STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

EXCEPTIONS TO THE ALJ'S REPORT

OF

FRIENDS OF THE HEADWATERS

APRIL 28, 2015

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INTRODUCTION

Judge Lipman's recommendation to the Commission suffers from four major errors of law, all of which form the basis of his Findings of Fact, Summary of Public Testimony, Conclusions of Law and Recommendation to grant a Certificate of Need ("CON") for the applicant's preferred location for its pipeline project. In contrast, the attached Proposed Findings of Fact and Conclusions of Law from Friends of the Headwaters[1] are grounded in the applicable statute and rule and the facts in evidence. As a result of these fundamental flaws, the Public Utilities Commission ("Commission") should disregard the Administrative Law Judge's ("ALJ's") recommendations and deny the Certificate of Need for the Sandpiper Pipeline.

First, contrary to the ALJ's conclusions, the Commission has the discretion to deny a Certificate of Need for a pipeline, even if the application fulfills the bare requirements laid out in rule. The PUC has ample discretion to deny a Certificate of Need for a proposed pipeline based on the record evidence if it so chooses, under the both the statutory direction given by the state legislature and its own rules. To find otherwise would set a disastrous precedent for future pipeline projects.

The Commission has not traditionally denied "need" certification requests from pipeline companies. But now, the winds have shifted, and the time has come for the Commission to actively exercise the authority given it by the Minnesota legislature. As the Commission's earlier actions in this proceeding demonstrate, Minnesota is not merely a speed bump for crude oil moving to distant markets. The burden of proof for a pipeline company must be more than a "check list" of requirements to fulfill. Simply because a pipeline company wishes to put a pipeline in a particular location does not make an inevitability. It is the right and the

[1] For the convenience of the Commission, a redlined version of the ALJ's Proposed Findings of Fact and Conclusions of Law is incorporated by reference and attached to these Exceptions as Attachment A.

responsibility of the Commission to make this decision in the best interest of the state of Minnesota. Contrary to the ALJ's recommendations, the company's bottom line cannot determine the outcome of these proceedings.

Second, this case is about the public interest, an interest the ALJ's Findings of Fact do not recognize. The citizens of Minnesota have little or nothing to gain from this pipeline, while we are asked to risk a great deal, putting our clean water, other natural resources and our taxpayer dollars at risk during construction and in the event of an accident. The ALJ's Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendation (hereinafter "Findings of Fact") attempt to answer the question, "Is this the right pipeline for the oil shippers and the applicant?" But the question the Commission must answer is, "Is this the right pipeline for Minnesota?"

Third, the applicant continues to bear the burden of proof, and this burden is greater than merely checking off the minimum requirements of an application process. The construction of a large energy facility is not and should not be presumed. The Commission as well as the Minnesota Legislature have recognized that there are social costs to any large energy facility in the form of environmental impacts, and there are environmentally preferable alternatives such as energy conservation. The fact that Minnesotans aren't consuming any of this energy directly makes it all the more important for the state to assert its right to control the type and location of energy facilities that cross the state, as the state bears all the risks and enjoys none of the benefits.

Fourth, the ALJ's opinion ignores environmental issues, including the expert opinions of both the Minnesota Pollution Control Agency ("MPCA") and the Department of Natural Resources ("MDNR"). Despite the fact that the record contains opinions of four experts on

environmental impacts of pipelines, including Minnesota's two expert environmental state agencies, the ALJ fails to come to any meaningful conclusions about the comparative environmental effects of the system alternatives. This is not the kind of thorough, thoughtful and professional review of environmental impacts that the Commission clearly told parties it wanted when it set up this process last summer. It would be contrary to the Commission's own statements regarding the need for environmental analysis to adopt the proposed findings for this huge project, given its own stated requirements. Instead, we believe, based on sound law and policy, the PUC must conclude either: (1) the existing record is inadequate to evaluate the various system alternatives, in which case additional work must be done before a CON may be granted; or (2) the existing record is sufficient to demonstrate that NDPC's route is the least preferable environmental option, and therefore the requested CON must be denied. The record supports no other conclusion.

