NO. A15-0016

State of Minnesota
In Court of Appeals

In the Matter of the Application of
North Dakota Pipeline Company LLC for a
Certificate of Need and Route Permit for the
Sandpiper Pipeline Project in Minnesota

REPLY BRIEF OF RELATOR FRIENDS OF THE HEADWATERS

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I. INTRODUCTION

This case presents a simple question of statutory interpretation. The Minnesota Environmental Policy Act ("MEPA") mandates an environmental impact statement ("EIS") for governmental actions with the potential for significant environmental effects, such as pipelines proposed to carry over one million gallons of crude oil per day across Minnesota's water-rich northern environment. In addition and separately, MEPA prohibits the government from making any final decisions related to such proposals until environmental review is complete.

Here, there is no dispute about whether environmental review is required—all parties agree that the Sandpiper Pipeline is a project that requires environmental review pursuant to MEPA. The only disputed question is whether governmental decisions related to the project—in particular, the granting of a certificate of need—are prohibited before that environmental review is complete. Relator Friends of the Headwaters contends that a certificate of need is a final governmental decision that cannot be issued until environmental review is complete. The interpretation of the statutory provision prohibiting "final governmental decisions" (Minn. Stat. § 116D.04, subd. 2b) is the sole issue the Court needs to address to resolve this case.

II. STANDARD OF REVIEW

Respondent Minnesota Public Utilities Commission and Intervenor North Dakota Pipeline Company ("NDPC") erroneously state the standard of review as something other than de novo. Respondent and Intervenor focus solely on the deference that agencies deserve when a court is asked to review an agency decision involving facts within its area

of expertise or involving a reasonable interpretation of an unclear rule. *See, e.g.*, *In re Annandale NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 515 (Minn. 2007) (noting that deference is appropriate when an agency is interpreting an ambiguous regulation); *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (describing when an agency decision within its unique field of expertise is due deference). But neither of these situations is present in this case: the statute and rule are unambiguous and Respondent's decision did not rely on facts within its area of expertise.

This singular focus on agency deference ignores the proper standard of review when, as here, an error of law stems from the misapplication of a statute. This Court "retain[s] the authority to review de novo errors of law which arise when an agency decision is based upon the meaning of words in a statute." *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003). In these situations, this Court need not defer to the agency. "When a decision turns on the meaning of words in a statute a legal question is presented. In considering such questions of law, reviewing courts are not bound by the decision of the agency and need not defer to agency expertise." *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989) (citations omitted). Because this case involves the interpretation of the plain meaning of a statute, the proper standard of review is de novo.

III. RESPONDENT AND INTERVENOR HAVE FAILED TO ADDRESS THE FUNDAMENTAL QUESTION IN THIS APPEAL.

MEPA prohibits any "final governmental decision . . . to grant a permit, approve a project, or begin a project" until environmental review is complete. Minn. Stat. § 116D.04, subd. 2b. Relator contends that the certificate of need is a "final governmental decision" as that term is used in MEPA and interpreted in long-standing Environmental Quality Board ("EQB") guidance. That is the only issue before this Court.[1]

Rather than addressing the fundamental question raised on appeal, however, Respondent and Intervenor try to confuse the issue by claiming that environmental review under MEPA is not required in this case because a certificate of need, if requested by a company in isolation, would not trigger environmental review under MEPA. Respondent and Intervenor ask the wrong question and fail to respond to Relator's central argument. Whether environmental review would be required for a pipeline seeking *only* a certificate of need is not a question the Court needs to reach in this appeal. The question before the Court is whether a certificate of need is a "final governmental decision" and thus an approval that cannot be granted *before* the required environmental review takes place.

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[1] *See* Relator's Statement of the Case, 3 – 4 (citing Minn. Stat. § 116D.04, subd. 2b and stating that the issue is whether the "Public Utilities Commission erred when it ordered, contrary to state law, that its decision on a Certificate of Need for a large oil pipeline could be made without first completing an Environmental Impact Statement or equivalent environmental review approved by the Environmental Quality Board").

