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No. A15-0016

**FILED**

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State of Minnesota  
In the Supreme Court

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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

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**PETITION FOR REVIEW OF DECISION OF  
COURT OF APPEALS AND ADDENDUM**

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**To: The Supreme Court of the State of Minnesota**

This petition is submitted on behalf of the Minnesota Public Utilities Commission ("MPUC"). For over 25 years, applications for petroleum pipelines in Minnesota have been governed exclusively by the specific pipeline review process currently set forth in Minnesota Rules Chapters 7852 and 7853. The Minnesota Court of Appeals rejected that longstanding process set forth in Minnesota law and ordered a duplicative and premature second layer of environmental review even before the need for the pipeline is determined. In so ruling, the court failed to give due deference to State agencies; recognize the limited scope of the certificate of need decision; acknowledge that appropriate environmental review was ordered for purposes of the certificate of need proceedings and that further environmental review will take place at a later time, if the certificate of need is granted.

#### **STATEMENT OF LEGAL ISSUES**

- 1. Does Minnesota Rule 4410.4400, subp. 24 provide that environmental review of pipelines shall take place solely through the "alternative review process" set forth in Minnesota Rules Chapters 7852 and 7853?**

The court of appeals held that the MEPA-compliant alternative review process, approved by EQB through proper rulemaking procedures, did not preclude an EIS for a certificate of need.

- 2. Was the initial environmental review submitted and ordered as part of the certificate of need process legally sufficient for that purpose?**

The court of appeals did not acknowledge the extent of environmental review provided for nor analyze whether the environmental review was legally sufficient for the certificate of need stage.

- 3. Are certificate of need decisions for pipelines sufficiently definite and site-specific to prepare a meaningful Environmental Impact Statement?**

The court of appeals held that a pipeline was a "major governmental action" requiring an Environmental Impact Statement ("EIS") without considering the narrow scope of the certificate of need process.

## STATEMENT OF CRITERIA GOVERNING REVIEW

Pipeline applications are being filed in Minnesota with greater frequency. The question of whether an EIS is required for a certificate of need is therefore likely to recur, has a statewide impact, and is an important one upon which the Supreme Court should rule. Minn. R. App. P. 117. Furthermore, because the court of appeals failed to give appropriate deference to both the Environmental Quality Board (“EQB”) and MPUC, and failed to address important legal questions raised in the appeal, it has departed from the accepted and usual course of justice. *Id.*

## STATEMENT OF THE CASE

In November 2013, North Dakota Pipeline Company LLC (“NDPC”) filed an application to build a new pipeline in Minnesota known as the Sandpiper Pipeline. NDPC must obtain both a certificate of need and routing permit from the MPUC to build the proposed pipeline. The certificate of need decision focuses on the NDPC’s need for the facility. Minn. Stat. § 216B.243; Minn. R. 7853.0130. The routing application focuses on detailed and site-specific questions, which includes consideration of environmental impacts at a granular level. Minn. Stat. § 216G.02; Minn. R. 7852.1900.

On October 7, 2014, MPUC granted a motion by parties concerned about the resource intensive nature of the proceedings to have the certificate of need proceed to contested case before the routing permit. *Add.* at 15-27. Although not required by EQB for pipeline review, MPUC also ordered an environmental review as part of the certificate of need process of six “system alternatives” proposed during public comments. *Id.* Based on its expertise, MPUC ordered that the environmental review be appropriately tailored to the information and inquiry relevant to certificate of need. *Id.* Because certificate of need is not a location-specific inquiry, MPUC explained that the more granular and site-specific review of alternative routes would be conducted as part of its consideration of the routing permit. *Id.* As such, MPUC declined to

grant Friends of the Headwaters (“FOH”) request for an EIS structured in a manner different from that approved by EQB for pipeline review. *Id.*

FOH appealed pursuant to Minn. Stat. § 116D.04, subd. 10. On September 14, 2015, the court of appeals reversed and remanded the Commission’s decision for completion of an EIS under the Minnesota Environmental Policy Act (“MEPA”).<sup>1</sup> Add. at 1-11.

## ANALYSIS

### I. MANDATORY ENVIRONMENTAL REVIEW OF A PIPELINE OCCURS AT THE ROUTING STAGE.

As it relates to petroleum pipelines and pursuant to its statutory authority, EQB established a mandatory environmental review category only for “routing of a pipeline, subject to the full route selection procedures under Minnesota Statutes, section 216G.02 . . . .” Minn. R. 4410.4400, subp. 24; Minn. Stat. § 116D.04, subd. 2a(a). That mandatory environmental review is completed through a MEPA-compliant “alternative review process” for pipelines. 1988 Alternative Review, Add. at 40-44; Minn. Stat. § 116D.04, subd. 4a. The alternative review process “avoid[s] the potential for disruption and delay . . . due to a request for a EAW or EIS . . . .” 1988 SONAR, Add. at 33-34; EQB, Mandatory Environmental Review Categories (Jan. 2013) (citing same), Add. at 47-49. Accordingly, the EQB rules provide that the detailed environmental review will take place at the routing stage, when specific sites and locations of the pipeline are considered.

