt from the operation of that statute shall "comply with any applicable state rule and any applicable zoning, building and land use rules, regulations and ordinances or any regional, county, local and special purpose government." Minn. Stat. § 116C.57, subd. 5.

Plaintiff has explained that the mayors of three affected local units of government got together to form a Steering Committee to consider NSP's proposal. This relates directly to an NSP statement to the Board of its commitment to work with local units of government. "With regard to alternatives, Northern States Power is completely committed to working with the local units of government to examine alternatives, if that is what they wish." R. at 1243. This result was also foreseen by members of the Board during the MEQB's decision-making process. R. at 1293-94 (Board member Engebretson, a county commissioner encouraging the mayors to work with NSP) and 1305-06 (Board member Enzler, "I know from my own experience where there

were some environmental issues that did not rise to the level of potential, but which the local unit of government was able to address through the CUP process.”)

Upon transmittal of the record of decision to five cities affected by the Project, the Executive Director of the MEQB stated in the transmittal letter that “[I]n making its decision, the EQB noted that the negative declaration should not preclude local permitting jurisdictions from considering alternative routes that may better comply with planning and development criteria at the local level.” R. at 1188. This letter was also attached to NSP’s initial filing with this Court in the summary judgment proceeding.

The permitting for the Project is proceeding before the representatives of the people most directly affected by the Project. The Court appropriately denied Plaintiff’s challenge to the MEQB decision on the Project and upheld the MEQB’s negative declaration decision. The information gathered in the environmental review process is being used by the local units of government for, among other things, helping to define additional information they need to complete their tasks. The system is working. The Court should let it continue to work. Remanding the issue of alternatives to the Board likely would not affect the Board’s decision, thus failing to satisfy a required showing to obtain a new trial. *Vikse*, 316 N.W.2d at 284.

C. Some Or All Of The Alternative Information That Plaintiff Seeks To Have Admitted Did Not Exist During The Proceedings Before This Court, And Thus Cannot Be Used To Reopen The Judgment Today.

Plaintiff’s presentation is somewhat ambiguous on the point, but it appears that at least the Commonwealth Associates alternatives were identified and created by that entity between September and October of 2000. Information that did not exist at the time of the earlier proceedings before this Court can not serve as the basis for imposition of Rule 60.02 (b). The newly discovered information posited as a basis for imposition of the rule must have existed at

the time of trial. *Brown v. Bertrand*, 94 N.W.2d at 548; Hen, et al., Motion *Practice, supra* at 24:8. The Commonwealth Associates-created alternatives are thus not subject to the rule or a basis for granting the relief requested.

D. Some Of The Alternatives Information That Plaintiff Claims Is "New" Existed At The Time Of Trial And Could Have Been Discovered By Plaintiff Through The Exercise Of Due Diligence.

Plaintiff claims that the MAPP alternative route is new information that was not part of the record before the MEQB. This is not the case. The MAPP alternative existed, was known by Plaintiff at the time of the proceeding before the MEQB, was discussed by the Board, and was subject to discovery if Plaintiff needed more information for purposes of the declaratory judgment action before this Court.

Plaintiff knew about the MAPP alternative prior to the proceeding before the MEQB. Mr. Conant referred to it in his statement to the Board. R. at 1220-22. Further, the representative of NSP who made a statement to the Board referred to the identified MAPP alternative and the other alternatives in an exchange with Commissioner Minn, identified by Plaintiff at page 5 of its Memorandum of Law as the 'Board member pursuing the alternatives issue

MR. ALDERS: Chairman, Commissioner Minn, we need to clarify a point, that the MAPP Committee identified NSP's proposal as the proposal to pursue. But MAPP also identified additional alternatives as part of its analysis. So MAPP and NSP are consistent in their presentation. It's not an either/or situation.

— R. at 1246.

Just a few minutes later in the meeting, Commissioner Minn acknowledged the superfluity of the NSP alternative:

Mr. Alders, you were not obligated to submit an alternative route in your EI -- in your EAW, yet you decided to do so for illustrative purposes. Would you share with the board the thinking behind the selection of that alternative as opposed to the 494 alternative or the MAPP alternative?

