BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
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In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project	MPUC Docket No. PL-6668/CN-13-473 OAH Docket No. 8-2500-31260

CARLTON COUNTY LAND STEWARDS

EXCEPTIONS SUMMARY

and

APPENDIX

I. INTRODUCTION

Our exceptions are founded on a fundamental difference with the Administrative Law Judge's vision of what MEPA and the alternative environmental review require. Each of our individual exceptions correlates directly with this underlying difference. CCLS contends that the alternative environmental review approved by the Environmental Quality Board requires that a pipeline route proposer must conduct a true comparative environmental review *before* submitting its application. As we explained to the Administrative Law Judge, the alternative review demands that the environmental review must culminate in an environmental impact statement quality document which compares the impacts of the proposed route to the impacts of reasonable alternatives. This impact statement has traditionally been called an Environmental Assessment Supplement (EAS).

There cannot be any doubt that Chapter 116D requires that an Environmental Impact Statement must be prepared before any governmental action, and that a Certificate of Need is a government action. Section 116D.04, Subd. 2a, titled: "*When prepared*" states:

> Where 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. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, *analyzes its significant environmental impacts,* discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated…… ***To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action.*** (emphasis added).

Governmental action is not limited to a "project." "Governmental action" means activities, *including projects* wholly or partially conducted, permitted, assisted, financed, regulated or approved by units of government including the federal government." Minn. Stat. §116D.04

subd. 1a(2). The statute requires that "The responsible governmental unit shall, to the extent practicable, avoid duplication and ensure coordination between state and federal environmental review and between environmental review and environmental permitting. *Whenever practical, information needed by a governmental unit for making final decisions on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement. Minn. Stat § 116D.04 subd. 2a.*

Just like the traditional environmental impact statement, the environmental assessment supplement should be drafted after consultation with the key Minnesota and federal agencies with jurisdiction over public lands and waters. NDPC's EAS was drafted in a vacuum. It evidences no attempt to consult and acquire information from the DNR, the MPCA, the US Army Corps of Engineers, EPA, or the tribal authorities with interests in management of resources of importance to tribal members. It appears that NDPC prepared its environmental assessment supplement without seeking input from key agency regulators on which routes should be studied. It fastened on a single route, and described only that route in its impact statement. Moreover, the testimony revealed that NDPC did not prepare an environmental impact study at all, but instead selected a route based upon Marathon's cost and route-length.

Having selected that route, NDPC commendably made adjustments to the route in order to "microsite" the route to avoid where possible the environmental damage that might be caused by that particular route. But there is not a shred of evidence that the team advising NDPC on the environment had any impact on route endpoints, route location, other than to describe the geographic features through which the route passes.

This decision, to lock itself into analysis of a single route choice, when the overall need is clearly to carry petroleum from Bakken to refineries in the Midwest – Ohio, Michigan and

Illinois, is responsible for the problematic nature of these proceedings. If NDPC had conducted a true open consultation with MPCA, DNR, USACE, EPA, and tribal authorities to identify the major environmental issues, and then crafted its route around the public concerns expressed by agencies with accumulated expertise, then this Commission might have been presented with an environmental assessment supplement with the quality of a true environmental impact statement. But NDPC instead narrowed the focus of these proceedings improperly.

The Administrative Law Judge wrongly understood Minnesota law to allow a pipeline company and its refinery partner to pick the route that best meets their mutual private financial advantage, based solely on cost, prepare an application that describes the geographic features through which that single selected route travels, but without describing the impacts, and then without a true environmental impact statement. Under the Administrative Law Judge's approach, the refinery and carrier may enter into agreements committing the refinery and other shippers to the route predesignated, thereby preventing any other possible route from being considered, on the grounds that no one can prove that there is a market for any other alternative route. Moreover, under the ALJ's approach, any alternative route which is developed by the public is inherently an inferior route, because it has not been studied and because it would take more time than the applicant's single chosen route to obtain approvals.

The approach that is being taken in the ALJ's proposed findings is to turn over to Marathon petroleum, which is not even a common carrier, the right to choose how petroleum will be delivered across the State of Minnesota, based entirely on its desire to minimize the transportation cost. The proposed findings have bought, hook, line, and sinker, the preposterous argument that an alleged thirty-three cent differential in transportation cost will render the proposed pipeline economically unfeasible, even though the undisputed testimony that pipeline

capacity is in such limited supply that petroleum is being shipped by rail at a cost of $5 per barrel more than pipeline costs. And hence, the ALJ has concluded that a few cents increase in cost per barrel would prevent shippers from choosing a different Sandpiper route, and keep them using vastly more expensive rail.

The Administrative Law Judge has approved a fatally flawed environmental review procedure, without even making findings or legal conclusions that confront the issues raised at the contested case. In the following exceptions, CCLS exposes the flaws point by point. Our exceptions urge that the Commission reject this flawed procedure and either deny the Certificate of Need altogether, or adopt an alternative approach that would fix the flaws and require a MEPA compliant environmental impact statement in accordance with the proposed findings in our exceptions document.

II. THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW COMPLETELY FAIL TO ADDRESS APPLICANT'S COMPLIANCE WITH CHAPTER 116D, AND THE CONDITIONS REQUIRED FOR AN ALTERNATIVE ENVIRONMENTAL REVIEW IN PIPELINE PROCEEDINGS.

CCLS submitted proposed findings 110-116 to set out the legal requirements for an adequate environmental impact statement to be filed in a pipeline proceeding. We interpose an exception to the ALJ's failure to make these findings. Our proposed findings 131 – 166 set out in detail the deficiencies in the environmental review. These proposed findings are not mere ravings of an uninformed citizen trying to justify a "not in my back yard" approach: they are findings which rest upon evidence submitted by the MPCA, DNR, and Dr. Chapman. Dr. Chapman's testimony was accepted by all parties without cross examination. Yet, the Administrative Law Judge failed even to acknowledge that there was evidence submitted challenging adequacy of the environmental assessment supplement. This failure to examine the

issue of the adequacy of the environmental review is especially problematic, because (as discussed below) the Commission itself has acknowledge that the Contested Case proceeding is a critical element of the process of assuring that decisions on pipeline location are founded upon an adequate environmental review.

One of the major purposes of this portion of our exception document is to show that the Environmental Quality Board's approval of an alternative environmental review for pipelines was conditioned upon the requirement that the applicant would prepare and file a document equivalent to an adequate environmental impact statement evidencing the completion of a comprehensive impact an alternatives review *before* the application is filed. A traditional environmental impact statement is developed with a series of integrity protections:

- scoping hearings,
- scoping decision,
- development of the data and analysis by the scientists and regulatory experts selected by the responsible governmental unit,
- publication for comment of a draft environmental impact statement,
- receipt of public written and oral comments,
- analysis of those comments again by the experts retained to draft the EIS, and publication of a final EIS together with document (traditionally called an Environmental Assessment Supplement)
- Followed by a contested case focused upon the factual issues raised as to the adequacy of the environmental impact statement

All of these protections were supplanted by the alternative review, but the EQB recognized that MEPA and its implementing regulations demand that rigorous environmental review must be subjected to professional and public scrutiny.

The premise of the alternative review waiver was that these traditional integrity guarantees would be replaced by requiring that the applicant submit an environmental impact statement quality document with its application. What we have here, however, instead, is an environmental assessment supplement that contains no analysis, no discussion of impacts, no

comparison of alternatives, followed by a proposed findings and conclusions that ignore completely the adequacy of the document itself. The EQB waiver provided that a MEPA compliant environmental review document would be available as an "action –forcing" instrument to assist the public, the PUC and agencies with co-extensive jurisdiction to grant or deny permits *at the beginning* of all proceedings. This quality of this action-forcing document is critical, and under the alternative review, one of the main functions of the review is to provide adequate information upon which the Commission can choose among alternatives.

The Minnesota Constitution authorizes common carriers to utilize the awesome public condemnation power in the public interest. When a common carrier uses the government's authority, it is functioning in a quasi-governmental capacity to decide which property most serves the public, not a private need, and then to exercise the eminent domain power to fulfill that public need. Minnesota has conditioned the use of that governmental power upon compliance with Minnesota Chapter 116D, and specifically, to decide in the public interest, how best to carry petroleum across the state of Minnesota. To assure that these decisions are made in the public interest, the applicant must demonstrate that it has analyzed alternatives, and used the sciences to understand and make manifest the impacts of those alternatives. The results of that analysis was to be filed with the joint CON and Routing application, and a finding that the environmental assessment supplement complies with MEPA (and MEPA implementing regulations) is a pre-condition of, and necessary foundation for, all other decisions made by the Commission. See *Brief of the Minnesota PUC, Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission*, Court of Appeals No. A-812, page 9 (2010).

This failure to address the adequacy of the environmental review contravenes the description of how the alternative pipeline review works by this Commission. In the LsR-

Alberta Clipper proceedings, parties complained that a Certificate of Need and Routing Permit was granted without traditional environmental review. On appeal from a Commission order confirming that a standard Environmental Impact Statement was not required, because the applicant had filed a MEPA compliant Environmental Assessment Supplement, the Commission represented to the Minnesota Court of Appeals that pipeline proceedings were MEPA compliant, because the "Environmental Assessment Supplement" (EAS) must be submitted with the application, and that the EAS must contain the same information that would be prepared by a Responsible Governmental Authority in traditional MEPA proceedings. See Rule 4410.3600 subpart 1; Minn. Rules sec. 7852.3100; See Brief of the Minnesota PUC, Minnesota Center for Environmental Advocacy (MCEA) v. Minnesota Public Utilities Commission, Court of Appeals No. A-812, page 9 (2010).

In that appeal, MCEA challenged the EAS approval process, pointing out that the EAS is developed by the applicant, not the PUC, that there is no scoping order, no agency response to comments, and thus the alternative environmental review could not meet MEPA standards. The Commission beat back MCEA's challenge by making specific representations to the Court of Appeals about the guarantees of integrity built into the alternative review. They included the following:

- The applicant would file an Environmental Assessment Supplement that would be of Environmental Impact Statement quality with the applications at commencement of the docket[1].
- The EAS would contain a comparative analysis of alternatives to the proposed route, including a comparative analysis of the environmental impacts of these alternatives[2].

[1] As discussed below, here, applicant submitted only a single route. An applicant preparing a genuine analysis of route alternatives would make an effort to consult with MPCA, DNR, USACE, EPA, and tribal authorities, and would surely learn through that consultation that alternative routes should be advanced.
[2] Here, as discussed below, applicant did not describe environmental impacts even for the proposed route, but merely itemized the types of geographic features through which the pipeline would pass.

- In lieu of the traditional scoping process (scoping hearings, scoping decision, the public and parties would have the full duration of the contested case proceedings to challenge the adequacy of the environmental assessment supplement[3].
- As part of the contested case, the Administrative Law Judge would take testimony on adequacy of the environmental assessment supplement, holding it to the high standards of an environmental impact statement, and make findings and conclusions assuring that the requirements of MEPA have been met.

In prior cases, this procedure has been followed, although until now, a party has not presented evidence on the content of the document. For example, in the *Minnesota Pipeline* Certificate of Need case the Administrative Law Judge made extensive factual findings regarding the adequacy of the environmental assessment supplement and based on those factual findings recommended a conclusion determining that the Applicant had conducted an appropriate environmental assessment consistent with Minn. Rules 4415.0115 to 4415.0170 and met the requirements for alternative environmental review in Minn. Rule 4410.3600[4]. The applicant submitted a number of alternative routes, and included a comparative impact analysis. The actual content of that application was not tested or closely scrutinized, because none of the parties, nor MPCA and DNR, launched a significant challenge to the EAS.

Here, parties and agencies devoted a significant amount of effort to litigating this central issue. The MPCA submitted several strongly worded position statements objecting to the completeness of the environmental review. The DNR submitted a position statement and sent a representative to hearing who testified on the Department's official position. Our proposed findings reference and quote the departmental positions and testimony. Three tribal authorities with jurisdiction over tribal resources contended that they had not been consulted and their

[3] Here, the Commission decided to add system alternatives to the docket well into the proceedings. Thus, the public and parties had no environmental impact statement quality document, no scoping decision, and no scoping review. The PUC essentially placed the analysis on an unprecedented fast-track not authorized by the alternative review.
[4] The MinnCan Routing and Con contested cases were conducted simultaneously; the ALJ issued her recommended conclusions and findings in a joint recommended decision, and the Commission issued CON and Routing orders on the same date, April 13, 2007.

interests ignored and their testimony is referenced and quoted in our briefs. Dr. Chapman, an experienced ecologist, offered unrebutted testimony explaining why the environmental review was inadequate, and there was extensive cross examination of the NDPC employee who directed the preparation of the documents filed with the application. We presented extensive argument on the question of whether NDPC's approach to environmental review was consistent with MEPA and we itemized dozens of problems with the environmental review supported by the expertise of DNR and MPCA and Dr. Chapman.

None of these issues were addressed by the proposed findings, because it is quite clear that the Administrative Law Judge (wrongly) regarded an adequate environmental review as irrelevant to the grant of a Certificate of Need. As discussed below in connection with our specific exceptions, an adequate environmental review is a precondition of all decisions impacting the ultimate outcome of a major governmental decision affecting the environment[5]. The basic premise of the ALJ's recommendations is flawed: that citizen parties and co-equal state agencies may be required to carry the burden of proof regarding whether the applicant's proposed route meets the environmental criteria of the Certificate of Need, even in the absence of an adequate environmental review.

III. THE PROPOSED FINDINGS AND CONCLUSIONS FAIL TO RECOGNIZE THAT UNDER THE ALTERNATIVE PIPELINE ENVIRONMENTAL REVIEW RULE, THE ENVIRONMENTAL ASSESSMENT SUPPLEMENT FILED WITH THE APPLICATION IS THE ENVIRONMENTAL IMPACT STATEMENT, AND APPROVAL OF ITS ADEQUACY IS A PRECONDITION TO ISSUANCE OF A CERTIFICATE OF NEED.

CCLS excepts from the failure of the ALJ's findings and conclusions to recognize that CON and Routing proceedings require a valid Environmental Assessment Supplement at the

5 Section 116D.04 subdiv 2a requires that "To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action

initiation of proceedings. In our trial brief and reply, we have explained why an adequate environmental review is a precondition of grant of a certificate of need. In the Court of Appeals, Friends of the Headwaters has challenged the failure of PUC to conduct a MEPA compliant environmental review. Our view has been that the issue of the adequacy of the environmental review is actually an issue that needs to be addressed in the contested case proceedings and by the Commission, upon review of the Environmental Assessment Supplement. The painful fact is that NDPC chose to craft its EAS in-house, without vetting the concerns of key administrative agencies. The ALJ's findings sought to shift the blame to intervenors attempt to enforce MEPA in these proceedings, as if enforcing MEPA gums up the works and impermissibly delays implementation of the public interest. We respectfully reject that contention: delay is the direct result of NDPC's decision to develop its environmental review document without consulting regulatory agencies: it decided to leap before it looked.

The intent of the environmental review authorized by the alternative review rule is to make sure that "alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process." Minn. Rules 4400.3600 subp 1(C). The process must include the aspects of the process that are intended to substitute for an EIS process that addresses substantially the same issues as an EIS and use procedures similar to those used in preparing an EIS but in a more timely or more efficient manner. Id. subd 1(B). The Administrative Law Judge's proposed findings would use the Certificate of Need proceeding improperly to eliminate viable alternatives to the proposed route, and it is using environmental conclusions to eliminate those alternatives[6] without first finding that an adequate environmental review was conducted.

[6] We don't object to winnowing unacceptable routes from consideration through an appropriate process that subjects them to scrutiny proportionate to the level of scrutiny required to make decisions. Our objection is to the

A close examination of the rule making process that led to adoption of the alternative review will show that the underlying premise of the alternative review adopted by the EQB in 1989 was that an environmental impact statement, scientifically prepared, would be completed *before applicant makes its route selection* and that this completed environmental review would be filed with the Commission with its application. As of 1989, petroleum pipeline certificates of need were being granted by the Public Utilities Commission[7] but routing permits were issued by the Environmental Quality Board.[8] At that time, the legislative rationale for allocating routing permit jurisdiction to the EQB was that routing of petroleum pipelines implicates resources managed and regulated by a number of agencies, and the EQB brought together in one place, the regulatory experience of each of those agencies (DNR[9], MPCA[10], Agriculture, etc)[11].

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wholesale elimination of all route alternatives without an adequate environmental review of those routes, simply because they don't pass through the endpoints and pumping station pre-selected by the applicant and its partner refinery.

7 See Minn. Stat. 1988 sec. 216B.2421, 243. A history of the PUC through 2001 is available at http://www.house.leg.state.mn.us/hrd/pubs/mpucagen.pdf

8 See Minn. Stat. 1988 Chapter 116I.

9 The Minnesota Department of Natural Resources has broad jurisdiction over Minnesota's public waters (including rivers, streams, lakes and wetlands) Minnesota Chapter 103G, game and fish, Chapter 97-102, and broad powers over conservation, state lands, forestry and lands and minerals. The Department of Natural Resources issues pipeline permits for crossings over public waters and thus has important regulatory authority over pipelines that cross public waters and public lands. All utility crossings (transmission and distribution) of wild, scenic or recreational rivers, or of state lands within their land use districts which are under the control of the commissioner, require a permit from the commissioner pursuant to Minnesota Statutes, section 84.415 or 103G.245 under Minn. Rules 6105.0170. See also Minn. Rules 6135.1000 (DNR regulation utility crossings of public lands and waters in order to provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings.")

10 The Minnesota Pollution Control Agency was established "To meet the variety and complexity of problems relating to water, air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state…" Minn. Stat. § 116.01. The Commission has extensive experience in the preparation of environmental reviews under its statutory authority. Minn. Stat. § 116.02. It has broad and extensive jurisdiction in the protection of Minnesota's waters, and has regulatory authority over pollution in cooperation with the federal Environmental Protection Agency and the United States Army Corps of Engineers under the Clean Water Act. Like the DNR, MPCA has vast experience in environmental protection, a coordinated responsibility with the federal government in water protection, and substantially more expertise in the crafting of science based environmental reviews.