“Under this approach, pipelines subject to the proposed rules would not actually be reviewed through [an EIS], but would receive equivalent review under the routing and permitting

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<sup>1</sup> The Order also improperly reversed MPUC’s non-final and non-appealable decision to grant a certificate of need and required the EIS be completed before commencement of Certificate of Need proceedings. Add. at 11. On September 30, 2015, the Court of Appeals issued an Order correcting these aspects of its September 14, 2015 Order. Add at 12-14.

process established in the proposed rules.” 1988 Pipeline Rules SONAR, Add. at 37; *see also* Minn. R. 4410.3600, subp. 2 and Minn. R. 4410.4600, subp. 2(E) (explaining that projects subject to alternative review are exempt from additional environmental review under Chapter 116D).

EQB recognized the interplay between certificate of need and routing, and expressly designed the pipeline rules to provide the environmental review required by MEPA as part of the routing process. *See* 1988 Alternative Review, Add. at 40-44; 1988 Pipeline Rules SONAR, Add. at 38 (recognizing difference and interconnection between certificate of need and routing); 1982 SONAR, Add. at 46 (explaining that mandatory environmental review thresholds for routing were developed because “the certificate of need process does not entail a comprehensive assessment of potential environmental impacts”).

## **II. THE COURT OF APPEALS FAILED TO CONSIDER THE ENVIRONMENTAL REVIEW MPUC ORDERED AS PART OF THE CERTIFICATE OF NEED PROCEEDING.**

Where a project approval requires multiple decisions, MEPA allows for a “tiered” environmental review. Minn. R. 4410.4000; 1995 SONAR, Add. at 29-30. “The level of detail and site-specificity of the information increases as you move from one tier to the next, and only issues ‘ripe’ at the particular stage of decision-making are discussed in the particular tiered EIS.” 1995 SONAR, Add. at 30.

Environmental review of pipelines is completed through environmental data submitted by an applicant, supplemental data on new alternatives proposed, and public input through meetings, contested case proceedings, and public comment. 1988 Alternative Review, Add. at 40-44. As the Minnesota Court of Appeals has twice recognized, the alternative environmental review for pipelines is MEPA-compliant and sufficient for both the certificate of need and routing permit decisions. *See Minn. Ctr. for Envtl. Advocacy v. Minn. Public Utilities Comm’n*,

No. A10-812, 2010 WL 5071389 (Minn. App. Dec. 14, 2010); *In re Minn. Pipe Line Co.*, No. A07-1318, 2008 WL 2344736 (Minn. App. June 10, 2008).

In this case, NDPC submitted the environmental data required as part of the application and public participation was provided for. MPUC ordered environmental review of the “system alternatives” being considered at the certificate of need proceeding, the specificity of which was tailored for that stage of inquiry. If the pipeline application moves to the more site-specific route stage, MPUC rules explicitly provide that the environmental review of proposed route alternatives would be conducted at that stage. As such, in accordance with the applicable rules, MPUC properly exercised its discretion to provide for an appropriately-tiered environmental review for purposes of the certificate of need proceeding.

**III. THE COURT OF APPEALS FAILED TO CONSIDER OR DETERMINE WHETHER AT THE CERTIFICATE OF NEED STAGE THE INQUIRY IS SUFFICIENTLY SITE-SPECIFIC TO PREPARE A MEANINGFUL EIS.**

The court of appeals also failed to analyze or even consider whether at the certificate of need stage a proposed pipeline was sufficiently definite and site-specific to constitute a project under Rule 4410.0200, subp. 65. Add. at 8-9. In similar cases under both state and federal law, when additional review would be provided in a later and more definite and site-specific process, environmental review was not required at the earlier stages. *See, e.g., In re Environmental Assessment Worksheet for 33<sup>rd</sup> Sale of State Metallic Leases in Aitkin, Lake, and Saint Lois Counties*, 838 N.W.2d 212, 217 (Minn. App. 2103); *Minnesotans for Responsible Recreation v. Dep’t of Natural Resources*, 651 N.W.2d 533, 539-40 (Minn. App. 2002). The court of appeals also failed to consider and explain what authority it had to order an EIS pursuant to Minn. R. 4410.2000, subps 2, 3.

For these reasons, the Court should grant review in this matter.

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Respectfully submitted,

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