BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
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David C. Boyd	Commissioner
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

IN THE MATTER OF THE APPLICATION OF ENBRIDGE ENERGY, LIMITED PARTNERSHIP FOR A CERTIFICATE OF NEED FOR THE LINE 67, PHASE 2 PROJECT	OAH Docket No. 8-2500-30952 MPUC Docket No. CN-13-153

REPLY BRIEF OF THE MINNESOTA DEPARTMENT OF COMMERCE

MAY 13, 2014

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INTRODUCTION

The Minnesota Department of Commerce, Division of Energy Resources ("Department" or "DOC") respectfully submits this Reply Brief, together with Proposed Findings of Fact, to provide the Administrative Law Judge ("ALJ") and the Minnesota Public Utilities Commission ("Commission") with analysis of the facts and law pertaining to the Application for a Certificate of Need for the Line 67 Phase 2 Project ("Project"), filed by Enbridge Energy, Limited Partnership ("Enbridge" or "Applicant"). While the Department continues to rely on the extensive discussion of issues that it provided in its Initial Brief, the Department provides in this Reply Brief additional response to arguments presented in the Initial Brief of Enbridge and the Initial Brief of MN350 and the Sierra Club ("Environmental Intervenors"). After analysis of the record under Minnesota Rules part 7853.0130 and Minnesota Statutes section 216B.243, subdivision 3, the Department continues to conclude that Enbridge has shown the proposed Project is needed in Minnesota, neighboring states, and the region, with the understanding that Enbridge will be able to obtain the permits necessary to upgrade the existing Line 67, and that denial of the requested Project would have a negative effect on the adequacy, reliability, or efficiency of heavy crude oil supplies.

I. DEPARTMENT'S RESPONSE TO ENBRIDGE

The Department continues to conclude that Enbridge has satisfied its burden of demonstrating that the proposed Project is needed in Minnesota, neighboring states, and the region because denial of the proposed Project would have a negative effect on the adequacy, reliability, or efficiency of heavy crude oil supplies. That being said, the Department responds to the "Applicable Law" section in Enbridge's Initial Brief because it does not agree with certain aspects of Enbridge's interpretation of the Commission's Rules.

In its Initial Brief, Enbridge argues that the Commission must consider the "full text" of Minnesota Rules part 7853.0130 in assessing the need for a large petroleum facility.[1] Specifically, Enbridge points to this language in the Rules:

> The Probable result of 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.[2]

Enbridge notes the presence of the conjunction "or" found in part 7853.0130(A) and constructs this Rules part as requiring the Commission to grant a certificate of need to an applicant when "the probable result of denial [of a certificate of need] would adversely affect the future adequacy, reliability, or efficiency of energy supply" in one of three situations: 1) when denial would adversely affect "the applicant"; 2) when denial would adversely affect "the applicant's customers"; or 3) when denial would adversely affect "the people of Minnesota and neighboring states . . . ."[3] Enbridge goes on to conclude that "Enbridge's demonstration that denial of the Application would have adversely impacted the supply of energy to its customers, *regardless of their location*, would be sufficient for the MPUC to issue the CN under Minnesota law, if all other elements of Minn. R. 7853.0130 are satisfied."[4]

That is, Enbridge argues that, if the Commission determined that the "the probable result of denial [of the application] would adversely affect the future adequacy, reliability, or efficiency of energy supply" for *only* Enbridge's customers on the U.S. Gulf Coast, assuming the other factors are satisfied, the Commission would be required to grant Enbridge a certificate of need.[5]

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[1] Enbridge Initial Br. at 44–46.
[2] Minn. R. 7853.0130(A) (2013).
[3] *Id.* at 44–45. The Commission's use of the conjunction "or" can be found in other need criteria in the Minnesota Rules. *See, e.g.*, Minn. R. 7849.120(A) (Power Plant or Line); Minn. R. 7851.0120(A) (Gas Storage, Pipeline); Minn. R. 7855.0120(A) (Large Energy Facility).
[4] *Id.* at 45 (emphasis added).
[5] *Id*.

Enbridge continues its argument by stating that only if Minnesota Rules part 7583.0130(A) had used the conjunction "and" rather than "or," would the Commission then have been required to consider whether the people of Minnesota and in the neighboring states would be adversely affected by the Commission's denial of a certificate of need application.[6]

As indicated in the Department's Initial Brief, the applicable criteria that the Commission uses to determine whether or not a proposed large petroleum facility is needed in Minnesota are found in Minnesota Statutes section 216B.243, subdivision 3 and Minnesota Rules part 7853.0130.[7] A "large energy facility shall [not] be sited or constructed in Minnesota without the issuance of a certificate of need by the commission pursuant to sections 216C.05 to 216C.30 and this section and consistent with the criteria for assessment of need."[8] Minnesota Rules part 7853.0130 stems from the Minnesota legislature's requirement that the Commission adopt "assessment of need criteria" when it evaluates an application for a certificate of need.[9] Under part 7853.0130, each of the Commission's criteria generally include a list of factors that the Commission must consider, provided they are "applicable and pertinent to each facility proposed . . . ."[10]

Enbridge argues that it would be "impermissibly narrow" for the Commission to interpret the need criteria for a petroleum facility to require a showing that the energy needs of the people of Minnesota and neighboring states would be adversely affected if a certificate of need were not granted.[11] In fact, Enbridge believes that such an interpretation would be unconstitutional because focusing only on the energy needs of the people of Minnesota and the neighboring states

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[6] *Id.*
[7] DOC Initial Br. at 10.
[8] Minn. Stat. § 216B.243, subd. 2 (2012).
[9] Minn. Stat. § 216B.243, subd. 1 (2012).
[10] Minn. R. 7853.0100 (2013).
[11] Enbridge Initial Br. at 45.

when determining whether to grant a certificate of need for an interstate pipeline would place a substantial burden on interstate commerce.[12] The Department disagrees.

