
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

RESPONDENT'S BRIEF AND ADDENDUM

Kathryn M. Hoffman (#0386759)
Leigh K. Currie (#035218)
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY
26 East Exchange Street, Suite 206
St. Paul, MN 55101
(651) 287-4863
(651) 287-4873

*Attorneys for Relator
Friends of the Headwaters*

Richard D. Snyder (#1292)
John E. Drawz (#24326)
Patrick D. J. Mahlberg (#0388028)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000

*Attorneys for Intervenor North
Dakota Pipeline Company LLC*

Alethea Huyser (#0389270)
Leah M. P. Hedman (#0280501)
Max Kieley (#0389363)
Assistant Attorneys General

OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
1100 Bremer Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2127
Telephone: (651) 757-1243

Attorneys for Respondent

Gerald W. Von Korff (#113232)
RINKE NOONAN
ATTORNEYS AT LAW
1015 W. Germain Street, Suite 300
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

*Attorney for Amicus Curiae Carlton
County Land Stewards*

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LEGAL ISSUES

1. Did the Public Utilities Commission err in not requiring an Environmental Impact Statement?

On October 7, 2014, the Commission ordered the consideration of North Dakota Pipeline Company LLC's Certificate of Need application to proceed according to the procedures set forth in Minnesota Rule 7853, except that the Commission also asked the Department of Commerce to prepare and submit additional environmental review. R.A. 303; R.B. 433. In doing so, the Commission rejected Friends of the Headwaters' position. *Id.*; R.A. 404; R.B. 498.

Apposite Authorities:

Minn. Stat. § 116D.04
Minn. Stat. § 216B.243
Minn. Stat. § 216G.02

Minn. R. Ch. 7853
Minn. R. Ch. 7852
Minn. R. 4410.4400, subd. 24

Minn. Ctr. for Envtl. Advocacy v. Minn. Public Utilities Comm'n, No. A10-812, 2010 WL 5071389 (Minn. Ct. App. Dec. 14, 2010)

In re Minn. Pipe Line Co., No. A07-1318, 2008 WL 2344736 (Minn. Ct. App. June 10, 2008)

STATEMENT OF THE CASE

This case arises out of Intervenor North Dakota Pipeline Company LLC's ("NDPC") application to build a new crude oil pipeline in Minnesota known as the Sandpiper Pipeline. In order to build the Sandpiper Pipeline, NDPC must obtain a certificate of need and routing permit from the Minnesota Public Utilities Commission ("Commission").

In an Order dated October 7, 2014, the Commission decided that NDPC's certificate of need application should proceed in advance of the routing permit proceedings. At the same time, the Commission asked the Department of Commerce to undertake and file in the contested case docket an environmental review of six "system alternatives" that had been proposed during a prior public comment period.

Relator Friends of the Headwaters ("FOH") argued that the Commission was obligated under the Minnesota Environmental Policy Act ("MEPA") to require an Environmental Impact Statement ("EIS") not provided for in the certificate of need statute and rules. As such, FOH filed for certiorari appeal pursuant to Minnesota Statute section 116D.04, subd. 10, alleging that the Commission's October 7, 2014, decision constitutes a final decision denying an EIS.

The Commission states that its October 7, 2014, Order complied with the long-standing rules governing its consideration of petroleum pipelines and with the environmental review requirements articulated by MEPA for such projects. Accordingly, the Commission respectfully requests that this Court affirm its decision.

STATEMENT OF FACTS

North Dakota Pipeline Company LLC (“NDPC”)¹ seeks to construct a new pipeline to transport crude oil from its Beaver Lodge Station south of Tioga, North Dakota, to an NDPC-affiliate terminal in Superior, Wisconsin, referred to as the Sandpiper Pipeline. R.A. 90 at p. 2.² Approximately 299 miles of the Sandpiper Pipeline would cross Minnesota. *Id.*; R.B. 79 at p. 2. The proposed pipeline qualifies as a new large energy facility. Minn. Stat. § 216B.2421, subd. 2(4); Minn. Stat. § 216G.02, subd. 1(1). As such, NDPC was required to obtain both a certificate of need and pipeline routing permit prior to beginning construction of the pipeline.

On November 8, 2013, NDPC submitted applications for both the certificate of need and the route permit. Both applications are still pending before the Minnesota Public Utilities Commission (“Commission”).

¹ Due to a joint venture with Marathon Petroleum, Enbridge Pipelines (North Dakota) LLC changed its name to North Dakota Pipeline Company LLC. R.A. 60 at p. 1. All references to “Enbridge Pipelines (North Dakota) LLC” or “EPND,” contained in the Administrative Record should be understood to now refer to NDPC.

² The Administrative Record underlying this appeal is set forth in the Commission’s “Administrative Record Indices and Certification of Administrative Record of Respondent,” filed on February 6, 2015 (a revised version of the Administrative Record Indices was filed on March 25, 2015). The Administrative Record Indices contain two tables. “Table A” contains documents from the Commission docket relating to NDPC’s certificate of need application for the Sandpiper Pipeline. “Table B” contains documents from the Commission docket relating to NDPC’s routing permit application for the Sandpiper Pipeline. For the sake of consistency, all future citations to the Administrative Record will be abbreviated. For example, page 2 of document 90 from Table A will appear as “R.A. 90 at p. 2.”

I. PROCEDURES FOR ADMINISTRATIVE REVIEW OF PROPOSED PETROLEUM PIPELINES IN MINNESOTA.

A. History Of Environmental Review Of Proposed Petroleum Pipelines.

The Commission has been charged with approving certificate of need applications for large energy facilities, including petroleum pipelines, since 1983. 1983 Minn. Law Ch. 289, § 115. As they relate to the subject matter of this case, the statutory authority and rules governing certificate of need applications, have remained largely unchanged throughout that time period. *Compare id.* to Minn. Stat. § 216B.243; *see also generally* Minn. R. Ch. 7853 (indicating little change since transfer in 1983).

In contrast, there have been changes to the authority for routing and siting permits. Prior to July 1, 2005, the routing and siting permits for large energy facilities were obtained separately from the Minnesota Environmental Quality Board (“EQB”). In that capacity, EQB developed the rules governing routing and siting permit applications. *In the Matter of the Proposed Permanent Rules Relating to Pipeline Routing*, Statement of Need and Reasonableness (Sept. 30, 1988) (hereinafter “1988 SONAR”).³ In 2005, authority over routing and siting permits was transferred to the Commission, with the Department of Commerce taking certain responsibilities. Since authority over routing was transferred to the Commission, *see* 2005 Minn. Laws Ch. 97, art. 3, § 19, the statutes and rules governing petroleum pipeline routing permits have remained largely unchanged. *Compare* Minn. R. Ch. 4415 (1989) *with* Minn. R. Ch. 7852 (2014).

³ The 1988 SONAR is available at: <http://www.leg.mn/archive/sonar/SONAR-01316.pdf>.

EQB is also the agency generally charged with implementation of the Minnesota Environmental Policy Act (“MEPA”). EQB is charged with identifying categories for mandatory environmental review and identifying the appropriate Responsible Governmental Unit (“RGU”) to conduct that review. Minn. Stat. § 116D.04, subd. 5a. According to EQB’s rules, the Commission is the RGU for purposes of environmental review for qualifying pipelines and the environmental review is to take place during the routing permit process. Minn. R. 4410.4400, subp. 24; Minn. R. Ch. 7852 (routing).