Finally, it should be noted that the ALJ's opinion distorts Friends of the Headwaters's ("FOH's") position. In fact, the Findings of Fact fail to acknowledge FOH's position at all, let alone any nuance among the parties. The Commission should be concerned about the ALJ's characterization of the parties' positions, which shows a complete lack of interest in the arguments that FOH has carefully and thoughtfully crafted throughout this proceeding and throughout the entire process for the Sandpiper Pipeline. The ALJ stated that the parties in this matter "diverge on a central point: whether the benefits of improving access to North Dakota crude oil are worth assuming the risks that there might later be a large-scale oil spill from the pipeline."[2] But FOH has never taken an anti-pipeline position; rather FOH has only advocated to relocate the proposed pipeline to a safer location in the state. FOH asks that the Commission re-

[2] Findings of Fact at 2.

evaluate NDPC's Certificate of Need application in light of the actual evidence presented, and not rely on a distortion of the parties' positions.

PROCEDURAL HISTORY

North Dakota Pipeline Company ("NDPC")[3] applied for a Certificate of Need ("CON") and a Route Permit in November 2013.[4] The CON and Route Permit applications were conditionally accepted as complete in February 2014, and, at that time, the Commission invited the public to suggest "alternative pipeline routes."[5] The Commission then referred the cases to the Office of Administrative Hearings for a contested case and authorized the Department of Commerce Energy Environmental Review and Analysis ("DOC-EERA") to facilitate the development of route proposals beyond those proposed by NDPC.[6]

In the public comment period that ensued,[7] 402 citizens and 55 organizations and businesses wrote to oppose the proposed pipeline, as did one local unit of government and one tribal entity.[8] Only 30 citizens and five organizations or businesses wrote to support the project.[9] Among the concerns raised, over 380 expressed environmental concerns, over 350 comments expressed concern about water quality specifically, and 347 comments expressed a preference for an alternative route.[10] As part of the same public comment period, FOH submitted alternative

[3] The application was submitted by Enbridge Pipelines (North Dakota) LLC in November 2013 (Ex. 1 at 1), but Enbridge updated the application and changed the applicant to NDPC in January 2014 (Ex. 3). NDPC is a joint venture between Enbridge Energy Partners, L.P. and Marathon Petroleum Company. (Ex. 3 at 2.) The Exhibits referred to are the Exhibits as designated in the contested case hearing.
[4] Ex. 1.
[5] Ex. 42 at 2.
[6] Ex. 42 at 10.
[7] There was a second comment period that ended January 23, 2015, which is qualitatively summarized at paragraphs 618-625 of the ALJ's Findings of Fact.
[8] DOC-EERA Comments and Recommendations, dated July 16, 2014 at 11.
[9] *Id.*
[10] *Id.*

routes for consideration.[11] FOH's routes (System Alternatives designated SA-04, SA-05, SA-06 and SA-07) follow existing pipeline rights-of-way to serve Midwestern refineries.[12] The MPCA also filed a preliminary[13] alternative to the Project, designated SA-03, and Honor The Earth filed a System Alternative as well.[14] DOC-EERA filed a report describing these "System Alternatives" as well as several "route alternatives" in July 2014.[15] DOC-EERA's report describes the System Alternatives as follows:

- SA-03, proposed by MPCA, bypasses the Lake Country's Environmentally Sensitive Resources (and the Clearbrook Terminal), follows existing corridors south, then heads east to the I-35 corridor and back north to terminate in Superior. SA-03 is approximately 360 miles long.

- SA-04 would follow the existing Alliance Pipeline through North and South Dakota, Minnesota, Iowa and Illinois. It entirely avoids the concentrated areas of clear water lakes, wild rice lakes, wetlands, and vulnerable aquifers (the "Lake Country's Environmentally Sensitive Resources") that NDPC's Preferred Route traverses, and crosses primarily agricultural land. It is approximately 1,050 miles long, and does not connect with terminals in Clearbrook or Superior.

