

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

**BRIEF AND ADDENDUM OF
RELATOR FRIENDS OF THE HEADWATERS**

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INTRODUCTION

This case turns on two simple questions: (1) whether a state agency decision to approve a large oil pipeline triggers environmental review pursuant to the Minnesota Environmental Policy Act (“MEPA”), and (2) whether the agency must fully comply with MEPA prior to granting the governmental approval. Both questions are answered by the plain text of MEPA, its implementing regulations, and written guidelines published by the Environmental Quality Board.

The Minnesota Legislature enacted the state’s environmental laws to ensure that governmental decision-makers consider all pertinent environmental information, including input from the public, prior to approval of major projects. For this reason, the law explicitly requires that MEPA’s substantive and procedural requirements be completed prior to the governmental agency considering whether to grant any approval for a project.

Here, the Minnesota Public Utilities Commission determined that it could grant a certificate of need for a major petroleum pipeline without first complying with MEPA. The proposed pipeline would carry 375,000 barrels of crude oil per day through one of Minnesota’s most ecologically sensitive areas, destroying thousands of acres of prairie, wetlands and forests, and putting Minnesota’s precious water resources at significant risk from oil leaks and spills. Under MEPA, a full record of the potential environmental impacts of the proposed pipeline and any alternatives to the proposal must be developed and available to the Commission prior to it making any decision to grant a certificate of need.

Relator seeks to enforce the rights and values established by the legislature when it enacted the Minnesota Environmental Policy Act. That law does not allow the Public Utilities Commission to issue a certificate of need for a large oil pipeline prior to completing a full environmental review that adequately addresses all of the environmental impacts from the proposed project as well as alternatives. Relator asks this Court to preserve the stated legislative intent and enforce the Minnesota Environmental Policy Act as enacted.

STATEMENT OF LEGAL ISSUE

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?

- (1) Relator Friends of the Headwaters raised this issue in its Petition for Reconsideration and Amendment dated October 27, 2014 (R-473 Doc. 319), and its Response to North Dakota Pipeline Company LLC's Petition for Reconsideration dated November 6, 2014 (R-473. Doc. 342).*
- (2) On December 5, 2014, the Public Utilities Commission denied Relator's Petition for Reconsideration and Amendment. (R-473 Doc. 404.)*
- (3) This issue was preserved for appeal in Relator's Petition for Reconsideration dated October 27, 2014 (R-473 Doc. 319.)*
- (4) Most Apposite Authority: Minnesota Environmental Policy Act, Minn. Stat. §§ 116D.01-.11 (2014).*

STATEMENT OF THE CASE

Relator Friends of the Headwaters challenges the decision of Respondent Public Utilities Commission ("Commission") to proceed with a final decision on a certification

of need for a large oil pipeline before complying with the Minnesota Environmental Policy Act (“MEPA”), Minnesota Statutes Chapter 116D (2014).

In November 2013, Intervenor North Dakota Pipeline Company, LLC (“NDPC”) proposed a 616-mile crude oil pipeline to cross Minnesota at what is possibly the worst location from an environmental perspective in the entire state (the “Sandpiper Pipeline” or “the Project”). This proposed pipeline would, if approved, carry 375,000 barrels per day of crude oil on a route that cuts across the highest quality and most pristine lakes in the state, the most concentrated area of wild rice lakes, rivers of cultural and ecological significance including the Mississippi, vulnerable aquifers, and the most remote areas, making access to respond to an incident difficult. Moreover, NDPC has designed the proposed pipeline to expand to 711,000 barrels of crude oil per day and has already begun the approval process to put a second pipeline in this same corridor; this will bring the total volume of oil moving through this ecologically sensitive corridor to well over 1,000,000 barrels per day.

The Commission has jurisdiction over the certificate of need and route permit that NDPC needs to construct the Sandpiper Pipeline. Minn. Stat. § 216B.243 (2014). Although the Commission will often conduct certificate of need and route permit proceedings jointly, in this case the Commission separated the two proceedings and stayed the route permit proceeding indefinitely until it first made a decision on the certificate of need. The route permit process includes MEPA-compliant environmental review; however there is no similar MEPA-complaint environmental review as part of the certificate of need proceedings. When the two proceedings occur simultaneously, the

MEPA-complaint environmental review for the route permit can inform the Commission on both decisions.

The issue in this case arises in part from the decision to bifurcate the proceedings and put the route permit proceedings second. Rather than ordering the MEPA-compliant environmental review to occur *before* the certificate of need decision, the Commission instead asked the Department of Commerce staff to prepare a environmental report that is alien to MEPA and does not afford Relator or the public any of the rights associated with environmental review under state law. This is an error of law and must be reversed.