EQB also has the authority to “identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an [EIS] in a more timely or more efficient manner to be utilized in lieu of an [EIS].” Minn. Stat. § 116D.04, subd. 4a. Pursuant to this grant of authority, in 1989 EQB established a MEPA-compliant alternative environmental review for proposed pipelines. Respondent’s Addendum at p. 001-005 (hereinafter “R. Add.”) (*In the Matter of the Approval of EQB Pipeline Routing Rules Chapter 4415, as an Alternative Form of Environmental Review*, EQB’s Findings of Fact, Conclusions, and Order of Approval)⁴. The alternative review process specifies the environmental data that applicants are required to submit as part of the routing permit process, as well as review of possible alternative routes called a Comparative Environmental Analysis (“CEA”). *Id.* “Under this approach, pipelines subject to the proposed rules would not actually be reviewed through environmental assessment worksheets (EAWs) or environmental impact statements (EISs), but would

⁴ These findings were unanimously approved by the EQB during a board meeting dated February 16, 1989.

receive equivalent review under the routing and permitting process established in the proposed rules.” 1988 SONAR at p. 2.

When authority over the routing permit was transferred to the Commission in 2005, the alternative review provided for in the routing permit rules remained the method for conducting environmental review of petroleum pipelines. The Minnesota Court of Appeals has previously found that the alternative review process satisfies MEPA’s requirements for environmental review of proposed pipelines. *See, e.g., In re Minn. Pipe Line Co.*, No. A07-1318, 2008 WL 2344736 (Minn. Ct. App. June 10, 2008); *Minn. Ctr. for Envtl. Advocacy v. Minn. Public Utilities Comm’n*, No. A10-812, 2010 WL 5071389 (Minn. Ct. App. Dec. 14, 2010).

B. Commission Review Of Application For Certificate Of Need.

NDPC cannot site or construct the Sandpiper Pipeline in Minnesota without “issuance of a certificate of need” by the Commission. *See* Minn. R. Ch. 7853. In determining whether to approve a certificate of need, the Commission is charged with assessing the applicant’s need for the facility. *See* Minn. Stat. § 216B.243.

The assessment of need for a pipeline focuses on criteria such as long range energy demand forecasts, the possibility of meeting any energy need through conservation and improvement of existing facilities, improving energy reliability, and regional and federal demand and regulation. *Id.* at subd. 3; Minn. R. 7853.0130. The Commission is also charged with considering the existence of more reasonable and prudent alternatives, the consequences of granting the certificate, and compliance with all relevant rules and regulations. Minn. R. 7853.0130. In order to facilitate those

assessments, the application must include specific information on the proposed pipeline, the justification for its need, its socially beneficial uses, and its location, if known. *See, e.g.*, Minn. R. 7853.0220-.0250, 7853.0500-.0640.

As it relates to environmental data, for all routes and alternative routes considered, the applicant must submit information on the impacts on natural and cultural resources, including identification of municipal, federal, or other lands, types of soils, general terrain, vegetation, types of land use, lakes, streams, wetlands, transportation, landmarks, national park and preserves, and state parks and preserves, among other things. Minn. R. 7853.0600-.0610. In addition, the applicant must indicate impacts on water discharge, runoff, and pollution; airborne emissions and pollution; noise; oil spill, fire and explosion dangers; erosion control; other impacts and types of monitoring; impacts on use of other utilities, water use, traffic, agricultural lands and disruption thereto, and relocation of persons. Minn. R. 7853.0620-.0640.

When an application is accepted as substantially complete, the Commission typically refers the certificate of need to the Office of Administrative Hearings (“OAH”) for a contested case hearing. Minn. R. 7853.0200. In addition to the OAH proceedings, a public hearing is required to “obtain public opinion on the necessity of granting a certificate of need” Minn. Stat. § 216B.243, subd. 4. Following the conclusion of the public hearing and OAH proceedings, the administrative law judge makes a recommendation. *See, e.g.*, Minn. Stat. § 14.62; Minn. R. 7829.2700. Based on the full record before it, the Commission “shall approve or deny a certificate of need for the facility.” Minn. Stat. § 216B.243, subd. 5.

C. Commission Review Of Application For Routing Permit.

Even if a certificate of need is granted, NDPC cannot begin any construction on the Sandpiper Pipeline unless and until it obtains a routing permit. Minn. Stat. § 216G.02, subd. 2. Construction is limited to whatever route is designated in the route permit. *Id.*

Unlike the need inquiry considered at the certificate of need stage, the route permit process explicitly focuses on detailed and site-specific questions related to location and human, natural, and economic impacts. *See, e.g.*, Minn. Stat. § 216G.02; Minn. R. 7852.1900. Rule 7852.0200 explains that the purpose of pipeline review is to “properly assess and determine the location of a pipeline,” and to do so it is “necessary to understand the impact that a proposed pipeline . . . will have on the environment.” Minn. R. 7852.0200, subp. 3. As such, “[t]he purpose of this chapter is to aid in the selection of a pipeline route and to aid in the understanding of its impacts and how those impacts may be reduced or mitigated through the preparation and review of information contained in pipeline routing permit applications and environmental review documents.” *Id.* The routing permit application is the only process through which site approval is acquired for a pipeline. Minn. Stat. § 216G.02, subd. 4.

The application for a routing permit requires details and specifics on the proposed pipeline design, Minn. R. 7852.2200, and any plans for future expansion, Minn. R. 7852.2400. As to the location for the pipeline, the application must identify information about its preferred route and alternatives considered, along with maps and photos of their locations and a description of the existing environment on the preferred route, as well as

detailed information on the construction plans for the pipeline. Minn. R. 7852.2300, 7852.2500, 7852.2600.

Environmental data is submitted on the possible effects of the planned construction, along with “analysis of the potential human and environmental impacts” Minn. R. 7852.2700-.2800. In addition, among other things, the applicant must provide environmental information on how the preferred route impacts existing and planned future human settlements and land use; the natural environment, including public and designated lands; lands with historical significance; economies along the route, including commercial, agricultural, mining, recreational, and forestry; natural resources and features; cumulative effects of related or anticipated future projects; and the possibility of mitigation to adverse effects. Minn. R. 7852.2700, 7852.1900.

When the application is deemed substantially complete, the public and parties are given an opportunity to identify and suggest other alternative routes for any proposed pipeline. Minn. R. 7852.1400. The Commission then determines which of the proposed alternative routes should be accepted for consideration as part of the docket. *Id.* at subpart 1. A CEA is then either completed or approved by the Department of Commerce on all routes accepted for consideration, and that is submitted in the record. Minn. R. 7852.1500.

Public information meetings are also held in each county crossed by the applicant’s preferred pipeline route. Minn. R. 7852.1300. All alternatives accepted for consideration are also published publicly before the public hearing, Minn. R. 7852.1600, and proponents of each alternative and all parties present at the public hearing provide

information to members of the public who attend. Any party or member of the public may provide written or oral testimony during the public hearings.