A. All Parties Agree That The Sandpiper Pipeline Triggers Environmental Review Under MEPA.

All of the parties agree that the Sandpiper Pipeline Project is subject to environmental review under MEPA. (*See* Resp't Br. at 22 ("Consistent with [MEPA's] mandate, environmental review on the proposed Sandpiper Pipeline project will occur as part of any route permit proceeding conducted under Minn. Stat. § 216G.02 and Minn. R. Ch. 7852."); Intervenor Br. at 23-24 ("[T]he required [Environmental Impact Statement]-equivalent environmental review occurs at [the route permit] stage.")). This mandate referred to by both Respondent and Intervenor is contained in subpart 24 of Minnesota Rule 4410.4400, which states that "[f]or routing of a pipeline subject to the full route selection procedures under Minnesota Statutes, section 216G.02, the Public Utilities Commission is the RGU."

All of the parties also agree that the EQB is authorized to establish alternative review procedures and that it did so for pipelines. The parties further agree that this alternative environmental review, known as the comparative environmental analysis, has not yet been completed and, according to Respondent's October 7, 2014 Order at issue here, will not be completed until *after* Respondent makes a final decision on the certificate of need. (Add. at 6 noting that the "Commission will postpone any further action on the route permit proceeding until a decision has been made by the Commission on the certificate of need" and Add. at 7 noting that "Minn. R. 7852.1500 provides for a comparative environmental analysis, within the routing docket, of all of the pipeline routes accepted for consideration at the public hearing"). Thus, there is full agreement

among the parties that environmental review is required for the proposed Sandpiper Pipeline pursuant to Section 116D.04, Subdivision 2a of MEPA and that the required environmental has not yet occurred.

B. Whether An Application For A Certificate Of Need Alone Would Trigger Environmental Review Under Section 116D.04, Subdivision 2a Need Not Be Resolved By This Court.

To avoid the central challenge posed by Relator's appeal, Respondent and Intervenor attempt to divorce the certificate of need for a pipeline from the pipeline project as a whole. Intervenor repeatedly refers to the certificate of need for a pipeline as "standing alone" and fails to view the project as a whole. (Intervenor Br. pp. 23-24.) Intervenor posits a scenario—both unrealistic and irrelevant—where Respondent would only grant a certificate of need and nothing further. This theoretical situation where a certificate-of-need application is pending absent a route-permit application is not present here and need not be addressed.

For this pipeline, there is a route permit application pending and there is mandatory environmental review. MEPA's prohibition on final governmental decisions applies "if [environmental review] is required for governmental action under subdivision 2a." Minn. Stat. § 116D.04, subd. 2b. No party disputes that environmental review is required for the Sandpiper Pipeline Project under subdivision 2a. The sole dispute, therefore, is the legal question of whether subdivision 2b of MEPA prohibits Respondent from proceeding with a "final governmental decision" on Intervenor's application for a certificate of need *before* mandatory environmental review is complete. There is no need to reach the question of whether, in some hypothetical vacuum, an EIS for a stand-alone

certificate of need would be required under MEPA. We are not in a vacuum and all parties agree that MEPA requires environmental review of a pipeline project of this magnitude.

IV. A CERTIFICATE OF NEED IS A "FINAL GOVERNMENTAL DECISION" TO GRANT A "PERMIT" AND IS PROHIBITED UNDER MEPA UNTIL ENVIRONMENTAL REVIEW IS COMPLETE.

The fact that the Sandpiper Pipeline Project is subject to environmental review establishes the applicability of Minn. Stat. § 116D.04, subd. 2b. The only issue on appeal, therefore, is whether the certificate-of-need decision underway at the Public Utilities Commission is a prohibited "final governmental decision" to "permit" a project absent environmental review. The answer to this question is clearly "yes." Respondent and Intervenor offered no argument as to why a certificate of need does not meet these definitions because there is no such argument.

