

STATE OF MINNESOTA

IN SUPREME COURT

A19-0688

A19-0704

Court of Appeals

McKeig, J.  
Dissenting, Chutich J.

In the Matter of Minnesota Power's Petition for  
Approval of the EnergyForward Resource Package.

Filed: April 21, 2021  
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## S Y L L A B U S

The Minnesota Public Utilities Commission is not required to conduct review under the Minnesota Environmental Protection Act, Minn. Stat. ch. 116D (2020), before approving affiliated-interest agreements that govern construction and operation of a Wisconsin power plant by a Minnesota utility.

Reversed and remanded.

## OPINION

McKEIG, Justice.

This appeal considers whether the Minnesota Environmental Policy Act, Minnesota Statutes ch. 116D (2020), requires the Minnesota Public Utilities Commission to conduct an environmental review before deciding whether to approve affiliated-interest agreements under Minnesota Statutes section 216B.48, subdivision 3 (2020), that will govern the construction and operation of a power plant in a neighboring state. The court of appeals held that the Commission erred by approving the affiliated-interest agreements without first considering whether environmental review was necessary. *In re Minn. Power's Petition for Approval of the EnergyForward Res. Package (In re Minn. Power)*, 938 N.W.2d 843, 853 (Minn. App. 2019). We disagree. We therefore reverse the court of appeals and remand to that court to address the remaining issues on appeal.

## FACTS

In July 2017, appellant Minnesota Power, a Minnesota public utility, filed a petition with appellant Minnesota Public Utilities Commission (Commission) for approval of its *EnergyForward* resource package as required under Minnesota law. *See* Minn. Stat. § 216B.2422, subd. 2 (2020); Minn. R. ch. 7843 (2019). This petition included a proposal for the Nemadji Trail Energy Center (NTEC), a natural gas power plant, to be located in Superior, Wisconsin. Wisconsin does not allow foreign entities to obtain a license, permit, or franchise to own or operate a power-generation facility in Wisconsin. Wis. Stat. § 196.53 (2020). Thus, Minnesota Power explained to the Commission, NTEC will be jointly owned and developed by South Shore Energy LLC, a Wisconsin affiliate of

Minnesota Power, and Dairyland, a Wisconsin generation and transmission cooperative. South Shore and Dairyland will each own an equal share of NTEC and an equal share of the power generated at the plant.

Because Minnesota Power is a regulated Minnesota utility, it is required under Minnesota law to secure Commission approval of agreements with its affiliate, South Shore. Minn. Stat. § 216B.48, subd. 3 (stating that a “contract” between a “public utility” and an “affiliated interest” must have the Commission’s “written approval”). Thus, in its July 2017 petition, Minnesota Power sought Commission review and approval of three affiliated-interest agreements. In the first agreement, South Shore agrees to sell 48 percent of the capacity produced at NTEC to Minnesota Power. In the second agreement, South Shore assigns its rights and responsibilities as construction agent for NTEC to Minnesota Power. In the third agreement, South Shore assigns its rights to act as the operating agent of NTEC to Minnesota Power.

The Commission referred the *EnergyForward* plan and the affiliated-interest agreements to a contested case hearing before an administrative law judge (ALJ). Respondents Minnesota Center for Environmental Advocacy, Union of Concerned Scientists, and Sierra Club filed comments regarding the *EnergyForward* proposal and the affiliated-interest agreements. Respondent Honor the Earth filed a petition for Minnesota Environmental Policy Act (MEPA) review of NTEC with the Commission, which the ALJ found was outside the scope of the contested-case proceeding. Thus, the issue before the ALJ was whether Minnesota Power’s proposed purchase of capacity from NTEC was needed and reasonable and, therefore, whether the affiliated-interest agreements should be

approved. In her findings, the ALJ concluded that Minnesota Power had failed to establish that the capacity purchase from NTEC was needed and reasonable. Finding the company's analysis of alternative forms of energy both inadequate and biased in favor of NTEC, the ALJ recommended that the Commission deny Minnesota Power's request for approval of the affiliated-interest agreements.

In October 2018, after the ALJ made her recommendations, respondent Honor the Earth filed a petition with the Environmental Quality Board to request MEPA review of the NTEC plant; specifically, that an Environmental Assessment Worksheet (EAW) be prepared. The Environmental Quality Board referred the petition to the Commission, as the responsible governmental unit to make the decision on the need for an EAW. *See* Minn. R. 4410.0500, 4410.4300 (2019).

The Commission did not adopt the ALJ's recommendations. *See* Minn. Stat. § 14.62, subd. 2a (2020) (stating that an ALJ's decision is final unless the agency rejects it). In its decision, the Commission addressed both the approval of the NTEC plan and whether approval of the affiliated-interest agreements requires environmental review and an EAW under MEPA.