STATEMENT OF THE FACTS

NDPC is seeking approval from the Commission to construct the Minnesota portion of the proposed Sandpiper Pipeline, a new 616-mile, 24- to 30-inch diameter pipeline and associated facilities to transport crude oil from Enbridge's Beaver Lodge Station south of Tioga, North Dakota to an existing Enbridge terminal in Superior, Wisconsin. (R-473¹ Doc. 68 at 1.) NDPC is a joint venture between Enbridge Energy Partners, L.P. and Marathon Petroleum Corporation. (R-473 Doc. 64 at 2.) Enbridge Energy Partners, L.P. is a wholly owned subsidiary of Enbridge Energy, Limited Partnership, which owns and operates the U.S. portion of the Enbridge Mainline System. (R-473 Doc. 64 at 2.) Approximately 300 miles of the Project would be located in Minnesota. (R-473 Doc. 64 at 1.) The Project also includes construction of a new

¹ The index to the Administrative Record contains sequentially numbered documents for both Minnesota Public Utilities Commission Docket Nos. PL-6668/CN-13-473 ("Table A") and Docket No. PL-6669/PPL-13-474 ("Table B"). For ease of reference, documents in Table A will be referred to by "R-473" Doc. No. X and documents in Table B will be referred to by "R-474" Doc. No. X.

terminal with two 150,000 barrel tanks and a new pump station near Clearbrook, Minnesota. (R-473 Doc. 64 at 3-4.)

The proposed route originates in North Dakota. From Clearbrook to Superior it follows an existing pipeline right of way south from Clearbrook until it reaches the southern edge of Hubbard County, Minnesota, at which point the Sandpiper Pipeline turns east and follows existing third-party rights-of-way where practicable. (R-473 Doc. 68 at § 7853.0230 at 3.) Approximately 25 percent of the pipeline will be built in new, or “greenfield” corridors that have never been disturbed by other infrastructure projects. (R 473 Doc. 243 at 2.) The initial capacity of the proposed pipeline would be 225,000 barrels per day (“bpd”) into Clearbrook, Minnesota and 375,000 bpd from Clearbrook to Superior; however, the project is designed to accommodate a future expansion to 406,000 bpd into Clearbrook and 711,000 bpd from Clearbrook to Superior. (R-473 Doc. 68 at 7, Table 7853.0230-1-D.5-1.) NDPC filed its route permit and certificate of need applications on November 8, 2013. (R-473 Docs. 16, 18-45.) By order dated February 11, 2014, the Commission accepted the applications as substantially complete and forwarded the matter to the Office of Administrative Hearings for contested case proceedings. (R 473 Doc. 90.)

In a public comment period ending May 30, 2014, more than 1,000 individuals, organizations and state agencies commented on potential alternatives to NDPC’s proposed route. (R-473 Doc. 272 at 3.) Relator participated in this public comment period, as did the Department of Natural Resources (“DNR”) and the Minnesota Pollution Control Agency (“MPCA”). (R-473 Doc. 272 at 4.) All three entities expressed

significant concerns about the location of the Project because it crosses northern Minnesota's water-rich environment, much of it undisturbed, ecologically sensitive, and remote, making it difficult to reach in the event of a leak or spill. (R-474 Docs. 47, 160, 199, 306-07, 403-04.)

On September 11, 2014, the Commission met to consider (1) whether the route permit proceeding and certificate of need proceedings should be bifurcated; and (2) whether environmental review, if any, should be completed as part of the certificate of need proceeding. (R-473 Doc. 282.)

In an Order dated October 7, 2014, the Commission determined that (1) the certificate of need and route permit proceedings should be bifurcated and that the certificate of need proceeding should be completed first; (2) six "system alternatives"—alternative locations for the pipeline that avoid many of northern Minnesota's most sensitive regions and were proposed by parties other than NDPC—should be evaluated in the certificate of need proceeding; and (3) a "high-level," "broad-based" environmental report² of these six system alternatives should be conducted. (Add. at 2.) The Commission ordered that the route permit proceeding be stayed indefinitely until it had made a final decision on whether to grant a certificate of need. (Add. at 2.)

² Although the Commission referred to this document as "environmental review," environmental review is a term of art in the context of MEPA, referring to an Environmental Assessment Worksheet or Environmental Impact Statement and the procedural safeguards that accompany these documents. Minn. Stat. § 116D.04. To avoid confusion, Relator will refer to the Department of Commerce document as an environmental report, not environmental review.