A. The Question Before The Court Is The Meaning Of Subdivision 2b.

MEPA states that "[i]f an environmental assessment worksheet or an environmental impact statement is required for a governmental action under subdivision 2a, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project until" environmental review is complete. Minn. Stat. § 116D.04, subd. 2b. As discussed below, the statutory language is clear and unambiguous and prohibits any final governmental decision—such as the decision of whether or not to grant a certificate of need—until environmental review has been completed. When a statute is unambiguous, there is no need to defer to an agency interpretation. *See In re PERA Police and Fire Plan Line of Duty Disability Benefits of*

Brittain, 724 N.W.2d 512, 519 (Minn. 2006). If the Court determines that this section of MEPA is ambiguous, however, the court should look to the EQB's May 2010 Guide to Minnesota Environmental Review Rules (hereinafter "EQB Guide").[2]

B. A Certificate Of Need Is A "Permit."

MEPA prohibits a "final governmental decision" to grant a "permit" whenever environmental review is required under MEPA. A permit is defined to include "a permit, lease, license, *certificate*, or other entitlement for use or permission to act that may be granted or issued by a governmental unit." Minn. R. 4410.0200, subp. 58 (emphasis added). Neither Respondent nor Intervenor offered an argument that a certificate of need does not meet this definition.

C. A Certificate Of Need Is A "Final Governmental Decision."

Granting a certificate of need for a project is a "final governmental decision" prohibited under subdivision 2b of MEPA. Respondent does not refute this. Intervenor conflates the definition of a "major governmental action" in Minn. Stat. § 116D.04, subd. 2a with a "final governmental decision" referenced in subdivision 2b of MEPA. (*See, e.g.*, Intervenor Br. at 21 referencing a "final governmental action"—a term that appears nowhere in the statute.)

It is clear that a governmental decision—such as whether or not to grant a certificate of need—does not have to be a "major governmental action" to be considered a "final governmental decision" under subdivision 2b. Nothing in a plain reading of the

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[2] *Available at* https://www.eqb.state.mn.us/sites/default/files/documents/Guide%20to%20MN%20ER%20Rules-May%202010.pdf (last visited March 9, 2015).

statute or applicable rules limits a "final governmental decision" referenced in subdivision 2b of MEPA to "major governmental actions" described in subdivision 2a of MEPA. Rather, the use of these different terms indicates the opposite. "When the Legislature uses different words, we normally presume that those words have different meanings." *Nelson v. Schlener*, 859 N.W.2d 288, 294 (Minn. 2015); *see also Citizens Advocating Responsible Development v. Kandiyohi Cnty. Bd. Of Comm'rs*, 713 N.W.2d 817, 829-30 (Minn. 2006) (determining in the context of MEPA that the phrases "cumulative impacts" and "cumulative potential effects" have different meanings).

There is nothing ambiguous about the phrase "final governmental decision" and there is no authority to suggest that a certificate of need is anything other than a final governmental decision. If it were ambiguous, however, the EQB Guidance on which decisions are prohibited under subdivision 2b of MEPA is very clear:

> Governmental units have taken the position that permits or approvals that did not directly authorize the construction or operation of the project were not subject to the prohibition. To the contrary, the statutory wording applies to *all* permitting and approval actions that apply to a project for which environmental review is required and not yet completed. Again, the intent of the law is that all project-related governmental decisions benefit from the information disclosed through the process.

EQB Guide at 14. As stated by the EQB, the prohibition in subdivision 2b is intended to apply to *all* permitting and approval actions. Respondent and Intervenor did not address this Guidance nor even attempt to present an argument as to why Respondent's decision regarding whether or not to grant a certificate of need would not fall within the prohibition contained in subdivision 2b.

