

State of Minnesota  
In Supreme Court

**FILED**

October 14, 2015

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

**OFFICE OF  
APPELLATE COURTS**

Date of Filing of Court of  
Appeals Decision: September 14, 2015

Appellate Court Case Number:  
**A15-0016**

*In the Matter of the Application of  
North Dakota Pipeline Company LLC  
for a Pipeline Routing Permit for the  
Sandpiper Pipeline Project in Minnesota*

**NORTH DAKOTA PIPELINE COMPANY LLC's  
PETITION FOR REVIEW AND PETITIONER'S ADDENDUM**

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Petitioner North Dakota Pipeline Company LLC (“NDPC”) respectfully requests that the Court review the September 14, 2015, published decision of the Court of Appeals.

**I. STATEMENT OF LEGAL ISSUES.**

Did the Court of Appeals improperly substitute its judgment for that of the Public Utilities Commission (“Commission”) and the Environmental Quality Board (“EQB”) as to the level of environmental review required for granting a certificate of need for a proposed pipeline, and err in its interpretation of the Minnesota Environmental Policy Act (“MEPA”)?

**II. STATEMENT OF CRITERIA TO SUPPORT THE PETITION.**

This case involves a major Minnesota energy infrastructure project. It presents important questions about the required level of environmental review under MEPA for pipeline certificate of need determinations. A clear regulatory process and clear rules governing the certificate of need criteria are paramount concerns for project applicants. The Court of Appeals decision creates uncertainty for this and future projects because the Court improperly substituted its own judgment for that of the regulators, and in doing so, incorrectly interpreted and applied MEPA. Further review is needed and justified under Rule 117, subd. 2(a), (c), (d)(2) and (d)(3).

**III. STATEMENT OF THE CASE AND FACTS.**

For decades, the Commission has been responsible for deciding certificates of need and route permits for large energy facilities, including crude oil pipelines, and is the responsible governmental unit (“RGU”) under MEPA. The Commission consistently exercises discretion and judgment in determining the appropriate level of environmental review needed to inform its certificate of need decisions. It has never required an environmental impact statement (“EIS”) to approve a pipeline certificate of need and has never had a court rule that an EIS is required.<sup>1</sup>

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<sup>1</sup> To the contrary, appellate courts have rejected challenges under MEPA to Commission pipeline certificate of need decisions made without EISs. *See Minn. Ctr. for Env'tl. 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).

For the Sandpiper Pipeline, the Commission gave environmental issues a “hard look” that far exceeds that given to prior crude oil pipelines. Its environmental review began with NDPC’s 139-page Environmental Information Report (“EIR”) and supporting appendices which evaluated the Project’s environmental effects, studied alternatives, including trucking, rail transport and other pipeline systems, and evaluated a no-action alternative. The Commission considered comments on the EIR by the public and other agencies. Environmental issues relevant to the certificate of need determination were then litigated in a contested case hearing before an ALJ, and further considered by the Commission when it evaluated the ALJ’s recommendation to approve the certificate of need.

On top of this, and unique to the Sandpiper Pipeline, the Commission directed the Department of Commerce, Energy Environmental Review and Analysis (“DOC-EERA”) to conduct *additional* environmental review of six hypothetical “system alternatives”<sup>2</sup> proposed by commenters, and to compare the hypothetical environmental effects of those systems to the proposed pipeline. The Commission understood that the level of detail associated with an EIS “of necessity” was not possible for the evaluation of hypothetical “system alternatives” which, if they ever were to be built, might be located anywhere within a broad, miles-wide corridor:

[T]he certificate of need decision is a preliminary decision, involving a high level of examination and review appropriate for the type of decision being made. Accordingly, the Commission seeks to ensure that the record in the certificate of need proceeding contains an adequate, albeit preliminary, environmental analysis *of the system alternatives*. The Commission recognizes that the environmental analysis, *of necessity*, will be a more tiered, broader-based analysis, reflecting a high-level review appropriate to the level of detail of the [system] alternative being considered. The more detailed and site-specific environmental review will be completed as part of the routing proceeding, if need is shown.

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<sup>2</sup> “System alternatives” are not proposed alternative routes, but are hypothetical alternative pipeline systems connecting different geographic points. The hypothetical alternative systems were used to evaluate whether a need exists for the proposed pipeline.

(Add. 23)(emphasis added). DOC-EERA then prepared a 268-page document entitled “Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives.” NDPC prepared an additional 206-page environmental “System Alternatives Analysis Report.” The Commission considered all environmental reports, all comments and information supplied by the public and other agencies, and the contested case record to inform its certificate of need decision.

In addition, before the Sandpiper Pipeline project can be approved for construction, another detailed EIS-equivalent environmental review, called a comparative environmental analysis (“CEA”), will be prepared by DOC-EERA in the routing proceeding. It will compare the environmental impacts of the proposed Sandpiper Pipeline route against 54 alternative routes identified by the public and other agencies during public information meetings. The CEA is part of the “alternative environmental review” procedures that the EQB approved under MEPA as a substitute for an EIS for crude oil pipelines.