The Commission ordered staff for the Department of Commerce to prepare an environmental report for the certificate of need proceeding that does not comply with Minnesota's environmental review law. In describing this environmental report, the Commission distinguished it from the MEPA-compliant form of environmental review for route permits. It stated that "the environmental review conducted at the certificate of need stage will *not* be equivalent in terms of specificity and level of detail to a comparative environmental analysis undertaken in the route permit proceeding." (Add. at 12 (emphasis added.)) The Order does not provide any of the procedural or substantive rights guaranteed by MEPA as part of the environmental report. For example, the Commission did not provide for scoping of environmental review, public comments on the scoping document, a draft of an environmental impact statement, public comments on such a draft, or government responses to public comments received. (Add. at 11-12.) Instead, the Commission instructed staff from the Department of Commerce to complete a "high-level" environmental report prior to commencement of the certificate of need contested case hearings. (Add. at 12.)

Relator filed a petition for reconsideration of the Commission's October 7, 2014 order bifurcating the route permit and certificate of need proceedings and ordering an environmental report from the Department of Commerce. (R-473 Doc. 319.) Relator's petition for reconsideration asserted that the environmental report requested by the Commission did not comply with MEPA. (R-473 Doc. 319 at 2.) The Commission considered the request for reconsideration on December 4, and, on December 5, 2014, the

Commission issued an order denying the request for reconsideration. (R-473 Doc. 404.) Relator petitioned for certiorari on January 5, 2015. This appeal follows.

ARGUMENT

The Commission's determination to make a final decision on the certificate of need for the proposed pipeline prior to complying with MEPA is an error of law that must be reversed. MEPA applies to all major governmental actions and prohibits any permits, certifications, or other final decisions before environmental review under MEPA has been completed. The construction of a pipeline across 300 miles of Minnesota is a major governmental action and the decision to grant or deny a certificate of need for the Project cannot occur until environmental review under MEPA is complete. The Commission's Order asking an agency to complete an environmental report that does not provide the substantive and procedural safeguards granted by Minnesota law violates MEPA. The Commission's decision must therefore be reversed.

I. Standard Of Review.

"A person aggrieved by a final decision on the need for an environmental assessment worksheet, the need for an environmental impact statement, or the adequacy of an environmental impact statement is entitled to judicial review of the decision under sections 14.63 to 14.68." Minn. Stat. § 116D.04, subd. 10. This Court ordinarily reviews decisions under MEPA to determine whether they are unreasonable, arbitrary, or capricious, but when final decisions under this section involve "the interpretation of statutes and rules and the application of statutes and rules to undisputed facts," this Court reviews such decisions de novo. *In re Env'tl. Assessment Worksheet for 33rd Sale of*

Metallic Leases, 838 N.W.2d 212, 216 (Minn. Ct. App. 2013). Relator brings this certiorari appeal under Minnesota Statute § 116D.04, Subdivision 10 because the Commission's Order violates MEPA by substituting an agency report for MEPA-compliant environmental review such as an EIS, and is therefore "a final decision on . . . the need for an environmental impact statement."

Here, the Commission's determination that it will make a final decision to grant or deny the certificate of need without first complying with MEPA violates the plain language of the statute and is therefore unreasonable and must be reversed.

II. Statutory And Regulatory Background Of The Minnesota Environmental Policy Act.

The Minnesota Environmental Policy Act was enacted with the recognition that humans have a significant impact on our natural resources, and the state must work to understand and limit those impacts as part of the evaluation process for any project. MEPA's statutory goals are to:

- (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment;
- (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and
- (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Minn. Stat. § 116D.01.

MEPA governs environmental review for all projects that require state action or authorization. Minn. Stat. §§ 116D.01-.11. MEPA requires that "[w]here 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. MEPA grants authority to the Environmental Quality Board to establish “categories of actions for which environmental impact statements . . . shall be prepared as well as categories of actions for which no environmental review is required under this section.” Minn. Stat. § 116D.04, subd. 2a(a). Pursuant to authority granted in MEPA, the Environmental Quality Board adopted detailed rules that control agency review and establish both procedural and substantive rights. *See* Minn. R. Ch. 4410.