Respondent and Intervenor have also failed to find any case law that supports their position that a certificate of need is not a "final governmental decision" for purposes of MEPA's prohibition in Subdivision 2b. The unpublished case Intervenor cites regarding the adequacy of environmental review for a transmission line is inapposite for two reasons. (Intervenor Br. at 24-25 (citing *In re Application of Great River Energy*, No. A09-1646, 2010 WL 2266138 at *4 (Minn. Ct. App. June 8, 2010))). First, the case did not deal with the prohibition on final governmental decisions. Instead, Relators in *Great River Energy* were challenging the adequacy of the environmental review after a certificate of need had been issued. *Great River Energy*, 2010 WL 2266138 at *4. Relators did not allege that MEPA was violated because the certificate of need was granted before mandatory environmental review had occurred, and the court did not address that issue. *Id.*

Second, the rules governing environmental review of transmission lines are different in a critical way: the EQB-approved environmental review for transmission lines occurs at *both* the certificate-of-need and the route-permit stage. *See* Minn. R. 4410.4400, subp. 6 (stating that "[f]or construction of a high voltage transmission line, environmental review shall be conducted according to parts 7849.1000 to 7849.2100 [certificate of need rules] and 7850.100 to 7850.5600 [route permit rules]"). The fact that the court affirmed a certificate of need for a transmission line *after* the mandatory environmental review for that project had been completed is irrelevant to the question raised by this appeal. The question here is whether the certificate of need can be granted *before* that review occurs.

In addition to the lack of statutory or case law authority that would allow Respondent to proceed in the manner it did here, the prior orders of the Public Utilities Commission cited by Intervenor were not issued in cases analogous to this case. (*See* Intervenor Br. at 20-21.) In fact, no party can point to a case where the certificate-of-need decision was bifurcated from the route-permit decision and where the Public Utilities Commission ordered the certificate-of-need decision to proceed first in time in the absence of the environmental review that would accompany the route-permit decision. There simply is no precedent for what Respondent has ordered in this case.

D. The Prohibition On Governmental Decisions Prior To The Completion Of Environmental Review Is A Well-Established Principle Of Environmental Law.

The very purpose of environmental review is to provide a guide for any agency in making permitting and regulatory decisions in such a way as to minimize human impact on the environment and to allow the public to weigh in on areas of concern. MEPA recognizes the "profound impact of human activity on the interrelations of all components of the natural environment" and "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings." Minn. Stat § 116D.02, subd. 1. MEPA therefore imposes the duty on all state agencies to obtain a thorough understanding of the impact of any proposed project on the environment through the preparation and public review of environmental documents. *Id.*, subd. 2; Minn. Stat. § 116D.04. The purpose of environmental review is to serve as a guide to agencies in assessing environmental impacts, issuing, amending, and denying

permits to avoid or minimize adverse environmental effects and to restore and enhance environmental quality. *Id.*

This is why environmental review must occur "at the earliest possible time" and "before any irreversible and irretrievable commitment of resources." *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9th Cir. 2000). The prohibition against committing resources before mandatory environmental review is completed includes actions that "for all intents and purposes dramatically reduce[] the number of realistically available routes" for a proposed project. *Lakes & Parks Alliance of Minneapolis v. Fed. Transit Admin.*, ___ F. Supp.3d ___, ___, 2015 WL 999945 at *17 (D. Minn. March 6, 2015). If an action would "effectively limit[] 'the choice of reasonable alternatives' available during the environmental review process," it is prohibited. *Id.* (quoting the National Environmental Policy Act prohibition at 40 C.F.R. § 1506.1(a)(2)). The certificate-of-need decision will reduce the number of alternatives forwarded to the route proceeding. Proceeding with the decision in the absence of required environmental review is therefore prohibited.

E. Relator Sought Compliance With MEPA By Requesting An EIS For The Certificate Of Need. Respondent and Intervenor Confuse That Request With The Primary Issue On Appeal.