Enbridge ignores the legislature's purpose behind its requirements for a certificate of need: that no proposed large energy facility (*e.g.*, petroleum pipeline) can be constructed in Minnesota unless an applicant satisfies certain required criteria pertaining to Minnesota and the region's energy needs, policies, and conservation programs.[13] Further, in interpreting Minnesota law, "the legislature intends to favor the public interest as against any private interest."[14] Therefore, the legislature could not have intended that the Commission give more weight to the private interests of Enbridge and its customers over the public interests of the people of Minnesota and the neighboring states. In the end, Enbridge's attempt to challenge the constitutionality of Minnesota Rules part 7853.0130 holds no weight in a proceeding before the Commission, for constitutional issues cannot generally be adjudicated before administrative bodies.[15]

Enbridge's argument that the Minnesota Commission cannot limit its focus in a certificate of need proceeding to the people of Minnesota and the neighboring states is also puzzling because Enbridge presented almost no specific, verifiable evidence in this matter regarding who its customers (shippers) are and whether its customers (shippers) would be adversely affected by denial of the proposed Project.[16] The Department welcomes this information in future certificate of need proceedings. Nevertheless, based on additional information Enbridge provided as requested by the Department, the Department has concluded

[12] *Id.*
[13] Minn. Stat. § 216B.243, subd. 2, 3 (2012).
[14] Minn. Stat. § 645.17(5) (2012).
[15] *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977); *see also Padilla v. Minn. State Bd. of Med. Exam'rs*, 382 N.W.2d 876, 882 (Minn. Ct. App. 1986).
[16] *See, e.g.*, Enbridge Ex. 1 at 7853.0530 (Revised Application).

that the proposed Project is needed in Minnesota, neighboring states, and the region because denial of the requested Project would have a negative effect on the adequacy, reliability, or efficiency of heavy crude oil supplies for the people of Minnesota, neighboring states, and the region, given the apportionment provisions in Enbridge's tariff for Line 67.[17] The Department appropriately focuses on energy needs in Minnesota, the neighboring states, and the region in arriving at its recommendation to the Commission.

II. DEPARTMENT'S RESPONSE TO ENVIRONMENTAL INTERVENORS

A. The Department Considered Environmental Impacts Of The Proposed Project And Its Alternatives

The Environmental Intervenors argue that the Department failed to consider the effects of additional greenhouse gas emissions that the proposed Project may facilitate.[18] The Department analyzed potential impacts on the natural environment that the proposed Project may cause as part of its analysis of the Revised Application under Minnesota Rule 7853.0130(C).[19] A summary of the Department's review of the proposed Project's potential environmental impacts can also be found in the Department's Initial Brief.[20] The Department's recommendation that the Commission approve the proposed Project is also based upon the understanding that Enbridge will obtain all permits and approvals from local, state, and federal government agencies that are required for the proposed Project, which include permits and approvals that impact the environment.[21]

[17] DOC Ex. 37 at 21–25 (Otis Surrebuttal).
[18] MN350 Initial Br. at 43–44.
[19] DOC Ex. 35 at 41–43 (Otis Direct).
[20] DOC Initial Br. at 34–36.
[21] DOC Ex. 37 at 25 (Otis Surrebuttal).

B. The Required Environmental Review of Line 67 Was Completed During The Initial Routing Permit Proceeding

In addition, the Environmental Intervenors believe that the Department did not adequately address the required environmental issues as part of an Environmental Impact Statement ("EIS") or through the preparation of an environmental assessment worksheet.[22] The Minnesota Environmental Policy Act ("MEPA") generally requires the "responsive government unit" to create an EIS when "there is potential for significant environmental effects resulting from any major government action . . . ."[23] In the initial Routing Permit docket for the Alberta Clipper Line (PPL-07-361), the Commission noted that pipeline companies in recent history have satisfied MEPA requirements by filing an Environmental Assessment Supplement ("EAS").[24] Under the Commission's Rules, "[t]he 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."[25] Further, commission staff or an applicant for a route permit must also provide "[a] comparative environmental analysis of all of the pipeline routes accepted for consideration at public hearings shall be prepared by the commission staff or by the applicant and reviewed by the commission staff.[26] This comparative environmental analysis must be submitted as prefiled testimony as required by part 1405.1900."[27] The criteria that the

[22] MN350 Initial Br. at 28–29.
[23] Minn. Stat. § 116D.04, subd. 2a (2012).
[24] *In the Matter of the Application of Enbridge Energy Limited Partnership and Enbridge Pipeline (Southern Lights) L.L.C. for a Routing Permit for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project*, Docket No. PL-9/PPL-07-361, ORDER GRANTING PIPELINE ROUTING PERMIT at 9 (Dec. 29, 2008).
[25] Minn. R. 7852.2700 (2013).
[26] Minn. R. 7852.1500 (2013). In a March 7, 2008 letter in the 07-361 docket, the Department reviewed Enbridge's comparative environmental analysis for the Alberta Clipper pipeline, after which it authorized Enbridge to submit the comparative environmental analysis into the record as pre-filed testimony.
[27] *Id.*