Contested case proceedings at OAH then further develop the information and testimony and the presiding administrative law judge prepares a recommendation for the Commission's review. Ultimately, the Commission must consider the full record in determining whether and where to grant a permit. Minn. R. 7852.1800. Unlike the certificate of need, which provides for only approval or denial of the requested certificate, the route permit decision affords the Commission considerable latitude to identify an appropriate route for the proposed pipeline, balancing cost and need with the impacts on the natural, cultural, and socioeconomic environments that could be affected. Minn. R. 7852.1900.

II. PROCEDURAL HISTORY OF NDPC'S SANDPIPER PIPELINE PROJECT AT THE COMMISSION.

A. NDPC Applies For A Certificate Of Need And Routing Permit.

On November 8, 2013, NDPC filed applications for a certificate of need and a routing permit with the Commission for the Sandpiper Pipeline project. *See generally* R.A. 14-45; R.B. 1-31. The applications filed in both dockets are the same, and include the environmental information NDPC prepared to meet the requirements for both the certificate of need and routing permit applications. *Id.*; *see also* R.A. 67-88 (revised application); R.B. 56-77 (revised application).

The stated purpose of the Sandpiper Pipeline project is to transport crude oil produced in North Dakota to the terminals in Clearbrook, Minnesota and Superior,

Wisconsin. R.A. 303 at p. 3; R.B. 433 at p. 3. As proposed, the Sandpiper Pipeline project would begin with a 24-inch diameter pipeline with a capacity of 225,000 barrels per day entering at the Minnesota-North Dakota border, approximately two miles south of Grand Forks, North Dakota. R.A. 90 at p. 2; R.B. 79 at p. 2. From there, it would follow Enbridge Energy's existing pipeline right-of-way to Clearbrook, Minnesota. *Id.* From Clearbrook, the pipeline would expand to a diameter of 30 inches and a capacity of 375,000 barrels per day and the route would proceed south to Hubbard, Minnesota, and then east to the Minnesota-Wisconsin border approximately five miles east-south east of Wrenshall, Minnesota. *Id.*

By March 19, 2014, the Commission had accepted both NDPC's certificate of need and routing permit applications as substantially complete, and referred the matters to OAH for contested case proceedings. R.A. 90 at pp. 4-5; R.B. 79 at p. 5; R.A. 114-116, 119.

B. The Development Of Alternative Pipeline Routes For Purposes of Analyzing the Routing Permit Application.

In a February 11, 2014, Order, the Commission authorized the Minnesota Department of Commerce's Energy Environmental Review and Analysis unit ("EERA") to: (1) facilitate the development of route proposals beyond those proposed by NDPC; (2) prepare an analysis of alternative route proposals on the basis of their harm to the environment; and (3) take other procedural steps to enable an evaluation of NDPC's proposed Sandpiper Pipeline route. R.B. 79 at p. 2.

Between March 3 and 13, 2014, staff from the Commission and EERA conducted seven public informational meetings in six different counties along NDPC's proposed Sandpiper Pipeline route.⁵ R.B. 54. The Commission opened a comment period from January 31, 2014 to May 30, 2014, to provide the public an opportunity to comment on potential human and environmental impacts and to suggest alternative pipeline routes to be considered by EERA.⁶ R.B. 161. By May 30, 2014, the route proposal deadline, the Commission received over 1,000 comments regarding route permit alignment modifications and alternative route proposals from approximately 940 commenters and organizations. R.A. 272 at p. 2; R.B. 406 at p. 2. Relator Friends of the Headwaters ("FOH") was among these commenters. R.A. 272 at p. 4; R.B. 409 at p. 4.

On July 17, 2014, EERA filed comments and recommendations that summarized the alternative route designation process and identified 53 alternative routes and route segments and eight system alternatives⁷ for further consideration in the contested case

⁵ Public information meetings were held in the following cities: Crookston in Polk County (March 3, 2014); McIntosh in Polk County (March 4, 2014); Clearbrook in Clearwater County (March 4, 2014); Park Rapids in Hubbard County (March 12, 2014); Pine River in Cass County (March 12, 2014); McGregor in Aitkin County (March 13, 2014); and Carlton in Carlton County (March 13, 2014). R.B. 54.

⁶ The original comment period deadline of April 4, 2014, was extended to May 30, 2014, in a notice issued by the Commission on April 14, 2014. R.B. 161.

⁷ The term "system alternatives" was coined by the parties, and is used to refer to different pipelines suggested during the public comment period. System alternatives are not alternative routes. Rather, they are fairly generic lines on a map of Minnesota that represent suggestions for completely different pipelines, with different start and/or end points. It was unknown whether the suggested system alternatives connected to other (Footnote Continued on Next Page)

hearings. R.B. 318-322. On August 25, 2014, the Commission issued an order forwarding the 53 route alternatives and one system alternative (SA-03)⁸ to be considered in the contested case hearing governing NDPC's routing permit application. See generally R.A. 272; R.B. 406.

C. The Commission's October 7, 2014, Order Separating NDPC's Certificate Of Need And Routing Permit Applications And Requiring The Department Of Commerce To Prepare An Environmental Report For The Certificate Of Need Proceedings.

Following the introduction of 54 different routes into the route permit proceeding, parties to the Sandpiper Pipeline proceeding began to express concerns about the complexity and expense of adjudicating both the certificate of need and routing permit at the same time. The Commission set a hearing to consider the issue of whether to separate the proceedings, and provided an opportunity for party and public comment. A variety of

(Footnote Continued from Previous Page)

pipeline infrastructure outside Minnesota, or whether any company would choose to construct such an alternative.

Nonetheless, one of the factors for consideration during a certificate of need proceeding is whether there are reasonable and prudent alternatives available which indicate that the project proposer does not need the requested facility. See, e.g., Minn. R. 7853.0130, supb. B (requiring the Commission to grant a certificate of need if "a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence . . ."). For example, the Commission typically might consider whether oil could be moved by train or truck. Likewise, the "system alternatives" would be relevant to the Commission's decision on a certificate of need solely to the extent they suggest that NDPC cannot establish the requisite need for approval because a system alternative presents a more reasonable and prudent alternative.

⁸ EERA identified two of the eight system alternatives (SA-02 and SA-03) that could potentially be modified to include appropriate connections to the Clearbrook facility, which could make these system alternatives potentially viable route alternatives. R.A. 272 at p. 9; R.B. 406 at p. 9.

individuals and entities weighed in asking the Commission to bifurcate the proceedings, including members of the public, parties, and other state agencies.

On September 11, 2014, the Commission held a hearing and voted to bifurcate the certificate of need and routing permit proceedings and stay the routing permit proceeding while the certificate of need proceeding went forward. R.A. 339; R.B. 461. On October 7, 2014, the Commission issued its “Order Separating Certificate of Need and Route Permit Proceedings and Requiring Environmental Review of System Alternatives.” *See generally* R.A. 303; R.B. 433. Specifically, the October 7, 2014, Order came to three conclusions: (1) just cause existed to separate Sandpiper Pipeline project’s certificate of need proceeding from the routing permit proceeding; (2) just cause existed to postpone the routing permit application until the Commission reached a decision regarding NDPC’s certificate of need application; and (3) EERA staff was asked to undertake and file an environmental review of six system alternatives before the commencement of the certificate of need contested case hearing.⁹ R.A. 303 at p. 2; R.B. 433 at p. 2.