FOH filed a motion for reconsideration of the Commission’s decision on the level of environmental review for the hypothetical systems alternatives, arguing that an EIS is required. The Commission, which had already determined that a more detailed form of environmental review was not feasible, denied FOH’s motion. (Add. 23.) On appeal, the Court of Appeals accorded no deference to the Commission’s judgment and reversed. (Add. 1.)

#### **IV. ARGUMENT IN SUPPORT OF PETITION.**

##### **A. The Court Improperly Substituted its Judgment for that of two Administrative Agencies.**

An RGU’s conclusion that an EIS is not required under MEPA is presumed to be correct and entitled to deference on appeal. *Minn. Ctr. for Env’tl. Advocacy v. MPCA*, 644 N.W.2d 457, 464 (Minn. 2002). Here, the Court failed to defer to the Commission’s judgment on the level of environmental review needed for the hypothetical “systems alternatives” under the specific

certificate of need criteria, and the infeasibility of using an EIS. It also failed to defer to the EQB's judgment. The legislature conferred broad rulemaking authority on the EQB, requiring it to promulgate "rules which are reasonably necessary to carry out the requirements" of MEPA. Minn. Stat. § 116D.04, subd. 5a. The EQB established "Mandatory EIS Categories" for certain governmental actions. Minn. R. 4410.4400. It determined that pipeline *routing* is a governmental action requiring a mandatory EIS, *id*, subp. 24, and that a *certificate of need* is not. *Id*. The EQB also determined that the EIS requirement for pipelines is satisfied by the extensive environmental review that takes place under pipeline routing rules, Minn. R. Ch. 7852. The EQB's Statement of Need and Reasonableness for those rules<sup>3</sup> provides that the alternative environmental review in the routing rules will apply *to the project as a whole*:

Under this approach, *pipelines* subject to the proposed rules would not actually be reviewed through environmental assessment worksheets or environmental impact statements, but would receive equivalent review under the routing and permitting process... The proposed rules provide a review process that minimizes duplication, provides for timely review, *meets the requirements of environmental review*, and establishes an orderly method for the routing and permitting of *pipeline projects*.

The Court of Appeals should not have substituted its judgment for that of the two agencies.

**B. On an Important Issue of Statewide Significance, the Court Incorrectly Interpreted and Applied MEPA.**

An EIS is required only *if* a "major governmental action" has the "potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a. In erroneously concluding that a certificate of need, which addresses only whether there is a "need" for a pipeline, is a "major governmental action," the Court ignored the EQB's determination that a certificate of need is not a mandatory EIS category, and ignored and contradicted its own precedent that preliminary governmental approvals (like certificates of need), which do not authorize site-

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<sup>3</sup> *In the Matter of the Proposed Permanent Rules Relating to Pipeline Routing, Statement of Need and Reasonableness*, at p. 2 (Sept. 30, 1988) (emphasis added).

specific development are not “major governmental actions.”<sup>4</sup>

In addition, the Court never analyzed whether a certificate of need, by itself, has the “potential for significant environmental effects,” and therefore independently requires an EIS. A certificate of need does not cause environmental effects because it does not authorize pipeline construction.<sup>5</sup> It is simply a declaration that there is a need for a pipeline. Instead of analyzing the relevant issue, the Court reasoned that “the MPUC’s *overall approval* of the pipeline project” and the “construction of the pipeline” have the “potential for significant environmental impacts.” (App. 8.) However, the “overall approval” for the pipeline occurs only after routing proceedings occur, during which extensive additional MEPA-compliant environmental review occurs.

The Court also failed to address the rule that “[i]f the EQB accepts a governmental unit’s process as an adequate alternative review procedure, *projects* reviewed under that alternative review procedure shall be *exempt* from environmental review” under an EIS. Minn. R. 4410.3600, subp. 2. The exemption rule furthers the legislature’s directive that agencies “eliminat[e] unnecessary duplication of environmental reviews” and “reduce...delay.” Minn. Stat. § 116D.04, subd. 5a. Here, the EQB accepted the pipeline routing process as an adequate “alternative review procedure” and therefore the pipeline *project* is exempt from an EIS.

The Court of Appeals erred by not deferring to the Commission’s judgment, requiring an EIS, and mandating unnecessary duplication and delay. Its published decision will affect this project and future large energy projects in Minnesota. This Court should grant further review.

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<sup>4</sup> *Minnesotans for Responsible Recreation v. Dep’t of Natural Res.*, 651 N.W.2d 533, 540 (Minn. Ct. App. 2002); *In re Env’tl. Assessment Worksheet for the 33rd Sale of State Metallic Leases in Aitkin*, 838 N.W.2d 212, 217 (Minn. Ct. App. 2013).

<sup>5</sup> No pipeline can be built until a *routing permit* is approved by the Commission, and no routing permit can be approved until MEPA-compliant environmental review has occurred. Minn. Stat. § 216G.02, subd. 2; Minn. R. 4410.4400, subp. 24.

Respectfully submitted,

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