11 MEPA expects that the RGU will serve the needs of other governmental units. It provides that whenever practical, information needed by a governmental unit for making final decisions on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement. 116D.04 subdiv 2a(g). The ALJ's recommendations treat coequal coordinate agencies as if they were subordinate to

In 1989, the EQB utilized its jurisdiction over pipeline routing to integrate an alternative environmental review procedure into its routing jurisdiction[12] the rules for which were then codified to EQB Rule 4415. The routing rule, as amended in 1989, was intended to provide an accelerated environmental review, while providing procedures and substantive protections equivalent to the traditional environmental impact statement EQB Rule 4410.3600.[13] The alternative review, however, would provide a more expeditious procedure to achieve that same end: it would generate a comprehensive, science based analysis of the impacts on human and natural environment, a review of the potential alternatives including their environmental impacts.

By providing this careful analysis, the EQB could still use the joint regulatory expertise of its constituent regulatory agencies to select the best possible route consistent with the least-impact provisions of the Minnesota Environmental Policy Act prohibiting any state action which significantly affected the quality of the environment, where there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. 116D.04 subd 2b.

The EQB's 1989 decision provides for an accelerated procedure to deliver a MEPA compliant Environmental Impact Statement to the pipeline Certificate of Need and Routing processes. Under its alternative review authority, the EQB could not, and did not, eliminate the requirement for a robust environmental impact statement. It merely moved that review forward,

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the PUC, and this approach is totally contrary to the spirit and letter of MEPA. The PUC is the Responsible Government Unit, but it has not been granted jurisdiction over public waters, public lands and pollution protection, such that it can pretend that by virtue of regulating petroleum pipelines it can blithely ignore the environmental judgments of agencies with scientific and regulatory experience in their respective domains.

12 The formal rule adoption began: This chapter is adopted under authority granted in Minnesota Statutes, section 116I.01512 [now renumbered to Chapter 116G], to implement review procedures for the routing of pipelines that give effect to the purposes of the act.

13 Subpart 1 provides that "The governmental processes must address substantially the same issues as the EAW and EIS process and use procedures similar in effect to those of the EAW and EIS process."

to be conducted before the application was submitted, and delegated to the proposer the responsibility to conduct and prepare that review. To assure the integrity of the document generated, the alternative review rule demanded that any alternative review produce an environmental impact statement equivalent document through a procedure that provided equivalent protections to assure that the environmental review genuinely examined the impacts of a proposed project, and that a comprehensive review of alternatives to the proposed route must be prepared with that alternative environmental-impact-statement-equivalent document. We address the requirements for the alternative review document in a subsequent section[14].

We have devoted a great deal of effort to describing the process by which the alternative review was adopted, because the mechanism by which the public interest in selection of a petroleum route is protected, has become a subject of great controversy. In the Court of Appeals, intervenor FOH is pointing out that as implemented by NDPC, the environmental review has been conducted in a way that completely ignores the positions of the MPCA and DNR. And, as we point out below in a later section, the United States Army Corps of Engineers, which constitutes a major resource for environmental information has completely been read out of the process by NDPC's refusal to complete its section 404 permit application.

The alternative review adopted by the EQB sought to skip some of the steps traditionally utilized in the traditional environmental review by requiring the applicant to prepare a MEPA-Compliant Environmental Impact Statement before submitting its application. This

[14] The alternative environmental review requires that A. the process identifies the potential environmental impacts of each proposed project; Minn. Rules § 4410.3600 Subpart 1(A); B. the aspects of the process that are intended to substitute for an EIS process address substantially the same issues as an EIS and uses procedures similar to those used in preparing an EIS but in a more timely or more efficient manner. § 4410.3600 Subpart 1(B); C. alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process;§ 4410.3600 Subpart 1(C) ; E. Measures to mitigate the potential environmental impacts are identified and discussed; § 4410.3600 Subpart 1(D); F. A description of the proposed project and analysis of potential impacts, alternatives (in those aspects of the process intended to substitute for an EIS), and mitigating measures are provided to other affected or interested governmental units and the general public.

environmental impact statement came to be called an Environmental Assessment Supplement, and has traditionally been filed by the applicant when the applications for Certificate of Need and Routing Permit are jointly filed. In the MinnCan proceedings, one of the early cases in which the PUC exercised its newly acquired routing authority, the Environmental Assessment Supplement was authored by qualified environmental consultants with professional experience in conducting NEPA environmental reviews[15].

The regulations and Statement of Need and Reasonableness (SONAR) both confirm our position on the role of the Environmental Assessment Supplement as a fully formed environmental impact statement equivalent document. The alternative review clearly requires a compliant environmental impact statement equivalent document to be <u>filed with the application</u>. The EQB's alternative review requires that the applicant:

> must also submit to the commission along with the application an analysis of the potential human and environmental impacts that may be expected from pipeline right-of-way preparation and construction practices and operation and maintenance procedures. These impacts include but are not limited to the impacts for which criteria are specified in part 7852.0700 or 7852.1900. Minn. Rules 7852.2700.

The whole idea of the alternative review as adopted by the EQB was that when the public process began, there would already be an "action forcing" EIS-equivalent document available for use by regulatory agencies (MPCA, BWSR, DNR), local government, and the public to inform them of the potential *impacts* of the project and the potential impacts of alternatives to that project.

15 OAH Docket No. 8-2500-19094-2 MPUC Docket No. PL-9/CN-07-465 (Certificate of Need) MPUC Docket No. PL-9/PPL-07-361 (Route). Environmental Assessment Supplement, Natural Resources Group, April 2007 (LsR Project). PUC Docket No. Pl5/Ppl-05-2003, Environmental Assessment Supplement to the PUC Routing Permit Application, January 5, 2006, (MnCan Project.).

In addition, the applicant is required to submit evidence of consideration of alternative routes as follows:

> If the applicant is applying for a pipeline routing permit under parts 7852.0800 to 7852.1900, the applicant shall provide a summary discussion of the environmental impact of pipeline construction along the alternative routes consistent with the requirements of parts 7852.2600 to 7852.2700 and the rationale for rejection of the routing alternatives. Minn. Rules sec. 7852.3100

The SONAR[16] dated September 1988 corroborates our contention that the alternative review authorized by EQB requires the applicant to:

> Comply with "the direction provided by Minn. stat., section 116D.03, subd. 1, which states that "the legislature authorizes and directs that, to the fullest extent practicable the policies, regulations and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06", which is the State Environmental Policy Act. Statement of Need and Reasonableness (SONAR), EQB Rule Part 4415. Page 1.

The SONAR continues the environmental review criteria

> "found in the Routing Rule, (Criteria F through J) are taken from the content requirements for environmental impact statements found in the rules of the environmental review program (4410). Inclusion of these criteria, when taken with portions of the application contents part of these rules, provides for a level of environmental review consistent with the conditions qualifying for alternative review under the board's environmental review program. This obviates the need for a separate EIS for pipeline routing applications. *It will be the applicant's responsibility to provide a discussion of these criteria in its application, pursuant to part 4415.0145 (application procedures*)[17]. (Emphasis added). Id. Page 15.

Our position is further corroborated by the PUC's own description of the LsR brief to the Court of Appeals.[18] There, this Commission explained that the purpose of the Environmental

16 In the Matter of the Proposed Permanent Rules Relating to Pipeline Routing, Minnesota Environmental Quality Board, Statement of Need and Reasonableness, pp 1-2, September 30, 1988.

17 Rule 7852.0800, regarding application procedure states that "A person submitting an application for a pipeline routing permit must comply with the application procedures of part 7852.2000 and submit an application that contains the information required in parts 7852.2100 to 7852.3100."

18 MCEA entered the LsR proceedings at the last minute, just before the contested case began. They were not allowed to intervene, but participated as amicus, and thus could not develop an evidentiary record establishing the inadequacy of the environmental assessment supplement supplied with the application. The record of the

Assessment Supplement is to supply the docket with the same information as would be provided by an Environmental Impact Statement:

> Instead of the Commission preparing an EIS or EAW, the approved rules specifically provide that *the applicant is to submit essentially the same information as is found in an EIS*. See Minn. R. 7852.2700. This document filed by the applicant is commonly known as an Environmental Assessment Supplement ("EAS"). The rules then provide for public review and comment, and at least one hearing conducted by an administrative law judge. Minn. R. 7852.1300-1700. (Emphasis added).

The SONAR and the PUC's brief make it clear that it is the job of the applicant to explore route and system alternatives in the environmental impact statement substitute, filed with the routing application. The guarantee of integrity comes from the fact that the Environmental Assessment Supplement, (or as NDPC calls it an Environmental Impact Review "EIR"), is subject to nine months of public and agency review, culminating in a contested case. We are left with no findings, not even a recognition by the ALJ, that the EIR (EAS traditionally) is the subject of a review by the Administrative Law Judge. We thus except from the ALJ's Proposed Findings Completely Fails to address (with Proposed Factual Findings and Conclusions) Our Contention that the Environmental Review Submitted by NDPC Violates the Requirements of Rule 4410.3600**.**

IV. THE FINDINGS AND CONCLUSIONS SHOULD HAVE REJECTED THE ENVIRONMENTAL REVIEW BECAUSE IT CONSISTED OF AN ENUMERATION OF GEOGRAPHICAL FEATURES RATHER THAN AN ANALYSIS OF ENVIRONMENTAL IMPACTS AS REQUIRED BY MEPA.

In our previous sections, we have shown that the Environmental Impact Statement for pipelines must be prepared in advance of application submission. CCLS takes the position that in order for this to meet the letter and spirit of the alternative review process, it is essential that

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evidentiary hearing in this case contains a fully developed record challenging the adequacy of the environmental review, and further that that contention was supported by the MPCA and Department of Natural Resources.

the environmental impact statement substitute – the environmental assessment supplement – must be professionally prepared in consultation with regulators such as MPCA, DNR, USACE, EPA, and tribal authorities and local governments. By professionally prepared, we do not rule out the possibility that it could be prepared by a scientifically qualified team operating under contract with, or under exceptional circumstances, in the employ of the applicant. But it is difficult to imagine that a high quality environmental review could be conducted and submitted operating under the conditions imposed by NDPC.

An environmental impact statement (or in this case the environmental assessment supplement) represents a fundamental reform in the way that government approvals and governmental projects are sited. The purpose is to apply scientific judgment to the question of how much damage will this project inflict on environmental resources. For purposes of both MEPA and NEPA, "effects" and "impacts" mean the same thing. They include ecological, aesthetic, historic, cultural, economic, social, or health impacts, whether adverse or beneficial. 40 C.F.R. §§ 1508.7, 1508.8. The environmental impact statement or in this case environmental assessment supplement does not comply with the standards by merely reporting the kinds of terrain that the pipeline will traverse. An impact is

> "A direct result of an action which occurs at the same time and place; or an indirect result of an action which occurs later in time or in a different place and is reasonably foreseeable; or the cumulative results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions (40 CFR 1508.8).

But the evidence showed that the environmental assessment supplement was prepared by NDPC staff operating under the belief that an environmental impact statement consists of a counting and making transparent of the kinds of geographic features through which the pipeline passes. The EAS's lead author asserted that any scientific evaluation of the impact was outside

the realm of the environmental review document, because an environmental review does not make value judgments.

The environmental analysis submitted by NDPC was prepared under the direction of Sarah Ploetz. Ms. Ploetz has a bachelor's degree with a major in "environmental studies." Her prior experience consists in providing information requested by permitting authorities, but she has no prior experience in working on an Environmental Impact Statement. Ploetz Tr.66, lines 17-19. Ms. Ploetz evidenced no understanding of basic principles of ecology. She asserted that a scientifically trained environmental scientist could not quantify or describe environmental impacts, because that would require what she described as "value judgments." In this regard, her approach to an environmental review was starkly different from the testimony and position statements of agencies, MPCA and DNR, of Dr. Chapman, a trained practicing ecologist, and of the tribal authorities and their natural resources departments.

The application requirements demand that the applicant submit a complete environmental analysis of the preferred route. Rule 7852.2600.[19] The document must not merely provide description of the environment of the route as Ms. Ploetz contended. Id. Subpart 3. It must also provide an analysis of the impact of the route. Rule 7852.2700[20]. The essence of the letters from

[19] Subpart 1. Preferred route location. The applicant must identify the preferred route for the proposed pipeline and associated facilities, on any of the following documents which must be submitted with the application: A. United States Geological Survey topographical maps to the scale of 1:24,000, if available; B. Minnesota Department of Transportation county highway maps; or C. aerial photos or other appropriate maps of equal or greater detail in items A and B. The maps or photos may be reduced for inclusion in the application. One full-sized set shall be provided to the commission. Subp. 2. Other route locations. All other route alternatives considered by the applicant must be identified on a separate map or aerial photos or set of maps and photos or identified in correspondence or other documents evidencing consideration of the route by the applicant. Subp. 3. Description of environment. The applicant must provide a description of the existing environment along the preferred route

[20] The applicant must also submit to the commission along with the application an analysis of the potential human and environmental impacts that may be expected from pipeline right-of-way

MPCA and the DNR (as well as Dr. Chapman's testimony) is that the faux environmental review document submitted by Enbridge fails to meet that requirement and asking DOC-EERA to try to fix that problem at in a few months' time is simply not authorized by the EQB. An adequate document should have been available at the time the CON application was submitted, and the remedy for not preparing that document is to deny the CON because the environmental review document is not MEPA compliant. The drafters of the alternative review provisions thus contemplated that the application would likewise include a robust consideration of route alternatives and a comparative environmental review of those alternatives[21]. Rule 7852.3100.

Dr. Chapman supported the general criticism launched by DNR and MPCA experts. Treating all resources as equally impacted, as both NDPC did in its EAS and as DOC-EERA did in its review, is not an impact review; it is an abdication of scientific judgment.

> Many federal and state agencies evaluate the priority of an effect by its intensity, extent, and duration. Intensity refers to the severity of the direct and indirect impacts on the natural resource. Is a habitat completely destroyed by the effect, or only slightly damaged, for example. Is a groundwater aquifer rendered undrinkable, or only slightly contaminated at levels below a drinking water standard? Extent refers most often to a geographic scope. Lastly, duration indicates the reversibility of an effect: it is permanent or temporary, and if temporary, can recovery be accelerated by restoration and remediation? (January 6th, 2015 Rebuttal Testimony of Kim A. Chapman, pg.3, par.2) Most often a final determination of thresholds of harm and compensations requires a weighting of evidence and a judgment by qualified professionals.

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preparation and construction practices and operation and maintenance procedures. These impacts include but are not limited to the impacts for which criteria are specified in part 7852.0700 or 7852.1900.

[21] 7852.3100 EVIDENCE OF CONSIDERATION OF ALTERNATIVE ROUTES.
If the applicant is applying for a pipeline routing permit under parts 7852.0800 to 7852.1900, the applicant shall provide a summary discussion of the environmental impact of pipeline construction along the alternative routes consistent with the requirements of parts 7852.2600 to 7852.2700 and the rationale for rejection of the routing alternatives.

The evaluation of impacts, Dr. Chapman explained, involves applying scientific judgment as to the intensity, extent and duration of impacts and then using regulatory policies, and making policy judgments as to which of these impacts should be ranked as of higher or lower concern. NDPC tossed all of these judgments out the window, and used one, and only one judgment to rank routes as superior and inferior, and that is route length and cost. This is exactly what Minnesota Statutes section 116D.04 prohibits.

The approach that Ms. Ploetz took is that an environmental impact statement functions as a counting of geographic features and then treating those features as equally impacted. Using this approach, locating a refinery in a residential neighborhood would be the same as locating a glue factory in an industrial zone, because the allegation that a refinery impacts an industrial zone differently than residences is a value judgment. NDPC's environmental assessment supplement tells us how many counties, how many acres of forest, how many acres of wetlands, streams, rivers, lakes and prairie are in the vicinity of the proposed pipeline. This information is to some extent helpful, as far as it goes, but it is not an environmental impact statement equivalent document. This error is repeated throughout these proceedings, and even parroted by the DOC-EERA in its filing. The idea is that the Commission will be provided with an inventory of resources, and then lay people will draw their own unscientific guestimate of how the pipeline might impact those resources. As Dr. Chapman explained:

> While this is marvelously neutral in a way, it is nevertheless not unbiased. Presenting multiple factors as equal obscures a true evaluation of effects. (January 6th, 2015 Rebuttal Testimony of Kim A. Chapman, pg.4, par.5)

But what Ms. Ploetz regards as "value judgments" are actually scientific judgments made to determine, as required by MEPA, the gravity of the impact, or potential impact, from the project, as compared to alternatives to the project. Rule 7852.0200 Subd. 3 emphasizes the

requirement the environmental assessment supplement must assess environmental ***impacts***[22], not merely provide a general description of the environment. MEPA (116D.04 Subd. 2a) says "The environmental impact statement shall be an analytical rather than an encyclopedic document…" If, for example, a wastewater treatment plant serves a lake, it's not enough to say, merely, this project sends effluent into a lake. An assessment of environmental impacts must explain what impacts the effluent will cause in the lake[23].

There are numerous examples of NDPC's confusion between an enumeration of geographical features (counting them) and an ecological description of the impacts of the project on resources. For example, in her testimony, Ms. Ploetz sought to rebut the contention from tribes that NDPC paid no attention to the impacts of the project on wild rice resources. Ms. Ploetz testified that wild rice was discussed in an appendix of the Environmental Assessment Supplement. But, the only discussion of Wild Rice in the Environmental Assessment Supplement consists of a table that counts the number of waters which have been identified as supporting wild rice. The impacts on wild rice are left to others to bring forward, shifting the burden to develop impacts upon intervenors or state agencies. The table tells us that there are more wild rice supporting lakes on SA-Applicant than on the alternatives, but there is no information, not any, regarding the meaning of that data. See Table EAS page b-5.

This issue is important not simply because it violates the alternative review requirement that an impact statement be supplied at the commencement of the process, but it is also important because the preparation of an alternatives review is supposed to force the action of the applicant

[22] through the preparation and review of information contained in pipeline routing permit applications and environmental review documents.

[23] See for example, Dead Lake Association, Inc., v MPCA, A04-483 (Minn. App. 2005) (environmental review which failed to describe chemical interactions in a shallow lake was inadequate and MPCA acceptance of the review was arbitrary and capricious.

as well. When the applicant fails to compile scientific information on impacts to inform its judgment, it means that the applicant itself has made a misinformed judgment in selecting the route in the first place. NDPCs accountant's carefully calculated (albeit incorrectly) the cost of putting 70 extra miles of so-called filler petroleum in the pipeline. (We will show that these calculations are flagrantly wrong in a subsequent section.) But there is no evidence that NDPC contacted the experts at MPCA, DNR, tribal authorities and USACE to obtain advice and counsel on the impacts of the proposed pipeline on lakes, streams, waters, forests and public waters. This placed NDPC in the position of having to defend against, after the fact, the judgments of those regulatory authorities, when the alternative review demands that this diligence should be conducted before making the decision, in the public interest, of where best to locate a route.