R. at 1248.

Plaintiff had **discovery** rights and **time** to discover any **information** it needed for purposes of its case; **Plaintiff** did not exercise its rights. Plaintiff alleges without any cited support **at** page 2 of **its memorandum** of law supporting **its motion** that “Plaintiff could not avail itself of discovery because the matter was not subject to discovery **at** the district **court**.” The record reflects, however, that Plaintiff made its claim for discovery **rights** in its Informational Statement dated February 8, 2000:

Discovery **is** not **appropriate** outside of the administrative record as defined by Plaintiff to include **all** material **and** information available to the **staff** of the MEQB **prior** to the **meeting** of the Board on November 18, 1999, but **discovery** may be appropriate as to the files and information of **Defendant-Intervenor** NSP **as** to what **NSP knew** and did or did not disclose to the **MEQB**.

Plaintiff’s Informational Statement, paragraph 4 at 1 (**Wagenius** Affidavit, Exhibit B). It appears that Plaintiff’s counsel had in mind the **type** of **information** Plaintiff has now “newly discovered.”

MEQB and NSP stated in their joint informational statement that discovery was not appropriate outside the administrative record. The Court, **however**, adopted **Plaintiff’s** position:

2. **All** discovery shall **be** noticed so as to be completed by **May** 26, 2000. This cutoff date for **discovery** is also the deadline to bring **and** hear motions to compel discovery. No motion will be heard unless the parties **have** conferred in an **attempt to** revolve **their** differences prior to the **hearing**. The moving party shall **certify** to the court in writing, before the time of the **hearing**, compliance with this rule or **arty** reasons for not complying. (**Minn. R. Gen. Prac.** 115.10).

Scheduling **Order**, paragraph 2 (Feb. 17, 2000) (emphasis in **original**) (**Wagenius** Affidavit, Exhibit **C**).

To the **knowledge** of the **MEQB**, Plaintiff did not exercise the discovery rights that **it** had **confirmed** by the Court in its scheduling order. **Wagenius** Affidavit, paragraph **7**. This failure to **exercise** its discovery rights cannot be characterized as acting with due diligence. **This failure**

alone also constitutes sufficient basis to reject Plaintiffs argument regarding alternatives. *Regents*, 405 N.W.2d at 479.

III. PLAINTIFF'S REQUEST TO REOPEN THE RECORD BECAUSE OF INFORMATION REGARDING LOADING RATES SHOULD BE REJECTED BECAUSE THIS INFORMATION WAS PART OF THE RECORD BEFORE THE MEQB.

Plaintiff asserts at pages 1, 3, 4-5, 8-9, 10, and 13 of its memorandum that the alleged "new information" includes verification that line loading will essentially double, and any decrease in electric and magnetic fields as a result of the line upgrade would be short-term, if at all. Plaintiff quotes from page 8 of the Affidavit of Blecker that "the utility's claim is that magnetic fields will be cut in half through phase cancellation, but with a doubling of current and increasing magnetic fields, the net result is no substantive change from the current fields." Plaintiff argues that this new information is relevant, could not have been obtained by Plaintiff prior to disclosure, and is not collateral, impeaching or cumulative.

The information regarding the effect of construction and operation of the proposed facility on line loading and thus EMF was included in the record. See the Affidavit of John P. Hynes (Hynes Affidavit), paragraphs 14 and 15, pages 4 and 5. The EAW included a table that showed a reduction in magnetic field levels due to operation of the proposed facility in 2001. *Id.* at 4. Commenters on the EAW requested additional data that would show the effect of anticipated electric use growth on magnetic fields. *Id.* NSP provided a table showing projected load levels and EMF levels with the proposed facility on line for the years 2001, 2006, 2010 and 2020. *Id.* at 4-5. The line loading and EMF levels information was available to the MEQB more than a month prior to its first meeting on the Project. *Id.* It was attached to the proposed findings of fact sent to the Board on August 12, 1999. *Id.* at 5; R. at 887. It is not new information.