Rather than address the issue raised by Relator on appeal, Respondent and Intervenor have focused solely on Relator's request to Respondent for an Environmental Impact Statement prior to the certificate of need. Relator's legal issue raised on appeal is stated on page two of its principal Brief: "Was the Public Utilities Commission's determination to proceed with a final decision on a certificate of need for a large oil pipeline without first complying with the Minnesota Environmental Policy Act contrary

to law?" This remains the question on appeal and the question that neither Respondent nor Intervenor has squarely addressed. Instead, Respondent and Intervenor focus on Relator's request to Respondent for a remedy to this statutory violation. This statutory violation would have been avoided by conducting MEPA-compliant environmental review before the certificate-of-need proceeding commenced. This is what Relator requested, and what Respondent denied in its October 7, 2014 Order and December 5 denial of reconsideration.

The prohibition in subdivision 2b of MEPA would not apply and Relator would not have brought this appeal if an EIS had been prepared to inform the certificate-of-need decision. Relator asserted to Respondent that an EIS is the only proper environmental review at this stage; it is Relator's position that Respondent cannot use the comparative-environmental-analysis provisions, contained in Chapter 7852, because this is not the route permit proceeding. An EIS at the certificate-of-need stage would comply with MEPA and Relator therefore requested an EIS. The Commission's denial of Relator's request for an EIS and Respondent's decision to finalize its determination of the certificate of need before MEPA-compliant environmental review is completed violates MEPA and must be reversed.

Contrary to assertions in Intervenor's Brief, Relator did not request and is not requesting duplicative environmental review at *both* the certificate-of-need and the route-permit stage. Relator is challenging Respondent's decision to proceed with the certificate of need without conducting the mandatory environmental review under MEPA. Relator agrees that if an EIS had been ordered by Respondent instead of the "high-level" review

not recognized under MEPA, there would be no need for additional MEPA-based environmental review prior to Respondent's decision granting or denying other authorizations, including a route permit.

V. ALTHOUGH THE COURT NEED NOT REACH THE ISSUE, A CERTIFICATE OF NEED IS A "MAJOR GOVERNMENTAL ACTION" UNDER SUBDIVISION 2A.

Even though it is not necessary to determine if a certificate of need, in the absence of a route permit, would trigger environmental review under MEPA, it is clear in this case that it would. "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." Minn. Stat. § 116D.04, subd. 2a. A "governmental action" is defined as "activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government." *Id.* subd. 1a(d). Respondent and Intervenor claim that making a final decision on a certificate of need, "standing alone," would not meet the definition of a "major governmental action" because it is not a "project." This is incorrect.

A. A Pipeline Of The Magnitude Of The Sandpiper Pipeline Is A Project With The Potential For Significant Environmental Effects.

A "Project" is defined in EQB rules as "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.*" Minn. R. 4410.0200, subp. 65 (emphasis added). Intervenor

recognizes that MEPA is project-based and that "environmental review provided for in the rules will apply to the project as a whole." (Intervenor Br. at 21, 22 n. 4.) Yet despite this recognition, Intervenor nevertheless argues that in a hypothetical situation when a pipeline company applies for a certificate of need for a large petroleum pipeline without also applying for a route permit, *no* environmental review would be necessary. Respondent similarly asserts that there is no "project" proposed in this case and therefore environmental review is not necessary. To make these arguments, Respondent and Intervenor distort the certificate-of-need proceedings and the questions addressed therein.