The form of environmental review required by MEPA and its implementing rules depends upon the size and severity of potential impacts of the proposed project. Some projects are deemed significant enough on their face to require the most searching form of environmental review, generally known as an “Environmental Impact Statement” or “EIS.” *See* Minn. R. 4410.4400 (listing “mandatory categories” for EISs.)³ Pipelines such as the Sandpiper Pipeline are deemed by rule to have the potential for significant environmental effects and require the most searching environmental review, i.e., an EIS or EIS-equivalent alternative. *Id.*, subp. 24.⁴

³ For smaller projects, an “Environmental Assessment Worksheet” or “EAW” is required. Information in the EAW is used to determine if the project has the “potential for significant environmental effects,” in which case a full EIS is then required. Minn. R. 4410.4300, 4410.2000, subp. 3. If the EAW demonstrates that the project does not have the potential for significant effects, then the project may proceed to permitting.

⁴ The EQB rules state that “[a]n EIS must be prepared for projects that meet or exceed the threshold of any of subparts 2 to 25.” Minn. R. 4410.4400, subp. 1. Subpart 24 of this same section 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.” Minn. R. 4410.4400, subp. 24. There is no dispute in this case that the

MEPA allows the Environmental Quality Board to identify “alternative” forms of environmental review that “will address the same issues and utilize similar procedures as an environmental impact statement.” Minn. Stat. § 116D.04, subd. 4a. The Environmental Quality Board must approve any “alternative” form of environmental review through formal rule-making. *Id.* These alternative forms of environmental review must “address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement.” *Id.* In 1989, the Environmental Quality Board approved the pipeline routing rules, Minn. R. Ch. 7852, as such an alternative for pipeline route permits. (R-473 Doc. 320.) According to Environmental Quality Board staff at the time, “[u]nder this approach, pipelines subject to the routing rules would not actually be reviewed through environmental assessment worksheets or EISs, but would receive equivalent review under the routing and permitting process established in the pipeline routing rules.” (R-473 Doc. 320 at 5.) The Environmental Quality Board authorization of the pipeline routing rules as an alternative approach hinges on the various requirements “contained in the Pipeline Routing Rules.” (R-473 Doc. 320 at 12.) The certificate of need rules, in contrast, have not been approved as an alternative form of environmental review.

Public participation is an integral component of environmental review and the MEPA rules establish several procedural requirements, including:

proposed Sandpiper Pipeline is subject to the full route selection procedures under Minnesota Statutes, section 216G.02 and that it therefore falls into the category of projects for which an EIS is mandatory.

- A scoping process prior to preparation of an EIS, which includes an opportunity for public hearing and comment, Minn. R. 4410.2100;
- Publication and distribution of a draft EIS, informational meetings and an opportunity for public comment, Minn. R. 4410.2600;
- Responses from the government agency to comments received on the draft EIS, Minn. R. 4410.2600, subp. 10; Minn. R. 4410.2700, subp. 1;
- Publication and distribution of a final EIS, Minn. R. 4410.2700.

In addition, the rules dictate the substance of environmental review, requiring, for example, that reasonable alternatives to the project be fully evaluated, and that the indirect and cumulative effects of a project be discussed as well as its direct effects. Minn. R. 4410.2300 (G), (H.) All parts of the project, as well as any other connected projects, must be evaluated in a single environmental review document. Minn. R. 4410.2000, subp. 4.

No governmental approvals may be granted to a project until the environmental review for the project is deemed adequate by the responsible governmental unit:

If 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:

- (1) a petition for an environmental assessment worksheet is dismissed;
- (2) a negative declaration has been issued on the need for an environmental impact statement;
- (3) the environmental impact statement has been determined adequate; or
- (4) a variance has been granted from making an environmental impact statement by the environmental

quality board.

Minn. Stat. § 116D.04, subd. 2b (emphasis added); *see also* Minn. R. 4410.2900.

The law's reference to "final governmental decision" does not mean final in time. Rather, the responsible governmental agency, here the Commission, cannot eschew compliance with MEPA for the certificate of need determination simply because another later governmental decision (whether by a different agency or the same agency) is expected to comply with MEPA. The Environmental Quality Board has provided guidance specifically addressing this point. "The statute and rule prohibit "final decisions" granting permits, or other approvals. In this context, 'final' means 'not to be altered or undone,' rather than 'last.'" May 2010 Guide to Minnesota Environmental Review Rules, at 13 (hereinafter "EQB Guide").⁵ The EQB Guide goes on to explain that governmental agencies often make the error committed by the Commission in this case:

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.

Id. at 14.

⁵ 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.)

Finally, the Environmental Quality Board explains why it is so important that governmental decisions NOT be made until a full environmental review is complete.

“One of the key purposes of environmental review,” the Board advises,

is to provide information about potential environmental effects and how to avoid or minimize those effects to each of the governmental units which will approve or conduct the project. For this information to have utility, the governmental units must have the information in mind when they take their actions about the project. To issue permits or approvals before the information is available undermines the very purpose of the review. That is the reason why all decisions approving the project (or parts of the project) are prohibited until the review has been completed.