Commission must consider in selecting a pipeline route include evaluating the impact of the pipeline on:

a) human settlement, existence and density of populated areas, existing and planned future land use, and management plans;

b) the natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands;

c) lands of historical, archaeological, and cultural significance;

d) economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations;

e) pipeline cost and accessibility;

f) use of existing rights-of-way and right-of-way sharing or paralleling;

g) natural resources and features;

h) the extent to which human or environmental effects are subject to mitigation by regulatory control and by application of the permit conditions contained in part 7852.3400 for pipeline right-of-way preparation, construction, cleanup, and restoration practices;

i) cumulative potential effects of related or anticipated future pipeline construction; and

j) the relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws including ordinances adopted under Minnesota Statutes, section 299J.05, relating to the location, design, construction, or operation of the proposed pipeline and associated facilities.[28]

Regarding Line 67, the Commission thoroughly analyzed the required criteria found in Minnesota Rules part 7852.1900 as part of its review of the environmental impacts of Enbridge's proposed pipeline routing alternatives, and ultimately issued a Routing Permit for Line 67

[28] Minn. R. 7852.1900 (2013).

(Alberta Clipper) in the 07-361 docket.[29] Notably, the Minnesota Court of Appeals upheld the Commission's environmental review and issuance of a Routing Permit on appeal.[30] Because a Pipeline Routing Permit has already been issued for Line 67, and does not need to be amended, the required environmental review by the Department and the Commission has been conducted.

CONCLUSION

After analysis of the record under Minnesota Rules part 7853.0130 and Minnesota Statutes section 216B.243, subdivision 3, the Department continues to conclude that the proposed Project is needed in Minnesota, neighboring states, and the region because denial of the requested Project would have a negative effect on the adequacy, reliability, or efficiency of heavy crude oil supplies for people in Minnesota, neighboring states, and the region. Therefore, the Department respectfully recommends that the Commission approve the proposed Project

[29] *In the Matter of the Application of Enbridge Energy Limited Partnership and Enbridge Pipeline (Southern Lights) L.L.C. for a Routing Permit for the Alberta Clipper Pipeline Project and the Southern Lights Diluent Project*, Docket No. PL-9/PPL-07-361, ORDER GRANTING PIPELINE ROUTING PERMIT (Dec. 29, 2008).
[30] *Minn. Ctr. for Envtl. Advocacy v. Minn. Pub. Utils. Comm'n*, No. A10-812 (Minn. Ct. App. Dec. 14, 2010) (unpublished).

with the understanding that Enbridge will obtain all permits and approvals from local, state, and federal government agencies that are required for the proposed Project.

Dated: May 13, 2014

Respectfully submitted,

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Not Reported in N.W.2d, 2010 WL 5071389 (Minn.App.)
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Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, Appellant,
v.
MINNESOTA PUBLIC UTILITIES COMMISSION, Respondent,
Minnesota Environmental Quality Board, Respondent,
and
Enbridge Energy, Limited Partnership, et al., defendant intervenors, Respondents.

No. A10-812.
Dec. 14, 2010.

Background: Environmental group brought action against Minnesota Public Utilities Commission (MPUC) alleging violations of Minnesota Environmental Policy Act (MEPA) arising from MPUC's grant of petroleum company's application for certificate of need and issue of pipeline routing permit. Petroleum company intervened and group amended complaint to include claims against MPUC and company alleging violations of Minnesota Environmental Rights Act (MERA). The District Court, Clearwater County, granted summary judgment in favor of MPUC and petroleum company. Group appealed.

Holdings: The Court of Appeals, Larkin, J., held that:
(1) MPUC complied with alternative environmental-review process and thereby satisfied its environmental review responsibilities;
(2) project was not connected to or phased action;
(3) MPUC properly considered cumulative effects of project;
(4) MPUC adequately considered and addressed concerns of Department of Natural Resources (DNR);
(5) groups comments were beyond scope of necessary environmental review;
(6) MERA claims against company were procedurally barred;
(7) MERA claims against MPUC were not procedurally barred; and
(8) MEPA, rather than MERA, was proper vehicle to challenge adequacy of MPUC's environmental review.

Affirmed.

West Headnotes

[1] Environmental Law 149E ⚿577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases
Minnesota Public Utilities Commission (MPUC) complied with alternative environmental-review process and thereby satisfied its environmental review responsibilities under the Minnesota Environmental Policy Act (MEPA) in granting petroleum company's application for certificate of need and issuing pipeline routing permit, where, after numerous public hearings, administrative law judge (ALJ) issued his report in which the ALJ made findings of fact regarding relevant environmental criteria, and MPUC independently reviewed record, not blindly accepting ALJ's report of company's application. M.S.A. § 116D.04.

[2] Environmental Law 149E ⚿595(5)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compli-

ance with Requirements
149Ek595 Particular Projects
149Ek595(5) k. Mining; Oil and Gas. Most Cited Cases

Proposed petroleum pipeline project was not a connected or phased action with two other planned pipeline projects so as to require a single environmental review by Minnesota Public Utilities Commission (MPUC) under administrative rules; first pipeline project was intended to begin operating more than one year before the other two pipelines, pipelines were intended to be used for different purposes, and fact that the public hearings on the three proposed pipelines were consolidated for public convenience did not mean that the pipelines are connected actions as defined by rule. Minnesota Rules, part 4410.1700.

[3] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases

Minnesota Public Utilities Commission properly considered the direct, indirect, and cumulative effects of proposed pipelines on future projects pursuant to administrative rules in issuing pipeline routing permit, where the MPUC noted that, based on the best available evidence, that the preferred route would have had no greater cumulative effect that any feasible alternative. Minnesota Rules, part 7852.1900.

