

Case No. A15-0016
STATE OF MINNESOTA
IN COURT OF APPEALS

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

**BRIEF OF AMICUS CURIAE CARLTON
COUNTY LAND STEWARDS**

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I. INTRODUCTION

Carlton County Land Stewards¹, (CCLS) has been an active participant in these Certificate of Need (CN) and accompanying routing proceedings. CCLS recognizes that the record below establishes that new extraction technology has produced an explosion of domestic crude petroleum coming from the Bakken and other fields, and to the extent that new transportation capacity is needed, that is best served by construction of petroleum pipelines. R-380. CCLS has sought to advocate that Minnesota should locate any pipelines based on the public interest, using high quality environmental impact analysis, rather than the private business motivations of a particular pipeline company. In the contested case proceedings below CCLS has submitted professional ecological testimony by Dr. Chapman designed to show that the environmental review conducted by NDPC was grossly inadequate and unlawful, but that evidence is not part of this record, because it is an issue being tried to the PUC through the ALJ contested case process.

The problems with the environmental review are partly evident in the record before this Court, and partly in the record developed after the record in this certiorari review was closed. CCLS has been ambivalent as to whether it is possible to make

¹ CCLS presented with its intervention petition the names of its leadership. All members of the CCLS leadership are individuals who are bona fide participants in the organization. CCLS solicits and accepts donations in support of its organizational purposes, but donations are accepted to support the organization's position: no donor has sought to influence or control the organization's position by virtue of donation, nor has any donor sought to influence or control the position taken in this brief.

appropriate judgments about this appeal, when a piece of the puzzle is not yet available to a reviewing Court. Nonetheless, we agree with FOH's position that the part of the record that is available now demonstrates that the PUC's order failed to provide for a MEPA compliant environmental review encompassing all of the routes identified in the PUC's order².

In August of 2014, the MPCA and DNR and some intervener parties convinced the Commission that Enbridge's CN and Routing application, which proposed to run a major crude oil pipeline through the Mississippi headwaters region, posed monumental environmental threats to public waters and wetlands, wild rice resources important to native Americans and large forest blocks inhabited by species dependent upon those forest blocks. The threats included the potential for catastrophic spills like that which occurred in Kalamazoo Michigan in a region where such spills could destroy pristine resources and threats to forest regions which DNR has determined should not be broken up by the clearcutting that accompanies new pipeline development. R-371, p 12. R-474. These concerns convinced the Commission that NDPC had failed to consider alternative

² This case is not the appropriate venue to resolve whether it is possible to conduct a so called high level review that would seek to reduce the number of routes to a more manageable level. Regrettably, in calling for a "high level" of review, the PUC provided no definition to what that term meant, and as it happens, the DOC EERA interpreted it in a way that is completely different from the meaning that many of the parties understood the intent. The problem with concocting a new form of review is precisely this: a new alternative review cannot be invented on the fly, but must be created through a rule making procedure ultimately approved by the EQB.

routes with the potential for significantly less threat to important environmental resources.

As discussed below, one of the key requirements of the alternative pipeline environmental review authorized in 1989 is that the applicant must submit an EIS equivalent environmental review document with its application. As the behest of agency regulators charged with protecting environmental resources, the Public Utilities Commission correctly decided to require consideration of the environmental impacts of alternative routes which should have been considered in NDPC's original application. Minn. Rules 7852.2700; 7852.3100. The Commission considers these routes to be "system alternatives", because they would carry petroleum to Midwestern refineries in Ohio, Illinois, Michigan and other Midwestern destinations without passing through Clearbrook and Superior as NDPC prefers, but they are potentially valid routes which provide alternatives to deliver petroleum, routes which the MPCA and DNR and intervenors advanced as suitable alternatives, and which the PUC properly determined should be considered. In so doing, the Commission properly recognized that an application to create a new crude oil pipeline across the entire state implicates the eminent domain power, and that the State has the right and obligation under MEPA section 116D.04 to assure that the route is located where it best serves the public interest, and not primarily NDPC's private business convenience.