Respondent refers to the certificate-of-need proceedings as determining a "generic need for the proposed facility" and argues that because it ordered system alternatives to be considered as part of the certificate-of-need proceeding there are no "actual definite, site-specific plans for anything" including, presumably, Intervenor's proposed project. (Resp't Br. at 34, 34 n. 16.) This argument is particularly confusing in light of Respondent's statement earlier in its Brief that "NDPC submitted the same environmental report containing the same environmental data in support of both [its certificate-of-need and route-permit] applications." (Resp't Br. at 27.) It is difficult to understand how the same environmental report could be used to support a site-specific application requiring an EIS-equivalent review on the one hand and, on the other hand, be devoid of any site-specific information. Similarly, Intervenor ignores its own application for a certificate of need and claims that "any system alternatives considered at the certificate-of-need stage are not site-specific locations but are alternative modes of transportation (*e.g.*, truck and rail) or as in this case, alternative two-mile-wide corridors somewhere within which a

pipeline could be routed." (Intervenor Br. at 24.) Both Respondent and Intervenor distort the certificate-of-need determination in making these assertions.

First, the certificate-of-need rules require consideration of "the effect of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives" and "the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility." Minn. R. 7853.0130 B(3), C(2). If the certificate-of-need determination were truly "generic" with no site-specific information, it would be impossible to comply with this rule. But it is possible to comply with this rule just as it would be possible to conduct environmental review prior to making a decision on a certificate-of-need application. Indeed, Intervenor already

> submit[ted] data into the record that it had gathered regarding the additional costs and environmental demands that would be posed by the system alternatives in terms of added pipe length, associated facilities, power usage, and costs. The Company also submitted broad level environmental data it gathered from publicly available information on the system alternatives in a series of tables demonstrating, e.g., the number of stream crossings, perennial waterbodies, wetlands, state forest lands, and other factors.

(Add. at 8.) Intervenor provided all of this information while maintaining that no environmental review was necessary. It does not follow from these actions that environmental review that would have complied with MEPA is impossible at the certificate-of-need stage.

Second, the certificate-of-need decision in this case, perhaps even more so than in past certificate-of-need proceedings, is completely tied to the location of the pipeline.

Intervenor is insisting on an extremely narrow project on a narrowly defined route to the exclusion of other potential routes—and the certificate of need will, if granted, greatly narrow project alternatives. In its comments opposing Respondent's decision to include system alternatives in the certificate-of-need proceeding, Intervenor argued that the "rules do not contemplate allowing different endpoints to be proposed by parties, only the location of the pipeline between the endpoints. . . . The starting and ending points of a route are of vital importance to all applicants, because these points define the purpose of a proposed pipeline." (R-473 Doc. 243 at 6.) Intervenor opposed consideration of the system alternatives because they "fail[] to connect at either Tioga, North Dakota; Clearbrook, Minnesota; or Superior, Wisconsin." (R-473 Doc. 243 at 16.) Intervenor was therefore not requesting a "generic" determination of need but rather the need for a pipeline to be placed within a specific corridor in Minnesota. But Respondent rejected Intervenor's arguments that the need for a pipeline should be limited to its proposed corridor and instead forwarded the system alternatives to the certificate-of-need proceeding concluding that the rules "allow[] a party or individual who proposes an alternative to the Company's proposed facility to provide evidence in the certificate of need proceeding showing that the alternative can better achieve the claimed need articulated by the applicant, or that the claimed need is not reasonable." (Add. at 7.) Accordingly, the decision to be made by Respondent in the certificate-of-need proceeding is a determination of which location, namely the start and end points for the pipeline that determine the corridor, will best address the alleged need for a petroleum pipeline. This

decision will necessarily eliminate from consideration certain proposed corridors for the pipeline and is therefore site-specific.

Respondent's and Intervenor's attempts to distort the question to be addressed during the certificate-of-need proceeding cannot change the definition of a project under MEPA. A project refers to the on-the-ground activity proposed and not any particular governmental approval. Minn. R. 4410.0200, subp. 65. The Sandpiper Pipeline is the on-the-ground activity proposed, it is site-specific even at the certificate-of-need stage, and it meets the definition of a project.