The October 7, 2014, Commission Order explained that while “Minn. R. Ch. 7853, which governs pipeline certificate of need proceedings, requires the Commission to consider environmental impacts with the certificate of need docket it does not directly call for the preparation of a separate environmental document within those

⁹ The Commission’s decision to request EERA staff to undertake environmental review during the certificate of need stage was premised on “its enabling statute and rules as well as by the general charge of [MEPA], Minn. Stat. § 116D.03, that all departments and agencies consider environmental impacts and alternatives in their decision-making.” R.A. 303 at p. 11; R.B. 433 at p. 11.

proceedings.” R.A. 303 at p. 8; R.B. 433 at p. 8. The Order noted that such a review would take place, according to the applicable rules, during the routing permit application process. R.A. 303 at p. 7; R.B. 433 at p. 7.

Nonetheless, the Commission decided that some additional environmental analysis of the systems alternatives would be beneficial. Accordingly, the Commission sought “to ensure that the record in the certificate of need proceeding contains an adequate, albeit preliminary, environmental analysis of the system alternatives.” R.A. 303 at p. 12; R.B. 433 at p. 12. This approach was supported by other Minnesota agencies, including the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency. R.A. 303 at pp. 9-10; R.B. 433 at pp. 9-10.

Because of the nature of the need decision, the Commission found that the environmental analysis would have to be less granular and site-specific than the environmental review of alternatives conducted in the routing permit. R.A. 303 at p. 12; R.B. 433 at p. 12. The Commission therefore ordered a less detailed environmental analysis to help inform its consideration of need, consisting of a “more tiered, broader-based analysis, reflecting a high-level review appropriate to the level of detail . . . being considered.” *Id.*¹⁰

In coming to its decision on October 7, 2014, the Commission specifically rejected the position taken by FOH in its comments, and repeated in this case. *See generally* R.A.

¹⁰ The Commission further cautioned that “by its action in this unique case, it is not attempting to establish a separate form of alternative environmental review for certificate of need proceedings.” R.A. 303 at p. 12; R.B. 436 at p. 12.

303; R.B. 433. In an Order dated December 5, 2014, the Commission denied FOH's petition for reconsideration. R.A. 404 at p. 2; R.B. 498 at p. 2.

III. RELATOR FOH'S INITIATION OF THE PRESENT APPEAL.

On December 12, 2014, Relator FOH and Minnesota Center for Environmental Advocacy ("MCEA") filed an action in Ramsey County District Court, purporting to seek injunctive or declaratory relief from the Commission's decision on the need for environmental review under MEPA. On January 5, 2014, FOH, represented by MCEA, also filed a writ of certiorari with this Court challenging the Commission's decision not to require an EIS during the certificate of need proceeding. That same day, FOH moved this Court to stay its appeal during the pendency of the district court action. On January 27, 2015, this Court denied FOH's motion to stay on the grounds that MEPA did not provide FOH the right to pursue its case in district court. On February 11, 2015, FOH and MCEA voluntarily dismissed their district court action.

The sole issue on appeal before this Court is whether the Commission's decision to follow the statutes and rules setting forth the procedures governing certificate of need applications for petroleum pipelines, as interpreted and applied for more than 30 years, was arbitrary and capricious.

STANDARD OF REVIEW

Final decisions by an RGU regarding the need for an EIS are appealable to the Minnesota Court of Appeals by petition for writ of certiorari. Minn. Stat. § 116D.04, subd. 10. "The party challenging an RGU's decision . . . has the burden of proving that its findings are unsupported by the evidence as a whole." *Friends of Twin Lakes v. City*

of Roseville, 764 N.W.2d 378, 381 (Minn. Ct. App. 2009) (citing *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 833 (Minn. 2006) (hereinafter "*CARD*")).

When reviewing an agency's decision on whether to order an EIS, this Court will only reverse the agency's decision if it reflects an error of law, is arbitrary and capricious, or is unsupported by substantial evidence. See *CARD*, 713 N.W.2d at 832; *Watab Twp. Citizen Alliance v. Benton County Bd. of Comm'rs.*, 728 N.W.2d 82, 89 (Minn. Ct. App. 2007). The agency's determination on an environmental review matter is entitled to substantial deference. See *CARD*, 713 N.W.2d at 832.

Minnesota courts have explained that an agency decision is arbitrary and capricious only in the following circumstances:

A decision will be deemed arbitrary and capricious if the agency relied on factors which the legislature had not intended it to consider, if it *entirely* failed to consider an important aspect of the problem, if it offered an explanation that runs counter to the evidence, or if the decision is *so implausible* that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Audubon Soc'y v. Minn. Pollution Control Agency, 569 N.W.2d 211, 215 (Minn. Ct. App. 1997) (emphasis added) (quoting *Trout Unlimited, Inc. v. Minn. Dep't of Agric.*, 528 N.W.2d 903, 907 (Minn. Ct. App. 1995) *review denied* (Minn. Apr. 27, 1995)).

Substantial evidence consists of: "1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than 'some evidence'; 4) more than 'any evidence'; and 5) evidence considered in its entirety." *CARD*, 713 N.W.2d at 832 (citation omitted); *White v. Minn. Dep't of*

Natural Res., 567 N.W.2d 724, 730 (Minn. Ct. App. 1997). Absent manifest injustice, a reviewing court must accept the inferences that the agency has drawn from the evidence even if it appears that contrary inferences would be better supported. See *Urban Council on Mobility v. Minn. Dep't of Natural Res.*, 289 N.W.2d 729, 733 (Minn. 1980).

The Court gives deference to the Commission's determination of whether to require environmental review. *Friends of Twin Lakes*, 764 N.W.2d at 381. Deference is given to the agency on matters within its area of expertise, including decisions on environmental review matters. See, e.g., *White*, 567 N.W.2d at 730; *Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 881 (Minn. Ct. App. 1995) review denied (Minn. July 28, 1995); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); *In re Am. Iron & Supply Co.'s Proposed Metal Shredding Facility in Minneapolis, MN*, 604 N.W.2d 140, 144 (Minn. Ct. App. 2000). Technical expertise includes both an agency's scientific knowledge and an agency's experience with regard to its regulatory programs. See *Reserve Mining Co.*, 256 N.W.2d at 825. Where there are technical disputes or uncertainties, courts presume that the agency has exercised its discretion appropriately. See *Iron Rangers for Responsible Ridge Action*, 531 N.W.2d at 881; *In re Am. Iron & Supply Co.*, 604 N.W.2d at 145.

The deference accorded the agency determination is constitutionally required in order to avoid raising serious questions concerning the separation of powers. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (court "cannot interject itself within the area of discretion of the executive . . .") (citation and quotation omitted); *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated*

Wastewater, 731 N.W.2d 502, 513 (Minn. 2007) (“rationale for deference to administrative agency decisions is rooted in the separation of powers doctrine and the agency’s training and expertise in the subject matter”) (citation omitted).

This Court’s review of the Commission’s decision is limited to the agency’s administrative record. *See Iron Rangers for Responsible Ridge Action*, 531 N.W.2d at 880; *Nat’l Audubon Soc’y*, 569 N.W.2d at 215 (court reviews administrative record to determine if agency’s decision is appropriate).