- SA-05 also follows an existing gas pipeline, the Northern Border Natural Gas Pipeline that cuts across southwestern Minnesota, which is primarily an agricultural area. It avoids the Lake Country's Environmentally Sensitive Resources. It also does not connect with terminals in Clearbrook or Superior. SA-05 is approximately 1,100 miles long.

- SA-06 follows Minnesota Highway 9 south until it joins the Magellan Products pipeline. It follows the existing Magellan Products line south and east, where it intersects with the existing MinnCan crude oil pipeline. SA-06 could connect back to the terminal in Superior after it intersects with the existing Enbridge right-of-way, or it could proceed south to the Chicago area. It avoids the Lake Country's Environmentally Sensitive Resources.

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[11] *Id.* at 14-15. In order to distinguish proposals such as FOH, which are alternative locations for the pipeline and do not connect to Clearbrook and/or Superior, from the localized "route alternatives" that would make small adjustments to NDPC's Preferred Route, the alternative location proposals were dubbed "System Alternatives."
[12] *Id.*
[13] Upon further analysis MPCA concluded that System Alternatives proposed by other parties were environmentally superior to SA-03. (Ex. 183, Sch. 1 at 7.)
[14] DOC-EERA Comments and Recommendations, dated July 16, 2014 at 13-15.
[15] *Id*.

- SA-07 would follow I-94 to an existing Magellan Product pipeline south and east to a point where it intersect with the MinnCan 24-inch crude oil pipeline and follow it to Minnesota's two refineries. At those points the pipeline can proceed northward to the Superior terminal or follow an existing Magellan Product pipeline east into Wisconsin until it intersects the existing Enbridge right-of-way at which point a pipeline could be built to carry the oil back up to Superior or down to Illinois. It avoids the Lake Country's Environmentally Sensitive Resources.

- SA-08 was proposed by Honor The Earth, and delivers oil directly to the Minnesota refineries by following the I-29 and I-94 corridors. It avoids the Lake Country's Environmentally Sensitive Resources. [16]

The Commission considered DOC-EERA's report at a meeting on August 7, 2014.[17] At that meeting, the Commission heard comments from parties as well as from the public regarding the selection of additional route and/or System Alternatives for further consideration in these matters.[18] The Commission accepted 53 route alternatives and one modified system alternative (Modified SA-03)[19] for further consideration.[20] The Commission also solicited comments on which, if any, of the eight System Alternatives identified by DOC-EERA should be considered further, as well as the legal basis for determining whether the System Alternatives should be considered in either the CON proceeding or the Route Permit proceeding.[21] FOH submitted comments analyzing Enbridge's crude oil pipeline system in detail and refuting NDPC's alleged need to go through Clearbrook and terminate at Superior.[22] FOH stated that the System

[16] *Id*.
[17] Ex. 46 at 2.
[18] *Id.* at 3 n. 7.
[19] The modifications connected SA-03 (proposed by MPCA) to Clearbrook and Superior, essentially transforming the system alternative into a route alternative. FOH uses the term "System Alternatives" to include the System Alternatives that the Commission ordered to be addressed in the CON proceeding: SA-03, SA-04, SA-05, SA-06, SA-07, and SA-08. FOH will refer to Modified SA-03 and NDPC's "Preferred Route" separately. *See* the attached maps from FOH, Attachment B.
[20] Ex. 46 at 2.
[21] *Id.* at 10.
[22] Ex. 183, Sch. 4.