Id. at 13.

III. MEPA Prohibits The Commission From Making A Final Decision To Grant A Certificate Of Need For The Sandpiper Pipeline Until It Has Completed Environmental Review As Required By Statute And Rule.

The Commission may not grant a certificate of need for a proposed pipeline prior to completion of environmental review as required by MEPA. The purpose of environmental review is to allow agencies and the public to fully understand the potential environmental impacts of a project before agencies take any action on the project. It has no purpose after action has already been taken, because it cannot inform those decisions. Because the route permit proceeding has been bifurcated from the certificate of need proceeding for this Project, the EQB-approved alternative environmental review will not be complete until the route proceeding resumes—*after* the Commission has made a final decision on the certificate of need. The plain language of MEPA and its implementing regulations preclude the Commission from taking action on the certificate of need prior to

satisfying their procedural and substantive requirements.

A. There can be no dispute that governmental approval of the Sandpiper Pipeline triggers MEPA.

As set out above, Minnesota Statute § 116D.04, subdivision 2a requires a “detailed environmental impact statement⁶ prepared by the responsible governmental unit” where there is “potential for significant environmental effects resulting from any major governmental action.” If the Commission grants a certificate of need to the Sandpiper Pipeline, it is giving government approval to a “project” that has the “potential for significant environmental effects.”

1. Granting a certificate of need constitutes governmental approval of a project.

No pipeline may be sited or constructed in Minnesota without a certificate of need and a route permit from the Commission. Minn. Stat. § 216B.243. When the Commission acts to grant a certificate of need or route permit for a large oil pipeline, it is

⁶ As discussed above, the Environmental Quality Board is authorized to approve alternative forms of environmental review. Minn. Stat. § 116D.04, subd. 4a. The Environmental Quality Board has approved an alternative environmental review process for pipelines, which is codified in the Route Permit rules in chapter 7852. (R. Docs. 320-21 contain documents relevant to the EQB’s 1989 approval of the alternative form of review.) For example, “[a] comparative environmental analysis of all the pipeline routes accepted for consideration at public hearings shall be prepared by the commission staff or by the applicant and reviewed by the commission staff. This comparative environmental analysis must be submitted as prefiled testimony as required by part 1405.1900.” Minn. R. 7852.1500. No such environmental review requirement was approved by the Environmental Quality Board for the certificate of need process and no equivalent is contained in the rules relevant to a certificate of need, chapter 7853. Accordingly, Relator argued to the Commission that an EIS was required in this bifurcated proceeding. But even if the comparative environmental analysis contained in chapter 7852 were an Environmental Quality Board-approved alternative that could be used in the certificate of need proceeding, the comparative environmental analysis will not take place until *after* a decision on the certificate of need has been made and is therefore not applicable here.

“governmental action” for purposes of MEPA. “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.” Minn. Stat. § 116D.04, subd. 1a.

Because receipt of a certificate of need is a necessary condition of constructing a major oil pipeline, a decision to grant the certificate of need is a major governmental action triggering environmental review under MEPA. As the Environmental Quality Board’s Guide explains, MEPA is triggered by “any action or project that meets three conditions:

- The action or project must involve the physical manipulation of the environment, directly or indirectly.
- The action or project must involve at least one governmental approval

- Action or project approval and construction must take place in the future.”

EQB Guide at 5 (citation omitted).

Here, the Commission intends to make a final decision on a certificate of need selecting among six alternative sites for a major infrastructure project. There is no dispute that this decision will result in the “physical manipulation of the environment,” that it “involves at least one governmental approval” and that the approval is yet to be taken. Therefore, this is a major governmental action which will trigger MEPA, and requires an EIS or EIS-equivalent if it has the “potential for significant environmental effects.”

2. The Project has the potential for significant environmental effects.

No party appears to dispute the fact that a pipeline project of the magnitude of the Sandpiper Pipeline has the potential for significant environmental effects as defined by MEPA. Moreover, the EQB has established pipelines subject to the “full route selection procedures” as a mandatory EIS category, foreclosing any argument that the Sandpiper Pipeline does not meet this threshold. Minn. R. 4410.4400, subp. 24. Although not disputed, this fact is critical because it demonstrates the necessity of complying with MEPA’s substantive requirements and procedural protections. The very purpose of MEPA is to bring the resources of state government to bear, as well as the public’s attention, to fully understand the potential environmental effects of a decision as significant as this one, which could establish a pipeline corridor that will carry more than 1,000,000 barrels of crude oil per day.