The table of EMF levels projected over time from the current situation to year 2020 was incorporated by reference in Finding 20 of the Board's negative declaration decision, dated November 18, 1999, and attached to the decision as Exhibit # 1. *Id.*; R. 1175.1180; Exhibit XI is attached to the Hynes Affidavit. Similar information was included in the Hynes memorandum responding to EMF questions posed by Board Member Maline, circulated to all Board Members and interested persons prior to the second Board meeting considering this matter. *Id.* at 5; R. at 1168-70.

If Plaintiff did not understand the information or its implications, Plaintiff could have pursued the matter before the MEQB or exercised its discovery before this Court, as explained above. But the information was available to Plaintiff, the Board, and all interested persons. The information is not new, or newly discovered, in the sense of Rule 60.02 (b). This basis for relief should be rejected by the Court.

IV. THE PLAINTIFF'S REQUEST TO REOPEN THE RECORD BECAUSE OF NEW INFORMATION IN THE FORM OF PUBLISHED STUDIES REGARDING EMF SHOULD BE REJECTED.

A. Three of The EMF Studies Did Not Exist When The Matter Was Before The MEQB Or When The Matter Was Before The Court, And Thus Cannot Be Used As A Basis To Reopen The Judgment Now.

Plaintiff wants this Court to reopen the judgment for the MEQB to consider four new studies regarding EMF. Three of the articles are truly new studies, so new they do not qualify as "newly discovered evidence" under Rule 60.02 (b). They were published in September and October 2000, after the matter had been submitted to the Court. It is clear in the law that such new material does not qualify under the rule as "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." Discovery is hardly available for material that does not yet exist. *Gruenhagen*, 246 N.W.2d at 569.

B. The Newly-Published EMF Studies Are Cumulative With Information In The Record,

The first “new” study merely continues a discussion of a hypothesis first put forth in 1996. Hynes Affidavit at 3, paragraph 7. Plaintiff neglected to cite a separate article in the same journal that put the first article in a broader context, diminishing its potential significance. *Id.*, paragraph 8. These two articles merely supplement information already before the MEQB. *Id.*, paragraph 9. Supplemental information does not support Plaintiff’s motion. *Regents of University of Minnesota v. Medical Inc.*, 405 N.W.2d 474, 478 (Minn. Ct. App. 1987), citing *Gruenhagen v. Larson*, *supra* at 459, 246 N.W. 2d at 569: *see also Vikse v. Flaby*, 316 N.W.2d 276, 284 (Minn. 1982).

Even if all four of Plaintiff’s alleged new studies were subject to the rule, they provide no basis for a remand to the Board. None of them offers new information that would cause the Board to reverse its determination that the Project, does not have the potential for significant environmental effects as a result of its EMF. They offer no significant change to the EMF literature and are cumulative: they supplement but are not inconsistent with studies already known to the MEQB. Hynes Aff. at 34, paragraphs 10-14. *Regents of University of Minnesota v. Medical Inc.*, 405 N.W.2d 474, 478 (Minn. Ct. App. 1987): *see also Vikse v. Flaby*, 316 N.W.2d 276,284 (Minn. 1982)

Plaintiff implies that the MEQB made its negative declaration decision based on an assumption that all research was completed, that no studies were continuing, that the book was closed. That, of course, is not the situation at all. The NIEHS Report itself, the basis for the MEQB’s decision as regards EMF, acknowledges that research is continuing, R. at 0796, 0802, 0840, and 0843-45. MEQB Staff assured the Board that research on EMF continues, that studies are ongoing, and that staff follows that research on a regular basis. R. at 0791.

STATE OF MINNESOTA
COUNTY OF **RAMSEY**

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Civil

Power Line **Task** Force,
Plaintiff,

Court File No. **62-C3-99-010952**
Assigned Judge: Louise D. **Bjorkman**

VS.

Minnesota Environmental **Quality** Board,

Defendant.