The Commission found that the capacity purchase from NTEC, as proposed by Minnesota Power, is needed and reasonable because it is a cost-effective resource for meeting the company's energy needs as it retires older coal-powered resources. In reaching this conclusion, the Commission disagreed with the ALJ's conclusions regarding the sufficiency of the agency modeling on resource needs, demand, and energy efficiency.

On the request for MEPA review, the Commission concluded that its jurisdiction is limited to power plants proposed to be built in Minnesota. Because NTEC will be built entirely in Wisconsin and is not a cross-border project, the Commission concluded, it is not subject to Minnesota's permitting and environmental review regulations. The Commission also found the approval of the affiliated-interest agreements would not grant permission to Minnesota Power to construct or operate the plant; rather, that permission would have to be obtained from Wisconsin regulators. Thus, the Commission concluded there is no "project" subject to MEPA review. *See* Minn. Stat. § 116D.04, subd. 1a(d) (2020) (defining "governmental action" to include "projects"). The Commission therefore denied Honor the Earth's petition for MEPA review, and approved all three affiliated-interest agreements as "reasonable and consistent with the public interest under the relevant statute and rules." Minn. Stat. § 216B.48 (2020); Minn. R. 7825.1900-.2300 (2019).

Respondents appealed the Commission's decision to the court of appeals. In a published opinion, the court of appeals reversed the Commission's decision to deny the petition for MEPA review. *In re Minn. Power*, 938 N.W.2d at 847. The court concluded that "MEPA requires all state agencies to consider 'to the fullest extent practicable' the environmental consequences flowing from their actions." *Id.* at 850 (quoting Minn. Stat. § 116D.03, subd. 1 (2020)). With this broad directive in mind, the court concluded "that MEPA applies to the governmental action of approving the NTEC affiliated-interest agreements." *Id.* at 850-51. The court of appeals remanded the case to the Commission to determine if an EAW is necessary, declining to address the other challenges to the

Commission’s decision to approve the affiliated-interest agreements. *Id.* at 853 n.5. We granted Minnesota Power’s petition for review.<sup>1</sup>

## ANALYSIS

We independently review an agency’s decision without any special deference to the decision of the court of appeals. *Estate of Atkinson v. Minn. Dept. of Hum. Servs.*, 564 N.W.2d 209, 213 (Minn. 1997). Substantial deference, however, is given to the decision of the Commission and agency decisions enjoy a presumption of correctness. *City of Moorhead v. Minn. Pub. Util. Comm’n*, 343 N.W.2d 843, 846 (Minn. 1984). We may reverse or modify an agency decision if it is:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2020). The party challenging an agency decision “has the burden of proving that the conclusions of such agency violate one or more of the provisions” of Minn. Stat. § 14.69. *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

The parties agree that the question presented by this appeal—does MEPA require environmental review of affiliated-interest agreements associated with a Wisconsin power

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<sup>1</sup> After we granted Minnesota Power’s petition for review, the Commission, which did not file a petition for review, moved to appear as an appellant in the appeal. We granted that motion. Thus, references below to “appellants” refers to both Minnesota Power and the Commission.

plant before approval of those agreements—is a question of law. We review questions of law de novo, *see, e.g., Minnesota Sands, LLC v. Cnty. of Winona*, 940 N.W.2d 183, 200 (Minn. 2020), while giving substantial deference to an agency’s fact-finding process. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). We will reverse an agency decision if its findings are unsupported by substantial evidence. *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm’rs (CARD)*, 713 N.W.2d 817, 832 (Minn. 2006).

Appellants argue that the court of appeals erred when it held that the commission’s approval of Minnesota Power’s affiliated-interest agreements that govern a Wisconsin power plant is a “project” to which MEPA applies, thus requiring an EAW and an Environmental Impact Statement (EIS) before a final decision can be made. They contend that the but-for causation standard that the court of appeals applied is improper and too expansive. Appellants urge that MEPA does not apply because agency approval of affiliated-interest agreements governing a commercial relationship does not cause environmental effects, and an EAW is not required.

Respondents disagree. They argue that the court of appeals correctly recognized that the Commission’s decision to approve the affiliated-interest agreements proposed by a Minnesota utility for a project that will have environmental impacts in Minnesota requires MEPA review before the Commission can make an approval decision.<sup>2</sup>

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<sup>2</sup> The parties did not argue before the court of appeals, or before this court, that MEPA applies to the affiliated-interest agreement governing Minnesota Power’s purchase of capacity from NTEC. Thus, the MEPA review question before us is limited to the

We begin with the plain language of section 216B.48. *See CARD*, 713 N.W.2d at 828 (applying statutory interpretation principles to an administrative rule).