NDPC has maintained throughout this proceeding that environmental review of its Project is only necessary, and indeed, only possible, at the route selection stage. (R-473 Doc. 314 at 18-20.) But this position is untenable. By the time the Project is at the route permit stage, the presence of a 1,000,000-barrels-per-day corridor through the heart of Minnesota’s most ecologically sensitive area may well be a foregone conclusion. That flies in the face of MEPA. This kind of attempt to box Minnesotans into a corner and force an environmentally destructive decision is precisely the reason that MEPA was passed. “Prior to the passage of these laws, holders of eminent domain rights could simply decide to construct new . . . facilities, decide on a route, and go ahead and acquire the rights of way.” *No Power Line Inc. v. Minn. Env’tl. Quality Council*, 262 N.W.2d 312,

331 (Minn. 1977) (Yetka, J, concurring specially).

With the passage of the environmental policy contained in c. 116, however, the legislature clearly intended to place conditions and limitations on further destruction of the environment. The legislature decided, with the wisdom which must guide the courts, that before generating and transmission facilities could be constructed the need for those facilities and the impact on the environment must be considered.

Id.

Indeed, the potential for significant environmental effects from the Project prompted both DNR and MPCA to express concerns about the location of the Project. (R-474 Docs. 47, 160, 307, 403-04.) The same concern prompted both Relator and MPCA to offer system alternatives for consideration by the Commission that would locate the Project in a corridor that would be less environmentally destructive than the corridor proposed by NDPC. (R-473 Doc. 272 at 10; R-474 Doc. 306.) There can be no doubt that the Sandpiper Pipeline, in this sensitive corridor, has the potential for significant environmental effects.

Because granting the certificate of need is a major governmental action and because the Sandpiper Pipeline has the potential for significant environmental effects, the certificate of need decision on a large pipeline project such as the Sandpiper triggers MEPA under subdivision 2a.

B. A “final governmental decision” such as a certificate of need may not be made prior to fulfilling the procedural and substantive requirements of MEPA.

When MEPA applies to a proposed project, the state is prohibited from granting any approvals related to the project before environmental review has been completed.

Minn. Stat. § 116D.04, subd. 2b. The EQB Guide states that a “moratorium is automatically placed on action or project approval and construction” whenever environmental review is required. EQB Guide at 5. This prohibition on granting approvals prior to completing environmental review is one of the “key purposes” of environmental review. “To issue permits or approvals before the information is available undermines the very purpose of the review. That is the reason why all decisions approving the project (or parts of the project) are prohibited until the review has been completed.” *Id.* at 13.

1. The prohibition on final governmental action prior to completion of full environmental review is central to MEPA’s purpose.

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.*

The environmental review process is not only intended to help an agency decide whether to approve a project, but also to allow an agency to oversee design and construction of a project in a way that will minimize its impact on the environment. Minn. R. 4410.0300, subp. 3. MEPA is designed to “aid in providing that understanding through the preparation and public review of environmental outcomes.” *Id.* In order to achieve that goal, the documents “shall be available to governmental units and citizens early in the decision making process.” *Id.*

MEPA’s statutory goals are to:

- (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment;
- (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and
- (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Minn. Stat. § 116D.01. MEPA cannot achieve its goals to improve harmony between human beings and their environment, prevent or eliminate damage to the environment, and enrich understanding of ecological systems and natural resources unless agencies are given the full opportunity to gather and, most importantly, *use* information about potential environmental impacts of a project at the time when they are making decisions about the project.

In addition to its overarching policy goals, MEPA has the practical goals of providing “usable information to the project proposer, governmental decision makers and the public concerning the primary environmental effects of a proposed project,” and providing the public with access to decision makers to encourage accountability in decision making. Minn. R. 4410.0300, subp. 4. MEPA cannot achieve its practical goals of providing “usable” information if the information is not available until after decisions are made.

2. The prohibition on final governmental actions prior to completion of full environmental review is plainly expressed in the statute and controlling rules and guidance.

In order to serve as a guide for decision-making, MEPA prohibits any “final governmental decision . . . to grant a permit, approve a project or begin a project” until the EIS or Environmental Quality Board-approved alternative environmental review has been determined to be adequate. Minn. Stat. § 116D.04, subd. 2b; Minn. R. 4410.3100. 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.