Having correctly made the decision that these alternative routes could potentially serve the petroleum need in a way that would reduce the threat of spills into pristine

public water resources, could inflict significantly less damage to ecologically sensitive forest regions, and avoid threats to vulnerable aquifers, the PUC erred legally in attempting to address these important environmental issues through a process invented on the fly, one not sanctioned by the Minnesota Environmental Policy Act. There are only two procedures legally adequate to address the important environmental issues posed by the MPCA, DNR and the Commission's own order. One is the traditional MEPA process thoughtfully described by FOH in its brief, a process which insures validity by including a scoping decision, a draft environmental impact statement, careful review by regulatory agencies, comments by those agencies and the public, and then a final environmental impact statement which specifically addresses the material and substantive comments raised by regulatory and agency concerns, then followed by a contested case to address any disputed facts. The second is the alternative environmental review that occurs in the routing procedure. The alternative review, as discussed below, insures validity by requiring submission of a full environmental impact review document at the time of application, and then testing the quality of that document through the crucible of the routing rule contested case.

The PUC chose neither of these, attempting rather to request the Department of Commerce to fashion its own jerry-rigged environmental document, which the DOC described as a "Comparison of Environmental Effects of Reasonable Alternatives" (hereafter CEERA), a form of review never authorized by the EQB. The PUC hoped to jam that administratively fashioned review into a shortened time period, with neither the

procedural protections of the regular MEPA environmental review found in EQB regulations, or the procedural protections of the alternative environmental review fashioned in 1989 for petroleum pipelines. And it sought to conduct the contested case review of the newly fashioned procedure into the Certificate of Need case, when in fact, the procedure authorized by the EQB was to occur under the routing rule and routing jurisdiction.³ FOH is thus absolutely correct when it asserts that having recognized that these route alternatives should have been considered, it was error to attempt to force the decision through an environmental review process not sanctioned by MEPA, or MEPA regulations, or the alternative environmental review adopted by EQB in 1989.

In the record that is not before this Court, there will be lengthy position statements from the Minnesota Pollution Control Agency and the Department of Natural Resources with pages of itemized objections to the adequacy of CEERA that was conducted under the aegis of the order here under review. We allege in the contested case below, that the document, which by its title purports to compare environmental effects, does nothing of the sort, but that is an issue that cannot be addressed here. Whatever it is, and whatever it did, is simply not authorized by an EQB sanctioned procedure. It is an attempt of creating an abbreviated environmental inventory without any of the procedural guarantees provided by EQB Rule and MEPA.

³ The formal rule adoption began: This chapter is adopted under authority granted in Minnesota Statutes, section 116I.015³ [now renumbered to Chapter 116G], to implement review procedures for the routing of pipelines that give effect to the purposes of the act.

In the administrative contested case below, the position statements of MPCA and DNR challenging what was accomplished ought to be entitled to great weight, because MPCA and DNR are agencies charged with jurisdiction over impacted resources, because MPCA and DNR have significantly more experience in preparing environmental reviews than the Public Utility Commission, and because both MPCA and DNR have regulatory jurisdiction over important permits necessary for pipeline approval. But those position statements are not here, because the agency position statements postdate the completion of the DOC-EERA's CEERA, and thus this appeal lacks the benefit of their wisdom and experience. The absence of those position statements, authored after receipt of the CEERA, published on December 18, 2014, contributes to CCLS's ambivalence regarding the ability of this Court to understand the full scope problem which FOH's appeal seeks to address.

FOH's brief thoughtfully explains why the attempted CEERA, fails as a matter of law to comply with the requirements of MEPA evaluated as against the requirements for the traditional environmental review conducted under the EQB's MEPA regulations. In this brief, we focus primarily on the legal requirements for the alternative environmental review and explain why the procedure utilized by NDPC and PUC below does not comply with the alternative environmental review created by EQB's 1989 amendment to the pipeline routing rule. One glaring legal defect, of course, is that the CEERA, didn't lead to a contested case conducted under the routing rule, as authorized by the EQB's alternative review. That alone should disqualify the procedure adopted by PUC. But as

we now show the EQB's alternative review was crafted based on the assumption that the alternative review would begin with an environmental impact statement equivalent professionally prepared environmental review submitted with the application itself, and the PUC's order is predicated upon the failure of NDPC to file an environmental review that analyzes the environmental impacts of the route and its alternatives.