First, nothing in the specific statute requiring Commission approval of affiliated-interest agreements requires environmental review, an EAW, or an EIS before approval. Minnesota Statutes § 216B.48, subd. 3, provides that a contract or agreement between a utility and an affiliated interest is not “valid or effective unless and until the contract or arrangement has received the written approval of the Commission.” Nothing in the plain language of section 216B.48 mentions an environmental review, an EAW, an EIS, or section 116D.04, in considering an approval request or making an approval decision. Further, some affiliated-interest agreements requiring approval under section 216B.48 cover activities that would cause physical manipulation of the environment, so if the Legislature believed that Commission review of affiliated-interest agreements with these types of effects should be subject to environmental review, it could have said so. *See Depositors Ins. Co. v. Dollansky*, 919 N.W.2d 684, 688 (Minn. 2018) (“We do not add words to the statute that the Legislature did not supply.” (citation omitted) (internal quotation marks omitted)). Thus, based on the plain language of section 216B.48, we cannot conclude that the Legislature contemplated the need for an environmental review simply because a regulated utility enters into and seeks Commission approval of an affiliated-interest agreement.

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commission’s approval of the two affiliated-interest agreements that govern construction and operation of NTEC in Wisconsin.

Second, the reason for requiring Commission approval of affiliated-interest agreements is that affiliated interests do not stand at arms-length to the utility.<sup>3</sup> Accordingly, the usual guarantees that a deal is fair that arise from negotiation between parties at arms-length are not present with affiliated parties. This gap can be concerning with affiliated-interest agreements among utilities because ultimately it is ratepayers who are on the hook if the utility enters into sweetheart deals with its affiliates. Consequently, the Commission is charged with ensuring the fairness of the deal—that is, making sure that it “clearly appears” after investigation that the contract or agreement “is reasonable and consistent with the public interest.” Minn. Stat. § 216B.48, subd. 3.

Third, when an agreement with an affiliate involves acquisition of a new source of energy, like the new power plant that is the subject of the affiliated-interest agreements at issue in this case, the Commission’s determination of whether the affiliated-interest agreements are “reasonable and consistent with the public interest” must account for the factors set forth in Minnesota’s resource-planning and certificate-of-need statutes, Minn. Stat. §§ 216B.2422, .243 (2020). Those factors focus on the need and reasonableness of the new energy resource in the context of the utility’s customers’ future demand for power generation and socioeconomic and environmental costs, including the most recent environmental externality values established by the Commission. Minn. Stat.

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<sup>3</sup> Minnesota Statutes § 216B.48, subd. 1, defines affiliated interests to include, for example, subsidiaries and operating divisions of a utility, corporations or persons with a five percent or more ownership interest in the utility, entities with common directors, and persons or corporations exercising substantial influence over the policies and actions of the public utility.

§ 216B.2422, subds. 1(d), 3. The Commission undertook just such an analysis in this case. *In re Minn. Power’s Petition for Approval of the EnergyForward Res. Package*, Docket No. E-015/AI-17-568 at 11–12 (MPUC Jan. 24, 2019).

Accordingly, the dissent is correct that, as part of this consideration of the public interest, the Commission may take into account social and environmental impacts. But this consideration of social and environmental impacts in the context of affiliated-interest agreement approval focuses on whether the agreement is fair to ratepayers and whether it is needed and reasonable to meet the utility’s needs and consumer demand. This focused consideration of social and environmental considerations is narrower than the broad consideration of the environmental impact of a utility action—like the analysis undertaken in an EAW or EIS—urged by the dissent.<sup>4</sup>

Having concluded that section 216B.48, which expressly addresses affiliated-interest agreements, does not require environmental review, an EAW, or an EIS, we next turn to MEPA. MEPA requires state agencies to, among other duties, utilize environmental review of agency planning and decision-making that “may have an impact on the environment.” *See* Minn. Stat. § 116D.03, subd. 2(2) (2020). MEPA is patterned on the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12. When

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<sup>4</sup> The dissent states that an EAW or EIS would be highly valuable to the Commission in applying the statutory standards. To be clear, we do not hold that MEPA review is never required for approval under 216B.48. We hold only that the plain language of the statute, standing alone, does not require MEPA review. *See also* Minn. Stat. §§ 216B.2422, .243 (resource-planning and certificate-of-need statutes, which do not expressly require review under MEPA). Therefore we must next look to the MEPA requirements in chapter 116D.

interpreting MEPA, we have relied on federal case law applying NEPA. *See No Power Line, Inc. v. Minn. Env't Quality Council*, 262 N.W.2d 312, 323 n.28 (Minn. 1977) (noting that we have used federal case law to interpret MEPA); *see also CARD*, 713 N.W.2d at 826 (declining to apply language in NEPA regulations that is not present in MEPA regulations). Under MEPA, Minnesota recognizes “the profound impact of human activity on the interrelations of all components of the natural environment.” Minn. Stat. § 116D.02, subd. 1 (2020). MEPA requires governmental agencies to administer all state laws and rules in accordance with that commitment, and to proactively, systematically, and cooperatively consider and minimize negative impacts on the environment. Minn. Stat. § 116D.03, subd. 1.