[4] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases

Minnesota Public Utilities adequately considered and addressed Department of Natural Resources' (DNR) concerns before granting certificate of need and issuing pipeline routing permit for proposed petroleum pipeline, where, although MPUC did not respond to each of the DNR's comments with a great deal of specificity, it did address each of them in some respect. Minnesota Rules, part 7852.1800.

[5] Environmental Law 149E 577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases

Environmental group's comments concerning proposed petroleum pipeline's effects on mining, refining, and fuel consumption in general were beyond the scope of the necessary environmental review required by Minnesota Public Utilities Commission (MPUC). Minnesota Rules, part 7852.1900.

[6] Environmental Law 149E 666

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek666 k. Preservation of Error in Administrative Proceeding. Most Cited Cases

Environmental group's Minnesota Environmental Responsibility Act (MERA) claims against petroleum company arising out of proposed pipeline were procedurally barred by section of statute governing the process of reconsideration of Minnesota Public Utilities Commission (MPUC) decisions that precluded a party from bringing a cause of action arising out of MPUC decision unless it first raised the ground for claim in petition for rehearing; nothing in statute limited its application to only appeals from MPUC decisions, and, although group petitioned for reconsideration of MPUC's pipeline-routing decision, its petition was based solely on grounds that MPUC issued the routing permit and certificate of need prior to completion of adequate environmental review for the project. M.S.A. § 216B.27.

[7] Environmental Law 149E 666

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek666 k. Preservation of Error in Administrative Proceeding. Most Cited Cases

Environmental group's Minnesota Environmental Responsibility Act (MERA) claims against Minnesota Public Utilities Commission (MPUC) arising out of proposed petroleum pipeline were not procedurally barred by section of statute governing the process of reconsideration MPUC decisions that precluded a party from bringing a cause of action arising out of MPUC decision unless it first raised the ground for claim in petition for rehearing, where group raised issue of adequacy of MPUC's environmental review in its petition for reconsideration. M.S.A. § 216B.27.

[8] Environmental Law 149E 633

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek633 k. Nature and Form of Remedy; Applicable Law. Most Cited Cases

Minnesota Environmental Policy Act (MECA), rather than Minnesota Environmental Responsibility Act (MERA), was proper vehicle to challenge adequacy of Minnesota Public Utilities Commission's (MPUC) environmental findings with regards to a proposed petroleum pipeline, where MPUC's role was limited to conducting environmental review of the project at issue. M.S.A. § 116D.01.

Clearwater County District Court, File No. 15-CV-08-865.Alexandra B. Klass, Minneapolis, MN, Mary Winston Marrow, St. Paul, MN, for appellant.

Lori A. Swanson, Attorney General, Jeanne M. Cochran, Assistant Attorney General, St. Paul, MN, for respondent-Minnesota Public Utilities Commission.

Robert B. Roche, Assistant Attorney General, St. Paul, MN, for respondent-Minnesota Environmental Quality Board.

Elizabeth H. Schmiesing, Daniel J. Herber, Minneapolis, MN, Paul B. Kilgore, Duluth, MN, for respondent-Enbridge Energy.

Considered and decided by WRIGHT, Presiding Judge; LARKIN, Judge; and STAUBER, Judge.

UNPUBLISHED OPINION

LARKIN, Judge.

***1** Appellant challenges the district court's award of summary judgment in respondents' favor on appellant's claims under the Minnesota Environmental Policy Act and Minnesota Environmental Rights Act. Because respondents are entitled to judgment as a matter of law, we affirm.

FACTS

Respondent Enbridge Energy owns and operates interstate common-carrier pipelines for the transportation of crude petroleum, derivatives, and related products. This case involves Enbridge's LSr pipeline, which is an approximately 313-mile long, 20-inch diameter, crude-oil pipeline that runs between Manitoba, Canada and Clearbrook, Minnesota. Prior to constructing the LSr pipeline, Enbridge filed applications for a pipeline routing permit and a certificate of need with respondent Minnesota Public Utilities Commission (MPUC). Enbridge submitted an Environmental Assessment Supplement (EAS), as required by Minnesota Rule 7852.2700 (2007), with its applications. After receiving comments on the applications, MPUC accepted the applications as substantially complete and referred the matters to the office of administrative hearings for contested-case proceedings.

The general public was provided with notice of the proposed pipeline, and public informational meetings were held in six Minnesota counties. At those hearings, the administrative-law judge (ALJ) received public comments regarding the LSr and portions of two other pipelines, the Alberta Clipper and Southern Lights. In response to preliminary input from landowners and others, Enbridge filed a

revised pipeline route request for the LSr. Following additional public hearings, the ALJ issued a report recommending that MPUC issue the certificate of need and routing permit subject to conditions.

The matter came before MPUC for consideration. MPUC granted Enbridge's application for a certificate of need and issued the pipeline routing permit. Appellant Minnesota Center for Environmental Advocacy (MCEA) filed a request for reconsideration, which MPUC denied.

MCEA filed suit against MPUC in district court, claiming violations of the Minnesota Environmental Policy Act (MEPA). Enbridge intervened in the action. Thereafter, MCEA filed an amended complaint alleging additional MEPA claims against MPUC, as well as claims against MPUC and Enbridge under the Minnesota Environmental Rights Act (MERA). The district court granted summary judgment in respondents' favor on all claims. This appeal follows.

DECISION

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court [ ] erred in [its] application of the law." *State by Cooper v. French,* 460 N.W.2d 2, 4 (Minn.1990) . "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.,* 644 N.W.2d 72, 77 (Minn.2002).

I.