ARGUMENT

I. MEPA DOES NOT REQUIRE THE COMMISSION TO CONDUCT AN EIS DURING THE CERTIFICATE OF NEED PROCEEDINGS.

MEPA provides the legal framework for when and how “governmental agencies contemplating taking action . . . on a proposed project” should consider possible “environmental consequences.” *CARD*, 713 N.W.2d at 823. Specifically, MEPA instructs an RGU to conduct an environmental review if “there is potential for significant environmental effects resulting from any major governmental action” Minn. Stat. § 116D.04, subd. 2a; *see also* Minn. R. 4410.0200, subps. 33 and 65 (defining these threshold terms) *and infra* at Argument, Part I(A), (B).

Applicable statutes and rules lay out the specific framework for determining the need and scope for any required environmental review.¹¹ MEPA provides for a two-stage

¹¹ In addition to MEPA’s statutory language, the legislature has conferred broad rulemaking authority on EQB, requiring it to promulgate rules governing particular procedures and “any additional rules which are reasonably necessary to carry out the requirements of” environmental review under MEPA. *See* Minn. Stat. §§ 116D.04, subd. (Footnote Continued on Next Page)

environmental review process. First, the RGU must consider whether to order an Environmental Assessment Worksheet (“EAW”), which is preliminary in nature and is, in most instances, a prerequisite to determining whether an EIS is required for a particular project. Minn. Stat. § 116D.04, subd. 1a(c); *see also, e.g., Living Word Bible*, 2014 WL 3557954 at *5; *Dead Lake Ass’n, Inc. v. Otter Tail County*, No. A04-717, 2005 WL 221773, at *3 (Minn. Ct. App., Feb. 1, 2005) *review denied* (Minn. Apr. 27, 2005) (citing Minn. R. 4410.1000, subp. 1).

An EIS is typically the second stage of analysis, and it is “an exhaustive environmental review that the party proposing the project must conduct at its own expense.” *Living Word Bible*, 2014 WL 3557954, at *5 (quoting *CARD*, 713 N.W.2d at 824) (citing Minn. Stat. § 116D.04, subd. 2a (describing contents of EIS)). The EIS “describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts,” explores possible mitigation methods, and analyzes “economic, employment, and sociological effects that cannot be avoided should the action be implemented.” Minn. Stat. § 116D.04, subd. 2a.

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5a(11) (authorizing EQB to adopt rules implementing MEPA) *and* 116D.04, subd. 2a(a) (directing board to establish categories for which EAWs and EISs are and are not required). *See also In re Declaring a Negative Need for an Env’tl. Impact Statement for Proposed Living Word Bible Camp Project*, Nos. A13–1153, A13–1157, 2014 WL 3557954, at *4 (Minn. Ct. App. July 21, 2014) *review denied* (Minn. Oct. 14, 2014) (“Rules adopted by the EQB pursuant to this statutory authority have ‘the force and effect of law.’”) (citing and quoting Minn. Stat. § 14.38, subd. 1)).

The criteria for when an EIS is required is set forth in Minnesota Rule 4410.2000. An EIS can be required on either a mandatory or discretionary basis. *See* Minn. R. 4410.2000, subps. 2, 3. A mandatory EIS is required solely for projects identified by EQB in Rule 4410.4400. *Id.* at subp. 2; *see also In re Envtl. Assessment Worksheet on Proposed Full Circle Organics*, No. A12-16922013, 2013 WL 2372162, at *2 (Minn. Ct. App. June 3, 2013) (“Environmental review is mandatory if a project meets certain thresholds articulated in the rules.”). Rule 4410.4400 lists 28 mandatory EIS categories. *See* Minn. R. 4410.4400. *See also* Minn. Stat. § 116D.04, subd. 2a(a) (requiring EQB to establish “categories of actions” for which environmental review is mandatory).

A discretionary EIS can occur in two different circumstances. First, “when the RGU determines that, based on the EAW and any comments or additional information received during the EAW comment period, the proposed project has the potential for significant environmental effects.” Minn. R. 4410.2000, subp. 3(A). Second, a discretionary EIS may be prepared “when the RGU and the proposer of the project agree that an EIS should be prepared.” Minn. R. 4410.2000, subp. 3(B).

Relator FOH contends that a formal EIS is required pursuant to MEPA and EQB’s rules during the certificate of need proceedings. Because FOH cannot show that either a mandatory or discretionary EIS is required by the EQB’s rules, its allegation that MEPA requires an EIS during the certificate of need stage is without merit.

A. No Mandatory EIS Category Applies To Certificates Of Need For Proposed Pipelines.

Pursuant to the statutory mandate, EQB establishes “categories of actions” for which environmental review is mandatory. *See* Minn. Stat. § 116D.04, subd. 2a(a); Minnesota Rules 4410.4400 (“Mandatory EIS Categories”). As it relates to petroleum pipelines, EQB established only a mandatory category for the “*routing* of a pipeline subject to the full route selection procedures under Minnesota Statutes, section 216G.02” Minn. R. 4410.4400, subp. 24 (emphasis added); *cf.* Minn. R. 4410.4300, subp. 7 (requiring an EAW under certain circumstances for “*routing* of a pipeline”) (emphasis added). *See also infra* at Argument, Part II(A), (B) (explaining the MEPA-compliant process for environmental review on proposed pipelines).

Consistent with this 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. As it relates to the certificate of need decision, EQB unambiguously elected not to make an EIS mandatory for a certificate of need for a proposed pipeline. Minn. R. 4410.4400, subp. 24; *see also infra* at Argument, Part II.

B. A Discretionary EIS Is Inapplicable.

Relator FOH also cannot show that the standard for a discretionary EIS is met on the facts of this case. First, NDPC has not agreed to undertake an EIS during the certificate of need proceedings. *See* Minn. R. 4410.2000, subp. 3(B) (providing that an EIS shall be prepared when the RGU and project proposer both agree to do so); *see*

generally R.A. 1-405; R.B. 1-499 (at no point has NDPC elected to undertake an EAW for the Sandpiper Pipeline project).

Second, a discretionary EIS is to be prepared when an RGU determines based on an EAW that an EIS is appropriate. *See* Minn. R. 4410.2000, subp. 3(A) (requiring a discretionary EIS where “based on the EAW and any comments or additional information received during the EAW comment period, the proposed project has the potential for significant environmental effects . . .”).

No EAW has been undertaken and FOH has not, and does not now, request that the Commission undertake an EAW. *See generally* R.A. 1-405; R.B. 1-499 (at no point has FOH petitioned or otherwise requested an EAW for the Sandpiper Pipeline project). As such, FOH has waived any EAW argument for appeal. *See, e.g., In re Minn. Power*, 807 N.W.2d 484, 488 n.1 (Minn. Ct. App. 2011) (finding that Minnesota Power waived its right to present arguments not raised in petition for reconsideration) (citing Minn. Stat. § 216B.27, subd. 2 (precluding party from arguing issue to court that was not raised in petition for rehearing)); *Minn. Ctr. For Env'tl. Advocacy*, 2010 WL 5071389, at *8-9 (finding MCEA's MERA claims procedurally barred pursuant to Minn. Stat. § 216B.27, subd. 2 because that section “precludes a party from bringing a cause of action arising out of [a Commission] decision unless that party first raises the ground for the claim in a petitioner for rehearing on the decision.”); *cf.* 1988 SONAR at p. 2 (“[u]nder this approach, pipelines subject to the proposed rules would not actually be reviewed through [EAWs] or [EISs], but would receive equivalent review under the routing and permitting process established in the proposed rules.”).