We start with the language of the relevant statutes and rules. *See, e.g., People for Env't Enlightenment & Resp. (PEER), Inc. v. Minn. Env't Quality Council*, 266 N.W.2d 858, 866 (Minn. 1978) (considering statutory language in reviewing an agency decision to issue a permit). A state agency may be required to prepare an EAW and an EIS. Minn. Stat. § 116D.04, subd. 2a. An EAW is a brief preliminary report that sets out the basic facts necessary to determine whether the proposed action requires the more rigorous review of an EIS. *Id.*, subd. 1a(c). An EIS is required when there is “potential for significant environmental effects resulting from any major governmental action . . . .” *Id.*, subd. 2a(a). “Governmental action” is defined as “activities, including projects wholly or partially conducted, permitted, assisted, financed, regulated, or approved by units of the government.” *Id.*, subd. 1a(d). The term “project” is not defined in chapter 116D; however, in the rules that govern the Environmental Quality Board, a “project” is defined

as “a governmental action, the results of which would cause physical manipulation of the environment, directly or indirectly.” Minn. R. 4410.0200, subp. 65. Determining if a project requires environmental review is “made by reference to the physical activity to be undertaken and not to the governmental process of approving the project.” *Id.*

The court of appeals concluded that approval of Minnesota Power’s affiliated-interest agreements is “governmental action” within the meaning of Minn. Stat. § 116D.04, subd. 1a(d), and is a “project” within the meaning of Minn. R. 4410.0200, subp. 65, because the result of that action will indirectly cause environmental effects. *In re Minn. Power*, 938 N.W.2d at 849–50. Appellants argue that this is an error of law because approval of the affiliated-interest agreements addresses only *who* constructs and operates NTEC; approval does not actually authorize construction or operation and, therefore, approval does not *cause* environmental effects. Because the Commission does not have the authority to regulate the physical construction of the project, they contend, approval of Minnesota Power’s affiliated-interest agreements will not cause environmental effects. Finally, they assert that the Commission does not have the authority to conduct an environmental review of a power plant that is subject to Wisconsin’s permit and regulatory authority.

Respondents argue that MEPA requires environmental review before the Commission may approve the affiliated-interest agreements. Relying on our decision in *CARD*, they argue that MEPA “requires that governmental agencies contemplating taking action . . . on a proposed project must first consider the project’s environmental consequences.” 713 N.W.2d at 823. Here, they contend, “the activity contemplated by the government action is the construction and operation of [NTEC].”

We begin with the criteria in chapter 116D that triggers an environmental review: governmental action in the form of a project that results in direct or indirect physical manipulation of the environment. Minn. Stat. § 116D.04, subds. 1a(d), 2a(a). The court of appeals reasoned that the “construction and operation of a large power plant” is an environmentally significant proposed physical activity for purposes of a “project,” and because Minnesota Power needed approval of its affiliated-interest agreements to engage in those activities, the Commission’s approval decision will indirectly cause physical activities to occur that will indirectly impact the environment. *In re Minn. Power*, 938 N.W.2d at 850 (concluding that “Minnesota Power cannot construct and operate NTEC without the commission’s approval of the affiliated-interest agreements,” and thus, that approval “will indirectly cause those physical activities”).

We cannot square this analysis with the plain language of section 116D.04. Even assuming that the Commission’s decision under section 216B.48 is a “government action,” MEPA is not applicable unless that action has the potential for significant environmental effects.<sup>5</sup> Minn. Stat. § 116D.04, subd. 2a(a); *see* Minn. R. 4410.1100, subp. 6, 4410.2000, subp. 1. Subdivision 2b states that if an EAW or EIS is required for government action under subdivision 2a, “a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until” an EAW has occurred, or it is determined that an EAW is unnecessary. Minn. Stat. § 116D.04, subd. 2b. This language indicates that

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<sup>5</sup> The dissent focuses on the first portion of the statute, that there is governmental action. However, the statute must be read as a whole, and therefore it applies not simply when there is government action, but when there is government action that has the potential for significant environmental effects.

the government action contemplated by section 116D.04 is the action necessary to allow the project to proceed, either through a permit or other agency approval, the absence of which would block the project. Simply put, the decision to approve the terms and conditions of Minnesota Power’s affiliated-interest agreements does not grant a permit, does not approve the construction or operation of the NTEC power plant, and does not authorize Minnesota Power to proceed forward in Wisconsin. “We do not read words in isolation; the meaning of a word is informed by how it is used in the context of a statute.” *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 337 (Minn. 2020) (citation omitted) (internal quotation marks omitted); *see* Minn. R. 4410.1000, subp. 3 (requiring an EAW when the agency has “approval authority over the proposed project”). We cannot conclude that the indirect-cause standard in the definition of a “project,” Minn. R. 4410.0200, subp. 65, supports MEPA review before approval of Minnesota Power’s affiliated-interest agreements.