Alternatives were sufficient to meet the need of transporting oil from the Williston Basin to refineries in Minnesota and elsewhere.[23]

On September 11, 2014, the Commission met to decide whether to consider the System Alternatives further based on comments from the parties.[24] The Commission also considered two additional topics: (1) whether the route proceeding and CON proceedings should be bifurcated; and (2) what type of environmental review, if any, should be completed as part of the CON proceeding.[25] The Commission determined in a rare if not unprecedented action that: (1) the CON and Route Permit proceedings should be bifurcated and the CON proceeding should be completed before the route proceeding begins in order to avoid unnecessary confusion and resource expense; (2) the System Alternatives should be evaluated in the CON proceeding; and (3) a "high-level," "broad-based" environmental analysis of the System Alternatives should be conducted.[26]

The Commission bifurcated the proceedings based in part on the recommendation from MPCA and MDNR, who pointed out that bifurcating the proceedings would be a more efficient use of agency and public resources and improve public participation.[27] In its decision, the Commission expressed particular concern for citizen groups and the potential burden of participating in proceedings that addressed both need and routing simultaneously.[28]

The Commission concluded that environmental review of the System Alternatives is "appropriate," and its decision was guided by the "general charge" of MEPA, § 116D.03.[29] However, the Commission declined to order a form of environmental review recognized under

[23] *Id.* at 5-6.
[24] Ex. 47 at 3.
[25] *Id.*
[26] Ex. 48 at 11-13.
[27] *Id.* at 4-5.
[28] *Id.* at 6.
[29] *Id.* at 11.

MEPA. Instead, it ordered an environmental report from DOC-EERA, stating that "it is reasonable to investigate the potential natural and socioeconomic environmental impacts, as well as the economic and technical considerations posed by System Alternatives, as part of the need decision."[30] The Commission "anticipate[d] that this review should evidence, from a broad environmental perspective, the relative risks and merits of choosing a different system alternative."[31] The "high-level" environmental review ordered by the Commission was intended to "ensure opportunity for other governmental agencies, the public and other private entities, like pipelines, to weigh in on both the need and any System Alternatives."[32] Based on these recommendations, the Commission ordered DOC-EERA to prepare an environmental review document that "examines and evaluates the potential impacts of the proposed project" and the System Alternatives.[33]

DOC-EERA filed its Systems Alternative Report on December 18, 2014, a little more than two weeks before rebuttal testimony was due.[34] Rather than providing any substantive analysis of the system alternatives, the DOC-EERA report was essentially an accounting of the features within the corridors.[35] FOH witness Stolen, Carlton County Land Stewards witness Chapman, the MDNR, and MPCA all provided substantial criticisms of the Systems Alternative Report and found it severely inadequate because it was not analysis, but limited data.[36] Although Stolen and Chapman were allowed to provide their critiques as prefiled testimony, FOH's requests for subpoenas for MPCA and MDNR witnesses were denied. Judge Lipman initially

[30] *Id.* at 11-12.
[31] *Id.* at 12.
[32] Transcript Sept. 11, 2014 at 5.
[33] Ex. 48 at 12.
[34] Ex. 80.
[35] "Sandpiper Pipeline: Comparison Environmental Effects of Reasonable Alternative," DOC-EERA Report, December 2014 (*see, e.g.*, Chapter 6, Comparison of Alternatives, which compares numbers and types of resources within the corridors but does not analyze the impacts of a pipeline on those resources).
[36] *See* Exs. 184, 112, and 185, MPCA Comments dated January 23, 2015.

denied the subpoena requests, but invited FOH to refile its request. FOH did so, and Judge Lipman denied the requests again on January 20, 2015. MDNR eventually agreed to voluntarily appear, but none of the parties were allowed to question MPCA further about its analysis of the System Alternatives. All of the environmental experts agreed that NDPC's Preferred Route presents the least preferable location from an environmental standpoint for a pipeline to cross Minnesota.[37]

On April 13, 2015, Judge Lipman issued his Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendation. In his Findings of Fact, Judge Lipman recommended that the Commission grant a CON for the project, noting that "NDPC has complied with all relevant statutes and regulations regarding its Certificate of Need application."[38] The Findings of Fact substantially mirror the suggested "Findings of Fact" from NDPC with minor modifications. In his final reflections, Judge Lipman complained that he was given no choice in making his recommendation, concluding that the "text and structure of Minn. R. 7853.0130 leads readers to conclude that if a proposed pipeline is the most effective response to genuine market demands, is designed well, and will be installed carefully, 'a Certificate of Need *shall* be granted.'"[39] Therefore, Judge Lipman concluded that the Commission itself had, through its regulations, limited his discretion in making recommendations to the Commission.