AFFIDAVIT OF
JOHN P. HYNES

and

Northern States Power Company,

Intervenor-Defendant.

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Comes now John P. **Hynes**, upon oath, and deposes and states **as** follows:

1. I **am** employed by the Minnesota Environmental Quality Board (**EQB**) as **the** permit compliance manager for **the Power Plant Siting Program**. I have been employed by the EQB for **28** years.

2. **In my** tenure with the EQB. I have functioned **as** manager of transmission line projects on which **Environmental** Assessment Worksheets (**EAWs**) have been prepared, in addition to managing higher voltage projects on which more expansive Environmental **Impact** Statements have been prepared.

3. The EQB **has** had **the** responsibility to route high voltage transmission lines since 1973. Public concern over the **effects** of the electric and magnetic fields (**EMF**) emanating from

Rogers Lake - Stockyards

116kV Line

| | | Magnetic Field (milligauss) | | | | | | | | | | | | | |
|--|-----------|-------------------------------------|------|------|------|------|------|-----|-----|-----|-----|------|------|------|------|
| | | (3 feet above ground) | | | | | | | | | | | | | |
| | | Distance shown are to centerline of | | | | | | | | | | | | | |
| | | transmission line | | | | | | | | | | | | | |
| Type | Condition | (amps) | 250' | 200' | 150' | 100' | 50' | 25' | 0' | 25' | 50' | 100' | 150' | 200' | 250' |
| Existing Circuit Year 1999 | normal | 567 | 1.4 | 2 | 3 | 7 | 28 | 81 | 88 | 61 | 28 | 7 | 3 | 2 | 1.4 |
| | peak | 658 | 1.8 | 2.4 | 4.3 | 8 | 32 | 77 | 127 | 77 | 32 | 8 | 4.3 | 2.4 | 1.8 |
| Year 2001 | normal | 612 | 1.5 | 2 | 4 | 8 | 28 | 65 | 103 | 65 | 28 | 8 | 4 | 2 | 1.5 |
| | peak | 748 | 1.8 | 2.4 | 5 | 10 | 35 | 87 | 144 | 87 | 35 | 10 | 5 | 2.4 | 1.8 |
| Double Circuit Year 2001 | normal | 467/467 | 0.2 | 0.4 | 0.8 | 2 | 10 | 27 | 45 | 28 | 10 | 2 | 0.7 | 0.4 | 0.2 |
| | peak | 572/572 | 0.2 | 0.4 | 0.9 | 2.7 | 12.8 | 33 | 55 | 32 | 12 | 2.5 | 0.9 | 0.4 | 0.2 |
| Year 2006 | normal | 532/532 | 0.2 | 0.4 | 0.9 | 2.5 | 12 | 30 | 51 | 30 | 11 | 2.4 | 0.8 | 0.4 | 0.2 |
| | peak | 652/652 | 0.3 | 0.5 | 1 | 3 | 14 | 37 | 62 | 37 | 14 | 3 | 1 | 0.5 | 0.3 |
| Year 2010 | normal | 591/591 | 0.3 | 0.4 | 1 | 2.7 | 13 | 34 | 57 | 33 | 13 | 2.8 | 1 | 0.4 | 0.3 |
| | peak | 724/724 | 0.3 | 0.5 | 1.2 | 3.4 | 17 | 48 | 81 | 46 | 16 | 3.3 | 1.1 | 0.5 | 0.3 |
| Year 2020 | normal | 758/758 | 0.3 | 0.6 | 1.2 | 3.8 | 18 | 48 | 85 | 48 | 17 | 3.4 | 1.2 | 0.6 | 0.3 |
| | peak | 827/827 | 0.4 | 0.7 | 1.5 | 4.4 | 22 | 58 | 104 | 58 | 21 | 4.2 | 1.4 | 0.7 | 0.4 |
| Single Circuit Alternate | | | | | | | | | | | | | | | |
| Year 2001 | | | | | | | | | | | | | | | |
| Existing Circuit | normal | 467 | 1 | 2 | 3 | 6 | 22 | 50 | 79 | 50 | 22 | 6 | 3 | 2 | 1 |
| New Single Circuit | normal | 467 | 0.6 | 1 | 2 | 4 | 14 | 29 | 43 | 25 | 12 | 4 | 2 | 1 | 0.6 |
| Existing Circuit New Single Circuit | peak | 572 | 1 | 2 | 4 | 8 | 26 | 61 | 87 | 61 | 26 | 8 | 4 | 2 | 1 |
| | peak | 572 | 1 | 2 | 3 | 5 | 17 | 35 | 52 | 30 | 14 | 4 | 2 | 1 | 0.7 |
| Year 2006 | | | | | | | | | | | | | | | |
| Existing Circuit | normal | 532 | 1 | 2 | 3 | 7 | 25 | 57 | 88 | 57 | 25 | 7 | 3 | 2 | 1 |
| New Single Circuit | normal | 532 | 1 | 1.4 | 2 | 5 | 15 | 33 | 48 | 28 | 13 | 4 | 2 | 1 | 0.7 |
| Existing Circuit New Single Circuit | peak | 653 | 1.5 | 2 | 4 | 9 | 30 | 70 | 110 | 70 | 30 | 8 | 4 | 2 | 1.5 |
| | peak | 653 | 1 | 1.7 | 3 | 6 | 18 | 48 | 59 | 35 | 16 | 5 | 2 | 1.3 | 1 |
| Special Cases | | | | | | | | | | | | | | | |
| Double Circuit | normal | 514/420 | 0.4 | 0.6 | 1.2 | 3.2 | 13 | 31 | 46 | 23 | 7.6 | 1.1 | 0.3 | 0.1 | 0.1 |
| Unequal currents | normal | 612/0 | 1.4 | 2.2 | 4 | 8.6 | 27 | 51 | 60 | 32 | 17 | 6.3 | 3.2 | 2 | 1.3 |
| Unequal sags | normal | 467/467 | 0.1 | 0.4 | 0.7 | 2.2 | 10 | 25 | 42 | 25 | 10 | 2 | 0.7 | 0.3 | 0.2 |