NDPC told Ploetz to reject any "value judgments" that would determine which aspects of the environment deserved high priority protection, or to describe the nature of environmental impacts that might be involved by placement of the lines in or near these resources. The Environmental Assessment Supplement presented for public review, then, merely counted features quantitatively and made no qualitative judgments regarding environmental impacts. Ploetz Tr. pg. 22. NDPC's failure to scientifically assess environmental impacts in the environmental assessment supplement, filed with both CON and Routing Dockets, has drawn strong objection from MPCA, DNR and Dr. Chapman, because it is completely contrary to the way in which environmental impacts are assessed.

Ms. Ploetz's explained that NDPC's production of an EAS was envisioned as a "straightforward comparison" of the resources, by which NDPC means simply using the quantity

of numbers or data to compare alternative systems. (Ploetz pg. 37, lines 20-24)[24]. NDPC did not weigh in any way the different resources that were being counted, because "that would be an extremely difficult, if not impossible task to achieve. Ploetz Tr. 41, lines 17-22); (pg. 108, lines 4-7). Although the EAS is actually submitted in both dockets, tables reported density of resources only[25]. There was no attempt to quantify or compare potential routes based upon how they were impacted by a spill[26], nor was there any consideration of the potential increased risk of spill connected to the Line 3 replacement[27].

By deciding that environmental impacts should all be counted equally, because all resources are supposedly equal and equally impacted, NDPC violated Minnesota's Environmental Policy Act. By way of example, Ploetz explained that when the Environmental Analysis reviewed water bodies, the environmental review would not differentiate between a shallow lake[28], and an artificial drainage ditch.[29] The entire environmental assessment document

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[24] A: I mean simply using the quantity of numbers or data that's indicated in the table.

Q: Yes, correct. (pag.37, lines 20-24)

[25] Each line item that you see on the table would be essentially a different factor that was looked at. So the -- where the density comes into play is the -- when you look at the total numbers, sheer quantity of what was identified within each factor that was looked at, that informs the overall density of the human and environmental features contained, within the two-mile-wide study area. (Pg.123-lines 19-25, pg.124)

[26] Q: Okay. Are you involved in projecting or placing values on areas that would be impacted by a spill?

A: As I've testified to earlier, we haven't placed a value on one resource being more important than another. (pg.62, 15-19).

[27] Tr. 106, lines 17-23.

[28] One of Minnesota's environmental challenges is to protect its numerous shallow lakes. The concern has spawned a major shallow lake program described at http://www.dnr.state.mn.us/wildlife/shallowlakes/index.html. The suggestion by NDPC's chief environmental employee that there is no special consideration for shallow lakes suggests a shocking state of ecological and environmental illiteracy. This is another example of the point that we later make, that environmental reviews need to be conducted of teams of scientists each applying their respective discipline so that the review integrates the acquired

was predicated on merely quantifying the number of types of resources[30]. Perhaps to Commissioners, this ignorance of the value of shallow lakes may seem innocent enough; however, it is an example of the importance of conducting an environmental review with an interdisciplinary approach, using the scientific judgments of experts in the field.

To Minnesota practitioners of ecology and limnology – fresh water science – the failure to recognize the ecological sensitivity, and their role in Minnesota's water ecology, would be shocking. It is not an indictment of Ms. Ploetz: it is a manifestation of the importance of using agency scientific expertise, of marshalling interdisciplinary approaches and bringing to the table, the appropriate expertise. This is why it is so dangerous for the Administrative Law Judge to have simply discarded the concerns of the agencies that have expertise in these matters. The agencies are telling the Commission, you have been presented with an unacceptable document. On what basis does an Administrative Law Judge reject that information: how is the Public Utilities Commission qualified to tell the MPCA and DNR that they do not understand lakes, forests, public waters, and the ecological sciences?

NDPC told the Administrative Law Judge that environmental impact analysis is as simple as being told that there are more people in the vicinity of a pipeline, and then taking judicial

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ecological knowledge specific to Minnesota's natural resources. Indeed, Ploetz admitted the only distinction made in its environmental review was between a water body or a fast-moving water body. Therefore, in their analysis overlap between the two could occur and an inaccurate counting of features is thus possible. (tr. 119, lines 5-9)

[29] Q :And so my question was it more ecologically healthy, is one more ecologically healthy than the other, do you think, if you were to look at – to identify a healthy ecosystem?

A: Again, I don't feel like I can answer that, because it would depend on the quality of the shallow lake that would be contained within that. There – there are a variety of potential impairments that could be placed on water bodies. You know, the use – human activity use of water bodies can affect that. It's difficult to answer. It's a complex distinction. (pg.118, lines 1-11)

[30] Tr. 128, lines 24-25; pg.129, lines 1-4)

notice, somehow, of the alleged fact that the impact of a pipeline is always less if it travels further from small cities. Thus, the Administrative Law Judge rejected out of hand, the version of SA-03 which passes near Little Falls, without any direct evidence that there was any specific concern. The Administrative Law Judge asserted that one of the positive features of NDPC's route is that it had engaged what Dr. Chapman described as "micro-siting," the improvement of a route by altering its course to avoid potentially problematic features (as for example proximity to Little Falls). But he compared the NDPC route to unadjusted routes and attributed to them all of the potential negative features that one could imagine. This approach substitutes a statement about proximity to geographic features, and application of lay opinion, for analysis of environmental impacts.

Dr. Chapman tried to explain this problem by using GIS to develop an analysis of the impact of the system alternative on forests. His purpose was to show the Administrative Law Judge that NDPC's approach to an environmental impact statement was in the wrong: that you cannot quantify impacts by simply counting the kinds of geographic features. An artificial drainage ditch cannot be counted the same as a shallow lake or trout stream. Dr. Chapman then proceeded in his testimony to explain that a proper environmental review (which should have been implemented by NDPC and reported in its EAS) must assess the impacts on other environmental resources in the same way. He explained that a citizen group and its retained expert cannot execute such an evaluation, especially in the time allotted by the Commission's order. The Administrative Law Judge's recommendations completely misunderstood the meaning of this testimony. He interpreted it as a request for continuance, so that Dr. Chapman himself could prepare a complete environmental impact statement comparing all of the impacts of the system alternatives. The Administrative Law Judge said that he was within his discretion

to deny this fictional request for extra time, and therefore the intervenors had failed to meet their burden.

Both DOC-EERA and NDPC pursued a completely incorrect vision of what an impact statement is. They told us how many forests, streams, prairie lands, and other geographic features are near the proposed pipeline, and they argued that it was the citizens' job to make generic judgments on whether the pipeline would better traverse forests, streams, prairie lands and so on. Environmental impact statements are supposed to be generated by application of informed ecological, biological, hydrological, chemical and other scientific judgment, judgments and the law affords great weight to the judgments of the agencies that have expertise in forming those judgments. MEPA and NEPA call upon the government agency which approves the environmental impact statement to:

> utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment; 42 USC § 4332(A) See Minn Rules 4410.2300 (potentially significant adverse or beneficial effects generated, be they direct, indirect, or cumulative).

The same defects are found in the DOC's Comparison of Environmental Effects of Reasonable Alternatives. Evidently, DOC is under the impression as well that when the Commission asked for a study of environmental impacts at a high level, that what it really wanted is another enumeration of geographic features. The Comparative Environmental Effects of Reasonable Alternatives (CEA) begins by recognizing;

> "For the Sandpiper Project, the Commission concluded that an environmental analysis of six system alternatives, which were identified in the Route Permit docket, and six alternatives to the proposed project identified by NDPC in its CN application would provide it with valuable information to be weighed along with

> other information while making its need decision. This document is intended to provide that analysis. (Pg.1, CEA)"

However, in the analysis of each system alternative, the CEA counted the number of features within in a preliminary category as defined with the 12 identified resource areas that public datasets were available for;

> "Datasets were identified in 12 resource areas: Geology/Soils/Groundwater, Ecoregions, Land cover, Water Resources, Special species and critical habitat, Public resource and recreational lands, Cities and population, Community features, Cultural resources, Contaminated areas, Air emissions, High-consequence areas.(pg.47, CEA)" See table 6-1 on pg. 249.

The CEA describes differences between system alternatives by counting the above referenced features crossed by each alternative route. No qualitative information regarding the alternative systems or analysis of the individual resources particular to that region and the potential to impact of that resource is discussed within the document. No scientific opinion, hydrological, ecological or otherwise was obtained or offered. To distinguish among alternatives, the CEA simply offers the features in percent-based format of each feature within an alternative. The CEA essentially mirrors the approach taken by Environmental Assessment Supplement.

But to compound this error, the CEA states, without foundation in science, that there are few differences among the alternatives and few differences among the potential impacts to some resource category because system alternatives would have "similar impacts to some resource categories," but it offers no support for this view, and evidently, it simply means that if a pipeline crosses through a forest, by definition, that is similar to crossing through wetlands, or through a prairie. (Pg. 249, CEA)

In each resource category, the CEA focuses on making tables depicting the different amounts of that resource in each system alternative; making the comparison factor based on

quantity and not quality of individual features or specific potential impacts to resources. For example, in relating water resources crossed by each alternative the CEA states;

> "Water resources vary considerably by type and extent across system alternatives. Stream crossings range from 1,157 in SA-05 to 615 in SA-Applicant, while the numbers of named lakes crossed range from 159 in SA-07 to 20 in SA-04. Generally, stream crossings are greater in the southern system alternatives while waterbody crossings tend to be higher in the northern system alternatives. (pg.250, CEA)." (See table 6-2A and table 6-2B for examples, both on pg. 250).

There is no statement or section in the CEA document that address the different potential impacts to specific resources in determining value of a resource or adverse effects on one type of resource from another. MnDOC's simple counting of features and its failure to address actual environmental concerns as related to each alternative drew strong criticism from both of State agencies that have experience in preparing real environmental impact statements. But the fault here is not with MnDOC: the problem is that the Environmental Assessment Supplement was submitted based on the premise that the only factor that really counts and can be weighed is the pipeline length and pipeline cost.

The foundation for DOC-EERA's casual dismissal of the alternatives as having equivalent environmental impacts is its cavalier assertion that if a pipeline spills petroleum on the flat prairie, that is the same as a pipeline spill in Lake Mille Lacs, or a wetland or river, because a spill is a spill is a spill and so, in that sense, the impact "spill" is the same in any region. In a true environmental review, the DOC-EERA would have to defend this position with science. When the MPCA challenged this conclusion, that the routes are essentially equal, because anyplace that the pipeline is placed, there will be a pipe, digging in the ground, and a spill risk, DOC-EERA would have to establish the basis for this conclusion with an authentic response to the comment. The PUC's process provides no substitute for the procedural

guarantees inherent in the regular MEPA process, and the alternative review simply did not allow the DOC-EERA's comparative analysis to substitute for the EIS equivalent document that was to be submitted with the application.

In its letter submitted for the record on January 2013, 2015, MPCA stated that the Applicant's proposed route was inferior to other routes analyzed:

> ***SA-Applicant presents significantly greater risks of potential environmental impacts and encroaches on higher quality natural resources than SA- 03 and several other system alternatives.*** Minn. Rule 7853.0130.8(3). ***The effects of SA- Applicant on the natural environment support a determination in favor of other alternatives.*** Minn. Rule 7853.0130.C(2) and C(3).

The letter continued:

> During these proceedings, the MPCA has commented extensively on the environmental concerns regarding the route proposed by Applicant in comparison to alternative routes and system alternatives. MPCA's prior comments can be found in Document Nos. 20146-100780-01, 20148-102458-02 and 20148-102458-04, each incorporated by reference. These prior comments have addressed such specific items as access to potential release sites in surface waters, potential to impact ground water, wild rice, the state's highest- quality surface water systems, wildlife habitat, low income populations, watersheds currently being assessed for restoration and protection strategies, fisheries, economies, and numerous other parameters.
>
> ***In these comments, the MPCA concluded that with respect to protection of the highest- quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the system alternatives, including SA-03.*** (emphasis added)

The DOC's conclusion that all routes are inherently equal, because all routes cross something and present the same spill risk to some land or other, is not based upon scientific findings.

V. THE ALJ'S FINDING ON NDPC'S COMPLIANCE WITH FEDERAL, STATE, AND LOCAL AGENCIES IS INCORRECT AND SHOULD BE CORRECTED.

In our view, there are two major problems with the assertion that NDPC has proven that it will comply with state and federal law. The first is that the finding ignores the unrebutted evidence that USACE long ago rejected NDPC's section 404 permit application as incomplete, and that NDPC has refused to complete that application, thus stopping any federal environmental review in its tracks. The second is that the finding ignores the fact that both federal and state law require a least impact analysis, and that NDPC did not present evidence that it consulted with regulatory agencies when it conducted its administrative review. How is it possible, then, to conclude that NDPC is going to be in compliance with state and federal law, when USACE is completely silent and MPCA and DNR are lodging protests to the environmental review.

A. The ALJ's Findings ignores the evidence respecting the US Army Corps of Engineers Section 404 Permit Process and Completely Fails to Acknowledge the Significance of NDPC's Refusal to Submit a Compliant Section 404 Application.

At findings 548-550, the ALJ makes the following findings, to which we except.

> 548. The Project is subject to regulation by a number of federal, state, and local agencies - including the United States Army Corps of Engineers, the Commission, MDNR, MPCA, to county-level governments.
>
> 549. NDPC's Application identifies the series of agencies from whom it must obtain approvals for the Project.
>
> 550. The record demonstrates that NDPC has taken the actions needed to obtain the required approvals for the Project.
>
> 551. NDPC provided updated information about the status of the various required state, federal, and local approvals for the Project.
>
> 552. NDPC has pledged that it will abide by the conditions contained within any permit required by law.

> 553. The record demonstrates that the design, construction and operation of the Project will meet the requirements of the applicable law.

At proposed finding 18, we requested a substitute finding as follows:

> During the month of February, NDPC filed an application with the United States Army Corps of Engineers for a section 404 Clean Water Act Permit for the project. A completed application would have triggered an environmental review under the National Environmental Policy Act (NEPA). A Section 404 permit is a prerequisite for construction of the pipeline. However the application was ruled by the USACE to be incomplete and NDPC has not yet filed a completed application. The failure to complete the section 404 application terminated the federal environmental review that would otherwise have been commenced.

Regrettably, the ALJ has simply parroted a finding provided to him by NDPC on a topic for which there is contrary evidence. In February of 2014, NDPC filed an incomplete Section 404 Clean Water Act Permit application with the US Army Corps of Engineers (USACE). The USACE notified NDPC that the application was incomplete, but NDPC refused to go forward with the application. Commencing this application would have triggered a federal environmental review under NEPA and would have triggered government to government information exchanges between USACE and Minnesota agencies, as well as consultations with Indian tribes on the impact of the proposal on native resources, as well as impacts on treaty rights. In August of 2014, NDPC's Ploetz filed inaccurate testimony claiming that this application had been completed, and that a permit decision was scheduled[31].

B. The proposed findings fail to recognize that NDPC's refusal to proceed with its section 404 application undermines the PUC's fact finding responsibilities and the collaboration requirements of Minn Rules § 4100.3900 and 40 CFR Part 1501.

Submission of a complete Section 404 application would have triggered a USACE NEPA review. The National Environmental Policy Act and its implementing

[31] On page 8 of her August 8, 2014 Direct Testimony, NDPC's Senior Environmental Analyst, Ploetz, represented (incorrectly) that NDPC had submitted an application for a Section 404 Permit on February of 2014 and that a decision was expected in August of 2015.

regulations include a robust requirement that a full review of alternatives, and NDPC's environmental assessment supplement could not possibly pass muster in a NEPA environmental review. In fact, the USACE had specifically notified NDPC that it had assembled an environmental review to evaluate the project under NEPA, but that it would not commence the required review until NDPC submitted a complete evaluation.

Under both state and federal law, the environmental reviews are designed to proceed simultaneously, and one of the major benefits of this collaborative process is that information compiled by each agency will be available to the other. See Minn. Rules section 4410.3900, 40 CFR Part 1501 and our Post-Hearing Brief, pages 22-24. Refusal to complete the section 404 application is of major significance here for several reasons:

- When implemented according to law and regulations, NEPA imposes a real environmental review, one that requires analysis of environmental *impacts*, not just the listing of the type of geographic features that NDPC provided in these proceedings. Refusal to proceed with its 404 Permit Application deprived the PUC, the public, and these proceedings of that real environmental impact statement.

- As tribal parties have made clear, the USACE takes responsibility for involving tribes and their constituents in a way that the pipeline process simply does not provide.

- Refusal to complete the 404 application deprived the PUC, the public and these proceedings of the expertise of the USACE. The NEPA process is a true "action-forcing" process, that is designed to assist the public and governmental decision makers look at true alternatives.

- By representing to the PUC that the 404 permit application was under way, it could create the impression that a full Minnesota environmental review would delay commencement of construction, when in fact; the NEPA review has not even begun.

The two processes, NEPA and MEPA are both designed to work together. See 40 CFR § 1503.1 (After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall: (2) Request the comments of: (i) Appropriate

State and local agencies); 40 CFR 1501.7 (a) As part of the scoping process, the lead agency shall:

> (1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds).

One of the critical features of NEPA is to allow public officials, including state public officials, to obtain information that will help them take a position on the proposed project. 40 CFR § 1500.1(NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA.)

The NEPA process –which should have been commenced long ago -- is "intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." But if the NEPA process is intentionally interrupted, then the effect of that is to deny to state regulators, local government, and citizens, the information that would otherwise have been produced in a federal review. NEPA does not have an alternative review. NEPA does not allow applicants to get away with segmenting connected actions, as the ALJ's proposed findings have done with the Line 3 application. NEPA does not allow parties to discuss geographic features as if they were environmental impacts, nor does it allow an applicant to treat pollution of a ditch as equivalent to pollution of a shallow lake.

