

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

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Nancy Lange	Commissioner
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Betsy Wergin	Commissioner

In the Matter of the Application of
Enbridge Pipelines (North Dakota) LLC
for a *Certificate of Need* for the
Sandpiper Project in Minnesota

**EXCEPTIONS TO THE REPORT OF
THE ADMINISTRATIVE LAW
JUDGE DATED APRIL 13, 2015**

OAH 8-2500-31259/MPUC PL-6668/CN-13-473

To: The above-named Commission

The White Earth Band of Ojibwe respectfully submits the following exceptions to the Findings of Fact, Conclusions of Law, and Recommendation issued by the Administrative Law Judge in the Certificate of Need proceeding.

(1) The White Earth Band of Ojibwe is particularly concerned that no consideration is made in the Report of the Administrative Law Judge to the retained and reserved usufructuary use rights within the 1855 Treaty ceded territory crossed by the proposed pipeline, despite notice of these rights and this concern.¹

267. The Preferred Route does not cross any federal or tribal lands. This is an incomplete statement of the interests in the lands traversed by the proposed pipeline. White Earth and Honor the Earth both raised the issue of usufructuary use rights, and in particular, the impact that construction and operation of the proposed pipeline could have wild

¹ See Petition to Intervene, White Earth Band of Ojibwe, at 4.

rice harvest and the health of wild rice beds and water resources.² The White Earth Band of Ojibwe urges the Commission to take into account the responsibility of the State of Minnesota to meaningfully consult with the tribes regarding the impact to usufructuary use rights resources within the 1855 Treaty ceded territory, and to not adopt Finding 267 as it has been offered.

(2) The White Earth Band of Ojibwe recommends that the Commission reconsider the following Finding of Fact pursuant to the comments offered by the Minnesota Pollution Control Agency and the Minnesota Department of Natural Resources concerning impaired versus unimpaired waterways, as the Administrative Law Judge made no distinction in the condition of waters potentially impacted.

360. The SA-03 Study Area contains more cities (including North Branch, Cambridge, Little Falls, and Detroit Lakes), more developed land, more residents, and more structures than the Preferred Route Study Area. It also contains more watersheds, more miles of water bodies, more streams, more wells, more aquifer, and more important federal and state resources.

The Administrative Law Judge notes that the Minnesota Pollution Control Agency offered SA-03 because that route has “fewer impacts to the highest quality surface waters and other natural resources in the state of Minnesota than SA-Applicant,”³ but goes on to conclude that SA-03 has a greater impact on more heavily populated areas.⁴ This is not an appropriate comparison – the proper inquiry should be the impact to waters in each of the alternatives. To compare the impact to unimpaired waters to the impact to population centers is misleading and fails to inform the inquiry into the appropriateness of SA-03.

The White Earth Band of Ojibwe recommends that the Commission not adopt Findings 360-362 as offered, but rather that the Commission consider the impact of the Applicant’s route

² See, *id.* at 3-4; HEARING TRANSCRIPT (Ploetz Testimony).

³ Findings of Fact at 361 (quotations in the original).

⁴ *Id.* at 362.

and SA-03 to impaired and unimpaired waters, as stated by the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency in their filed comments.⁵ These agencies bear the particular expertise necessary to make the appropriate inquiries, and deference to the position of these agencies on this point is appropriate.

(3) The Administrative Law Judge concludes at Finding of Fact 504 that “none of the System Alternatives present a clear advantage over the proposed Project,” and goes on to state, “By avoiding certain high-quality water resources in the Central Lakes Region, the System Alternatives prioritize protection of a special set of resources over other potential impacts.”⁶ The White Earth Band of Ojibwe urges the Commission to consider this statement in the alternative as well – that the Administrative Law Judge has, by this statement, prioritized certain considerations (i.e. avoidance of more populated centers) over other potential impacts (i.e. the impact to unimpaired waters). The White Earth Band of Ojibwe recommends that the Commission disregard this Finding, or alternatively, make equitable comparisons between the impact to waters and the impact to population centers, and not to compare one to the other. Impact to unimpaired waters is particularly concerning to the White Earth Band of Ojibwe because of the impacts to usufructuary use rights in the 1855 Treaty ceded territory, and it is the contention of White Earth that due comparison between the Applicant’s proposed route and the System Alternatives, particular SA-03 as offered by the Minnesota Pollution Control Agency, with regard to the quality of water being impacted is appropriate under the applicable statutes and rules.

⁵ Letter of the Minnesota Pollution Control Agency to Judge Lipman dated January 23, 2015; Letter of the Department of Natural Resources to Judge Lipman dated January 23, 2015.

⁶ Findings of Fact at 504.

(4) The White Earth Band of Ojibwe offers, lastly, its agreement that these proceedings are flawed, and should be reexamined by the Commission on this point – the Administrative Law Judge and the Applicant have asserted at various times that proponents of route alternatives must demonstrate the utility and feasibility of a proposed route to the extent that the Applicant has demonstrated its proposed route. However, this renders these proceedings meaningless for any party that is not the owner of pipelines or an engineering firm. The Administrative Law Judge found

508. None of the entities that proposed a System Alternative is itself in the oil or pipeline industry, or offered into the record engineering or operational assessments in support of their proposals.

The Administrative Law Judge goes on to find,

514. . . . NDPC’s proposed Project does the best job in minimizing the potential impacts to human populations and environmental resources, as well as resolving known constructability constraints and operational concerns. It does so because NDPC invested tens of thousands of man hours determining the most appropriate features of its proposal.

The applicable statutes and rules cannot possibly be read to mean that any party opposed to construction of a major pipeline in a proposed location must have the resources available to the Applicant to oppose such a request in order to demonstrate that a “more reasonable and prudent” alternative exists. This is unduly burdensome, and necessarily will result in the Applicant in any proposed pipeline proceeding being successful. The White Earth Band of Ojibwe urges the Commission to consider the role of the public and other agencies with the State of Minnesota in these proceedings, and whether participation can be meaningful if the statutes and rules are read as the Administrative Law Judge and the Applicant have stated. The Commission has provided for the public’s input, rightly, in these proceedings and should take into consideration the

limitations for parties and commenters. The White Earth Band of Ojibwe requests that the Commission reconsider Findings 508 and 514.

The White Earth Band of Ojibwe respectfully offers the foregoing exceptions to the Report, and appreciates the consideration of the Commission in this matter.

Dated: 4/28/2015

/s/ Joseph Plumer

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