The court of appeals applied a but-for test to conclude that approval of Minnesota Power’s affiliated-interest agreements is an “indirect cause” of the construction and operation of NTEC. This causal standard for environmental review under NEPA was rejected by the United States Supreme Court in *Department of Transportation v. Public Citizen*. 541 U.S. 752 (2004). The Court considered whether the rules issued by the Department of Transportation through the Federal Motor Carrier Safety Administration violated NEPA because the agency failed to give adequate environmental consideration to the effect of lifting a moratorium on the cross-border operations of Mexico-domiciled motor carriers. *Id.* at 762–63. “Effect” under NEPA, includes both direct and indirect

effects. *Id.* at 764. Thus, the question before the Court was “whether the increase in cross-border operations of Mexican motor carriers, with the correlative release of emissions by the Mexican trucks, is an ‘effect’ of” the agency’s rules. *Id.* The Court first noted that the agency “has no ability to countermand the President’s lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States.” *Id.* at 766; *see also id.* at 758–59 (recognizing the agency’s “limited discretion” with respect to registration of carriers, domestic and foreign, that agree to comply with applicable regulations). In light of these limitations, the Court reasoned:

Respondents must rest, then, on a particularly unyielding variation of “but for” causation, where an agency’s action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect. However, a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. . . . NEPA requires “a reasonably close causal relationship” between the environmental effect and the alleged cause.

*Id.* at 767. The Court also noted that “inherent in NEPA” is the notion that an environmental review will be useful to the agency’s decision making process. *Id.* at 767–68 (stating that when the agency “has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of” those operations has no effect on the agency’s decision because the agency cannot act on that information). The Court held that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.” *Id.* at 770. Thus, because the agency could not prevent cross-border operations of Mexican motor carriers, NEPA did not require the agency to evaluate the environmental effects of those operations. *Id.*

We have not previously defined the causation standard under section 116D.04, but we see no reason to adopt one that departs from the close causal relationship the Supreme Court established for NEPA.<sup>6</sup> We agree with the Supreme Court that, in light of the informational role served by MEPA review, the line that must be drawn requires a “reasonably close causal relationship” between the environmental effect and the alleged cause. *Id.* at 767.

Under this standard, we conclude that because the Commission does not have the authority to permit the construction and operation of NTEC, and NTEC can be—and according to Minnesota Power will be—built and run without the Commission’s approval, the Commission’s decision on the affiliated-interest agreements between Minnesota Power and South Shore is not a project and does not cause environmental effects. MEPA review therefore does not apply to that decision.<sup>7</sup>

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<sup>6</sup> Respondents argue that the but-for test applied by the court of appeals is correct. But to reach that conclusion, they contend that the term “resulting from” has the same meaning as “arising out of,” as used in the insurance context, which in turn has been “broadly construed” to mean “causally connected with.” *See Faber v. Roelofs*, 250 N.W.2d 817, 822 (Minn. 1977) (explaining that “but for” causation is sufficient to meet the “arising out of” standard). Based on this interpretation string, they contend that if the Legislature had wanted the commission to use a narrower causal connection standard, it would have required that the environmental effects result “solely” or “primarily” from the governmental action. We disagree. If the Legislature had intended “resulting from” to be construed by reference to entirely different terms, it would have said so. *See Depositors Ins. Co.*, 919 N.W.2d at 688 (declining to add words to a statute that the Legislature did not).

<sup>7</sup> Even if the court of appeals correctly considered the Environmental Quality Board’s administrative rules, the “approval” contemplated by rule 4410.0200 is not the same as the “written approval” for an affiliated-interest agreement provided for in section 216B.48. The rule defines “approval” as a decision “to issue a permit or to otherwise authorize commencement of a proposed project.” Minn. R. 4410.0200, subp. 4. The written approval

Respondents, citing Minn. Stat. § 116D.04, subd. 2b,<sup>8</sup> argue that Commission approval of the affiliated-interest agreements is government activity that “is definite, site-specific, and will result in real, on-the-ground changes that will have significant effects on the environment” and thus MEPA requires environmental review prior to approval of the affiliated-interest agreements. These arguments, however, focus solely on the government action, rather than whether that action has a reasonably close causal relationship to any environmental effects.