MEPA and its implementing regulations similarly call for coordination with any federal environmental review, so that the information compiled by federal agencies can be exchanged

with state agencies compiling information, each within their areas of expertise[32]. Because NDPC has intentionally cancelled the environmental review that otherwise would have taken place, we believe that we are entitled to an inference that the USACE/EPA would have supported the Minnesota regulatory agencies concerns. The ALJ's report makes no mention of this problem, and remarkably simply inserts a boilerplate finding proposed by NDPC that "the record demonstrates that NDPC has taken the actions needed to obtain the required approvals for the project.[33]"

C. The ALJ's Proposed Findings Fail to Recognize the Coordinate Jurisdiction of the DNR and MPCA.

The ALJ's finding at 548 – 550 represent a cavalier dismissal of the jurisdiction of the Minnesota Pollution Control Agency and Department of Natural Resources. Merely parroting NDPC's proposed finding that there are certain regulatory requirements administered by the DNR and MPCA, and, NDPC agrees to abide by them, which does not address the fact that a true environmental review is supposed to identify the regulatory issues raised by statutes and regulations administered by those agencies. That cannot be accomplished by a dismissal of the concerns of those agencies, as the ALJ's findings do. Both agencies have extensive permitting jurisdiction. The situation here is starkly different, for example, from the circumstances presented in the MinnCan proceedings. There, at the contested case the MPCA and DNR raised

[32] See for example, the collaboration involved in the PolyMet EIS. http://files.dnr.state.mn.us/input/environmentalreview/polymet/sdeis/004_executive_summary.pdf, page ES-7.

[33] Page 85, par. 548-550. 548. The Project is subject to regulation by a number of federal, state, and local agencies - including the United States Army Corps of Engineers, the Commission, MDNR, MPCA, to county-level governments. 549. NDPC's Application identifies the series of agencies from whom it must obtain approvals for the Project. 550. The record demonstrates that NDPC has taken the actions needed to obtain the required approvals for the Project. 551. NDPC provided updated information about the status of the various required state, federal, and local approvals for the Project. 552. NDPC has pledged that it will abide by the conditions contained within any permit required by law.553. …

no objections to the adequacy of the environmental review and did not argue that there existed other routes that are environmentally superior.

Our proposed findings contain recognition of the DNR's regulatory authority, which is not reflected in the ALJ's recommendations. The Minnesota Department of Natural Resources has broad jurisdiction over Minnesota's public waters (including rivers, streams, lakes and wetlands) Minnesota Chapter 103G, game and fish, Chapter 97-102, and broad powers over conservation, state lands, forestry lands and minerals[34]. The commissioner of the DNR has charge and control of all…waters of the state and of the use, sale, leasing, or other disposition thereof…,Minn. Stat. § 84.027 subdiv. 2. The Department of Natural Resources issues pipeline permits for crossings over public waters and thus has important regulatory authority over pipelines that cross public waters and public lands. All utility crossings (transmission and distribution) of wild, scenic or recreational rivers, or of state lands within their land use districts which are under the control of the commissioner, require a permit from the commissioner pursuant to Minnesota Statutes, section 84.415 or 103G.245 under Minn. Rules 6105.0170. The position of the Department of Natural Resources on matters within its jurisdiction are thus entitled to great weight. The EQB envisioned that the alternative review would encompass a review of those requirements, and it is difficult to imagine how NDPC could possibly have completed an Environmental Assessment Supplement without obtaining and reporting the advisory views and concerns of those agencies in the EAS.

Minnesota Rule 6135.1600, administered by the Department of Natural Resources, explicitly states that utility crossing permits are subordinated to the Minnesota Environmental Policy Act as follows:

[34] Proposed finding Paragraph 95.

> There are other Minnesota and Federal laws and rules and regulations concerned with utility crossings and the environment. In case of conflict with other environmental regulations, the parts included herein will be subordinated to any law, rule, or regulation which is stricter in its protection of the environment. Other related environmental laws and rules and regulations include but are not limited to those associated with: A. federal and state wild, scenic, and recreational rivers; B. the Minnesota Environmental Protection Act; and C. natural and scientific areas.

The Minnesota Pollution Control Agency has jurisdiction that should have been respected in the initial route selection process. The mission of the MPCA is:

> "To meet the variety and complexity of problems relating to water, air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state…" Minn. Stat. § 116.01.

The Commission has extensive experience in the preparation of environmental reviews under its statutory authority. Minn. Stat. § 116.02. It has broad and extensive jurisdiction in the protection of Minnesota's waters, and has regulatory authority over pollution in cooperation with the federal Environmental Protection Agency and the United States Army Corps of Engineers under the Clean Water Act. Like the DNR, MPCA has vast experience in environmental protection, a coordinated responsibility with the federal government in water protection, and substantially more expertise in the crafting of science based environmental reviews. As stated earlier, these consultations should have occurred during the drafting of the EAS.

Lack of coordination manifested itself as well in complaints from tribal authorities. For example, the Fond du Lac Reservation, established by the LaPointe Treaty of 1854, is one of six Reservations inhabited by members of the Minnesota Chippewa Tribe. The Chippewa Nation is the second largest ethnic group of Indians in the United States. Archaeologists maintain that ancestors of the present day Chippewa have resided in the Great Lakes area since at least 800

A.D[35]. The Fond du Lac Resource Management Division has responsibilities for management, conservation and sustainability of the natural resources of the Fond du Lac Band in order to protect the environment on the Fond du Lac Reservation and within its treaty areas. The Fond du Lac Natural Resources Program is responsible for the wild rice management and restoration activities of the Band. The Band confirms in its letter dated September 29, 2014, the concerns repeatedly raised by representatives of White Earth and Honor the Earth that NDPC failed to engage in the kind of due diligence called for when generating an environmental impact statement, and complains of a lack of consultation[36]. The Band contends as well that recently installed pipelines have resulted in major hydrological changes impacting wild rice resources:

> Changes in hydrology affect wetland type, and indirectly affect wetland functions, including wildlife habitat, fisheries habitat, groundwater recharge, surface water retention, nutrient transformation, sediment retention, conservation of biodiversity, etc. The Alberta Clipper and Southern Lights projects have already impacted the Fond du Lac wetlands along the Enbridge pipeline corridor. A Geographical Information Systems (GIS) analysis reveals up to forty (40) newly developed intermittent streams since the pipelines were installed. The National Wetland Inventory (NWI) documents a wetland type change from one side of the pipeline corridor to the other, clearly showing hydrology impacts from pipeline installations.

The role of the Department of Commerce in Public Utility Commission proceedings is to advocate for relevant public interest, the band writes:

> In this case, the Department [of commerce] sought no tribal input, leaving a significant section of the public ignored. The Department has an obligation to

[35] The LaPointe Treaty of September 24, 1854 (10 Stat. 1109) was the last principal treaty between the several bands of Chippewa inhabiting Northern Minnesota, Northern Wisconsin, and the Western Upper Peninsula of Michigan. In this treaty, the various bands of Lake Superior and Mississippi Chippewa ceded approximately 25% of the land areas of the present states of Minnesota and Wisconsin plus the balance of the Upper Peninsula of Michigan to the United States. The LaPointe Treaty established the Fond du Lac Reservation at 100,000 acres.

[36] Document No. 20149-103433-01

consult with tribes under Minnesota Governor's Executive Order # 13-1037. The Department has not met its obligations. Enbridge failed to follow through with negotiations with the Leech Lake and Fond du Lac Bands about the pipeline route and no agreement has been reached with the Bands. Although the Fond du Lac Band has concerns about all of Enbridge's proposed routes, the Band is particularly concerned that Enbridge's preferred route was chosen for the sole purpose of going around Indian reservations. As a result, Enbridge's proposed route fails to provide monetary compensation or legal protection to the Band, while exposing the Band to the same threats as if the route were to go directly through the reservation. Further safety considerations must be discussed given the increased volatility of Bakken crude oil.

VI. NDPC SELECTED PIPELINE ROUTES FOR ANALYSIS IN THE ENVIRONMENTAL ASSESSMENT SUPPLEMENT BY IMPROPERLY SELECTING ONLY THE SHORTEST PIPELINE LENGTH AND THE ALJ INCORPORATED FAULTY AND MISLEADING COST JUSTIFICATIONS.

In this section, we show that Enbridge and its petroleum refinery partner, Marathon decided to rule out system and route alternatives based upon the false premise that the market could not withstand even small price increases in petroleum delivery cost. We argue that this premise was infected by the fact that one of the NDPC partners is not a petroleum carrier, but rather the Midwest's largest refinery of petroleum products, and that the Environmental Assessment Supplement was thus directed away from system and route alternatives by business motivations instead of the public considerations that are required by Chapter 116D and by NDPC's use of eminent domain to acquire pipeline easements. In summary, we contend:

1. The EAS reported alternatives constrained by Marathon-Enbridge's mutual business commitment to keep prices low and eliminate consideration of alternatives which might even modestly increase Marathon's delivery price.

2. That the designers have operated based upon a grossly erroneous calculations of cost which vastly inflates the alleged cost of additional mileage

3. That the designers of this project were significantly influenced by the business interests of a particular non-carrier owner, Marathon, which understandably wanted to maximize its competitive advantage over competing refineries and

[37] https://mn.gov/governor/images/EO-13-10.pdf

retail competitors. The ALJ's proposed findings give great weight to the claim that nobody is able to show shipper support for even a small increase in pipeline prices. That finding is based upon Marathon-NDPC partners asserting that the routing decision should be driven by their own internal and secret business arrangements designed to maximize this competitive advantage, as opposed to the economics of the petroleum market at large.

4. That the designers of the pipeline predicated the route location upon the position that Marathon and the partner shippers are not willing to pay even 38 cents a barrel extra for a superior location. As we show, the $0.38 calculation is flagrantly wrong[38]. Nonetheless, the market data provided by the testimony shows that there is plenty of demand for pipeline services at prices far about the additional 38 cents per barrel that Marathon-NDPC used as a ceiling on additional cost.

We contend that the use of individual private shipper contracts to set the cost parameters for a common carrier's route choice would represent an unconstitutional use of the eminent domain power to satisfy private economic advantage. The overwhelming evidence showed that there is tremendous room for price increases in the pipeline market, because the spread between rail and pipeline costs is $5 per barrel. Petroleum is travelling great distances and the market is carrying that cost with great ease. It would be inconsistent with the very concept of common carrier in Minnesota and elsewhere, that a shipper could turn itself into a carrier and then contend that regulation of that common carrier/shipper, must be driven by the private secret contracts between the carrier wearing its carrier hat and the carrier wearing its shipper that. It would also contradict the provisions of section 116D.04 which prohibit the environmental review from selection comparison alternatives based solely upon economic considerations.

A. Market data shows that there is plenty of demand to support the additional costs required by a longer pipeline and hence the Environmental Supplement Assessment improperly eliminated longer pipeline alternatives.

The evidence overwhelmingly negates Marathon's and NDPC's assumption that longer pipelines could be excluded from the Environmental Assessment Supplement because the market

[38] See Glanzer cross examination beginning at 32.

would not support even small price increases. The ALJ clearly erred in adopting their contentions. In NDPC's application contains the following admission contradicting the assumptions that drove the environmental assessment supplement:

> Table 8 illustrates, if a Bakken crude oil shipper is seeking to access markets to the east, either in the Midwest or Mid-Continent, the Sandpiper route is unequivocally the lowest cost route. At Patoka, the Sandpiper route offers a total transportation cost that is $2.62 per barrel less than the alternative, and **the Sandpiper advantage to Chicago is $4.26 per barrel.** 20148-102134-03 Earnest CN Direct Testimony, Schedule 2, Page 38.

The claim that an extra 70 miles would sink the pipeline economically is completely rebutted by the recognition that Sandpiper would have a significant price advantage over the competition. Petroleum is carried 1000 miles on the Alberta Clipper from Hardesty to Superior. Southern lights carries petroleum products from 1588 miles from Chicago to Edmonton. Enbridge's Mainline, also known as the Lakehead system is 1900 miles long. The idea that 70 miles would be significant in this context is absurd. NDPC doesn't have shipper interest for a slightly longer pipeline, because NDPC didn't ask for it, and NDPC didn't ask for it, because before its application was submitted, NDPC had already ruled out alternatives[39].

NDPC's decision to eliminate alternatives from the comparison in the Environmental Assessment Supplement is thus inexplicable, unless it derives from a decision to reject any alternatives that might cost Marathon the refinery operation more. Applicant's shipper partner Marathon evidently prevailed by removing from considerations any route even 70 miles longer. Its claim that the extra 70 miles would cost shippers an extra $26 million would result in an additional cost of $.38 per barrel (Palmer Direct) is economically baseless as is its claim that the extra 38 cents per barrel would drive way shippers.

[39] For some reason, the ALJ completely ignores the viability of the 1,134 mile Bakken Pipeline which will carry crude from the Bakken oil fields in Northwest North Dakota, through South Dakota, Iowa and to end in Patoka, Illinois.

There are numerous flaws in the Palmer calculation. It wrongly pretends that the extra 70 miles of petroleum described as "filler" as if it were sitting stagnant in the pipeline. In fact, once the pipeline is operational, that 70 miles of petroleum moves to the other end of the pipeline where it is refined by Marathon or others. Petroleum is worth substantially more, as much as $15 per barrel more, at the end of the pipeline when it is delivered to a Marathon refinery than it was at the wellhead in Bakken. By treating the "filler" as if it is immobile, Marathon ignores the fact that the petroleum is actually moving from one end of the pipeline to the other, and that petroleum is made more valuable by moving it from wellhead to refinery head. At a $15 per barrel price-spread between well-head and refinery, the 348,000 barrels of oil that Marathon says is a burden actually gains five plus million dollars in value by making the trip from Bakken to the Marathon refinery. Perhaps Marathon or its shippers have accepted the filler fiction for purposes of their internal accounting: but the reality is that a pipeline adds value to all of the petroleum, including the fictional 70 miles which NDPC and Marathon treat as immobile.

But even if one accepts Marathon's erroneous hypothesis that it must invest $26 million into the pipeline as a one-time filler expense without compensating reward, and even if we pretend that the petroleum somehow sites immobile in the pipeline while other petroleum passes it by, still, Marathon's contention that this translates into a 38 cent per barrel cost to shippers is flagrantly incorrect. Mr. Palmer assumed a price of $75/barrel for purpose of his argument. Assuming that Sandpiper carries 225,000 barrels per day, let us deduct 15 days a year for maintenance, obviously a conservative assumption. In that case, Sandpiper would deliver 2.4 billion barrels of petroleum in 30 years of operation.

If one spreads Mr. Palmer's one-time cost for 348,000 barrels over 30 years, to apportion the cost of the so-called filler to the pipeline operations, one needs to divide 348,000 barrels, the

filler, by 2.4 billion barrels, the petroleum transported by the filler. At $75 per barrel, assumed by Mr. Palmer, that translates to about a penny of cost added on to each barrel carried, not the 38 cents projected by Marathon. By capping the universe of acceptable pipelines in this way, the Environmental Assessment Supplement was predicated upon a false assumption – that longer pipelines were economically infeasible.

But even the penny per barrel calculation still overstates the apportioned cost, *because at the end of the thirty years of operation, Marathon still has the 348,000 left in the pipeline line,* but now that filler petroleum could be sold at 2050 market prices. If the price of petroleum rises from its current $45 per barrel at the rate of inflation, the pipeline company will have recovered every last dollar of expenditure with interest, and potentially it could make a handsome profit on the filler.

This use of a refinery's internal accounting to cap the cost of pipeline construction is one of the grave dangers of granting the applicant pipeline company control over the drafting of the environmental impact statement – here the environmental assessment supplement. That danger is compounded when the carrier-applicant has a conflicting fiduciary duty to serve a petroleum refiner which is the dominant refiner in the region. It leads to the inference that NDPC joint venture Marathon has a business motive to drive down its own petroleum delivery costs. We wouldn't let a refinery control the design of rail cars on the theory that the refinery doesn't want the cost of rail shipment to rise.

Marathon is not a common carrier; it is the Midwest's largest and dominant refinery. It has an interest in controlling that market which is significantly different from that of a common carrier. If it is an owner of Sandpiper, reducing the delivery price of petroleum gives it a competitive advantage over other refineries. Yet, the State of Minnesota is being asked to grant

a Marathon owned joint venture eminent domain powers, and we are allowing a Marathon owned joint venture to decide which routes should be considered in the Environmental Assessment Supplement. This potential distortion of the public interest is one of the reasons is why it is unacceptable to grant the power of eminent domain to a petroleum refinery operation-- the Midwest's largest petroleum refinery operation-- and then allow that refinery to select comparison routes based upon the length of the pipeline. Doing so, and then allowing the refiner to have a commanding position in the design of the environmental impact statement substitute is fraught with danger and significant public policy and constitutional implications. Yet that is exactly what the ALJ's proposed findings accomplishes.

B. Applicant's Elimination of Routes Based on the Erroneous Premise that Even Small Price or Cost Increases is Contrary to the Evidence.

In the last section, we demonstrated that NDPC/Marathon's selection of routes for study in the Environmental Assessment Supplement was improperly limited by incorrect calculation of the cost associated with a longer route. But the ALJ's findings limits route selection by an improper assumption that Sandpiper could not afford even a small price increase to pay for a longer more environmentally sound route. NDPC repeatedly argued that the law of supply and demand would drive shippers away because price increases necessarily reduce demand, but cross examination showed that this contention is based on junk economics and a misunderstanding of how supply and demand actually works.

Contrary to Applicants' assertion, the general law of supply and demand taken from microeconomics-201 simply does not support the application of that principle to the circumstances here. The basic principle of supply and demand to which applicant's counsel referred in her cross examination of DOC's Heinen assumes complete free competition, a dynamic unrestrained supply and demand. But current market conditions are nothing like that

assumption. In fact, there has been a huge explosion of demand for rail service, even though the price of rail is about $5 per barrel higher than the current market price for pipeline service.

> The market is telling us that there is a growing demand for transmission services at prices far above the price proposed by NDPC for its line. Thus the actual demand curve for petroleum transmission is clearing right now at $5 per barrel greater than the pipeline transmission cost.

If NDPC's new pipeline were to increase the proposed transmission price by $2 or more to accommodate environmentally preferable locations, shippers would still save money in comparison to rail. The claim that pipeline service demand in this market is ultra-sensitive to increase in price per barrel is preposterous[40].