II. THE PUC'S ORDER REPRESENTS AN ATTEMPT TO FASHION A REMEDY TO A FLAWED ENVIRONMENTAL REVIEW BY FASHIONING A PROCESS THAT IS NOT AUTHORIZED BY THE EQB ROUTING RULE, NOR CONSISTENT WITH MEPA.

As of 1989, petroleum pipeline certificates of need were being granted by the Public Utilities Commission⁴ but routing permits were issued by the Environmental Quality Board.⁵ 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 (DNR⁶, MPCA⁷, Agriculture,

⁴ 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>

⁵ See Minn. Stat. 1988 Chapter 116I.

⁶ 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

etc). In 1989, the EQB utilized its jurisdiction over pipeline routing to integrate an alternative environmental review procedure into its routing jurisdiction⁸ 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 4410.3600.⁹ The alternative review, however, would provide a more expeditious procedure to achieve that same end: a comprehensive, science based analysis of the

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.”)

⁷ 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.

⁸ The formal rule adoption began: This chapter is adopted under authority granted in Minnesota Statutes, section 116I.015⁸ [now renumbered to Chapter 116G], to implement review procedures for the routing of pipelines that give effect to the purposes of the act.

⁹ 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.”

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 affecting 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.

As relator points out, the EQB's 1989 routing rule eliminated some of the important procedural protections provided in the regular environmental review. Those MEPA procedural protections are designed to enhance public scrutiny and agency expertise so that, before taking governmental action, the environmental review applies science and regulatory experience to each of the areas where potential impacts of crude oil pipelines might have significant environmental impacts. Environmental lawyers say that environmental reviews are "action forcing." An Environmental Impact Statement under MEPA and NEPA (the federal Act upon which MEPA is modelled) is an "action-forcing" procedure because it is designed to assist decision makers to act deliberately and to make decisions that will prevent avoidable environmental damage. Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978 (8th Cir. 2011). That is, they are designed to

make a difference in what agencies do, by making transparent the environmental impacts and forcing decision makers to confront the consequences of a proposal, using best ecological, geological, hydrological, biological and chemical science, applying the regulatory knowledge, experience and policies, to assure that governmental action protects and preserves the environment to the maximum extent possible. In order for the action-forcing component of MEPA to work, there must be adequate time and attention devoted to careful review and consideration by the agencies which have expertise to apply to the problem before the responsible governmental authority.

A key component of the environmental review, then, is the scrutiny applied by public and regulators to the environmental review. That's the purpose of the scoping decision, the draft EIS, the public comments, and the requirement that the final EIS respond to material public comments, in both MEPA and NEPA regulations. Those procedural guarantees were removed in the alternative review authorized by EQB, but the authors of the EQB alternative review did not intend to dispense with these procedural protections without compensating alternative guarantees. They provided instead, that the routing applicant must furnish a high quality environmental –impact – statement equivalent document, prepared on behalf of the applicant, and filed with the routing application itself. This document has traditionally been called an “Environmental Assessment Supplement” and is filed generally with both CN and routing applications. 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).

(AC Add. 1-2). NDPC filed an environmental impact review in both CN and Routing Dockets, expressly purporting to comply with the environmental review requirements of the routing rule. Record 18. The issue whether that document complies with the requirements described in the PUC's brief cited above, and the alternative environmental review regulations adopted by the EQB in 1989 is a hotly contested mixed question of law and fact under consideration in the contested case. Most of the evidence, including pre-filed testimony, cross examination, and official statement of positions by regulatory agencies has not been brought before this reviewing Court, because that information post-dates the order issued by the PUC. We can say that one of the fundamental problems that will be confronted by the PUC when it considers the administrative record of the contested case is the position of MPCA, DNR, tribal sovereigns that NDPC's Environmental Information Review, Record Document 18 is materially out of compliance with the requirements of the alternative review in the routing rule.