As such, a discretionary EIS pursuant to Minn. R. 4410.2000, subp. 3(A) does not apply. Because the prerequisites for an EIS under Minnesota Rule 4410.2000 have not been met, the Commission did not err as a matter of law and Relator's contention that MEPA requires an EIS during the certificate of need stage is without merit.

II. THE COMMISSION FOLLOWED THE RULES GOVERNING REVIEW OF PROPOSED PIPELINES, WHICH HAVE LONG BEEN HELD TO COMPLY WITH MEPA.

The rules and statutes governing certificates of need and routing permits have been largely unchanged for over 25 years, and the Minnesota Court of Appeals has upheld the pipeline review rules as MEPA-compliant. *See In re Minn. Pipe Line Co.*, 2008 WL 2344736; *Minn. Ctr. For Env'tl. Advocacy*, 2010 WL 5071389.

The Commission has consistently followed these established rules governing pipeline applications. Based on these authorities and well-settled principles relating to agency deference, *see, e.g., In re Minn. Pipe Line Co.*, 2008 WL 2344736, at *10 (citing *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 465 (Minn. 2002) (stating that the courts defer to agency expertise in interpreting and applying its own regulations)), this Court should uphold the Commission's decision.

A. Under Minnesota Rules, Alternative Review Is The Appropriate Environmental Review For A Commission Decision Related To A Proposed Pipeline.

Pursuant to the directive in Minn. Stat. § 116D, EQB developed mandatory EIS categories. EQB required a mandatory EIS explicitly and solely for routing of pipelines. *See* Minn. Rule 4410.4400, subp. 24 ("For *routing of a pipeline* subject to the full route selection procedures under Minnesota Statutes, section 216G.02, the Public Utilities

Commission is the RGU”). EQB could have created a mandatory category for pipelines generally or for certificate of need decisions, but it did not.

Since 1989, the environmental impacts of proposed pipelines have been evaluated in the routing docket using an EQB-established and EQB-approved alternative review process. *See* Minn. Stat. § 116D.04, subd. 4a (allowing EQB to identify alternative forms of environmental review); R. Add. 001-005; 1988 SONAR at p. 2 (providing that environmental review of proposed pipelines will take place under routing rules and not through a separate EAW or EIS); Minn. R. Ch. 7852 (rules governing routing permit applications).

The Minnesota Court of Appeals has confirmed that the alternative review process enacted in the routing rules satisfies MEPA’s requirements for environmental review of proposed petroleum pipelines. *See, e.g., In re Minn. Pipe Line Co.*, 2008 WL 2344736; *Minn. Ctr. For Envtl. Advocacy*, 2010 WL 5071389.

In *In re Minn. Pipe Line Co.*, landowners along a proposed crude-oil pipeline route challenged the Commission’s decisions to grant both an application for a certificate of need and routing permit. The so-called “MinnCan” pipeline project was the first pipeline over which the Commission had routing authority. Among other things, the landowners argued that the Commission decision did not comply with MEPA. *Id.* at *10-12.¹² In responding, the Minnesota Court of Appeals explained that “[p]ursuant to

¹² Chapter 4415 of the Minnesota Rules was renumbered in chapter 7852 in 2007. *In re Minn. Pipe Line Co.*, 2008 WL 2344736, at *2 n.1. “Minn R. 4415.0145 is now numbered 7852.2700, Minn. R. 4415.0100 is now numbered 7852.1900, and Minn. R. 4415.0050 is now numbered 7852.0900.” *Id.*

section 116D.04, subd. 4a, chapter 4415 (2005) of the Minnesota Rules contains the alternative form of environmental review for proposed pipelines.” *Id.* at *10. Landowners also objected to the Commission’s reliance under the rules on the applicant’s own Environmental Assessment Supplement (“EAS”) under Minn. R. 7852.2700. *Id.* at *12. The Court concluded “that the environmental assessment was consistent with the rules and criteria” for alternative environmental review and upheld the Commission’s decisions as MEPA-compliant. *Id.* at *10-12.

In 2010, MCEA challenged the Commission’s decisions to grant both an application for a certificate of need and to issue a pipeline route permit, alleging violations of MEPA. *Minn. Ctr. For Env’tl. Advocacy*, 2010 WL 5071389. Again, the Court explained that “EQB has promulgated rules that provide an alternative form of environmental review for proposed pipelines, which is contained in the rules governing the routing permit process.” *Id.* at *3 (citing Minn. R. Ch. 7852).

MCEA objected that the Commission’s review was not sufficient because, among other things, the Commission did not “conduct its own thorough, independent analysis of environmental effects.” *Id.* Pursuant to the rules, the applicant had submitted an EAS upon which the Commission relied. The Court noted that the Commission had followed its rules—the data submitted by the applicant had been subjected to public review, contested case hearings, and an administrative law judge’s scrutiny before being considered by the Commission. Considering both the certificate of need and routing decisions, the Court concluded that the Commission had “complied with the alternative

environmental-review process and thereby satisfied its environmental review responsibilities under MEPA.” *Id.* at *4.

As part of its certificate of need application, NDPC submitted a lengthy environmental report, along with appendices providing additional environmental information. R.A. 14-45; R.A. 67-88 (revised environmental report). NDPC also submitted the same report and supporting information in the route permit application, to comply with the requirements of the routing rules. R.B. 1-31; R.B. 56-77 (revised environmental report). Indeed, comparison of the certificate of need and route permit dockets reveals that NDPC submitted the same environmental report containing the same environmental data in support of both applications. This is precisely the same application material referred to as an EAS and which this Court upheld against MEPA challenges in prior decisions because it complied with EQB’s alternative review process. *In re Minn. Pipe Line Co.*, 2008 WL 2344736; *Minn. Ctr. For Env’tl. Advocacy*, 2010 WL 5071389.

Just as it did in the prior cases, the Commission will have the benefit of the application material to review, as well as any other data provided for the by the rules, submitted in public comments, developed in contested case proceedings, and scrutinized by the administrative law judge before making a decision on the certificate of need. In addition, because the Commission asked for environmental review of the system alternatives, the Commission will have the benefit of even more review than existed in the prior cases. If the certificate is granted, the EQB-established alternative review process will take place for the more detailed and site-specific route alternatives during the route permit proceeding.

In short, the Commission has acted in accordance with the applicable rules and this Court's prior case law upholding those rules.

B. FOH's Attempts To Distinguish Applicable Rules And Law Are Unavailing.

Although Minnesota courts have recognized that no violation of MEPA occurs when the Commission complies with the certificate of need and routing rules governing pipeline applications, and although the Commission's decision to stagger the certificate of need and route permit proceedings was provided for by those rules, Relator FOH urges this Court to impose additional layers of environmental review. Relator's arguments fail as matter of law.