We don't criticize Marathon the shipper for trying to convince the State of Minnesota to keep Marathon's delivery prices down, because that is what a corporation driven by profits would necessarily attempt to do, but it is unacceptable to for the State of Minnesota to allow the author of an Environmental Assessment Supplement to put delivery price above everything else, including the environment. As stated above, building the lowest possible cost pipeline, under ownership by Marathon, will strengthen Marathon's competitive lock on the Midwest market, by establishing it as part-owner of the cheapest possible transmission alternative. But the evidence overwhelmingly shows that there is no economic justification for doing that.

Marathon's position that the partnership cannot withstand even a small increase in cost to accommodate environmental objectives infects the integrity of the environmental review. That environmental review was conducted on behalf of a partnership which had wrongly determined

[40] We supported FOH's motion to review the trade-secret protected TSA's, but as we said at the time, our view is that the TSA's are largely irrelevant to the issues that are faced here. The TSA's are private agreements, arrangements among potential customers who are looking for an opportunity to take advantage of what the applicant acknowledges is likely the lowest price alternative in the marketplace at a time when the market is telling us that the demand for even the highest price alternative transportation is exploding beyond all bounds.

that lengthening the pipeline route was unacceptable, because it increased the price per barrel beyond what Marathon was willing to support. This is why both federal and state courts look with great suspicion on an environmental impact statement which is authored by the project proposer.

VII. THE ADMINISTRATIVE LAW JUDGE'S PROPOSED FINDINGS IMPROPERLY SHIFTS THE BURDEN TO INTERVENORS TO IDENTIFY AND CONDUCT AN ENVIRONMENTAL IMPACT REVIEW, AND THEN TEST THE MARKET FOR POTENTIAL SHIPPERS FOR ALTERNATIVE ROUTES.

The evidence shows that there are more reasonable and prudent alternatives. All agency witnesses expressed a preference for one or more of the other alternatives. Even constrained by an incomplete environmental review, MPCA and DNR were able to show that the other alternative routes reduced environmental impacts. All of the alternative routes meet the requirement that they deliver petroleum to NDPC's customers in Patoka, Chicago and other Midwestern refineries. Regrettably, NDPC has placed the economic review in a straightjacket by eliminating all alternative routes because they are a bit longer than the preferred route. Our proposed findings of fact are due with our next submission, but they will step by step show NDPC has not met its burden to prove that all CON criteria have been met.

At this point, we want to emphasize by way of conclusion, that attempting to analyze these factors is premature, because the CON factors must be analyzed with a complete Chapter 116D compliant environmental review. Either that review must be conducted under the mantle of the EQB's alternative review, which requires a finding that NDPC's EAS meets the minimum specifications of an environmental impact statement substitute, or that review must be conducted as FOH advocates, in a separate environmental review. The alternative review rule is quite clear on this point, the environmental review --- in this case the EAS – must meet the requirements described in our proposed finding number 115 as follows:

115. Among the requirements for the alternative review established by the EQB were the following:

A. The process identifies the potential environmental impacts of each proposed project and alternatives; the term "impact" is a synonym for effects.

B. The aspects of the process that are intended to substitute for an EIS process address substantially the same issues as an EIS and uses procedures similar to those used in preparing an EIS but in a more timely or more efficient manner;

C. Alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process;

D. Measures to mitigate the potential environmental impacts are identified and discussed;

E. A description of the proposed project and analysis of potential impacts, alternatives (in those aspects of the process intended to substitute for an EIS), and mitigating measures are provided to other affected or interested governmental units and the general public.

We mention in passing that, contrary to the ALJ's suggestion, requiring a quality compliant environmental review will not prejudice the applicant. It has withdrawn its USACE Section 404 application, and once that application is filed, the USACE will launch a NEPA review. Until a section 404 permit is granted, the project cannot progress in any event. NDPC has just now filed its Line-3 application, and an environmental review is clearly required in connection with that proposal. NDPC justifies its failure to include a Line – 3 analysis in its EAS, by suggesting that Line-3 was being developed by a different team within the company, but that suggestion is preposterous. It is impossible to imagine that a major pipeline company could be unaware that a different team is developing a proposal to run a pipeline in the very same location as being developed within the same company. Requiring an adequate environmental review will allow the USACE, DOC, MPCA and DNR to complete this process in the way that the law intends: by marshalling agency resources to supervise an independent options review that is driven by the public interest rather than Marathon's business interests.

It is the applicant's burden to demonstrate that there is not a more prudent and reasonable way than the proposed project to meet reasonable objectives, in this case, to deliver petroleum to Midwestern Refineries. This is The Commission's own description of the Certificate of Need process contains the following explanation of how a Certificate of Need process works:

> ***For larger energy projects, an applicant must receive a Certificate of Need (CON) in conjunction with a routing or siting permit. …. Through the CON proceedings the applicant must demonstrate using a number of factors prescribed in the rules that the proposed facility is in the best interest of the state's citizens. <u>The applicant must</u> <u>also demonstrate</u> there is not a more prudent and reasonable way than the proposed project to provide the stated goals.***

This is an accurate statement of the law in Minnesota regarding projects that have the potential for material impact upon the environment First, it is quite clear that under the CON Statute, the applicant, not the public, nor interveners bears the burden of proof to demonstrate that the criteria for a certificate of need have been met. See Minn. Stat. 216B.243, subd. 2. Second, a decision on any permit or other governmental authority cannot be made, unless it is first shown that a valid environmental impact statement has been submitted, subjected to scrutiny, and accepted by the responsible governmental authority. That showing has not been made, indeed, there is no substantial evidence in the record that an adequate environmental impact statement or its EQB authorized substitute, has been submitted.

This principle derives from our Environmental Policy Act—which is modelled after the National Environmental Policy Act (NEPA). MEPA is designed (a) to prevent environmental damage[41] and to ensure that agency decisionmakers take environmental factors into account[42]. In the Minnesota Environmental Rights Act, Section 116B.01 the legislature has declared:

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[41] The Senate Report explains that NEPA is a declaration "that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of

> The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction. Minn. Stat. Ann. § 116B.01 (West).

Although Minnesota's Environmental Policy Act (MEPA) is modelled after the National policy act NEPA. 25 Minn. Prac., Real Estate Law § 9:3 (2013 ed.), our act differs in that it impose substantive protections for the environment by barring governmental approvals of projects that are not shown to be the "least impact solution." Both environmental Policy Acts are "action forcing" statutes[43]—in other words, they are designed to govern and drive the ultimate decision to grant or deny requested authority. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). But action cannot be forced, when the environmental review is inadequate, as it is here, and that requirement, of an adequate environmental review supercedes other specific laws. As Minnesota's Supreme Court has stated:

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mankind: That will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth…..The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings. S Rep No 296, 91st Cong p 102, 115 Cong. Rec. 40416 (1969).

[42] "By focusing the agency's attention on the environmental consequences of a proposed project, [the environmental policy act] ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[43] The term "action forcing" was introduced during the Senate's consideration of NEPA, see Kleppe v. Sierra Club, 427 U.S. 390, 409, n. 18, 96 S.Ct. 2718, 2730 n. 18, 49 L.Ed.2d 576 (1976), and refers to the notion that preparation of an EIS ensures that the environmental goals set out in NEPA are "infused into the ongoing programs and actions of the Federal Government," 115 Cong.Rec. 40416 (1969) (remarks of Sen. Jackson).

> Throughout the statutes are policy statements recognizing that often there are conflicts between preserving the environment and promoting the economy. Minn.St. 116D.03, subd. 2(c), states that all departments and agencies shall"(i)dentify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical considerations." In that vein, Minn.St. 116D.04, subd. 6, prohibits the issuance of a permit for natural resources management and development if it is likely to have an adverse impact on the environment "so long as there is a feasible and prudent alternative." The section concludes by stating, "Economic considerations alone shall not justify such conduct." This policy is echoed elsewhere in the statutes, Minn.St. 116B.04 and 116B.09, subd. 2. Reserve Min. Co. v. Herbst, 256 N.W.2d 808, 827-28 (Minn. 1977)

Under both state and federal laws, if there is potential for significant environmental impacts, the Responsible Governmental Unit (RGU) prepares an environmental review document that analyzes the impacts of the proposed project and describe alternatives that may reduce, mitigate or avoid those impacts. There is no precedent in the entire sweep of environmental law, that an agency or party that believes that a project imposes an unacceptable or avoidable impact, must itself submit an application for project approval for the alternative project. Nothing in Minnesota's Environmental Policy Act nor in the Minnesota Environmental Rights Act justifies the conclusion that those who contend that there exists a feasible lesser impact solution must carry that heavy burden—and it is a complete misreading of the routing rule to suggest that it does so. On the contrary, MERA and MEPA taken together establish that the proponent of a project has a heavy burden to reject a lesser impact solution. Once project opponents have demonstrated that a project inflicts major environmental damage, the burden shifts to the project proponent to demonstrate that there exists no feasible lesser impact alternative. State by Archabal v. Cnty. of Hennepin, 495 N.W.2d 416, 423 (Minn. 1993) (We believe that these cases, taken together, establish an extremely high standard for defendants to

meet in establishing an affirmative defense). See People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978). (Destruction of seven or eight homes was considered insufficient to overcome the law's preference against proliferation of high voltage transmission lines and the destruction of natural resources.); State, by Powderly v. Erickson, 285 N.W.2d 84, 89 (Minn. 1979).

When an Applicant submits a faulty environmental impact statement, the remedy is to demand a revised environmental impact statement. It is not permissible to force other parties to present evidence to fix the defects in the environmental impact statement (or its alternative substitute). If a developer proposes to put an industrial plant with effluent that has mercury content next to Lake Superior, but the developer fails to explore the impact of the mercury on Lake Superior, the developer can't defend the permit by saying: "nobody proved that there is a mercury damage to Lake Superior, so we win." The Dead Lake MPCA permitting case cited above, is an excellent example of that principle. An invalid environmental review stops permitting in its tracks, because nobody has the burden of proof on any environmental issue, until a complete examination of the environmental impacts has been submitted and accepted.

VIII. CONCLUSION

A common theme runs throughout the ALJ's findings and some of the DOC submissions as well, to the effect that since NDPC has defined its proposed project as carrying petroleum from Clearbrook to Superior, why then all other proposed routes are suspect or indeed unworthy of serious consideration. A route, the ALJ opines, is defined by a pipeline that runs between two endpoints. It follows, the ALJ further opines, that this case is vastly simpler than the PUC has made it out to be. The question is, he opines, whether there is shipper support for carrying

the petroleum from Clearbrook to Superior, and if there is, which route that runs from Clearbrook to Superior is better.

This approach, which to some extent has polluted the analysis of the Department of Commerce is patently wrong. A route may be defined a pipeline between two endpoints, but that does not imply that an alternative route runs through the same endpoints. In fact, it is more logical to conclude that an alternative method of carrying petroleum from Bakken to the Midwestern Petroleum Fields would be a route with alternative endpoints.

This problem --- the definition of project need --- infects all cases impacting the environment. The project proponent, having decided exactly where it wants to locate the project seeks to define the project as narrowly as possible, so that the responsible governmental authority cannot find a feasible alternative. By defining away all feasible alternatives, the project proponent hopes to hogtie the environmental alternatives review in a way that eliminates all possibility that a different choice will be required. Unless the responsible governmental unit has the discretion to determine whether the project definition unduly restricts the options, section 116D.04 would be meaningless. The DOC-EERA obviously doesn't believe that exploration of alternatives must be limited to routes with Clearbrook and Superior endpoints. At page 28, its examination of the rail alternative includes a discussion of the possibility of shipping petroleum by rail from Bakken to Chicago. See also Table 2-3. A map of Class I railroads is inserted at page 27 of the CEA so that the Commission can see that the DOC considered available methods of crossing the state of Minnesota by Rail. If a reasonable person, unrestricted by NDPC-Marathon's private economic motivations were seeking to identify a reasonable method of transporting Bakken petroleum to Midwestern refineries, the inquiry would not be limited to transit through Superior and Clearbrook. Page 31 of the CEA likewise shows that the most

direct trucking route to Chicago runs through Glenwood and Winona, and shows that running truck routes up to Clearbrook and over to Superior would make absolutely no sense.

The CEA then examines pipeline alternatives at page 37, and examines the Bakken North Pipeline, the High Prairie Pipeline, and Koch's Dakota Express. "In order to connect with the Enbridge pipeline system to move oil eastward," the CEA explains, "HPP would need an interconnection agreement with Enbridge Energy," but the parties were not able to arrive at such an agreement. Thus, that option is eliminated, not for public purpose and necessity reasons, but rather, because the private parties couldn't agree on the economic arrangements necessary to facilitate the transfer of petroleum. But NDPC is asking for access to the Governments power of eminent domain. It is acting in a quasi-governmental capacity, as we have said. These pipeline companies, all of them, are crossing the country carrying petroleum from Bakken to the East Coast, and all of them are using the public's power of eminent domain. The suggestion that they can eliminate from consideration the best possible, least impactful, route simply by barring each other from sharing route rights of way, or refusing to grant access to the public's right of way is fundamentally inconsistent with their obligations as common carriers and with their request to use the public's power of eminent domain.

The PUC should act decisively to wrest control of the public's power of eminent domain away from serving the private economic interests of common carriers. To this end, it should:

- Enforce the letter and spirit of the Alternative Environmental Review and make it clear that pipeline companies who seek the benefits of the alternative review must create an environmental assessment supplement that considers the concerns of Minnesota agencies and builds those concerns into the EAS before the application is filed.

- Adjudicate the environmental issues for a Certificate of Need only after a compliant EAS, meeting the letter of the alternative review rule, and reject the ALJ's recommendation that citizens must carry the burden of proof on environmental issues, when the applicant has failed to submit a compliant EAS.
- Prohibit an applicant from stalling USACE review under NEPA by refusing to submit a compliant application to the USACE.
- Reject the EAS submitted by NDPC as non-compliant and deny the Certificate of Need until a compliant environmental review is supplied, considering genuine alternatives including route alternatives that cross Minnesota south of I-94.

Dated: April 28, 2015

Respectfully Submitted,

RINKE NOONAN

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ATTORNEYS FOR CARLTON COUNTY LAND STEWARDS

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project	MPUC Docket No. PL-6668/CN-13-473 OAH Docket No. 8-2500-31260

APPENDIX

CARLTON COUNTY LAND STEWARDS

EXCEPTIONS TO FINDINGS AND CONCLUSIONS

INTRODUCTION

In this appendix, Intervenor, Carlton County Land Stewards (CCLS) excepts from the Administrative Law Judge's proposed findings and conclusions in that they fail to include the following findings and conclusions duly requested in our post-trial submissions. We thus supplement the summary of our exceptions by identifying the previously proposed findings that should supplant the ALJ's recommended findings related to the same subject matter. The numbering follows the paragraph numbers for those paragraphs in our proposed findings. Our exceptions seek to have these findings substituted for inconsistent findings and conclusions recommended by the Administrative Law Judge. *In the vast majority of these identified findings, although there was competent testimony from highly qualified witnesses, the Administrative Law Judge's report neither evidences that the proposed findings were considered, or that the testimony was considered, nor does he provide any evidence for rejecting the proposed findings.*

CCLS Objects to the Failure to Make the Following Findings

14. The applicant, North Dakota Pipeline Company LLC, is a limited liability company duly organized under the laws of the State of Delaware and qualified to do business in Minnesota. North Dakota Pipeline Company. NDPC is a joint venture between Enbridge Energy Partners, L.P. ("EEP) and Marathon Petroleum Corporation ("MPC"). EEP operates the Enbridge Mainline System, the U.S. portion of an operationally integrated pipeline system spanning 3,300 miles across North America to connect producers and shippers of crude oil and natural gas liquids in western Canada with markets in the United States and eastern Canada. MPC is the fourth largest crude oil refiner in the U.S., operating seven 85 refineries in six states (Illinois, Michigan, Ohio, Kentucky, Louisiana, and Texas) 86 with a total crude oil refining capacity of approximately 1.7 million barrels per day 87 ("bpd"). MPC is the largest refiner and marketer in the Midwest.

16. NDPC filed identical Minnesota Environmental Information Reports (herein referred to as "EIR", the document is also known as an Environmental Assessment Supplement) with Certificate of Need and Routing applications. The Environmental Information Reports state that they were prepared in accordance with the MPUC's Pipeline Routing rules (Chapter 7853) and supplement information provided in both the PRP and CN applications as follows: Location of Preferred Route and Description of Environment (PRP, Section 7852.2600); Environmental

Impact of Preferred Route (PRP, Section 7852.2700); Right-of-Way Protection and Restoration Measures (PRP, Section 7852.2800); Evidence of Consideration of Alternative Routes (PRP, Section 7852.3100); Information Required (CN, Section 7853.0600); Alternatives (CN, Section 7853.0540); Location (CN, Section 7853.0610); Wastewater, Air Emissions, and Noise Sources (CN, Section 7853.0620); Pollution Control and Safeguards Equipment (CN, Section 7853.0630); and Induced Developments (CN, Section 7853.0640).

17. The EIR as prepared by NDPC represents an inventory of the types of geographic features, designed to be a "straightforward comparison" of the resources, by which NDPC meant simply using the quantity of numbers or data to compare alternative systems. (Ploetz pg. 37, lines 20-24)[1]. NDPC did not weigh in any way the different resources that were being counted, because it considered that a difficult, if not impossible task to achieve. Ploetz Tr. 41, lines 17-22); (pg. 108, lines 4-7). Although the EAS is actually submitted in both dockets, the tables reported density of resources only[2]. There was no attempt to quantify or compare potential routes based upon how they would be impacted by a spill[3], nor was there any consideration of the potential increased risk of spill connected to the Line 3 replacement[4].

18. During the month of February, NDPC filed an application with the United States Army Corps of Engineers for a section 404 Clean Water Act Permit for the project. A completed application would have triggered an environmental review under the National Environmental Policy Act (NEPA). A Section 404 permit is a prerequisite for construction of the pipeline. However the application was ruled by the USACE to be incomplete and NDPC has not yet filed a completed application. The failure to complete the section 404 application terminated the federal environmental review that would otherwise have been commenced.