Because agencies and parties contend that the document filed by NDPC with their application is far short of the standard set by the rule itself (as well as the PUC's own position in its 2010 brief in this Court), we expect considerable pushback from NDPC against our contention that the document filed with the application was required itself to meet the requirements of a professional environmental review. For this reason, we are taking pains, here in this section, to support our position with reference to the rule text

itself, to the rule's SONAR,¹⁰ and to the PUC's previous position in this court in the LsR case. Although the adequacy of that document is under review in the contested case proceeding, concerns about its deficiencies underly the DNR and MPCA's position statements in the contested case proceedings before the ALJ.

By requiring the applicant to provide an EIS equivalent environmental review *with the routing application*, and then to defend it in the routing docket under the routing regulations, regulatory agencies with concerns about public lands and minerals, regulatory jurisdiction over public waters, groundwater pollution, and forest resources, could within the routing docket, express their concerns as to whether an adequate environmental review had been conducted. To assure compliance with the high standards contemplated by the EQB's alternative review authorization, in some dockets, we see these Environmental Assessment Supplements being authored by qualified environmental scientists with professional experience in conducting NEPA environmental reviews¹¹. Under the alternative review, agencies, intervenors, and the public would have nearly nine months to review and challenge the adequacy of the environmental review document filed by the applicant when the docket is initiated, but the PUC tried to substitute for that

¹⁰ SONAR's for the Routing Rule are on file with the Minnesota SONAR digital archiving project. <http://www.leg.state.mn.us/lrl/sonar/sonar.aspx>

¹¹ 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. P15/Ppl-05-2003, Environmental Assessment Supplement to the PUC Routing Permit Application, January 5, 2006, (MnCan Project.).

process a hastily drafted CEERA, presented for the first time Friday before the midwinter Christmas and New Years' holidays. Although the PUC instructed the DOC to make that document MEPA compliant, the meaning of those instructions are not clear, nor is there an EQB certified process that deals with the circumstances presented. Further, the results of that assessment were to be considered, not in the routing docket, as the EQB alternative review authorized, but in the bifurcated certificate of need proceeding just about a month after the document was published. The EQB never endorsed the concept that a vastly truncated hastily concocted CEERA, conducted in the Certificate of Need proceedings could be used to meet the routing rule's requirements to assess the environmental impacts of potential route alternatives.

Moreover, the PUC's process required parties to submit their direct testimony on all environmental issues in the CN proceeding in August 2014, long before the document authored by DOC (the CEERA), was available. Pre-filed Rebuttal Testimony was due on January 6, 2015, but the CEERA, was published on December 18, so that agencies and parties were being asked to prepare rebuttal testimony over the Christmas – New Year's holidays in response to a technically complex document. In contrast, the EQB alternative review provided parties and agencies with at least nine months to review, comment, and provide testimony on the EIS equivalent document in the context of the routing docket.

The alternative review clearly required a compliant environmental impact statement equivalent document to be filed with the application. The EQB's routing rule required 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.

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 SONAR¹² dated September 1988 corroborates our contention that the alternative review authorized by EQB required 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 1160.06", 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

¹² 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.

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)*¹³. (Emphasis added). Id. Page 15.

Our position is wholly consistent with the PUC's own description of the LsR brief to the Court of Appeals.¹⁴ There, the PUC explained that the purpose of this EAS 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,

¹³ 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."

¹⁴ 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 evidentiary hearing in this case would show 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.

filed with the routing application. The guarantee of integrity comes from the fact that the Environmental Assessment Supplement, (or as NDPC calls it an EIR), is subject to nine months of public and agency review, culminating in a contested case.

The order here on review was triggered by concerns raised by a number of parties, capped off by the MPCA's position statement submitted in its letter of August 2014, where the MPCA¹⁵ wrote:

Given the high potential of additional 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.*** For the reasons outlined below, 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. August 6, 2014 Letter to Commission. Record 324-336.

MPCA's concerns, as reflected in its official comments include the following:

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.

¹⁵ 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.