ARGUMENT

I. The ALJ's Opinion Is Flawed In Four Critical Areas, And Therefore Cannot Be Adopted As Written Based On The Evidentiary Record.

In resolving this case, the Commission must confront issues that are fundamental to the Commission's authority under statutory law, administrative law, and the role of public

[37] Exs. 112 and 185, MPCA Comments, dated January 23, 2015.
[38] Findings of Fact, p. 3.
[39] *Id.* at 102 (emphasis in original).

participation. The Commission's decision will set an important precedent, establishing standards that will apply well beyond the Sandpiper Project. This case is about the future of Commission's regulatory authority over pipelines in general. It is about whether the public can effectively participate in pipeline proceedings. And it is about whether Minnesota will have a say in how, or whether, crude oil will travel across our state, putting our landscape at risk. The Commission has the opportunity to positively influence the outcome of these significant issues, and it would be a mistake not to do so.

A. Contrary to the ALJ's opinion, the Commission has the discretion to deny a Certificate of Need, even if the company has completed the application process.

This case presents a defining moment for the Commission's ability to exercise authority over oil pipelines. If it were to agree with the ALJ, the Commission would almost entirely, with the stroke of a pen, sign away its authority over pipelines. In the future, Minnesotans would be subject to the demands of pipelines companies, who would use the ALJ's reasoning to claim that they are entitled to a pipeline in their chosen location simply because they filed an application that met the minimum requirements outlined in rule by the Commission. But the application process must be more than a checklist. Because in truth, any pipeline company can do what NDPC has done – file an application and hire the expertise to support it, as well as sign contracts to demonstrate some level of shipper support prior to entering the permitting process. That should not be the determining factor.

The Commission *must* maintain its authority to reject a pipeline application in favor of a different project or no project at all if Minnesota's statutes are to have any effect. And the Sandpiper is a test for those statutes and the Commission's authority, a test in which the citizens of Minnesota have come out by the thousands to express their concern and raise fundamental factual, legal and environmental questions about the proposal. Those citizens believed that

Minnesota law gave the Commission the power to protect the state's interests by effectively regulating the private enterprise of pipelines – pipelines that would, in this case, cross the most pristine and fragile lands and waters in Minnesota. The law supports the citizens' interpretation; it does not support the ALJ's. In the short term, if the Commission does not assert its authority now, it raises ominous public policy implications for the Line 3 enlargement proposed along this very same corridor. In the long term, it could affect other corridors as well that might attract future pipeline proposals.

As the Commission is well aware, it need not defer to the ALJ's findings. The ALJ's opinion is merely one piece of the evidence in the record, and the Commission need not treat the ALJ's recommendation with the same deference an appellate court might give the findings of a trial court.[40] "Agencies must make their own independent decisions and not 'rubber stamp' the findings of a hearing examiner."[41]

The Commission has ample discretion to deny a Certificate of Need, even when the proposer has completed the minimum application requirements. To the extent that Judge Lipman saw his authority as limited, he was relying on the text of Minnesota Rule 7853.0130, not the statute. But the statute in this case is the relevant provision, because it determines the Commission's scope of authority. The statutory requirements for a CON not only grant the Commission that discretion – they assume a critical examination by the Commission for any proposal, presuming that there are better, more environmentally sound alternatives.

Judge Lipman seems to assume that the use of the word "shall" leads inevitably to his conclusion, but that is a misinterpretation of the language.[42] In fact, the word is used in the *negative* in the statutory prescription: "No large energy facility shall be sited or constructed in

[40] *In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264, 274 (Minn. 2001).
[41] *Id.* (internal citations and ellipses omitted).
[42] Findings of Fact, p. 102 ("Yet, for many, the words 'shall' and 'pipeline' are simply incompatible.").