43. On July 17, 2014, DOC-EERA filed comments and recommendations summarizing the alternative route designation process and identifying 54 route alternatives and eight "system alternatives" it considered (SA-01 through SA-08).[5] In addition, DOC-EERA suggested a potential modification to SA-03 ("SA-03, as modified") to create a connection at Clearbrook. EERA recommended that the Commission consider 53 route alternatives. DOC-EERA further recommended that the Commission not consider the eight system alternatives because "they do not meet the purpose of the project as identified in the permit application and are, therefore, not alternative routes for accomplishing the purpose of the project."[6]

On August 6, 2014, the Minnesota Pollution Control Agency submitted comments to the PUC urging that the Commission expand the alternatives Given the high potential of additional

[1] (page.37, lines 20-24)

[2] (Pg.123-lines 19-25, pg.124)

[3] pg.62, 15-19

[4] Tr. 106, lines 17-23.

[5] MPUC Docket No. PL-6668/PPL-13-474, Comments and Recommendations of DOC-EERA Staff (July 17, 2014) (E-Dockets Document No. 20147-101573-03).

[6] Ex. 80, at 19 (EERA Report); *see also* Evid. Hr'g Tr. Vol. 7, at 245:17-18 (Pile). ("None of the system alternatives were recommended to go into routing.").

pipelines and replacement or upgrading of existing pipelines in the near future, and within the same corridors, it is critical that the current effort consider multiple alternatives, including both route and system alternatives**.** MPCA stated that limiting the alternatives to route options alone at this stage would unnecessarily narrow the scope of project options to reduce environmental and public health risks.

44. The MPCA's August 6 2014 comments raised concerns about unresolved issues including: "Future access to potential release sites; construction and operation of the break-out tanks; cumulative impacts from construction of additional pipelines and infrastructure in the area; emergency responsiveness and spill prevention; inspections and monitoring conducted during construction; proposed water body crossing methods and time frames; wastewater issues; and water quality, watershed and wetland issues."

58. The PUC's order for review of system alternatives stated that "to ensure that an environmental review is available to the public and the parties, the Commission requests that the EERA prepare an environmental review document that examines and ***evaluates the potential impacts of the proposed project with those of the six alternative system configurations, and other alternative methods to satisfy need."***[7] Minn Rules 7852.0200 Subp 3 declares that identification of environmental impacts is critical to pipeline siting[8].

70. On December 18, 2014, DOC-EERA filed the Comparison of Environmental Effects of Reasonable Alternatives (the "EERA Report"), along with related maps and appendices. The EERA Report described the environmental features present in a two-mile wide Study Area for SA-03 through SA-08 and the Preferred Route.[9] The EERA report did not describe or compare the environmental impacts of the system alternatives on the environment and thus did not fulfill the mandate of the Commission

77. On January 23, 2015, the Minnesota Department of Natural Resources submitted its official position regarding the Certificate of Need. The DNR determined that "Comparison of Environmental Effects of Reasonable Alternatives" was inadequate to identify which system alternative would have the least environmental impact, stating: "In general, due to the limited scope requested for this document, the broad geographic area, and challenges related to the type of data and analysis used, DNR was not able to use this document alone to identify the least environmentally impacting System Alternatives."

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[7] Id., p 12

[8] ….pipeline location and restoration of the affected area after construction is important to citizens and their welfare and that the presence or location of a pipeline may have a significant impact on humans and the environment. To properly assess and determine the location of a pipeline, it is necessary to understand the impact that a proposed pipeline project will have on the environment. Minn Rules 7852.0200 Subp 3.

[9] Ex. 80 (EERA Report).

78. When only comparing applicant's proposed route and SA-03, DNR found:

> SA-03 appears to impact less natural resources than SA-Applicant. SA-Applicant features that would incur impacts greater than those identified for SA-03 are: forest and wetland acreage, river and stream segment crossings, and crossings of public lands. Cultivated lands and occurrences of already-impaired waters are greater along SA-03, indicating the developed state of lands along this route.

79. The DNR found that routes located south of I-94 appeared feasible from a natural resources perspective and were environmentally superior to the northerly routes:

> Within Minnesota, more southern routes (south of I-94 corridor) have less concentration of natural resources (regardless of length) within the 2-mile corridor. Therefore, there is a greater opportunity for avoidance of resources with the more southern System Alternatives…From a natural resource perspective, the more southern routes appear to be feasible and prudent System Alternatives that merit consideration.

80. The Minnesota Pollution Control Agency submitted its official position regarding the Certificate of Need on January 23, 2015[10]. The MPCA wrote:

> SA-Applicant presents significantly greater risks of potential environmental impacts and encroaches on higher quality natural resources than SA- 03 and several other system alternatives. Minn. Rule 7853.0130.8(3). The effects of SA- Applicant on the natural environment support a determination in favor of other alternatives. Minn. Rule 7853.0130.C(2) and C(3).

81. The MPCA's position continued:

> During these proceedings, the MPCA has commented extensively on the environmental concerns regarding the route proposed by Applicant in comparison to alternative routes and system alternatives. MPCA's prior comments can be found in Document Nos. 20146- 100780-01, 20148-102458-02 and 20148-102458-04, each incorporated by reference. These prior comments have addressed such specific items as access to potential release sites in surface waters, potential to impact ground water, wild rice, the state's highest- quality surface water systems, wildlife habitat, low income populations, watersheds currently being assessed for restoration and protection strategies, fisheries, economies, and numerous other parameters.

[10] MPCA Position Statement (Jan. 23, 2015) E-Dockets Document No. 20151-106572-01.

> In these comments, the MPCA concluded that with respect to protection of the highest- quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the system alternatives, including SA-03. (Emphasis added)

STATE AGENCY POSITIONS

95. The Minnesota Department of Natural Resources has broad jurisdiction over Minnesota's public waters (including rivers, streams, lakes and wetlands) Minnesota Chapter 103G, game and fish, Chapter 97-102, and broad powers over conservation, state lands, forestry and lands and minerals. The commissioner of the DNR has charge and control of all…waters of the state and of the use, sale, leasing, or other disposition thereof…,Minn. Stat. § 84.027 subdiv. 2. The Department of Natural Resources issues pipeline permits for crossings over public waters and thus has important regulatory authority over pipelines that cross public waters and public lands. All utility crossings (transmission and distribution) of wild, scenic or recreational rivers, or of state lands within their land use districts which are under the control of the commissioner, require a permit from the commissioner pursuant to Minnesota Statutes, section 84.415 or 103G.245 under Minn. Rules 6105.0170. The position of the Department of Natural Resources on matters within its jurisdiction are thus entitled to great weight.

96. Minnesota Rule 6135.1600, administered by the Department of Natural Resources, explicitly states that utility crossing permits are subordinated to the Minnesota Environmental Policy Act as follows:

> 97. There are other Minnesota and Federal laws and rules and regulations concerned with utility crossings and the environment. In case of conflict with other environmental regulations, the parts included herein will be subordinated to any law, rule, or regulation which is stricter in its protection of the environment. Other related environmental laws and rules and regulations include but are not limited to those associated with: A. federal and state wild, scenic, and recreational rivers; B. the Minnesota Environmental Protection Act; and C. natural and scientific areas.

98. Minnesota Rule Section, 6135.1100 also under Minnesota DNR jurisdiction, explicitly incorporates the avoidance and least impact principles of MEPA as follows:

> Subp. 4. Crossing public waters. With regard to crossing of public waters: A. avoid streams, but if that is not feasible and prudent, cross at the narrowest places wherever feasible and prudent, or at existing crossings of roads, bridges, or utilities; and B. avoid lakes, but where there is no feasible and prudent alternative route, minimize the extent of encroachment by crossing under the water.

99. The DNR found that the environmental reviews conducted by Applicant and Department of Commerce were inadequate to complete a proper alternatives review. The DNR found that

100. "Within Minnesota, more southern routes (south of I-94 corridor) have less concentration of natural resources (regardless of length) within the 2-mile corridor. Therefore, there is a greater opportunity for avoidance of resources with the more southern System Alternatives. The DNR found that

> "When only comparing the SA-03 route and the applicant's route, DNR found, SA-03 appears to impact less natural resources than SA-Applicant. SA-Applicant features that would incur impacts greater than those identified for SA-03 are: forest and wetland acreage, river and stream segment crossings, and crossings of public lands. Cultivated lands and occurrences of already-impaired waters are greater along SA-03, indicating the developed state of lands along this route."

101. The Minnesota Pollution Control Agency was established

> "To meet the variety and complexity of problems relating to water, air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state…" Minn. Stat. § 116.01. The Commission has extensive experience in the preparation of environmental reviews under its statutory authority. Minn. Stat. § 116.02. It has broad and extensive jurisdiction in the protection of Minnesota's waters, and has regulatory authority over pollution in cooperation with the federal Environmental Protection Agency and the United States Army Corps of Engineers under the Clean Water Act.

102. The MPCA found,

> "SA-Applicant presents significantly greater risks of potential environmental impacts and encroaches on higher quality natural resources than SA- 03 and several other system alternatives. Minn. Rule 7853.0130.8(3). The effects of SA-Applicant on the natural environment support a determination in favor of other alternatives. Minn. Rule 7853.0130.C(2) and C(3)."….."the MPCA concluded that with respect to protection of the highest- quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the system alternatives, including SA-03."

103. MPCA's permitting and environmental review jurisdiction entitle its position statement on matters within its jurisdiction to great weight.

104. The Mille Lacs Band's position statement requests that the Public Utilities Commission deny the North Dakota Pipeline Company's (NDPC) application for a certificate of need for the Sandpiper pipeline. It writes:

> "The pipeline route proposed by NDPC would have greater negative impacts to wild rice, water and other natural resources utilized by the Band than several of the system alternatives proposed by the Minnesota Pollution Control Agency (MPCA) and citizen groups. The proposed route for the Sandpiper pipeline

project borders our Minisinaakwaang (East Lake) Community and threatens the Big Sandy Lake and Rice Lake watersheds, in which the Band's members and their ancestors have gathered wild rice and harvested other natural resources for generations. Neither the Comparative Environmental Analysis (Doc. # 201412-105544, Dec. 18, 2014) prepared for the proposed route and the six system alternatives identified by the MPCA nor the revised Environmental Information Report submitted by the North Dakota Pipeline Company (Doc. # 20141-96101-02) discuss the impacts that pipeline construction and operation could have on wild rice waters or other natural resources of critical importance to the Band.[11]

105. The Fond du Lac Band of Lake Superior Chippewa position statement writes:

> "Changes in hydrology affect wetland type, and indirectly affect wetland functions, including wildlife habitat, fisheries habitat, groundwater recharge, surface water retention, nutrient transformation, sediment retention, conservation of biodiversity, etc. The Alberta Clipper and Southern Lights projects have already impacted the Fond du Lac wetlands along the Enbridge pipeline corridor. A Geographical Information Systems (GIS) analysis reveals up to forty (40) newly developed intermittent streams since the pipelines were installed. The National Wetland Inventory (NWI) documents a wetland type change from one side of the pipeline corridor to the other, clearly showing hydrology impacts from pipeline installations."

106. Tribal sovereigns have a right to express their environmental concerns insofar as a project impacts tribal lands or treaty rights in the NEPA process. NDPC has not yet commenced the USACE Section 404 permitting process.

Minnesota Environmental Policy Act

110. Minn. St. 116D.03, subd. 2(c), states that all departments and agencies shall "(i)dentify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical considerations."

111. Minn. St. 116D.04, subd. 6, prohibits the issuance of a permit for natural resources management and development if it is likely to have an adverse impact on the environment "so long as there is a feasible and prudent alternative." "Economic considerations alone shall not justify such conduct." This policy is echoed elsewhere in the statutes[12].

[11] Letter of January 20, 2014. Doc No. 20151-106385-01.

[12] Minn. St. 116B.04 and 116B.09, subd. 2. Reserve Min. Co. v. Herbst, 256 N.W.2d 808, 827-28 (Minn. 1977).

112. Once project opponents have demonstrated that a project inflicts major environmental damage, the burden shifts to the project proponent to demonstrate that there exists no feasible lesser impact alternative[13].

113. Minnesota's Environmental Policy Act provides that information on environmental impacts must be collected and publicly provided so that decision makers and the public will be fully informed on those impacts, before governmental action at any level and before final public comment is provided. Section 116D.04 subdivision 2a provides that

> Where 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. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action.

114. The Minnesota Environmental Quality Board authorized alternative routing regulations under authority granted to it under Environmental Quality Board Rules 4410.3600[14].

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[13] State by Archabal v. Cnty. of Hennepin, 495 N.W.2d 416, 423 (Minn. 1993) See People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978); State, by Powderly v. Erickson, 285 N.W.2d 84, 89 (Minn. 1979).

[14] Subpart 1. Implementation. Governmental units may request EQB approval of an alternative form of environmental review for categories of projects which undergo environmental review under other governmental processes. The governmental processes must address substantially the same issues as the EAW and EIS process and use procedures similar in effect to those of the EAW and EIS process. The EQB shall approve the governmental process as an alternative form of environmental review if the governmental unit demonstrates the process meets the following conditions: A. the process identifies the potential environmental impacts of each proposed project; B. the aspects of the process that are intended to substitute for an EIS process address substantially the same issues as an EIS and uses procedures similar to those used in preparing an EIS but in a more timely or more efficient manner; C. alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process; D. measures to mitigate the potential environmental impacts are identified and discussed; E. a description of the proposed project and analysis of

Acting pursuant to that Rule, the Environmental Quality Board sought to provide the same level of early environmental review required in MEPA's Section 116D.04 subdivision 2a. To this end, applicants were required to provide an environmental impact statement quality document which analyzed a proposal's significant adverse environmental impacts and appropriate alternatives.

115. Among the requirements for the alternative review established by the EQB were the following:

A. The process identifies the potential environmental impacts of each proposed project and alternatives; the term "impact" is a synonym for effects.

B. The aspects of the process that are intended to substitute for an EIS process address substantially the same issues as an EIS and uses procedures similar to those used in preparing an EIS but in a more timely or more efficient manner;

C. Alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process;

D. Measures to mitigate the potential environmental impacts are identified and discussed;

E. A description of the proposed project and analysis of potential impacts, alternatives (in those aspects of the process intended to substitute for an EIS), and mitigating measures are provided to other affected or interested governmental units and the general public.

116. The intent of MEPA and the alternative review that implements it is that at the time of application, there will be a fully MEPA compliant environmental review document submitted by the applicant. All other procedures in the Certificate of Need and Routing Rule depend upon submission of that environmentally impact statement quality document, in the form of an Environmental Assessment Supplement or Environmental Information Review.

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potential impacts, alternatives (in those aspects of the process intended to substitute for an EIS), and mitigating measures are provided to other affected or interested governmental units and the general public; F. the governmental unit shall provide notice of the availability of environmental documents to the general public in at least the area affected by the project (a copy of environmental documents on projects reviewed under an alternative review procedure shall be submitted to the EQB; the EQB shall be responsible for publishing notice of the availability of the documents in the EQB Monitor) G. other governmental units and the public are provided with a reasonable opportunity to request environmental review and to review and comment on the information concerning the project (the process must provide for RGU response to timely substantive comments relating to issues discussed in environmental documents relating to the project); and H. the process must routinely develop the information required in items A to E and provide the notification and review opportunities in items F and G for each project that would be subject to environmental review.

B. Environmental Review of Applicant's Proposed Project

131. The environmental review for Applicant's Proposed Project does not satisfy the Chapter 116D and the requirements of Minnesota Rules parts 7852.2100-.3100 and the requirements for alternative environmental review in Minnesota Rules part 4410.3600.

132. Under the alternative environmental review authorized in the routing rule, the primary environmental review document is prepared by the applicant and submitted with the certificate of need and routing applications. The Environmental Assessment Supplement presented for public review, merely counted features quantitatively and made no qualitative judgments regarding environmental impacts[15]. Neither the environmental review provided in this docket, nor the information yet supplied by the parties, allows a systematic, fair comparison of system alternatives from an environmental effects standpoint. As a result, the process thus far does not give policy-makers a complete or fair assessment of alternatives[16].

133. The MPCA, DNR and other parties provided persuasive evidence that there were route or system alternatives (that is route alternatives with different endpoints than those proposed by applicant) that should have been studied in the environmental assessment supplement submitted by the applicant.[17]

134. In general, the alternative environmental review documents failed to fulfill the requirements of the alternative review[18], in its:

A. failure to identify the potential environmental impacts of the proposed project;

B. failure to address substantially the same issues as an Environmental Impact Statement

C. failure to use procedures similar to those used in preparing an EIS but in a more timely or more efficient manner;

D. failure to consider alternatives to the proposed project in light of their potential environmental impacts

E. Failure to adequately to analyze potential mitigation measures where environmental impacts are identified

[15] Ploetz Tr. pg. 22, 37. 41.

[16] Dr. Chapman Surrebuttal, paragraph 1.; (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3

[17] (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3; (WS_MPCA-2) page 5

[18] Minn. Rules 4400.3600

F. Both Minnesota Environmental Policy Act – MEPA-- (and its implementing regulations) and the National Environmental Policy Act[19] --NEPA—(and its implementing regulations) call for close coordination between the federal and state environmental reviews. When an applicant proposes to use the alternative environmental review described by the routing rule, it is thus imperative that the applicant trigger that cooperation before the application and environmental assessment supplement are submitted.

135. The environmental review documents were inadequate to satisfy the needs of both the Minnesota Pollution Control Agency and the Department of Natural Resources for use in connection with its permitting process.

136. The environmental review's treatment of impacts to undisturbed lands versus previously disturbed lands is inadequate[20] and fails adequately to

i. Include impacts of fragmentation to forests due to the construction of corridors

ii. Include sites containing area sensitive avian species

iii. Describe the impact of invasive species introduced

iv. Acknowledge construction through undisturbed areas results in habitat loss, conversion, degradation, and fragmentation

v. Recognize ag land has impacted soils already

vi. Recognize that BMPs are not practical for undisturbed areas

vii. Consider the impact to natural ecoregions versus ag land or developed regions

viii. Recognize the distinction between regular ag land and agricultural land that is devoted to sustainable or organic farming.

137. The environmental review fails to consider the value of water resources being crossed and provide alternative routes or systems to avoid these areas.[21]

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[19] • The two processes, NEPA and MEPA are both designed to work together. See 40 CFR § 1503.1 (After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall: (2) Request the comments of: (i) Appropriate State and local agencies); 40 CFR 1501.7 (a) As part of the scoping process, the lead agency shall: • (1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds). •One of the critical features of NEPA is to allow public officials, including state public officials, to obtain information that will help them take a position on the proposed project. 40 CFR § 1500.1(NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA.)