As indicated above, the plain language of Minn. R. 4410.4400, subp. 24 shows that EQB chose to require a mandatory EIS-equivalent only during the route permitting stage and not during the certificate of need stage. *See, e.g., Minn. Ctr. For Envtl. Advocacy*, 2010 WL 5071389, at *8 (“[i]f the legislature’s intent is clearly discernible from a statute’s unambiguous language, courts interpret the language according to its plain meaning, without resorting to other principles of statutory construction.”) (citing *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004)).

In addition, EQB's own interpretation further shows that providing for the alternative environmental review as part of the route proceeding, but not the certificate of need proceeding, was appropriate. *See, e.g., Living Word Bible*, 2014 WL 3557954, at *4 (“[w]e will defer to an agency’s interpretation of its own statutes unless such interpretation is in conflict with the express purpose of the statutes and the legislature’s

intent.”) (quoting *Lemmerman v. ETA Sys., Inc.*, 458 N.W.2d 431, 433 (Minn. Ct. App. 1990)); *CARD*, 713 N.W.2d at 831 (concluding that “the EQB’s assertion regarding the intent behind the ‘cumulative potential effects’ term is not contradicted by the language of the rules and therefore is entitled to deference.”) (citation omitted); *Matter of N. States Power Co. Application for Certificate of Site Compatibility for the Goodhue County Indep. Spent Nuclear Fuel Storage Facility*, 563 N.W.2d 302, 307-8 (Minn. Ct. App. 1997) *review denied* (Minn. July 10, 1997) (noting that courts “defer to the agency’s expertise if a statutory interpretation is complicated and technical in nature” and concluding that “given that our construction of the statute matches the [EQB’s] interpretation, it is appropriate to recognize some deference to the [EQB] in this case.”) (citations omitted)).

In developing the alternative review process, EQB explained that under its approach, “pipelines subject to the proposed rules would not actually be reviewed through environmental assessment worksheets (EAWs) or environmental impact statements (EISs), but would receive equivalent review under the routing and permit process established in the proposed rules.” 1988 SONAR at p. 2.

In a more recent comment drafted in January 2013, and required by MEPA, EQB set forth the purpose and historical understanding of the various mandatory EAW and EIS rules, including specifically the alternative review process established for proposed

pipelines.¹³ Minn. Stat. § 116D.04, subd. 5b (requiring EQB’s “Mandatory Environmental Review Categories” document to include, among other factors, the “intended historical purposes of the category”). The EQB’s “Mandatory Environmental Review Categories” document looked to the Statement of Need and Reasonableness in support of what is now Minn. R. 4410.4400 to support the “intended historical purpose” of requiring an EIS during the route permitting stage as opposed to the certificate of need stage:

These [EIS and EAW mandatory] categories are needed because, although a certificate of need must be prepared for large energy facilities, *the certificate of need process does not entail a comprehensive assessment of potential environmental impacts*. The thresholds were selected to promote consistency with the certificate of need process.

R. Add. 015 (citing and quoting EQB’s *Proposed Environmental Review Program Rules*, Statement of Need and Reasonableness, at p. 119 (1982) (emphasis added) (hereinafter “1982 SONAR”)).¹⁴

EQB’s interpretation also corresponds with the established practices and history of petroleum pipeline review. From 1983 to 2005, the certificate of need and routing permit applications were decided by separate agencies, with the Commission deciding the certificate of need and EQB deciding the routing permit. The rules were substantially the same as they are now, including the environmental review provisions. *See supra* at

¹³ The EQB’s January 2013 document entitled “Mandatory Environmental Review Categories” is included in Respondent Commission’s Addendum at R. Add. 006-016.

¹⁴ The 1982 SONAR is available at:
<https://www.eqb.state.mn.us/sites/default/files/documents/1982%20rulemaking%20SONAR.pdf>.

Statement of Facts, Part I(A). MEPA was enacted in 1973, and was in effect throughout that time period. Yet, FOH is unable to identify any authority to support their contention that the Commission's longstanding certificate of need procedures violate MEPA.

III. ALTERNATIVELY, EVEN IF A TRADITIONAL MEPA ANALYSIS APPLIES, THE COMMISSION'S DECISION COMPLIES WITH MEPA.

For all the reasons set forth above, FOH's arguments fail. However, even if a traditional MEPA analysis was applicable (which it is not), FOH's claim still would fail as a matter of law for at least two reasons. First, the question of whether a project proponent can demonstrate sufficient need to move oil through a pipeline, does not yet involve a definite, site-specific "project" under MEPA. Second, the Commission's decision to order some environmental analysis of "system alternatives" (which would be relied on solely to show that need cannot be established) would be an appropriately-tiered version of a CEA for the need stage.

A. The Question Of Whether The Project Proposer Has Established Need Is Not Sufficiently Site-Specific To Qualify As A "Project," So No EIS Is Required.

FOH argues that an EIS should be completed before a certificate of need application decision as "the Sandpiper Pipeline is a major governmental action with the potential for significant environmental effects" under MEPA. However, a certificate of need application is not a "major governmental action" or "project" under MEPA.

MEPA states that "governmental action"

means activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of government including the federal government.

Minn. Stat. § 116D.04, subd. 1a(d). Minnesota case law has honed in on “project” as the operative word, which EQB’s rules define 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.

For over ten years, the Minnesota Court of Appeals has observed that, “despite the circularity” of the two definitions, both “imply that an ‘action’ or ‘activity’—*something more than just planning*—is required before a governmental action or project may be found to exist.” *In re Environmental Assessment Worksheet for 33rd Sale of State Metallic Leases in Aitkin, Lake, and Saint Louis Counties*, 838 N.W.2d 212, 217 (Minn. Ct. App. 2013) *review denied* (Minn. Nov. 26, 2013) (hereinafter “*Metallic Leases*”) (citing *Minnesotans for Responsible Recreation v. Dep’t of Natural Res.*, 651 N.W.2d 533, 539-40 (Minn. Ct. App. 2002) (emphasis added)). Rather, a “project” for MEPA purposes is “a definite, site-specific, action that contemplates on-the-ground environmental changes, including changes in the nature of the use.” *Id.* at 540.

In *Metallic Leases*, a relator claimed the Minnesota Department of Natural Resources’ (“DNR”) sale of mineral leases for certain real property violated MEPA because DNR did not require an EAW to be completed before the sale. *Metallic Leases*, 838 N.W.2d at 213. The mineral interests at issue existed as a fee interest that necessarily included the “right to search for, develop, and remove minerals from land or to receive a royalty based on the production of minerals.” *Id.* (citation and quotation

omitted). Although the leases granted exclusive rights of exploration, mining and removal of metallic minerals, the lessee was also required to obtain further permission or approval from the state to engage in most if not all of the activities associated with the lease. *Id.* at 214. Pursuant to Minn. Stat. § 116D.04, subd. 2a(c) and Rule 4410.1100, subp. 1, the relator had submitted a petition with more than 140 signatures for the completion of an EAW.¹⁵ *Id.* at 215. DNR ultimately declined to order an EAW. *Id.*

In upholding DNR's decision, the Minnesota Court of Appeals confirmed that the lease sales were not a "project" under MEPA. The Court acknowledged that because the leases granted rights to explore and mine minerals, their sale contemplated the possibility of on the ground, physical changes to the environment. 838 N.W.2d at 217-219. In addition, the leases were "somewhat site-specific" in that they identified specific parcels of land. *Id.* at 217. However, the Court concluded that the "leases transfer only the *right* to explore for and mine minerals . . . and future exploration and mining activities remain subject to the MEPA and the rules governing environmental review." *Id.* at 219. As such, the sale of leases did not amount to a "project" within the meaning of MEPA. *Id.* at 217-219.