***2** We first review the award of summary judgment on MCEA's MEPA claims. The purposes of MEPA are

> (a) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment; (b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and (c) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.
>
> Minn.Stat. § 116D.01 (2008).

MEPA requires that "[w]here 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 [(RGU)]." Minn.Stat. 116D.04, subd. 2a (2008). "Decisions on the need for an environmental assessment worksheet, the need for an environmental impact statement and the adequacy of an environmental impact statement may be reviewed by a declaratory judgment action in the district court of the county wherein the proposed action, or any part thereof, would be undertaken." Minn.Stat. § 116D.04, subd. 10 (2008). MCEA asked the district court to declare that MPUC violated MEPA by failing "to provide the required environmental analysis, instead relying on environmental information prepared solely by the pipeline company."

Because we review the district court's award of summary judgment on the MEPA claims de novo, *see STAR Ctrs., Inc.,* 644 N.W.2d at 77, we ultimately review the agency decision directly. When reviewing an administrative agency decision, we may affirm, reverse, modify the decision, or remand for further proceedings if the "substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

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

(f) arbitrary or capricious.

Minn.Stat. § 14.69 (2008).

The party seeking appellate review of an agency decision has the burden of proving that the decision was the product of one or more of these statutory infirmities. *Markwardt v. State, Water Res. Bd.,* 254 N.W.2d 371, 374 (Minn.1977). The decisions of administrative agencies are presumed to be correct and to have been based upon the application of the expertise necessary to decide technical matters that are within the scope of the agencies' concerns and authority. *In re Universal Underwriters Life Ins. Co.,* 685 N.W.2d 44, 45-46 (Minn.App.2004). In reviewing agency decisions, the courts must exercise restraint so as not to substitute their judgment for that which is the product of the technical training, education, and experience found within the agency. *Id.* We will not hold an agency's decision arbitrary and capricious if there is a rational connection between the facts found and the decision, and if the agency has reasonably articulated the basis for its decision. *Id.* at 45. "We defer to the agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable." *In re an Investigation into Intra-LATA Equal Access & Presubscription,* 532 N.W.2d 583, 588 (Minn.App.1995), *review denied* (Minn. Aug. 30, 1995).

A. Mootness

***3** Respondents assert that because the pipeline has already been built and is fully operational, MCEA's MEPA claims are moot. A moot case is defined as "[a] matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights." *Black's Law Dictionary* 1099 (9th ed.2009). The issue presented here is not abstract; a controversy still exists for which relief could be provided. Moreover, "[w]hen evaluating the issue of mootness in [National Environmental Policy Act (NEPA)] cases, [federal courts] have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities could merely ignore the requirements of NEPA, build [their] structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable." *Cantrell v. City of Long Beach,* 241 F.3d 674, 678 (9th Cir.2001) (quotation omitted). We agree with the federal court's assessment and will consider the merits of MCEA's MEPA claims.

B. Compliance With Environmental Review Responsibilities

[1] MCEA challenges the adequacy of MPUC's environmental review, arguing that MPUC "violated MEPA by failing to conduct its own thorough, independent analysis of environmental effects." MCEA argues that "once the PUC received the EAS, it had the responsibility for ensuring that the EAS (and any other environmental document it may have independently prepared) complied with applicable MEPA rules, as well as the pipeline routing rules," and that MPUC failed to do so.

Although MEPA requires "a detailed environmental impact statement prepared by the responsible governmental unit," it also provides that the Environmental Quality Board (EQB) "shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement." Minn.Stat. § 116D.04, subds. 2a, 4a (2008). Pursuant to this grant of authority, the EQB has promulgated rules that provide an alternative form of environmental review for proposed pipelines, which is contained in the rules governing the routing permit process. *See generally* Minn. R. 7852 (2007).

The applicable rule states that "[t]he applicant must also submit to the commission along with the application an [EAS containing 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." Minn. R. 7852.2700. The

impacts to be addressed include, but are not limited to, human settlements; the existence and density of populated areas; natural areas, wildlife habitat, water, and recreational lands; and land of historical, archaeological, and cultural significance. Minn. R. 7852.0700. Following public review and contested case hearings, MPUC must "consider" the environmental impacts of the proposed pipeline route "based on the public hearing record" and provide the reasons for its decision in written findings of fact. Minn. R. 7852.1800, 1900.

***4** The record shows that MPUC followed this process. After numerous public hearings, the ALJ issued his report. In that report, the ALJ made findings of fact regarding the relevant environmental criteria. The ALJ cited to specific record evidence that substantially supports the findings. Based on those findings, the ALJ recommended issuance of a route permit. Next, MPUC independently reviewed the record. MPUC's order granting the pipeline routing permit does not blindly accept Enbridge's application or the ALJ's report. MPUC stated:

> Having examined the record itself and carefully considered the ALJ's Report, the Commission concurs in nearly all his findings of fact and conclusions of law. At a few points, however, the Commission is persuaded that the record better supports the findings and conclusions offered by Enbridge and [Office of Energy Security] for the reasons discussed above.

MPUC complied with the alternative environmental-review process and thereby satisfied its environmental review responsibilities under MEPA.

C. Connected and Phased Actions

[2] MCEA contends that MPUC should have conducted a single environmental review for the LSr project and two other Enbridge pipeline projects: the Alberta Clipper and the Southern Lights. In support of its position, MCEA cites the Minnesota Administrative Rules, which provide that "connected actions or phased actions shall be considered a single project for purposes of the determination of need for an [Environmental Impact Statement (EIS)]." Minn. R. 4410.1700, subp. 9 (2007).