[20] JS 1, pages 3-4; (WS_MPCA-1) page 11, page 13 paragraph 1

138. The environmental review fails to consider the Tamarack state mineral lease in route determination and fails to identify safety concerns on the possibility of having both future crude oil pipeline and mining operations on the same state-owned land.[22]

139. The environmental review failed to discuss the potential of additional/future pipeline infrastructure constructed through Clearbrook, MN and did not assess the site from an environmental impact view, failing to recognize the Clearbrook area as one of Minnesota's largest concentration of sensitive surface and groundwater. The potential impacts to the natural resources of this area include degradation due to oil spills or releases into some of the State's most valuable surface and groundwater resources.[23]

140. The environmental review failed to assess impact of contamination to Minnesota's most susceptible groundwater areas through which the proposed route crosses.[24]

141. The environmental review failed to include a risk assessment of potential damages as a result of an oil leak.[25]

142. The environmental review failed to adequately address Minnesota State listed threatened and endangered species and Minnesota sites of biodiversity significance.[26]

143. The environmental review failed to evaluate impacts to sensitive species, including plants, permanent alteration due to disruption of sensitive-specific and balanced conditions.[27]

144. The environmental review failed to adequately address standard measures of preserving undisturbed soil, organic and sustainable agricultural and related impact to undisturbed areas.[28]

145. The environmental review failed to adequately conduct hydraulic conductivity ratings at appropriate standard pipeline depths.[29]

146. The study, Stream-Aquifer Interactions in the Straight River Area, Becker and Hubbard Counties, Minnesota, studied a representative portion of the investigation area that is underlain by an extensive surficial aquifer consisting of glacial outwash. Stark Study, page 3. The study explains: This aquifer is part of a large surficial aquifer system, called the Pinelands

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[21] JS 1, page 5

[22] JS 1, page 6 paragraph 4

[23] (WS_MPCA-2) page 14 paragraph 2

[24] (WS_MPCA-2) page 12

[25] JS 1, page 6

[26] Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

[27] (WS_MCPA-1) page 12 paragraph 1

[28] Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

[29] Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

Sands (Helgesen, 1977), which underlies 770 square miles of Becker, Cass, Hubbard, and Wadena Counties. Confined drift aquifers also underlie most of the investigation area. (Stark Study, page 3).

147. According to the study, the aquifer system in this region is characterized by values of vertical hydraulic conductivity, which are higher than those reported for other parts of the glaciated northern United States. Stark Study page 32. The study further indicates that residence-time data obtained in the study are "significant because they indicate that waters in both the surficial and in the uppermost confined-drift aquifers are susceptible to contamination from local recharge." Stark Study page 48. Further, the study indicates that this region includes The Straight River which contains water that is underlain by highly transmissive surficial and confined-drift aquifers.

148. The environmental review failed to distinguish between all public lands and inadequately address the functionality and services provided by said lands to the public.[30]

149. The environmental review failed to clearly define the definition of impaired water across different regions crossed in the suggested route; therefore it fails to adequately account for existing water quality conditions.[31]

150. The environmental review failed to account for the biological quality ranking of specific communities; hydrological continuity, species diversity, disease, regeneration and presence of invasive species.[32]

151. The environmental review failed to quantify the acres of public land crossed, therefore the varying sizes of parcels is not accounted for and the impact assessment cannot be evaluated appropriately[33]

152. The environmental review failed to adequately provide information regarding the Spire Valley AMA therefore impact assessment does not include all potential impacts and ramifications.[34]

153. The environmental review failed to provide an adequate cost analysis based on evaluation of a system's ability to reduce the risk of a costly spill to a sensitive environment area[35] It fails to recognize that the cost associated with restoration and rehabilitation of a site is significantly greater compared to preservation and protection methods. The Evaluation of Spill

[30] Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 8

[31] Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 10; see also (William Sierks 1/23/15 Letter -WS_MPCA-1) page 7, paragraph 3

[32] Exhibit 185, page 10

[33] Exhibit 185, page 10

[34] (JS-3) (Jamie Schrenzel 5/30/14 Letter) page 2, paragraphs 1-2

[35] (WS_MPCA-1) page 3, paragraph 2-3

Response, failed to include factors that minimize potential for costly spills or discharge and failed to evaluate the risk associated with limited access to potential release sites.[36]

154. The environmental review failed to adequately consider limited access to water bodies crossed by the proposed systems.

155. The environmental review failed to adequately evaluate damage to aquatic systems from potential spills[37] including impact assessment of cleanup processes.

156. The environmental review failed to recognize that significant data gathering must be performed in the SA-Application route that transverses glacial moraines prior to understanding the movement of oil discharge in the area and understand the difficulty to accurately assess the potential for groundwater contamination based solely on GIS layers.[38]

157. The environmental review failed to adequately include an impact assessment for the native wild rice of Minnesota[39] and failed to assess the cultural importance of wild rice in Minnesota.

158. The environmental review failed to adequately recognize Minnesota's wild rice crops sensitivity and ecoregion-specific qualities which limit its ability to grow abundantly in other areas or after contamination to its native site.

159. The environmental review failed to recognize that temporary economic benefits would occur regardless of project location, therefore analysis should include other economies that may potentially be affected permanently.[40]

160. The environmental review failed to adequately assess potential damage from hydrostatic testing discharges and failed to include passable prevention methods.[41]

161. The environmental review failed to seriously evaluate impacts to potentially undetectable sites that limited access may prevent timely detection.[42]

162. The environmental review failed to adequately provide a systematic, fair comparison of system alternatives from an environmental effects standpoint. As a result, the process thus far does not give policy-makers a complete or fair assessment of alternatives.[43]

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[36] (WS_MPCA-1) page 4, paragraph 2; (WS_MPCA-2) page 10

[37] (WS_MPCA-1) page 8 paragraph 3

[38] (WS_MPCA-1) page 10, paragraph 1

[39] (WS_MPCA-1) page 10, paragraph 3; (WS_MPCA-2) page 8

[40] (WS_MPCA-2) page 7

[41] (WS_MPCA-1) page 9 paragraph 2

[42] (WS_MPCA-1) page 13 paragraph 3

163. The environmental review failed to provide comparison of potential environmental effects among the system alternatives, including failing to complete a water sensitivity analysis and flow path analysis.

164. The MPCA, DNR and other parties provided persuasive evidence that there were route or system alternatives (that is route alternatives with different endpoints than those proposed by Applicant) that should have been studied in the environmental assessment supplement submitted by the Applicant.[44]

165. Instead, the assessment documents merely list the number of resources in the region, which does not provide adequate data to determine which potential routes pose the greatest risk to resources.

166. The environmental reviews are materially and substantially incomplete, and in the absence of a complete environmental review, neither a certificate of need nor routing permit can be granted.

167. NDPC's Project is based on the business objectives of its joint owner Marathon and Enbridge's desire to route petroleum to Midwestern refineries. The primary motivating factor was its emphasis on the finding the lowest cost route to deliver petroleum from Bakken to Midwestern refineries, except for the existing Enbridge route which crosses Indian Reservations, without considering environmental factors in connection with the choice of route.

168. During the course of its route selection, NDPC made binding commitments to shippers based on the assumption that it would receive a Certificate of Need and Routing permit, but before completion and acceptance of an adequate environmental review. NDPC's contention that these commitments furnish a compelling reason for approving the application is barred by Minn Rules 4410.3100 which prohibits an applicant from taking action which prejudices the outcome of the governmental decision.

169. NDPC considered and appropriately rejected non-pipeline system alternatives rail[45] and truck.[46]

170. Applicant's environmental review considered and rejected the existing route to Superior, even though that route follows an existing pipeline right of way throughout its course, and even though that route is shorter than Applicant's preferred route.

171. Applicant's environmental review considered the proposed Plains All American Pipeline L.P. reversal, which would have carried Bakken oil via Canada and then via third party

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[43] Dr. Chapman Surrebuttal, paragraph 1.; (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3

[44] (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3; (WS_MPCA-2) page 5

[45] Environmental Information Review (Section 2.2.3)

[46] EIR (Section 2.2.2)

carriers to Cushing, Oklahoma, because the project had not met its scheduled construction date.[47;48]

172. Applicant's environmental review considered Koch Pipeline Company, L.P.'s possible Dakota Express Pipeline from western North Dakota through Minnesota to Hartford and Patoka, Illinois with a connection that would possibly serve Gulf Coast refineries.[49]

173. Applicant's environmental review failed to consider the Bakken Pipeline route which would follow an existing pipeline to Patoka without inflicting any environmental impacts on Minnesota.

174. Applicant's environmental review rejected all other possible routes based upon the assertion that: "Any other pipeline system would require entirely new right-of-way as well as new pump station sites, power supplies, valve sites, and potential access roads that would likely be equal to or greater in impact than the proposed Project.[50]" However, this rejection was based upon Applicant's faulty assumption that all environmental impacts, in whatever ecological environment, are inherently equal.

175. In selecting the preferred route, NDPC gave no serious consideration to alternatives other than its existing route from Clearbrook to Superior and its preferred route. When negotiating shipper agreements, NDPC and its potential shippers were legally obligated to recognize that a Minnesota certificate of need could not be granted unless the environmental assessment supplement submitted with the application complied with Minnesota Statutes Chapter 116D by exploring system alternatives and by providing a compliant analysis of the environmental impacts of each alternative.[51]

176. Applicant's proposal extends beyond Clearbrook to Superior because NDPC prefers the lowest cost route to Marathon's Midwestern refineries and Enbridge's Lakehead System.

186. The economics of the rate, cost, and cost-recovery is significantly different when the largest shipper and largest Midwestern refinery holds a significant ownership interest in a pipeline project. As an owner, Marathon has multiple economic interests which differ from that of a non-owner shipper, and from that of a disinterested common carrier.

188. The first criterion under Minn. R. 7853.0130 is whether the probable result of a denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states.

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[48] EIR (Section 2.2.1, page 2-3).

[49] EIR (Section 2.2.1, page 2-3).

[50] .Id.

[51] Minn Rules 4410.3100

When assessing this criterion, the Commission considers the following factors, which are analyzed in more detail below:

> (1) The accuracy of NDPC's forecast of demand for the type of energy that would be supplied by the proposed facility;
>
> (2) The effects of NDPC's existing or expected conservation programs and state and federal conservation programs;
>
> (3) The effects of NDPC's promotional practices that may have given rise to the increase in the energy demand;
>
> (4) The ability of current facilities and planned facilities not requiring certificates of need, and to which NDPC has access, to meet the future demand; and,
>
> (5) The effect of the proposed facility, or a suitable modification of it, in making efficient use of resources. [52]

189. Considering these factors, the record evidence shows that denial of a pipeline certificate of need for some pipeline, properly located, to carry Bakken petroleum to the eastern-Midwestern refineries would have an adverse effect on the future adequacy, reliability, and efficiency of energy supply to NDPC's potential customers served by the Lakehead system in the eastern Midwest, but it has not shown that denial of a certificate to Applicant's proposed project would have a negative impact on its customers, and to the people of Minnesota and neighboring states. On the contrary, the evidence shows that there is sufficient demand for pipeline services such that any of the system alternatives could meet the need for pipeline services. The probable result of a denial of the Project would not adversely affect the future adequacy, reliability, or efficiency of energy supply to the Applicant, to the Applicant's customers, because there exists suitable alternatives with lesser environmental impacts.

207. There is no evidence in the record that, absent the Sandpiper Pipeline, or if the Sandpiper Pipeline is built in an alternative location, shippers, refiners or consumers will suffer any sort of shortage or unreliable energy supply. (Ex. 13 at 5:134-35.) (Ex. 13 at 10:253-58.)

208. NDPC concedes that conservation efforts have effectively reduced demand for petroleum products in Minnesota, and does not dispute the Department of Commerce-Division of Energy Resources' observation that demand for petroleum in Minnesota, neighboring states, and the U.S. as a whole is down dramatically and is not expected to rebound fully for decades

225. Marathon supports the Project, but the evidence does not establish that Marathon would refuse to offer similar support to an alternative project, either system or route alternative, that delivers the same amount of petroleum from Bakken to its Midwestern refineries.

226. As set forth in more detail in Sections III (B)(c) and (d), truck and rail are not preferable alternatives to the Project. The current rail system in Minnesota does not have the

[52] Minn. R. 7853.0130(A).

capacity required to support the increase in crude-by-rail traffic that will occur if the Project is not approved.[53] Further, the majority of shippers that utilize the NDPC System support the development and construction of the Project because it affords them a transportation alternative to truck and rail,[54] and because pipeline delivery costs as much as $5 per barrel less than its rail alternative

231. First, there is record evidence that the Project is designed in some respects to efficiently utilize existing pipeline infrastructure. [55] However, the proposed pipeline location exacerbates a problem created with the location of Clearbrook 50 years ago by creating a new pipeline in new locations in environmentally sensitive areas of Minnesota's lake country.

232. The only potential customer beneficiaries of the Clearbrook delivery point on NDPC's Preferred Route would be the two refineries in Minnesota—St. Paul Park Refining Co. ("SPPRC") and Flint Hills. (Ex. 20 at 10:283-84.) These refineries do not appear to be shippers, and have not expressed support for the Project. Moreover, the shipping capacity between Clearbrook and these refineries will not increase, nullifying any potential benefit to these refineries.[56]

233. Any Clearbrook advantages, arise from its establishment fifty years ago at a time when regulation of pipelines were not impacted by MEPA and other environmental protections. However, Clearbrook is located in a particularly environmentally sensitive area. The placement of the new terminal construction west of the proposed Clearbrook location as suggested by MPCA in SA-03 would assure that future pipelines are located west and south of these pristine areas, thus avoiding the resources that the state is spending millions of dollars to protect. Meanwhile, the continued expansion of the Clearbrook facility that will coincide with construction in the SA-Applicant location will mean continued impact and potential impact to the highest value pristine waters in Minnesota as a result of future pipeline construction.[57]

234. NDPC has failed to prove that there is sufficient demand to require that Bakken petroleum must be transported to Illinois and other Midwestern pipelines through Superior. Other than co-owner Marathon, few shippers have shown interest in the Project, and fewer still have been willing to publicly support it.[58]

MORE REASONABLE AND PRUDENT ALTERNATIVE

235. The second criterion under Minn. R. 7853.0130 is that a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the

[53] Ex. 15, at 2:36-38 (Rennicke Direct).

[54] Ex. 7, at 9:275-277 (Steede Direct).

[55] Ex. 17, at 15:422-425 (Eberth Rebuttal).

[56] Ex. 9 at 5:158-60; (Ex. 50 at 24:1-19; Ex. 54 at 30:13-17.); Ex. 50 at 25-26.

[57] MPCA Position Statement January 23, 2015.

[58] Ex. 183, Sch. 4 at 182-83. Tr. Vol. III at 77:13-18.

evidence on the record.[59] This criterion can only be considered after a valid and complete environmental review has been approved. When assessing this criterion, the Commission considers the following factors, which are analyzed for each alternative in more detail below:

(1) The appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;

(2) The cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;

(3) The effect of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and

(4) The expected reliability of the proposed facility compare to the expected reliability of reasonable alternatives.

236. NDPC's assertion that it is the burden of other parties to demonstrate the existence of superior alternatives is inconsistent with Minnesota environmental law. Under Minnesota Chapter 116D.04, it is applicant's burden first to establish that there are no feasible alternatives which deliver Bakken crude to Midwestern refineries, and NDPC has not met that burden. No evaluation of superior alternatives can occur, and no determination can be made by the Commission, until NDPC first supplies an adequate environmental review, and an adequate review has not been supplied or approved. Further, the evidence supplied by MPCA, DNR, and interveners establishes that in fact there are superior alternatives.

238. Although NDPC contends that the Commission should approve the preferred route because the preferred route can be approved more quickly than environmentally superior alternatives, the reasons offered do not provide adequate justification for grant of a Certificate of Need. The following factors lead to this conclusion:

a. NDPC intentionally filed an application proposing only a single route alternative, when the facts and circumstances should have led NDPC to recognize that alternatives were likely to be considered in order to comply with Minnesota law.

b. NDPC failed to proceed with its US Army Corps of Engineers Permit and has thus intentionally delayed the environmental review required under NEPA.

c. NDPC submitted a defective Environmental Information Review which fails to comply with Chapter 116D and the alternative environmental review. There is no legal basis for sanctioning a defective environmental review to facilitate a more rapid approval.

[59] Minn. R. 7853.0130(B).

d. NDPC should have allowed for potential system alternatives in its shipper agreements, since it could not presume acceptance of the only route that it submitted.

e. NDPC knew or should have known that it intended to submit a Line 3 application traversing the same route, but failed to treat those applications as connected action for environmental review purposes.

f. NDPC acknowledges the existence of a glut of oil in today's markets. While NDPC is planning for the long run, current market conditions do not support NDPC's suggestion that suitable alternatives should be ignored simply to facilitate more rapid approval cannot be sustained.

239. The Preferred Route is not significantly shorter than the system alternatives and SA-03, as modified or other alternatives. The distance traversed by petroleum to Midwestern refineries is on the order of 1000 miles. The cost difference involved in a longer line is insignificant as compared to the rail-pipeline price differential.

B. Effect on Natural and Socioeconomic Environments.

240. The record does not demonstrate that the Project is compatible with the natural and human environments.

241. NDPC's Application contained a discussion of the geographic features adjoining the proposed route but did not provide an adequate discussion of environmental impacts of the Project.

242. The environmental review and NDPC's position statements contend that environmental impacts can be assessed by counting resource categories such as the number of watersheds, [60] and the number of stream segments,[61] but the positions of MPCA, DNR, and Chapman testimony all support the conclusion that a counting of resources crossed is not equivalent to an environmental impact study. In the absence of a true accounting for environmental impacts, NDPC cannot show that its route is compatible with the natural and human environments.

243. NDPC's Environmental Protection Plan ("EPP") outlines construction-related environmental policies, procedures, and general mitigation measures. The EPP also includes spill prevention, containment, and control measures designed to minimize the likelihood of a construction-related spill and designed to quickly and successfully conduct clean-up activities. The EPP further addresses erosion control, drilling mud releases, noxious and invasive weeds, and restoration/revegetation measures.[62] However, it is conceded that these protection plans

[60] Ex. 17, Schedule 1, at 185 (Eberth Rebuttal). *See* Section III(B)(f) for more detail regarding the human and environmental features identified in each system alternative Study Area.