Respondents also contend that the Legislature would have excluded out-of-state projects from MEPA review if it wanted to do so. However, Minnesota’s laws are not generally enforceable outside of the territory of the State. Minn. Stat. § 1.01 (2020) (“The sovereignty and jurisdiction of this state extend to all places within its boundaries as defined in the constitution . . . .”); *In re Pratt*, 18 N.W.2d 147, 153 (Minn. 1945) (“The laws of one state of their own vigor have no extraterritorial effect.”). Accordingly, there would be no reason for the Legislature to expressly exclude out-of-state projects.<sup>9</sup>

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of Minnesota Power’s affiliated-interest agreements did not result in a permit nor did it authorize Minnesota Power to “commence” NTEC; those decisions were made by Wisconsin and the federal government.

<sup>8</sup> Minnesota Statutes § 116D. 04, subd. 2b, states: “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” certain events occur.

<sup>9</sup> The decision in *Joint Powers Auth. v. U.S. Army Corps of Eng’rs*, 826 F.3d 1030 (8th Cir. 2016), is distinguishable. There, the Eighth Circuit held that MEPA applied to a flood diversion project that was built both in North Dakota and in Minnesota because even the North Dakota portion was “part of a larger interstate project.” *Id.* at 1041. Here, in

Because we conclude that MEPA does not apply, we need not reach the parties' arguments regarding the dormant Commerce Clause. However, because the court of appeals did not decide whether the Commission's decision to approve the affiliated-interest agreements was supported by substantial evidence, we remand for determination of that issue.<sup>10</sup>

## CONCLUSION

For the foregoing reasons we reverse the decision of the court of appeals and remand to the court of appeals for determination of whether the Commission erred in approving the affiliated-interest agreements.

Reversed and remanded.

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contrast, NTEC will be built and operated solely in Wisconsin. The parties agree that the commission does not have the authority to dictate how NTEC is built, constructed, or any specifics of the plant because that authority rests solely with Wisconsin, where the plant is located. Further, Commission approval of the affiliated-interest agreements does not "cause" the environmental effects that respondents fear; those effects, should they occur, would result from the construction and operation of NTEC as approved by Wisconsin. As appellants point out, NTEC *could* be built without commission approval of the affiliated-interest agreements. Although doing so would be without Minnesota Power's involvement, respondents do not contest the assertion that the project could proceed in Wisconsin without commission approval; they simply debate the probability of possibilities that we do not need to resolve to decide this appeal. Finally, we note that although no one challenges the commission's approval of the affiliated-interest agreement that governs Minnesota Power's capacity purchases from NTEC, the environmental impacts that respondents identified here are equally likely to result from the approval of that affiliated-interest agreement.

<sup>10</sup> We decline Minnesota Power's invitation to resolve this issue without a remand to the court of appeals. The court of appeals did not reach this issue, *In re Minn. Power*, 938 N.W.2d at 853 n.5, and we granted review only of the court of appeals' decision, not the underlying merits that were not addressed by that court. As the merits of the commission's decision have already been briefed before the court of appeals, a remand will not unduly delay that court's resolution of the remaining issues in this appeal.

## DISSENT

CHUTICH, Justice (dissenting).

The Legislature, through the Minnesota Environmental Policy Act (MEPA), Minn. Stat. ch. 116D (2020), recognizes that various human activities, including “energy production and use,” profoundly affect environmental resources that are essential to the welfare of present and future generations of Minnesotans. Minn. Stat. § 116D.02, subds. 1, 2(9). Accordingly, to protect and preserve Minnesota’s resources, the Legislature enacted MEPA in concert with other environmental statutes, including the Minnesota Environmental Rights Act (MERA), Minn. Stat. ch. 116B (2020), to ensure that governmental agencies, when administering state laws and rules, consider and minimize negative impacts on the environment. Minn. Stat. § 116D.03, subd. 1; *see People for Env’t Enlightenment & Resp. (PEER), Inc. v. Minn. Env’t Quality Council*, 266 N.W.2d 858, 865 (Minn. 1978). The court’s holding today violates that legislative directive and, in doing so, deprives the public and state agencies of the information necessary to fully consider and appreciate the environmental impacts of the decision by the Public Utilities Commission here. Because the plain language of MEPA encompasses the Commission’s approval of the affiliated-interest agreements by Minnesota Power to finance and to construct a large power plant only 2.5 miles from Minnesota, an action having a significant impact on Minnesotans and their natural environment, I respectfully dissent. I would affirm the well-reasoned decision of the court of appeals, which held that MEPA applies to the Commission’s decision to approve the affiliated-interest agreements.