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Civil

Power Line Task Force,

Court File No. 62-C3-99-010952
Assigned Judge: Louise D. Bjorkman

Plaintiff.

vs.

Minnesota Environmental Quality Board,

Defendant.

AFFIDAVIT OF
DWIGHT S. WAGENIUS

and ,

Northern States Power Company,

Intervenor-Defendant.

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Comes now Dwight S. Wagenius, upon oath, and deposes and states as follow:

1. I am an Assistant Attorney General assigned to represent the Minnesota Environmental Quality Board (MEQB) in this case.

2. Attached as Exhibit A is a true and correct copy of the MEQB negative declaration decision dated November 18, 1999.

3. Attached as Exhibit B is a true and correct copy of Plaintiff's Informational Statement dated February 8, 1999.

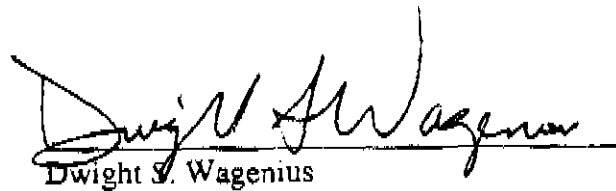
4. Attached as Exhibit C is a true and correct copy of the Court's Scheduling Order. dated February 17, 1999.

5 . Attached as Exhibit D is a true and correct copy of the Court's Order for summary judgment dated August 24, 1999, and attached Memorandum.

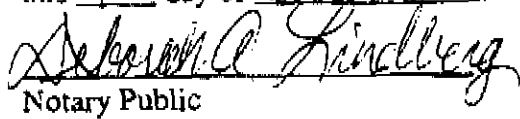
6. Attached as Exhibit E is a true and correct copy of the Affidavit of Robert D. Cupit.

7. There is no evidence in the record of Plaintiff exercising its discover' tights.

Further your Affiant saycth not.


Dwight S. Wagenius

Subscribed and sworn to before me
this 4th day of December, 2000.