Once the PUC credited the MPCA's position that the environmental review was not adequate, because it had failed consider the environmental impacts and merits of reasonable alternatives, it was obligated to ensure that the decision was made upon an adequate environmental review. We don't quarrel with PUC's belief that a decision in the CN proceeding under these circumstances – what one Commissioner called a pipeline tsunami – that the CN needed to be aided by an adequate environmental review as well. The CN rules¹⁶ require consideration of the impact of the pipeline on “the natural and socioeconomic environments compared to the effects of reasonable alternatives,” Minn. Rules 7853.0130 (B)(3), of whether the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate considering “the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility”, Minn. Rules 7853.0130(C)(2), and of whether “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.” Minn. Rules 7853.0130(D). The Routing permit requires consideration of “the characteristics, the potential impacts, and methods to minimize or mitigate the potential impacts of all proposed routes so that it may select a route that minimizes human and environmental

¹⁶ Pipelines have been categorized as large energy facilities since 1974 c 307 s 3; 1976 c 333 s 3 (passing then Minn. Stat. Sec. 116H.03 subdiv. 5). Criteria for assessment of need were to be promulgated by rule by 1976. Mn Stat. sec 116H.13 subd 9.

impact,” Minn. Rules 7852.1900 subp 2, and of consideration of the impacts of the route alternatives upon a variety of environmental factors. Id. Subp 3. Both routing and CN proceedings would likewise benefit from the integration of the two environmental reviews with the NEPA review that will eventually be conducted by the USACE under Section 404 of the Clean Water Act.

Both certificate of need and routing permit implicate the policies and substantive provisions of the Minnesota Environmental Policy Act, which prohibits any state action which significantly affecting 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. But the PUC has not been vested with authority to create an environmental review substitute of its own making under the mantle of the Certificate of Need proceeding. The PUC had only two lawful choices. If it wanted to use the Certificate of Need proceedings to eliminate valid route alternatives, it might have accepted FOH's request to commence a full dress environmental review,

Alternatively, it might have placed all of the proposed routes in the routing rule, to be examined as intended by the EQB authorized alternative. But this would have required a finding that the EIS-substitute filed with NDPC's application met the requirements of the alternative review, a position which would be unsustainable given the content of that document.

III. CONCLUSION

The concerns which gave rise to the request by parties to step back and engage in a more deliberate environmental review are not motivated by head-in-the-sand attempts to prevent development of domestic petroleum resources. They are endorsed by two regulatory agencies with long standing experience in environmental reviews, and major regulatory jurisdiction impacting pipelines themselves. See notes 6 and 7 above. Rather, regulatory agencies and intervenors believed that environmental assessment supplement filed by NDPC was deeply flawed and incomplete. Moreover, the Kalamazoo catastrophe, which has cost over a billion dollars to remediate, has been frequently cited by parties and citizens as requiring a much more searching review of alternatives. Recent spill events have caused regulators to take a new look at the need for environmental scrutiny of these applications.

The explosion of domestic petroleum supply during the past five years, major changes in petroleum extraction technology, and skyrocketing crude oil prices, has led to a major expansion in North American petroleum supplies. Canadian tar-sand fields and the Bakken fields of North Dakota and Montana have overwhelmed the existing petroleum pipeline infrastructure that carries petroleum from Canadian and US points west of the Red River to the major mid-western refineries west of Lake Michigan in Illinois, Michigan, Ohio, and other refineries to the North and South East. All of these developments have led to concerns that past scrutiny at the PUC was too casual.

The existing pipeline infrastructure was created a half century ago, before modern environmental protection laws. Parties and regulatory agencies became concerned that Minnesota needed to take a comprehensive look at the location of this new pipeline infrastructure. Again, the issues surrounding these important policy issues have a contested factual context. Any decisions that issues in this case should further the ability of all parties and regulatory agencies with jurisdiction over some aspect of the environment to address these important issues fully.

Connected to the latter point, in the midst of the Sandpiper proceedings, Enbridge opened a second docket, filing an application to run a second major pipeline parallel to the Sandpiper pipeline, and thus also through the Mississippi headwaters region. Under MEPA and NEPA, intervenors have contended, this second pipeline is plainly a connected action the environmental impacts of which should be examined jointly in the same environmental review. Moreover, NDPC refused (or failed) to submit a completed section 404 Clean Water Act application to the United States Army Corps of Engineers. Record No. 346, Exhibit A¹⁷. As a consequence, the US Army Corps of Engineers did not begin its environmental review under the National Environmental Policy Act (NEPA). Minnesota's environmental review is designed to coordinate with the federal environmental review. Tribal sovereigns, represented by intervenors Honor the Earth,

¹⁷ The Clean Water Act, 33 USC Section 1344 (Act section 404) provides a permitting process for major actions that impact public waters and wetlands. Major actions like the current action require not only a permit but trigger a National Environmental Policy Act (NEPA) environmental review.