[61] Ex. 17, Schedule 1, at 185 (Eberth Rebuttal).

[62] Ex. 11, at 11:261-267 (Ploetz Direct).

cannot eliminate the possibility of catastrophic spills. An important environmental issue therefore is whether there are alternative routes which reduce the potential spill impacts, and the testimony establishes that there is.

PIPELINE ALTERNATIVES

In its Application, NDPC analyzed the following pipelines as alternatives to the Project: Plains Bakken North Pipeline Project; High Prairie Pipeline Project; and, the Koch Pipeline Dakota Express Pipeline.[63] In addition, DOC-DER witness Adam Heinen analyzed the Bakken Pipeline and the Enterprise Products Partners' Pipeline as alternatives to the Project.[64]

1. Energy Transfer Partners' Bakken Pipeline.

253. The Bakken Pipeline is an approximately 1,100-mile, 30-inch proposed pipeline that would run from the Bakken region to Patoka, Illinois. The pipeline has a proposed initial capacity of 320,000 bpd and an ultimate capacity of up to 570,000 bpd. Energy Transfer Partners anticipates an in-service date at the end of 2016, at a cost of $3.7 billion.[65]

254. The Bakken Pipeline avoids Minnesota altogether and delivers petroleum to Midwestern refineries.

255. The Bakken Pipeline declared a binding open season on June 25, 2014, and received commitments for the entire initial capacity of 320,000 bpd. Energy Transfer Partners issued another open season on September 22, 2014, which suggests that the pipeline will be constructed to a higher initial capacity. The results of the open season for the Bakken Pipeline and the results of the open season for the Project suggest that there is sufficient commercial interest in both pipelines.[66] ***Moreover, the interest demonstrates that there is an economically feasible pipeline alternative that avoids the sensitive Minnesota environmental resources as recommended by the MPCA and DNR***.

SYSTEM ALTERNATIVES

258. In addition to the alternatives to the Project discussed above, the Commission determined that an analysis of six "System Alternatives," which had been identified in the Route Permit docket, would provide it with valuable information.[67] The System Alternatives are alternatives to the Project which do not connect to Clearbrook, Minnesota, and/or Superior, Wisconsin.[68]

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[63] Ex. 3, Part 7853.0540, at 3-5 (Revised CN Application).

[64] Ex. 50, at 62:20-63:8 (Heinen Direct).

[65] Ex. 50, at 58:6-13 (Heinen Direct).

[66] Ex. 50, at 59:23-60:8 (Heinen Direct).

[67] Ex. 80, at 12 (EERA Report).

[68] Ex. 80, at 12 (EERA Report).

259. SA-Applicant presents significantly greater risks of potential environmental impacts and encroaches on higher quality natural resources than SA- 03 and several other system alternatives. Minn. Rule 7853.0130.8(3). The effects of SA- Applicant on the natural environment support a determination in favor of other alternatives. Minn. Rule 7853.0130.C(2) and C(3).[69] The testimony and position statements of MPCA and DNR establish that several of the System Alternatives present clear environmental advantage as compared to the Project when balancing all applicable CN rule criteria.

260. At the Commission's request, DOC-EERA conducted a high-level environmental analysis of each system alternative, as well as the Project, by establishing two-mile wide Study Area analysis corridors around the general location of each alternative.[70] In addition, NDPC completed its own environmental, engineering, and cost review of each System Alternative, as well as the Project and SA-03, as modified.[71] These reviews are not true environmental impact analyses, but rather represent a counting of geographic resources.

261. ***NDPC and DOC-EERA approached their reviews by counting geographic features, but the counting of geographic features is not an environmental impact assessment, it is a geographic inventory***. The fact that a system alternative study area contains more cities, counties, populated areas, residences, structures, schools, churches, cemeteries, wind turbines, railroads, roads, and communication towers than the Preferred Route Study Area, as contended by NDPC is not an indicator of environmental superiority.

262. Record evidence demonstrates that the consequences to Minnesota of granting the CN for the Project are less favorable than the consequences of denying the CN and approving a system alternative.

264. Record evidence does not demonstrate that selection of this project will have significantly greater positive impacts on the economy as compared to an alternative project. The economic benefits of an environmentally superior pipeline would actually be greater than an environmentally inferior pipeline[72].

265. As already described in Section III(C)(b)(1), the construction and operation of the Project is expected to have positive socioeconomic impacts. These impacts however, are not unique to this particular project and would be realized by an environmentally superior pipeline project.

266. David Barnett submitted direct testimony on behalf of the UA.[73] Approximately 7,800 UA members live in Minnesota.[74] Mr. Barnett stated that the UA's members receive

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[69] MPCA Position Statement January 23, 2015; DNR letter of January 23, 2015; Chapman Surrebuttal Testimony;

[70] Ex. 80, at 13 (EERA Report).

[71] Ex. 17, at 5:100-102 (Eberth Rebuttal).

[72] Lichty Tr. 60-64.

[73] Ex. 220 (Barnett Direct).

substantial training and are experienced in the construction of pipelines.[75] Mr. Barnett stated that the UA expects that the Project could result in as many as 1,500 construction jobs.[76] Mr. Barnett noted that the Project also has the potential to create manufacturing jobs to produce the materials and components used for the Project.[77] Mr. Barnett stated that the UA supports the Project and asks for the Commission's approval.[78] These same benefits would be realized by an alternative project.

267. Further, Helene Herauf submitted direct testimony on behalf of the GNDC.[79] GNDC represents nearly 1000 business members, including businesses in the transportation and oil and gas industries.[80] Ms. Herauf explained that North Dakota businesses and individuals will benefit from the construction of Sandpiper through increased sales of goods and services, as well as increased tax revenue.[81] These same benefits would be realized by construction of an environmentally superior project.

B. IT HAS BEEN DEMONSTRATED ON THE RECORD THAT THE DESIGN, CONSTRUCTION, OR OPERATION OF THE PROPOSED FACILITY WILL FAIL TO COMPLY WITH THOSE RELEVANT POLICIES, RULES, AND REGULATIONS OF OTHER STATE AND FEDERAL AGENCIES AND LOCAL GOVERNMENTS.

271. Finally, the fourth criterion under Minn. R. 7853.0130 is that it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.[82]

272. The Project is subject to permitting or consultation with numerous state, federal, and local agencies, ranging from federal agencies, such as the United States Army Corps of Engineers, to state agencies, such as the MDNR and MPCA, to county-level governments.[83] None of the state permits may be granted unless a MEPA compliant environmental review has been completed. The federal USACE permit has not been applied for. The Applicant assembled a table identifying the various state, federal, and local agencies with whom it must

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[74] Ex. 220, at 6:39-7:1 (Barnett Direct).

[75] Ex. 220, at 3:22-4:19 (Barnett Direct).

[76] Ex. 220, at 5:32-6:8 (Barnett Direct).

[77] Ex. 220, at 6:27-36 (Barnett Direct).

[78] Ex. 220, at 11:31-34 (Barnett Direct).

[79] Ex. 230 (Herauf Direct).

[80] Ex. 230 at 2 (Herauf Direct).

[81] Ex. 230 at 2 (Herauf Direct).

[82] Minn. R. 7853.0130(D).

[83] Ex. 3, Part 7853.0230, at 9-11 (Revised CN Application).

interact to obtain permits or approvals for the Project.[84] That table inaccurately claims that an application has been submitted to the United States Army Corps of Engineers, but in fact it has not been. NDPC provided updated information about the status of the various required state, federal, and local approvals for the Project, some of which is inaccurate.[85]

273. NDPC has not designed the Project to meet all applicable federal and state pipeline regulations. The MPCA and DNR determinations that the environmental review is inadequate bars issuance of MPCA and DNR permits. The failure to submit an application to the USACE leaves the record inadequate to demonstrate compliance. While NDPC has affirmed that it will obtain and abide by the conditions contained within any permit required by law,[86] that affirmation is inadequate to demonstrate that permits will be complied with.

OTHER ISSUES

C. System Alternatives.

281. The record evidence demonstrates that system alternatives (SA-03 through SA-08 and SA-03, as modified) are more reasonable and prudent alternatives than the Project. As a result, the Certificate of Need should be denied. In the event that the Commission decides to grant a Certificate of Need, the Commission should certify SA-03 in both its configurations, and two other alternative routes with end points that do not connect to Clearbrook and/or Superior and require a fully compliant environmental impact statement for these alternatives. The order should provide for scoping and a scoping order to be agreed upon jointly by DNR, DOC, and MPCA, subject to review by the PUC, and should require NDPC to file a complete Section 404 permit with the USAC so that the PUC and DOC will have the benefit of the collaboration required by MEPA and NEPA, and should consolidate this review with the Line-3 environmental review.

282. SA-04 through SA-08 do not connect to Clearbrook and/or Superior. The demonstrated need, however, is to deliver petroleum from Bakken fields to Patoka, Chicago, and other Midwestern refineries. NDPC cannot place a straightjacket on the location of a pipeline to meet that need by defining the interior points of the pipeline in such a way that it is impractical for the PUC to consider superior alternatives.

283. By refusing to consider alternatives unless the pipeline travels through Clearbrook and Superior, NDPC has rendered its environmental review useless for its intended purpose and deprived the Commission of comparative environmental impact analysis necessary to comply with Chapter 116D.

[84] Ex. 3, Part 7853.0230, at 10-11 (Revised CN Application).

[85] Ex. 27, at 1:13-4:14 (Ploetz Rebuttal).

[86] Ex. 9, at 12:348-51 (Simonson Direct).

D. The Design, Construction, or Operation of the Proposed Facility Does Not Comply With Those Relevant Policies, Rules, and Regulations of Other State and Federal Agencies and Local Governments.

284. The Project is subject to permitting or consultation with numerous state, federal, and local agencies, ranging from federal agencies, such as the United States Army Corps of Engineers, to state agencies, such as the MDNR and MPCA, to county-level governments. The Applicant assembled a table identifying the various state, federal, and local agencies with whom it must interact to obtain permits or approvals for the Project[87].

285. The Ploetz table and written testimony inaccurately states that NDPC has submitted an application to the United States Army Corps of Engineers for Clean Water Act Permits. In fact, NDPC was notified that its application was incomplete and NDPC has not advanced a completed application to the USACE.

286. One of the federal permits required is issued under title 33 USC Section 1344 (Act section 404). The National Environmental Policy Act (NEPA), 42 U.S.C. 4321, et seq., applies to the federal permits required for this project. NEPA requires the preparation of an EIS for "major Federal actions significantly affecting the human environment." 42 U.S.C. 4332(2)(C). NEPA was intended not only to insure that the appropriate responsible official considered the environmental effects of the project, but also to provide persons receiving a recommendation or proposal with a sound basis for evaluating the environmental aspects of the particular project or program. Save Our Ten Acres v. Kreger, 472 F.2d 463 at 466 (5th Cir.1973). Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army, 492 F.2d 1123, 1140 (5th Cir.1974) (emphasis added). USACE Section 404 permits involve an environmental sequencing which requires the applicant to demonstrate that the project complies with the section 404(b)(1) guidelines' least environmentally damaging practicable alternative requirement. See 40 CFR Part 230. The evidence submitted by MPCA, DNR and others demonstrates that the Project is unlikely to meet that requirement.

287. NDPC's failure to submit a completed Section 404 application has deprived the PUC of the information it needs from the USACE and NEPA process to determine whether a permit can or will be granted for this project.

288. Applications have not been, commenced as necessary to facilitate timely review and approval by governmental entities with oversight authority. NDPC provided updated, but inaccurate, information about the status of the various required state, federal, and local approvals for the Project. NDPC has affirmed that it will obtain and abide by the conditions contained within any permit required by law, but that affirmation is not adequate to establish that the project will comply with state and federal law.[88]

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[87] Ex. 27, at 1:13-4:14 (Ploetz Rebuttal).

[88] Ex. 9, at 12:348-51 (Simonson Direct).

289. The Project proposes to cross Minnesota public waters, including rivers, streams and wetlands. DNR and MPCA regulations include implicitly or in some cases explicitly, a least impact requirement. The official positions of the DNR and MPCA in these proceedings establish that the project does not meet that requirement.

CONCLUSIONS OF LAW

1. The environmental review for Applicant's Proposed Project does not satisfy the requirements of Minnesota Rules parts 7852.2100-.3100 and the requirements for alternative environmental review in Minnesota Rules part 4410.3600.

2. Under the alternative environmental review authorized in the routing rule, the primary environmental review document is prepared by the applicant and submitted with the certificate of need and routing applications. The Environmental Assessment Supplement presented for public review merely counted features quantitatively and made no qualitative judgments regarding environmental impacts. Neither the environmental review provided in this docket, nor the information yet supplied by the parties, allows a systematic, fair comparison of system alternatives from an environmental effects standpoint. As a result, the process thus far does not give policy-makers a complete or fair assessment of alternatives.

3. The MPCA, DNR and other parties provided persuasive evidence that there were route or system alternatives (that is route alternatives with different endpoints than those proposed by applicant) that should have been studied in the environmental assessment supplement submitted by the applicant.

4. In general, the alternative environmental review documents failed to fulfill the requirements of the alternative review, in that it:

A. failed to identify the potential environmental impacts of the proposed project;

B. failed to address substantially the same issues as an Environmental Impact Statement

C. failed to use procedures similar to those used in preparing an EIS but in a more timely or more efficient manner;

D. failed to consider alternatives to the proposed project in light of their potential environmental impacts.

E. failed to adequately analyze potential mitigation measures

F. failed to comply with the Minnesota Environmental Policy Act – MEPA-- (and its implementing regulations) and the National Environmental Policy Act -- NEPA—(and its implementing regulations) by discontinuing its federal permit applications.

G. failed to include an environmental assessment of the impacts of the second and proposed parallel line.

5. The environmental review documents were inadequate to satisfy the needs of both the Minnesota Pollution Control Agency and the Department of Natural Resources for use in connection with its permitting process.

6. The parties have disagreed on who bears the burden of proof on certain contested issues of fact or mixed law and fact. However, it is clear that any allocation of the burden of proof assumes that the applicant has first met its responsibility to provide and complete an environmental review. Since the environmental review fails to comply with Minnesota law, the allocation of burden of proof is moot. A Certificate of Need cannot be granted until a complete environmental review is conducted. Minn. Stat sec 116D.04 subd. 2b.

7. Regarding Minn. R. 7853.0130(A):

(a) The record demonstrates demand for both crude oil from the Bakken region to be delivered to the refineries in Chicago, Patoka and other Midwestern locations east of Lake Michigan. Accordingly, Minn. R. 7853.0130(A)(1) weighs in favor of issuing a certificate of need for some project that meets that needs, provided that the pipeline is properly located and designed and a compliant environmental review is conducted, but not the applicant's preferred project.

(b) No conservation programs, at either the state of federal level, will eliminate the need for a pipeline that meets the needs described in paragraph 7(a). As a common carrier, NDPC does not have a conservation program aimed at public demand for refined products. It does, however, have conservation programs that are aimed at reducing NDPC's impact on the environment. As a result, Minn. R. 7853.0130(A)(2) weighs in favor of issuing a certificate of need for a project that meets the need as defined in paragraph 1(a), provided that a compliant environmental review is completed, but not the applicant's preferred project.

(c) NDPC has not conducted promotional practices which have created the need for a project, but NDPC has conducted promotional practices designed to limit the need to the single pipeline location narrowly defined as meeting the need through a pipeline traversing Clearbrook to Superior. Rather, the need for a pipeline project is created by increased production from the Bakken region, insufficient pipeline capacity out of the Bakken region, and refineries seeking to meet the public demand for refined products. The need for the specific Project, however was created by granting Marathon an ownership interest in the project thus giving Marathon an economic incentive to demand a Clearbrook-Superior route as opposed to all other pipelines that would meet the need. Thus, Minn. R. 7853.0130(A)(3) weighs against issuing a certificate of need for the Project, but would weigh in favor of issuing a Certificate of need for an

alternative environmentally acceptable project meeting the need described in paragraph 1(a)/.

(d) There are no existing or planned facilities that can satisfy the demand for the Project, because Applicant restricted consideration of its project proposal to the Project and no other alternative project which could meet the need. Accordingly, Minn. R. 7853.0130(A)(4) weighs against issuing a CN for the Project.

8. Regarding Minn. R. 7853.0130(B): In the absence of a completed environmental review, neither party can be required to demonstrate by a preponderance of the evidence a more reasonable and prudent alternative to the Project. Accordingly, Minn. R. 7853.0130(B) weighs against the granting NDPC's Application for a certificate of need.

9. Regarding Minn. R. 7853.0130(C):

(a) Record evidence does demonstrate that a suitably located pipeline project will enhance the future adequacy, reliability, and efficiency of the energy supply needed by the surrounding region. Accordingly, Minn. R. 7853.0130(C)(1) would weigh in favor of issuing a certificate of need for a project which meets the need described in paragraph 7(a), after completion of a compliant environmental review.

(b) Record evidence does not demonstrate that the Project will have positive socioeconomic impacts on Minnesota and that the Project is compatible with the natural environment. Thus, Minn. R. 7853.0130(C)(2) weighs against issuing a certificate of need for the Project.

(c) Record evidence demonstrates that a properly located project, approved and located in compliance with environmental law, state and federal permitting, would have a positive impact on future development through increased economic activity, greater employment, and additional property tax revenues for local governments. In addition, record evidence establishes that such a project would facilitate development by providing a reliable, efficient, and safe method for transporting Bakken crude oil to market. Accordingly, Minn. R. 7853.0130(C)(3) weighs in favor of issuing a certificate of need for a properly located project, but against a certificate of need for the Project.

(d) A pipeline project is the most socially beneficial method to transport crude oil, which will be turned into refined products, including fuel and petrochemicals required by Minnesota consumers. Thus, Minn. R. 7853.0130(C)(4) also weighs in favor of issuing a certificate of need for a properly located project, but not in favor of issuing a certificate of need for the proposed Project.

10. Regarding Minn. R. 7853.0130(D):

(a) Record evidence does not demonstrate that the design, construction, and operation of the Project will comply with the relevant policies, rules, and regulations of other state and federal agencies and local governments. Thus, Minn. R. 7853.0130(D), like the other criteria, weighs against granting a certificate of need for the proposed Project.

RECOMMENDATION

The Minnesota Public Utilities Commission should deny a certificate of need to NDPC for the Project.