MEPA’s prohibition applies to all permitting and approval decisions, including the certificate of need for a large pipeline. The definition of “permit” is intentionally broad to encompass any sort of agency approval, including, notably, the term “certificate.” Minn. R. 4410.0200, subp. 58. The EQB Guide uses similarly broad language, stating that one of the “key purposes of environmental review is to provide information about potential environmental effects and how to avoid or minimize those effects to each of the

governmental units which will approve or conduct the project.” EQB Guide at 13. The information has no utility unless the governmental units have that information available when they take action on the permits. *Id.*

The EQB has specifically explained that a “final governmental decision” in the context of MEPA means “not to be altered or undone; rather than ‘last.’” *Id.* In fact, the EQB Guide explains that granting a preliminary approval prior to completion of MEPA review is a violation of the statute, and the EQB has had to correct this error in the past:

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.

Id. at 14 (emphasis added).

The certificate of need decision is precisely the sort of “final” government decision that is prohibited because it prejudices the ultimate decision prior to a completed environmental review. “Prejudicial actions are those that limit alternatives or mitigative measures or predetermine subsequent development.” *Id.* at 15. Actions that “make one option, including the option of not building the project, more or less likely to be chosen are prohibited.” *Id.* The certificate of need will determine which route or routes will be examined as part of the route permit proceeding, and will eliminate other routes from consideration, thereby limiting alternatives and prejudicing the ultimate decision prior to completion of environmental review.

3. Federal law under the National Environmental Policy Act, which is instructive when interpreting MEPA, also plainly requires environmental review prior to any governmental decisions.

The National Environmental Policy Act (“NEPA”) similarly prohibits agencies from making decisions prior to completion of environmental review.⁷ “The [Environmental Impact] Statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.” 40 C.F.R. § 1502.5. “Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.” 40 C.F.R. § 1502.2; *see also* 40 C.F.R. § 1506.1 (prohibiting any action concerning the proposal which would “limit the choice of reasonable alternatives” prior to completion of an environmental impact statement).

Federal courts have held that agencies that limit the range of options available to them prior to completion of environmental review violate NEPA. For instance, one federal court found that where the U.S. Government and a tribe signed a contract committing the US to supporting the tribe’s bid to hunt whales before environmental review on whale hunting was complete, the U.S. Government had violated NEPA and was ordered to suspend implementation of the agreement with the tribe. *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000). In *Metcalf*, the U.S. Government negotiated an agreement with the Makah Tribal Council to support the Makah’s application to the International

⁷ The Minnesota Environmental Policy Act is modeled on the National Environmental Policy Act. *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 468 (Minn. 2002). Minnesota courts may turn to federal courts to assist in interpretation of MEPA. *See, e.g., id.* at 468.

Whaling Commission for a hunting quota of five grey whales. *Id.* at 1139. That agreement was signed in 1996. *Id.* They did not prepare an environmental review document, however, until 1997. *Id.* at 1143. The court observed that “proper timing is one of NEPA’s central themes.” *Id.* at 1142. In order to comply with NEPA, an agency must initiate the NEPA process “*at the earliest possible time*” and “before any irreversible and irretrievable commitment of resources.” *Id.* at 1143.

The court held that by initiating environmental review after it had agreed to support the Makah’s request for a quota of five grey whales, it failed to engage NEPA at the “earliest possible time.” *Id.* It had already made a commitment by the time it conducted environmental review, and as a result it failed to “comply with NEPA’s requirements concerning the timing of their environmental analysis, thereby seriously impeding the degree to which their planning and decisions could reflect environmental values.” *Id.* at 1143-44 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988)).

Not only had the agency violated NEPA’s plain language, it also impaired the subsequent environmental review because it would likely be “slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment.” *Id.* at 1144. “NEPA’s effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process.” *Id.* at 1145. The court held that, by making a firm commitment before preparing the environmental review document, “the Federal Defendants failed to take a ‘hard look’ at the environmental consequences of their actions, and, therefore, violated NEPA.” *Id.*; see also *Robertson v. Methow Valley*

Citizens Council, 490 U.S. 332, 349 (1989) (noting that the timely preparation of an EIS “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning the significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (“The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at time when they retain a maximum range of options.”) (quotation omitted); *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) (stating that agencies must comply with NEPA as early as possible in the decisionmaking process because of the “difficulty of stopping a bureaucratic steam roller, once started”).