## I.

MEPA requires that the government study the environmental impacts whenever a “major governmental action” has the potential to create “significant environmental effects.” Minn. Stat. § 116D.04, subd. 2a(a). A “governmental action” broadly includes “projects” that are “approved” by units of government, including the Commission. *Id.*, subd. 1a(d). The Environmental Quality Board has defined “project” to mean a “governmental action, the results on which would cause physical manipulation of the environment, directly or indirectly.” Minn. R. 4410.0200, subp. 65 (2019). Whether the governmental action is a project focuses on “the physical activity to be undertaken and not the governmental process of approving” it. *Id.*

Here, the plain language of the statute and rule encompasses the Commission’s approval of the affiliated-interest agreements. The Commission’s approval of the agreements is a “governmental action” that would indirectly cause a “physical manipulation of the environment.” Minn. R. 4410.0200, subp. 65. As the court of appeals recognized, “[t]he affiliated-interest agreements contemplate Minnesota Power undertaking two physical activities”: (1) constructing the Nemadji Trail Energy Center and (2) operating the Nemadji Trail Energy Center. *In re Minn. Power’s Petition for Approval of the EnergyForward Res. Package*, 938 N.W.2d 843, 849 (Minn. App. 2020). The Environmental Quality Board’s inclusion of indirect effects in the definition of “project,” Rule 4410.0200, subpart 65, demonstrates how broadly MEPA should be applied and recognizes that even high-level decision-making by a state agency can have far-reaching environmental impacts.

Indeed, the environmental impacts affecting Minnesotans resulting from the Commission's approval of the affiliated-interest agreements are emblematic of the need for at least an Environmental Assessment Worksheet. The Nemadji Trail Energy Center will be constructed less than 3 miles from the Minnesota border near Duluth and Lake Superior. The 525-megawatt gas-fired power plant will unquestionably release great quantities of carbon dioxide over its multi-decade lifespan, which will reach and contaminate the air breathed by Minnesotans. The record shows that these emissions will further contribute to climate change, despite the State's statutory commitment to reducing greenhouse gas emissions. *See* Minn. Stat. § 216H.02, subd. 1 (2020).

The court primarily sidesteps a plain reading of the statute and rule by focusing on causation and adopting, for the first time in our jurisprudence, a strict interpretation of MEPA derived from the United States Supreme Court's interpretation of the National Environmental Policy Act (NEPA) in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). This reliance is misguided for several reasons.

First, we are not bound by a federal court's interpretation of NEPA when interpreting MEPA. We have recognized that, while NEPA and MEPA are "similar" to one another, *Minn. Ctr. for Env't Advoc. v. Minn. Pollution Control Agency*, 655 N.W.2d 457, 468 (Minn. 2002), federal cases are not controlling given the differences between the two acts, *No Power Line, Inc. v. Minn. Env't Quality Council*, 262 N.W.2d 312, 326 n.34 (Minn. 1977). The Minnesota act provides more protection than the federal act does, for example, by allowing citizens to petition for an Environmental Assessment Worksheet, Minn. Stat. § 116D.04 subd. 2a(e), a provision absent from federal law.

Second, *Public Citizen* is easily distinguishable from this case. There, the Department of Transportation was obligated to allow Mexican motor carriers to operate in the United States if they complied with the promulgated safety standards. 541 U.S. at 766 (citing 49 U.S.C. § 13902(a)(1)). The Commission is under no similar mandatory obligation. In fact, the statute governing the approval of affiliated-interest agreements allows the Commission to approve such agreements only in the limited circumstance when it “clearly appears and is established upon investigation that it is reasonable and consistent with the public interest.” Minn. Stat. § 216B.48, subd. 3. The burden of proof is on the utility to make that showing. *Id.*

The Supreme Court in *Public Citizen* also observed that preparing an Environmental Impact Statement would “serve no purpose” for the Department of Transportation because its statutory command was directed to “safety.” 541 U.S. at 765, 767. In contrast, the standards for approval of an affiliated-interest agreement *explicitly* include numerous environmental considerations.

For example, when deciding whether an agreement is reasonable and consistent with the public interest, the Commission must consider: (1) the “environmental costs,” including “socioeconomic costs” of the agreement, Minn. Stat. § 216B.2422, subd. 3; (2) whether the agreement will achieve “greenhouse gas reduction goals” and “renewable energy” and “solar energy” standards, *id.*, subd. 4(1); and (3) the “adverse impacts upon the environment,” Minn. R. 7843.0500, subp. 3(C) (2019).<sup>1</sup> Unlike the situation in *Public*

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<sup>1</sup> The Commission agrees that the cited statutes and rules governing resource planning apply to the approval of affiliated-interest agreements.

*Citizen*, an Environmental Assessment Worksheet or an Environmental Impact Statement here would be highly valuable to the Commission in applying the statutory standards for approval.