Two projects are considered connected actions "if a responsible governmental unit determines they are related in any of the following ways: A. one project would directly induce the other; B. one project is a prerequisite for the other and the prerequisite project is not justified by itself; or C. neither project is justified by itself." Minn. R. 4410.0200, subp. 9c (2007). A phased action "means two or more projects to be undertaken by the same proposer that a RGU determines: A. will have environmental effects on the same geographic area; and B. are substantially certain to be undertaken sequentially over a limited period of time." *Id.*, subp. 60 (2007).

But Minn. R. 4410.2000 expressly contemplates separate environmental review of a pipeline, like the LSr project, that is part of a larger planned network. Although the rule states that "[m]ultiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when determining the need for an EIS and in preparing the EIS," the rule goes on to state:

> For proposed projects such as highways, streets, *pipelines,* utility lines, or systems where the proposed project is related to a large existing or planned network, for which a governmental unit has determined environmental review is needed, the RGU shall treat the present proposal as the total proposal or select only some of the future elements for present consideration in the threshold determination and EIS. These selections must be logical in relation to the design of the total system or network and must not be made merely to divide a large system into exempted segments.

***5** Minn. R. 4410.2000, subp. 4 (emphasis added).

This rule is applicable here. The LSr project is part of Enbridge's planned pipeline network. Enbridge intended to begin operating the LSr pipeline more than one year before the other two pipelines. Therefore, the treatment of the LSr project as the total proposal was logical in relation to the design of the total network and was not made merely to "divide a large system into exempted segments."

Moreover, the LSr, Alberta Clipper, and Southern Lights pipelines are not connected actions. MCEA asserts that the three pipelines meet the definition of connected and phased actions because "they are dependent on each other for their existence." But the record shows that the three projects serve different purposes: the LSr carries light crude oil, the Alberta Clipper is intended to transport heavy crude oil, and the Southern Lights is intended to carry diluent. MCEA claims that LSr is a prerequisite for Southern Lights because Southern Lights will connect to Line 13, which will have its flow reversed to carry diluents and LSr will replace the crude transport capacity lost through the reversal of Line 13. But this does not render LSr a prerequisite for Southern Lights. Even though capacity replacement will result from construction of LSr, the record shows that the LSr was designed to alleviate existing bottlenecks in the pipeline system. Two actions are connected only if one project is a prerequisite for another and the prerequisite is not justified on its own; LSr is self-justified. And although these pipelines appear to be phased actions as defined by the rule, under Minn. R. 4410.2000, subp. 4, it was unnecessary to consider the three pipelines as a single project.

MCEA also alleges that MPUC "recognized the connected nature of the three pipelines and considered them as one project until just prior to the environmental review stage, at which time it arbitrarily split the LSr pipeline from the other two for permitting purposes." The record refutes this allegation. MPUC established one docket for the LSr and another for Alberta Clipper and Southern Lights. The public-meeting notices indicated that the LSr was a separate action from the other two pipelines. The fact that the public hearings on the three proposed pipelines were consolidated for public convenience does not mean that the pipelines are connected actions as defined by rule.

Lastly, MCEA argues that MPUC violated MEPA by failing to analyze the environmental impacts associated with the installation of additional pumps to utilize the full capacity of the LSr line and the additional pipelines needed to utilize the full capacity of the Alberta Clipper line. But the record indicates that no additional pumping stations or additional lines are planned. MCEA provides no legal support explaining how the LSr project can be considered a "connected" or "phased" action with unplanned, hypothetical pumping stations or pipelines.

D. Direct, Indirect, and Cumulative Effects

***6** [3] "In selecting a route for designation and issuance of a pipeline routing permit, the commission shall consider the impact [of] the pipeline [on] the following: cumulative potential effects of related or anticipated future pipeline construction[.]" Minn. R. 7852.1900, subp. 3(I). "[A] cumulative potential effects analysis is limited geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources ... as the proposed project." *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs,* 713 N.W.2d 817, 830 (Minn.2006). The cumulative-effects analysis focuses on whether a project that may not significantly impact the environment singularly causes a substantial impact when other planned or existing projects are considered.

MCEA asserts that the "cumulative, direct, and indirect impacts from the three pipelines must be examined, particularly as concerns the cumulative effects of these projects on global warming." According to MCEA, the environmental effects that must be examined are the "effect on global warming from the increase in greenhouse gas emissions associated with refining the tar sands [in Alberta, Canada] and using the resulting petroleum, the de-

struction of carbon-sequestering boreal forests and bogs in northern Alberta, and the subsequent release of carbon from those boreal forests and bogs." But rule 7852.1900, subp. 3(I), concerns the designation of a route for a proposed pipeline, whereas the effects with which MCEA is concerned relate to the tar-sand refining process in Alberta and the existence of the pipeline generally-not to the LSr pipeline route itself.

Moreover, MPUC considered the cumulative potential effects as specified by the rule. The ALJ noted that the revised route and alignment submitted by Enbridge "describes a 500 foot route width that will accommodate either, or both, of the LSr and Alberta Clipper pipelines, if approved by the Commission." These pipelines were planned to run adjacent and parallel. The ALJ further noted that, beyond the LSr and the Alberta Clipper Projects (i.e., the Alberta Clipper and Southern Lights pipelines), Enbridge did not have plans for further pipeline construction. In its report, MPUC noted that "[b]ased on the best available evidence, the Commission finds that Enbridge's preferred route ... will have no greater cumulative potential effect on future pipeline construction than any feasible alternative." This decision is presumed to be correct and to have been based upon the application of the expertise necessary to decide technical matters that are within the scope of the agencies' concerns and authority. *See Universal Underwriters Life Ins. Co.*, 685 N.W.2d at 45-46.