B. The Case Relied On By Respondent And Intervenor Is Inapposite.

Respondent and Intervenor rely heavily on *In re Envtl. Assessment Worksheet for 33rd Sale of Metallic Leases*, 838 N.W.2d 212, 216 (Minn. Ct. App. 2013) ("*Metallic Leases*") to support their assertion that the Sandpiper Pipeline is not a project under MEPA. (Intervenor Br. at 22-23; Resp't Br. at 32-35.) This case is inapposite. Relator in *Metallic Leases* petitioned the EQB for an Environmental Assessment Worksheet ("EAW") on 63,859 acres of land offered for lease by the state. *Mineral Leases*, 838 N.W.2d at 215. At the time of this EAW petition, no mineral exploration activity or mining activity was proposed on any of the land. *Id.* Moreover, the state received bids for only 9,509 of the 63,859 acres offered for lease. *Id.* The Minnesota Department of Natural Resources denied the petition for an EAW because at the time the petition was submitted, there was no "project" that could be reviewed. *Id.* This Court affirmed, stating that "the proper focus is not on what activity might be allowed to take place under the mineral leases, but on what activity is actually planned." *Id.* at 219.

Here, in contrast to the facts of *Mineral Leases*, there is a project actually proposed and a route application pending at the Public Utilities Commission. Even if the route-permit application had not been submitted, which is the hypothetical situation Respondent and Intervenor seem to want this Court to address, the fact that a pipeline has been proposed distinguishes it from the situation in *Mineral Leases*. In *Mineral Leases*, the lease could have resulted in activity that was exempt from environmental review under MEPA. *See* Minn. R. 4410.4600, subp. 8A (including in categories of exempt activities "[g]eneral mine site evaluate activities that do not result in a permanent alteration of the environment including mapping, aerial surveying, visual inspection, geologic field reconnaissance, geophysical studies, and surveying"). There is no possibility here that granting a certificate of need for pipeline confers the right to any activity that is exempt from environmental review. The only right a certificate of need for a pipeline confers is the right to construct that pipeline. And constructing a pipeline the size of the Sandpiper requires environmental review.

Simply put, MEPA applies to the on-the-ground activity proposed; not to any particular approval. Minn. R. 4410.0200, subp. 65. Here, the on-the-ground activity is building a pipeline, not granting or denying a certificate of need. Accordingly, even if this Court were being asked to determine if a stand-alone certificate of need for a large petroleum pipeline is a "major governmental action with the potential for significant environmental effects," the answer would be "yes," and Respondent's October 7, 2014 Order would violate MEPA.

Thus, even if this Court were to reach the issues presented by Respondent and Intervenor, the result would be the same. As made clear in the first part of Relator's Reply Brief, a certificate of need is a final governmental decision that Respondent is prohibited from making prior to the completion of environmental review. Minn. Stat. § 116D.04, subd. 2b. Additionally, a certificate of need for the Sandpiper Pipeline is a "major governmental action" with the potential for significant environmental effects which itself triggers the requirements of MEPA. Minn. Stat. § 116D.04, subd. 2a. Either way, Respondent's Order was in error and must be reversed.

VI. CONCLUSION

The language in MEPA is clear and unambiguous. The Public Utilities Commission cannot proceed with a "final governmental decision" related to the Sandpiper Pipeline Project until mandatory environmental review required under Minnesota Rule 4410.4400 subpart 24 is complete. Respondent's October 7, 2014 Order denying Relator's request for an EIS and proceeding with its final decision on the certificate of need for the Sandpiper Pipeline therefore violates MEPA. Relator respectfully requests that the Court reverse this Order and remand the case to Respondent to comply with MEPA.

Dated: April 27, 2015

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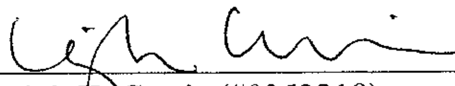
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of *Minn. R. Civ. App. P. 132.01*, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,016 words. This brief was prepared using Microsoft Word 2010.

Dated: April 27, 2015



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