White Earth, and commenter Mille Lacs Band, asserted that the US Army Corps of Engineers is the agency primarily responsible for assuring that tribal interests and treaty rights are observed. The failure to complete the Section 404 application deprived the public and Minnesota regulatory agencies of the traditional information and expertise sharing that occurs otherwise as a matter of course. See 40 CFR § 1503.1; 40 CFR 1501.7.

The CEERA completed by the Department of Commerce on December 18 2014 did not, and by design could not, repair the alleged grave defects in the Environmental Assessment Supplement filed with NDPC's application. The protests by the MPCA and Department of Natural Resources regarding the inadequacies in the environmental review require rigorous compliance with Minnesota's Environmental Policy Act, and the PUC order completely failed to follow any procedure sanctioned by MEPA or its implementing regulations.

Dated: March 18, 2015

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ADDENDUM

Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission

Court of Appeals No. A-812

Pages 9 and 10 of the Brief of Minnesota PUC (2010).....AC Add. 1-2

Compl., ¶ 109.) The alternative environmental review rules for pipeline projects are part of the routing process and are found in Minnesota Rules Chapter 7852. AA 22 (Amended Compl., ¶ 109.) According to the EQB, “any pipeline reviewed under Chapter 4415 [since renumbered as chapter 7852] automatically satisfies EAW⁴ and EIS requirements.” AA 141-42 (R. 160, pp. 45-46, citing EQB Guide to Minnesota Environmental Rules).

Under the alternative environmental review process for pipelines approved by the EQB and authorized by MEPA, the environmental review of a pipeline is accomplished through a multi-step process. *See generally*, Minn. R. ch. 7852. 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. After this significant opportunity for public input and development of further record evidence, the rules provide that the Commission is to consider the environmental information in the record and make a route determination according to the specific environmental impact criteria set forth in the rules. Minn. R. 7852.1800-1900.

MCEA misstates the law in the fact section of its brief when it claims that the Commission is required to prepare its own environmental review document. MCEA Br.

⁴ An “EAW” or “Environmental Assessment Worksheet” means a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action. Minn. Stat. §116D.04, Subd. 1a(c).

at 10, 16. As discussed below, no such requirement exists for pipeline projects reviewed under the EQB approved alternative review process. *See infra* 21-23; Minn. R. ch. 7852.

IV. THE ENVIRONMENTAL REVIEW OF THE LSR PROJECT FOLLOWED THE EQB APPROVED PROCESS.

The environmental review of the LSR Project was conducted using the alternative environmental review process set forth in chapter 7852 of the Minnesota Rules. First, consistent with the requirements of chapter 7852, Enbridge filed with the Commission a detailed EAS as part of its initial application. PUC App. 14-19 (R.6, Cover page and index; R.7, Index). The Enbridge LSR Project EAS provided substantially the same information as an environmental impact statement. The EAS provided an assessment of the existing environment along the proposed pipeline route, an analysis of human and environmental impacts that could potentially result from pipeline right-of-way preparation, construction, operation and maintenance of the proposed facilities, and a summary of the protection and restoration measures to be implemented to avoid and/or minimize environmental impacts. R.6, p. 1-1.

The EAS contains sections devoted to Route Selection and Analysis (R.6, section 2.0); Socioeconomics (R.6, section 3.0); Land Use (R.6, section 4.0); Terrain/Geology (R.6, section 5.0); Soils (R.6, section 6.0); Vegetation, Wildlife, and Fisheries (R.6, section 7.0); Groundwater Resources (R.6, section 8.0); Surface Water Resources (R.6, section 9.0); Cultural Resources (R.6, section 10.0); and Federal, State, and County Recreations Areas (R.6, section 11.0.)

Case No. A15-0016

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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

Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P.
132.01, subds. 1 and 3, for a brief produced with a monospaced font. The length of this brief is
5,667 words. This brief was prepared using MSWord 2013 software.

Dated: March 18, 2015

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