E. Failure to Respond to Comments

[4] MCEA also asserts that MPUC violated MEPA by failing to respond to the Minnesota Department of Natural Resource's (DNR) and MCEA's written comments expressing concerns about the LSr pipeline route and "by stating in response to comments by the DNR and MCEA that Enbridge could address any environmental concerns as they arose during the construction and operation of the pipeline."

*7 MPUC evaluated the evidence in the record and considered the comments made by the DNR. In an attempt to respond to the DNR's concerns, MPUC adopted seven supplemental findings, which were suggested by the Minnesota Department of Commerce's Office of Energy Security (OES), in its order granting the pipeline routing permit. Furthermore, the dictate that MPUC must consider evidence in the record does not necessarily mean that MPUC must specifically respond to each comment or concern. *See* Minn. R. 7852.1800 ("The commission's route selection decision shall be based on the public hearing record and made in accordance with part 7852.1900."). And we must keep in mind the deference that is afforded when reviewing matters within an agency's expertise. *See Universal Underwriters,* 685 N.W.2d at 45-46 ("When reviewing agency decisions we adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience."). Although MPUC did not respond to each of the DNR's comments with a great deal of specificity, it did address each of them in some respect. Based on our deferential standard of review, we conclude that MPUC adequately considered and addressed the DNR's concerns.

[5] MCEA also argues that MPUC failed to consider or respond to its written comments. MCEA takes issue with the lack of "analysis of any sort of the cumulative effects of all three pipelines on the development of the Alberta tar sands oil and the impact of that development on air quality in Minnesota or climate change." Specifically, MCEA argues that the mining process generates enormous carbon emissions in Canada and the resulting import of crude oil from the mines causes increased refinery activity and fuel consumption in Minnesota, which also increases carbon emissions. MCEA is correct-MPUC did not address these concerns. But these concerns deal with mining, refining, and fuel consumption in general, whereas MPUC was concerned with the environmental impact resulting from a specific, proposed pipeline

route. *See* Minn. R. 7852.1900. MCEA's general environmental concerns were beyond the scope of the necessary environmental review, and MPUC's review is not inadequate as a result of its failure to address them.

Lastly, MCEA misplaces reliance on *Trout Unlimited v. Minn. Dep't of Agric.* to support its argument that MPUC erred by allowing Enbridge to address environmental problems as they arose. 528 N.W.2d 903 (Minn.App.1995) *review denied* (Apr. 27, 1995). In *Trout Unlimited,* the agency recognized the potential for significant environmental impacts, but determined that, because the situation could be monitored and permits would need to be obtained, an EIS was unnecessary. *Id.* at 909. This court held that future mitigation measures were not a substitute for an EIS. *Id.* But *Trout Unlimited* is factually distinguishable because, in this case, an environmental impact review was conducted under the applicable rules. And although MPUC's order included mitigation plans, MPUC did not use mitigation measures as a substitute for environmental review.

***8** In sum, none of MCEA's arguments establishes a basis to reverse, modify, or remand the MPUC's decision to issue the routing permit and certificate of need for the LSr pipeline. *See* Minn.Stat. § 14.69. Accordingly, summary judgment in MPUC's favor on MCEA's MEPA claims is affirmed.

II.

We next address MCEA's MERA claims. "MERA provides a civil remedy for those that seek to protect ... the air, water, land, and other natural resources within the state" from pollution, impairment, or destruction. *State ex rel. Swan Lake Area Wildlife Ass'n v. Nicollet County Bd. of County Comm'rs,* 711 N.W.2d 522, 525 (Minn.App.2006), *review denied* (Minn. June 20, 2006). MCEA alleged one MERA count against MPUC and two MERA counts against Enbridge, generally asserting that respondents polluted, impaired, or destroyed a calcareous fen [FN1] in violation of MERA. MCEA also asserts that Enbridge violated an environmental-quality standard by acting without an approved management plan. *See* Minn. R. 8420.0935, subp. 4 (2007) ("Calcareous fens must not be impacted or otherwise altered or degraded except as provided for in a management plan approved by the commissioner."). MCEA sought declaratory and equitable relief on its MERA claims.

> FN1. "A calcareous fen is a peat-accumulating wetland dominated by distinct groundwater inflows having specific chemical characteristics. The water is characterized as circumneutral to alkaline, with high concentrations of calcium and low dissolved oxygen content. The chemistry provides an environment for specific and often rare hydrophytic plants." Minn. R. 8420.0935, subp. 2 (2007).

[6] On appeal, MCEA argues that summary judgment was improperly granted because there are genuine issues of material fact regarding its MERA claims. Respondents counter that MCEA's MERA claims are barred under Minn.Stat. § 216B.27, subd. 2 (2008). Chapter 216B governs Minnesota public utilities. *See* Minn.Stat. §§ 216B.01-.82 (2008). Minn.Stat. § 216B.27 describes the process for reconsideration of MPUC decisions, including the issuance of pipeline routing permits, and states:

> The application for a rehearing shall set forth specifically the grounds on which the applicant contends the decision is unlawful or unreasonable. No cause of action arising out of any decision constituting an order or determination of the commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after the service of the decision, shall have made application to the commission for a rehearing in the proceeding in which the decision was made. No person or corporation shall in any court urge or rely on any ground not so set forth in the application for rehearing.

Minn.Stat. § 216B.27, subd. 2.