Notary Public

AG: 436839.v 01



STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Power Line Task Force,
Plaintiff,

Case type: Other Civil

Court File No. 62-C3-99-010952

Vs.

**PLAINTIFF'S INFORMATIONAL
STATEMENT**

Minnesota Environmental Quality Board,
Defendant.

1. All parties have been served with process.
2. All parties have not joined in the filing of this form.
3. Brief description of the case:

At its November 18, 1999, regular meeting Defendant MEQB issued a negative declaration on the need for an EIS on Defendant-Intervenor NSP's proposal to upgrade its Twin Cities Southeast Metro Transmission Lines by adding a second 115-kilovolt line to an existing circuit. Plaintiff Power Line Task Force seeks a judgment declaring that an EIS is needed for the line or that the MEQB's decision was arbitrary and capricious and therefore void as a matter of law necessitating a new hearing.

4. Discovery

Discovery is not appropriate outside of the administrative record as defined by Plaintiff to include all materials and information available to the staff of the MEQB prior to the meeting of the Board on November 18, 1999, but discovery may be appropriate as to the files and information of Defendant-Intervenor NSP as to what NSP knew and did or did not disclose to the MEQB.

5. Assignment as a standard case is requested.
6. The following date is suggested:

June 19, 2000 date for submitting motions for summary judgment and for dismissal. All briefs and reply briefs by all parties should be filed by this date.

7. Estimated Trial Time:

A trial is not anticipated.

8. A jury trial is not appropriate.

9. ADR Process


ADR is not appropriate regarding the challenge to the negative declaration on preparation of an EIS because the case involves interpretation of the statutory authority of the MEQB and rules of due process.

10. Please list any additional information which might be helpful to the court when scheduling this matter:

With regard to the decision of the MEQB that no EIS is necessary with regard to the transmission line, the parties anticipate that both plaintiff and defendant will move for summary judgment on the basis of the full administrative record as defined in Paragraph 4 above and the files and records of Defendant-Intervenor NSP.

Dated this 8th day of February 2000.

STEPHEN B. YOUNG, ESQ.
Attorney at Law


By: Stephen B. Young (#196619)
Attorney for Plaintiffs
4040 IDS Center
Minneapolis, MN 55402
tel: (612) 339-5256
fax: (612) 339-8240

STATE OF MINNESOTA
COUNTY OF RAMSEY

FILED
Court Administrator
FEB 17 2000
~~____~~ Deputy

Exhibit C
DISTRICT COURT
SECOND JUDICIAL DISTRICT
COURT FILE NO. C3-99-10952

Power Line Task Force,
Plaintiff(s),

v.

SCHEDULING ORDER

Minnesota Environmental **Quality** Board,
Defendant(s).

Informational Statement Forms have been filed by Stephen B. Young for plaintiff(s), Dwight S. Wagenius for defendant(s) and Michael C. Connelly for intervenor Northern States Power Company. Based on the information contained therein, a review of the file and the proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Any deadline set forth in this order may not be extended by the stipulation of the parties without leave of the court.
2. All discovery shall be noticed so as to be completed by May 26, 2000. This cutoff date for discovery is also the deadline to bring and hear motions to compel discovery. No motion will be heard unless the parties have conferred in an attempt to resolve their differences prior to the hearing. The moving party shall certify to the court in writing, before the time of the hearing, compliance with this rule or any reasons for not complying. (Minnesota Gen. Rule Pract. 115.10).
3. Dispositive motions must be scheduled so that they are heard by June 30, 2000. Parties intending to bring dispositive motions should schedule the motion eight weeks prior to the deadline, or earlier. Counsel should monitor the status of the motion calendars and plan accordingly. The failure to schedule a motion timely will not be grounds for any extension of the motion deadline. No motion will be heard unless the moving party certifies in writing the attempts of the parties to resolve their differences prior to the motion hearing.

DATED: FEBRUARY 17, 2000


LOUISE DOVRE BJORKMAN
DISTRICT COURT JUDGE