Third, even if adopting a proximate cause standard were appropriate, that standard is met as demonstrated by the record here. As noted, the Commission must explicitly consider environmental factors when deciding whether the affiliated-interest agreements are reasonable and consistent with the public interest. And the Commission has the statutory authority to deny approval of the agreements if they are not reasonable or consistent with the public interest. Minn. Stat. § 216B.48, subd. 3. These agreements address the financing, construction, and operation of the power plant, all at a partial cost to Minnesota ratepayers. And if the Commission does not approve these agreements, then it appears that the plant may not be built.<sup>2</sup>

The court partly justifies adopting the causation requirement from *Public Citizen* by misinterpreting the word “final” in “final governmental decision,” Minn. Stat. § 116D.04, subd. 2b. The court believes that “final” means that the *project* will not proceed unless approved by the agency. The use of the word “final” in MEPA, however, simply describes the *timing* of an Environmental Assessment Worksheet or Environmental Impact Statement in the deliberative process. This terminology is essentially the same as that used in the Minnesota Administrative Procedure Act to describe when an agency decision may be

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<sup>2</sup> The court asserts, in a footnote and without citation to the record, that without the Commission’s approval, the power plant could be built anyway. The record does not contain support for this assertion because without Minnesota Power’s financial and operational support, it is not clear that the Nemadji Trail Energy Center would still be built.

challenged. Minn. Stat. § 14.63 (2020) (“Any person aggrieved by a *final* decision in a contested case . . . is entitled to judicial review of the decision.” (emphasis added)). Consequently, the word “final” does not refer to the finality of the entire project, but to the finality of the specific governmental decision being made.

In sum, the broad legislative commands and policy goals of MEPA demand that we operate from the presumption that it applies to a governmental action absent evidence to the contrary. The court’s analysis flips that statutory mandate on its head and, in doing so, erodes public trust in our State’s commitment to “prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of” Minnesotans. Minn. Stat. § 116D.01.

## II.

Because I would hold that MEPA applies on its face to the Commission’s approval of the affiliated-interest agreements, I must also reach the Commerce Clause issue. The Commission and Minnesota Power both assert that applying MEPA here would violate the dormant Commerce Clause of the United States Constitution. *See* U.S. Const. art. 1, § 8. “Although the Commerce Clause represents an affirmative grant of power to Congress, it has long been held to impliedly contain a negative command, commonly referred to as the ‘dormant’ Commerce Clause, that the states may not discriminate against or unduly burden interstate commerce.” *Chapman v. Comm’r of Revenue*, 651 N.W.2d 825, 832 (Minn. 2002).

The only Commerce Clause challenge brought by Minnesota Power and the Commission is that application of MEPA to the Commission’s approval of the affiliated-

interest agreements would violate the extraterritoriality doctrine. *See Swanson v. Integrity Advance, LLC*, 870 N.W.2d 90, 94 (Minn. 2015). Under this doctrine, it is unconstitutional for a state statute to regulate “ ‘commercial activity occurring wholly outside the boundary of the State.’ ” *Id.* (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989)). Extraterritoriality is rarely used to invalidate a statute, however. *See, e.g., id.* at 96 (upholding a state statute against extraterritoriality challenge).

Applying MEPA here, I conclude that it neither regulates “commercial activity” nor does any such activity occur “wholly outside the boundary of the State.” *Id.* at 94. First, MEPA, like its federal counterpart, is primarily procedural.<sup>3</sup> It only binds *agencies* to gather information and review the “environmental consequences of government action.” *Minn. Ctr. for Env’t Advoc.*, 644 N.W.2d at 468. Here, MEPA provides a mechanism for informing the Commission’s decision about whether the proposed affiliated-interest agreements are reasonable and consistent with the public interest concerning any environmental impacts. Once the Commission has conducted an environmental review, MEPA does not control the outcome or the Commission’s approval of the agreements. Nor does it bind Minnesota Power to a particular course of action. Because MEPA is merely a procedural law designed to inform decision-making, it does not regulate interstate commerce in violation of the Commerce Clause of the United States Constitution.

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<sup>3</sup> While NEPA does not contain any substantive protections, *see Public Citizen*, 541 U.S. at 756, we have yet to decide whether MEPA does, *see Minn. Ctr. for Env’t Advoc.*, 644 N.W.2d at 468 n.10.

Second, even if MEPA did regulate commercial activity, that activity does not occur “wholly outside the boundary of the State.” As we noted in *Swanson*, the “payment of funds to and from Minnesota” entities, including “electronic transfers into and out of Minnesota banks” are in-state economic activity that support the conclusion that extending MEPA to the affiliated-interest agreements does not violate the Commerce Clause. *See* 870 N.W.2d at 95. The affiliated-interest agreements here involve the same type of in-state economic activities between Minnesota-based Minnesota Power and its Wisconsin-based subsidiary as did the payday lending agreements that we held to be constitutionally permissible under the Commerce Clause in *Swanson*. Because MEPA does not regulate commercial activity occurring wholly outside the boundary of the state, it does not violate the dormant Commerce Clause.

In sum, because the plain language of MEPA merely informs the Commission’s decision whether to approve the affiliated-interest agreements, and because such information gathering does not have unconstitutional extraterritorial effect, I would affirm the decision of the court of appeals.