Similarly, in the earlier *Minnesotans for Responsible Recreation* case, the Court individually considered four system plans, containing more than thirty potential trails, connections and extensions proposed for DNR all-terrain and off highway vehicle trails. 651 N.W.2d at 536, 540. Among other things, the system plans included assessments of

¹⁵ Contrary to the facts of *Metallic Lease*, FOH did not submit a petition for an EAW in this case.

use levels and need for trails and discussed potential trail sites. *Id.* The Court held that the system plans did not amount to a “project” because they lacked site-specific information about the nature and location of the activity, to provide the basis for meaningful environmental review. *Id.* at 540-541. On the contrary, when the plan developed into more site-specific trails, the Court found them ripe for environmental review. *Id.*; *see also Harvieux v. Scott County*, No. C5-1735, 1998 WL 279218, at *3 (Minn. Ct. App. June 2, 1998) *review denied* (Minn. July 30, 1998) (denying MEPA challenge to county land sale because compliance with MEPA’s environmental review requirements would occur when the purchaser filed its application for conditional use permit to operate the sand mining business.).

Like the lease sales and system plans in the prior cases, the certificate of need proceeding for the proposed Sandpiper Pipeline is not a “project” within the meaning of applicable law. The certificate of need is an initial, “preliminary” stage which focuses on the question of whether a generic need for the proposed facility has been proven and no pipeline construction can begin until the route permit has been issued. *See, e.g., supra* at Statement of Facts, Part I(B) (citing Minn. R. Ch. 7853).¹⁶

¹⁶ FOH argues that the “Commission is proposing to make a firm commitment to certain [system] alternatives but not others in the certificate of need proceeding” Rel. Br. at p. 25. This argument fatally misunderstands the certificate of need review.

The Commission is instructed when determining whether to grant or deny an application for a certificate of need to consider whether reasonable and prudent alternatives exist which obviate the need for the proposed pipeline. *See* Minn. R. 7853.0130. Parties to the Sandpiper Pipeline proceedings have been developing evidence on “system alternatives,” including the possibility that truck, train, or new pipelines throughout Minnesota could meet any claimed need. These do not, however, constitute (Footnote Continued on Next Page)

Similar to *Metallic Leases*, an applicant is also unable to pursue construction or physical changes without first obtaining the route permit. In contrast to the certificate of need, the route permit proceeding adjudicates the site-specific plans for development. Much like the trails at issue in *Minnesotans for Responsible Recreation*, the route proceeding allows for detailed analysis of the pipeline route. In deciding the route permit, the parties will give significant consideration to 50+ alternative routes that have been proposed for the Sandpiper Pipeline, and analyze the natural, economical, and social environmental costs of the proposed project.

A certificate of need decision is a threshold determination, required for a pipeline application to advance to the EQB-approved alternative environmental review process and routing permitting stage. Accordingly, the routing stage is the appropriate time for rigorous environmental scrutiny, not the certificate of need. As such, a certificate of need

(Footnote Continued from Previous Page)

actual alternative locations to build a pipeline—they are not actual definite, site-specific plans for anything. Rather, the evidence is relevant only to the question of whether NDPC has shown a need for the pipeline it has requested. Thus, just like the lease sales and system plans, these “system alternatives” cover vast swaths of Minnesota. Furthermore, nobody has proposed building any of these “system alternatives,” and it was not clear when they were submitted in comments whether the “system alternatives” even connected to other regional pipeline infrastructure.

The federal case law cited by FOH in support of this argument is likewise inapposite to the Minnesota-specific rules and law governing pipeline review, *see generally supra*. Even if it were relevant, the federal NEPA law is more nuanced than FOH admits. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 145 (2010) (“Even if a particular agency proposal requires an EIS, applicable regulations allow the agency to take at least some action in furtherance of that proposal while the EIS is being prepared.”); *Tenn. Env'tl. Council v. Tenn. Valley Authority*, 32 F. Supp. 3d 876, 885 (E.D. Tenn. 2014) (explaining that even if agency entered into contracts before EIS was completed, it did not violate NEPA because the actual “work would be postponed” until environmental review was completed).

application decision would not fall within the definition of a “project” under Minn. R. 4410.0200, subp. 65, or a “major governmental action” under MEPA, thus no environmental review is triggered.

B. Although Not Legally Required, The Commission’s October 7, 2014, Order Provides For MEPA-Compliant Tiered Review As Part Of The Certificate Of Need Proceedings.

Although the Commission was not legally required to do so, it ordered Department of Commerce staff to provide an environmental analysis of certain system alternatives submitted by parties and commentators. R.A. 303 at p. 2; R.B. 433 at p. 2. The Commission recognized the nature of the inquiry would require the analysis to be less granular and more high-level than could be completed in a CEA under the routing permit rules. R.A. 303 at p. 12; R.B. 433 at p. 12. As such, the Commission was not requesting a substitute for the CEA; rather, it ordered additional environmental analysis of proposed “system alternatives” that were appropriately tailored for the more general, preliminary, and need-based inquiry at the certificate of need stage.

MEPA recognizes the appropriateness of tiered environmental review. *See* Minnesota Rule 4410.4000 (“An RGU may use a series of tiered EISs to fulfill environmental review requirements for an action where decisions on which alternative to select must be made in stages, progressing from the general to the specific.”) Here, the ordered environmental review will progress from a high-level review of system alternatives in the certificate of need proceeding to a more specific, granular, and detailed CEA that will be completed in any route permit proceeding. Thus, although environmental review is not required during the certificate of need proceeding, the

Commission ordered an environmental review which would qualify as a MEPA-compliant tiered version of the CEA.

Ultimately, the Certificate of Need docket contains a significant amount of environmental review. Pursuant to the rules, the NDPC submitted approximately 650 pages of environmental documents along with its application. *See supra* at Statement of Facts, Part II(A). After the Commission's October 7, 2014, Order, Department of Commerce staff completed an environmental review approximately 260 pages in length (excluding appendices), which was filed prior to public hearings and the contested case proceedings. Parties, other state agencies, and other commentators have continued to expand the testimony and evidence on the environmental record.

CONCLUSION

For the reasons set forth above as well as in its October 7, 2014, Order, Respondent Minnesota Public Utilities Commission respectfully requests the Court affirm its decision that the long-standing alternative environmental review process for proposed petroleum pipelines set forth in Minnesota law complies with, and does not violate, the Minnesota Environmental Policy Act.

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Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota



ALETHEA M. HUYSER
Assistant Attorney General
Atty. Reg. No. 0389270

LEAH M. P. HEDMAN
Assistant Attorney General
Atty. Reg. No. 0280501

MAX KIELEY
Assistant Attorney General
Atty. Reg. No. 0389363

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR MINNESOTA
PUBLIC UTILITIES COMMISSION

**CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 9,881 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.


LEAH M. P. HEDMAN