These cases are directly analogous to the certificate of need decision. The Commission, having been presented with multiple potential alternative locations for a pipeline on the premise that those alternatives may be less environmentally harmful, now proposes to make a determination about which of those alternatives, if any, should be considered in the next phase of the proceedings. (R-473 Doc. 303 at 7) (“Therefore, should parties or individuals wish to challenge the Company’s stated need or advance certain system alternatives within the certificate of need proceedings, they will have the opportunity to do so[.]”). The Commission is proposing to make a firm commitment to certain alternatives but not others in the certificate of need proceeding, thereby disregarding MEPA’s “central theme” of timing. By considering the various alternatives prior to conducting environmental review, the Commission will have inappropriately

narrowed its options, failing to comply with MEPA and “thereby seriously impeding the degree to which their planning and decisions could reflect environmental values.” *Metcalf v. Daley*, 214 F.3d at 1143-44.

IV. The Environmental Report Ordered By The Public Utilities Commission Does Not Comply With MEPA.

The environmental report ordered by the Commission is not, by its own terms, in compliance with MEPA. When the Commission ordered the environmental report, it “recognize[d]” that it would “not be equivalent in terms of the specificity and level of detail to a comparative environmental analysis undertaken in the route permit proceeding.” (Add. at 12.) It also “emphasize[d]” that it “is not attempting to establish a separate form of alternative environmental review for [certificate of need] proceedings.” (Add. at 12.) Thus, the Commission described and ordered an environmental report that did not comply with MEPA. The Commission acknowledged in its order that MEPA applied, but the Commission then requested an environmental report that is not recognized by MEPA and does not afford Relator the full suite of rights to participate in the process that MEPA grants.

The Commission did not include any of MEPA’s procedural safeguards in its description of the environmental review to be completed as part of the need proceeding, nor did it order an EIS. Instead, the Commission’s Order simply ignored the requirements of MEPA.

Moreover, the Commission’s alternative environmental review for route permitting will not comply with the requirements of MEPA for the certificate of need

determination because that alternative environmental review will not take place until *after*, and only if, the certificate of need is granted for the Sandpiper Pipeline. In other words, under the Commission's Order, environmental review will only be conducted after it has chosen between the very alternatives that have been proposed to deal with the environmental impacts of the project. Minnesota law authorizes the Commission to conduct joint hearings on the route permit and certificate of need, but in this case the Commission decided that it was in the public interest to bifurcate these decisions. Minn. Stat. § 216B.243, subd. 4. The Commission also decided that the need determination, which will include the selection among major alternatives to the route for this pipeline, should occur first. Accordingly, the entire pipeline route permit process has been suspended indefinitely, including the Environmental Quality Board-approved alternative form of environmental review.

The decision about whether or not an applicant for a certificate of need has justified the need for a pipeline is based on the certificate-of-need rules—a separate chapter with distinct requirements from the pipeline routing rules. The certificate-of-need rules, contained in Chapter 7853, have never been approved by the Environmental Quality Board as an alternative form of environmental review under MEPA. Without first completing an EIS or an Environmental Quality Board-authorized alternative form of environmental review, the Commission cannot make a final decision about whether or not NDPC has justified a need for the Sandpiper Pipeline project.

V. Failing To Enforce MEPA Will Have Broad-Reaching Effects.

This case is procedurally unique. The Commission's decision to bifurcate the certificate of need proceeding from the route permit proceeding might be unprecedented. And the way that the certificate of need proceeding is tied to the corridor in which the Project will be located is a situation of NDPC's and the Commission's creation. Accordingly, enforcing MEPA as written and requiring the Commission to complete a MEPA-compliant environmental review process before it can grant or deny a certificate of need will have a narrow application beyond this case.

On the other hand, a decision that suggests that agencies may grant a certificate of need, or some other type of permit or approval, without complying with MEPA could be far-reaching. MEPA was carefully drafted to include procedural safeguards and avenues for public participation. MEPA prohibits agencies from taking steps to approve projects without the benefit of the information regarding the environmental impacts of the project. Allowing the Commission to grant a certificate of need for a pipeline corridor destined to carry over 1,000,000 barrels of crude oil per day through previously undisturbed prairies, wetlands and forests without complying with these safeguards and prohibitions would be unprecedented and would open the door to the slippery slope of agencies claiming environmental review is not required until some point in the process when it is too late.

CONCLUSION

MEPA was enacted to inform decisions precisely like the certificate of need decision—whether to allow a large oil pipeline across the entire state to proceed, and if so, where it should be located. Analyzing the impacts of such a project after its location has been predetermined is meaningless. Allowing agencies to invent some limited form of environmental review under the guise of complying with the law violates MEPA. What the Commission did here is a violation of MEPA and is therefore an error of law.

Relator respectfully requests that this Court reverse the Commission's decision that a certificate of need can be granted or denied before complying with MEPA and remand for MEPA-compliant environmental review.

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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 7,599 words. This brief was prepared using Microsoft Word 2010.

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