MCEA argues that Minn.Stat. § 216B.27 does not apply to its MERA claims because "[t]hat statute limits the issues that a party may raise in an appeal of a PUC decision made as part of an administrative proceeding." But MCEA cites no authority to support its assertion that the statute applies only to appeals, and the assertion is inconsistent with the plain language of the statute. If the legislature's intent is clearly discernible from a statute's unambiguous language, courts interpret the language according to its plain meaning, without resorting to other principles of statutory construction. *State v. Anderson,* 683 N.W.2d 818, 821 (Minn.2004). Section 216B.27, subd. 2, unambiguously references "[n]o cause of action arising out of any decision" or "any proceeding for the judicial review" of the decision. The plain language of the statute therefore applies both to judicial proceedings to review a decision and to causes of action arising out of the decision. Because this case involves a cause of action arising out of a decision of MPUC, section 216B.27 , subd. 2, applies.

***9** We therefore consider whether MCEA'S MERA claims against Enbridge are barred under section 216B.27, subd. 2. This section precludes a party from bringing a cause of action arising out of an MPUC decision unless that party first raises the ground for the claim in a petition for rehearing on the decision. The grounds for MCEA's MERA claims against Enbridge are that Enbridge constructed and operates the LSr pipeline through a calcareous fen, thereby causing pollution, impairment and destruction of a natural resource, in the absence of a management plan approved by the DNR. These claims arise from MPUC's decision to authorize the construction of the pipeline in a particular location. Although MCEA petitioned for reconsideration of MPUC's pipeline-routing decision, its petition was based solely on grounds that MPUC issued the routing permit and certificate of need "prior to completion of adequate environmental review for the project" under MEPA. It is undisputed that MCEA did not raise the grounds for its MERA claims against Enbridge in its petition for rehearing. Accordingly, the claims against Enbridge are procedurally barred. *See* Minn.Stat. § 216B.27, subd. 2. Enbridge is therefore entitled to summary judgment on these claims as a matter of law.

Moreover, contrary to MCEA's assertion, Enbridge is not operating the LSr pipeline without an approved management plan. Under Minnesota law, no action may be brought under MERA on the basis of "conduct taken by a person pursuant to any environmental quality standard, limitation, rule, order, license, stipulation agreement or permit issued by the Pollution Control Agency, Department of Natural Resources, Department of Health or Department of Agriculture." Minn.Stat. § 116B.03, subd. 1 (2008); *see also* Minn. R. 4410.0200 (2007) (" 'Permit' means a permit, lease, license, certificate, or other entitlement for use or permission to act that may be granted or issued by a governmental unit...."). The DNR has approved a fen management plan for the affected fen. MCEA's argument that this management plan does not apply to the LSr pipeline is unpersuasive. The plan states: "The following discussion refers to calcareous fen components within the Gully 30 area that have been or will be impacted directly or indirectly by the 2008 installation of the LSr pipeline and the proposed installation of the Alberta Clipper pipeline...." Thus, even if MCEA's MERA claim against Enbridge were not procedurally barred, the claim based on Enbridge's operation of the LSr in the absence of an approved management plan would fail as a matter of law. *See* Minn.Stat. § 116B.03, subd. 1.

[7] We next consider whether MCEA's MERA claim against MPUC is barred under section 216B.27, subd. 2. MCEA asserts that MPUC failed to conduct an adequate environmental review as required by MEPA and as a direct result, granted a routing permit for the construction of the LSr pipeline through a calcareous fen, thereby causing pollution, impairment, and destruction of a natural resource in violation of MERA. This claim arises

out of MPUC's permitting decision. Because MCEA raised the adequacy of MPUC's environmental review in its petition for reconsideration of the permitting decision, the MERA claim is not procedurally barred. *See* § 216B.27, subd. 2.

***10** [8] But the reason that the MERA claim against MPUC is not procedurally barred is because the claim and MCEA's petition for reconsideration are based on identical grounds: MPUC's alleged failure to conduct adequate environmental review under MEPA. And because MCEA alleges inadequate environmental review as the basis for its MERA claim, the claim entails assessment of MPUC's environmental review. But MEPA, rather than MERA, is the "appropriate vehicle" with which to challenge the adequacy of MPUC's environmental review "where the agency's role is limited only to conducting environmental review of the project at issue." *See Nat'l Audubon Soc. v. Minnesota Pollution Control Agency,* 569 N.W.2d 211, 213, 219 (Minn.App.1997) (concluding that where plaintiffs were challenging an agency's environmental-review decision and the agency's role was limited to conducting the required environmental review of the project, plaintiffs' challenge must be brought under MEPA and not MERA), *review denied* (Minn. Dec. 16, 1997). Accordingly, MCEA may not maintain its claim against MPUC under MERA. *See id.* at 219.

Perhaps MCEA is attempting to avoid the conclusion, compelled by *National Audubon,* that MPUC's alleged inadequate review is not actionable under MERA by asserting that MPUC's inadequate review is "causing" pollution. *See id.* at 218 (explaining that "[b]ecause environmental review cannot result in pollution, impairment, or destruction of the environment ... environmental review does not constitute 'pollution, impairment, or destruction' of the environment as defined by MERA"). But because we have determined that MPUC's environmental review is adequate under MEPA, there is no genuine issue of material fact, and the MERA claim fails as a matter of law. *See Lubbers v. Anderson,* 539 N.W.2d 398, 401 (Minn.1995) ("A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim."). For these reasons, MPUC is entitled to summary judgment on MCEA's MERA claim.

In conclusion, summary judgment on all of MCEA's MERA claims is appropriate.

Affirmed.

Minn.App.,2010.
Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Com'n
Not Reported in N.W.2d, 2010 WL 5071389 (Minn.App.)

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