Minnesota without the issuance of a Certificate of Need…" and "No large energy facility shall be certified for construction unless the applicant can show…"[43] In other words, the mandatory instruction of "shall," often treated as a nondiscretionary command under traditional rules of statutory interpretation, is actually a "shall not" – as in the company shall not build an energy facility *unless* it has convinced the Commission that it is "needed," considering the twelve factors listed in the rule, as well as others the Commission sees fit, based on the record evidence and in the exercise of its public policy powers.[44] There is no instruction that the Commission "shall" grant any certificate in any event.

If the Commission adopts the ALJ's findings and grants the Certificate of Need, it is giving up its discretion in future pipeline cases. The Commission must retain the right to deny a completed application - even one completed correctly with supporting expert testimony from employees and consultants, as has been submitted here – or it condemns the state to allowing pipeline companies to place their pipelines as the company wishes, not as the state sees fit. This outcome should be unacceptable to the Commission. In his Memorandum, the ALJ acknowledges the "elephant in the room" – the fact that the public and the state agencies oppose this pipeline, yet the ALJ feels helpless to prevent it from being located along an inappropriate greenfield route. The Commission should reject the ALJ's recommendations, and reject the certificate of need for this pipeline.

B. The Commission's primary focus must always be the public interest.

This case is about the private interest of a few companies weighed against the public interest of the state of Minnesota and its citizens. The Legislature has specifically instructed that it intends for Minnesota laws to be interpreted "to favor the public interest as against any private

[43] Minn. Stat. § 216B.243, subs. 2&3.
[44] *Id.* at subd. 3.

interest."[45] In addition, the certificate of need statute revolves around the public interest.[46] Almost every factor under the statute is designed to address whether there is a public interest in the proposed energy facility. For instance, Factors (1) and (3) address whether the facility is necessary to serve the state's energy needs. Factors (2), (6) and (8) address whether conservation or efficiency may be used instead of building the facility, with the underlying assumption that increased efficiency and conservation are superior choices for the public interest. Factor (5) asks whether the output of the facility is socially beneficial, including its ability to "protect or enhance environmental quality" or "increase reliability" of energy supplies.

In fact, not a single criterion asks whether the proposed facility is economically viable or advantageous for the project proposer. And only a single factor – Factor (10) – considers whether the project proposer has completed the Certificate of Need application, a factor that the ALJ mistakenly elevates above all others.

NDPC stated in its Reply Brief that the "public interest" is not relevant, arguing that considering the "public interest" is equivalent to abandoning the current criteria.[47] But in fact, *only* the public interest is relevant, based on the plain language of the statute. NDPC's interest is not the issue.

As discussed in Section IV.B., the Department of Commerce ("DOC-DER") correctly concluded that there is no direct benefit to the state of Minnesota for the pipeline.[48] While NDPC hints at the interconnected nature of the petroleum market to imply that Minnesota has some interest, the reality is that it is to demonstrate any shortage or unreliability in the

[45] Minn. Stat. § 645.17.
[46] Minn. Stat. § 216B.243.
[47] NDPC Reply Brief at 17.
[48] Ex. 50 at 24:1-19, Ex. 54 at 30:13-17.

"interconnected" petroleum market today that requires this investment.[49] Simply saying that Minnesota is connected to other markets isn't enough; NDPC must demonstrate that there is a problem, and that this project could provide some or all of the remedy. But that is not what the record shows. The record establishes that the beneficiaries of the proposed pipeline are NDPC and Marathon Petroleum. Any other beneficiaries are vague, unquantified and unsubstantiated, or would enjoy those benefits wherever a pipeline is located.[50]

NDPC threatens increased rail traffic if the pipeline is not approved as proposed, suggesting that Minnesota will be a super highway for oil in any case, due to its proximity to the Bakken region.[51] Using this logic, NDPC urges the Commission to agree to build this pipeline or be subject to increased rail traffic. A number of factors in the record cast substantial doubt on this claim. First, the significant drop in the price of oil will inevitably decrease supply from the Bakken in the short-term, even if the price rises again in 2016 as the U.S. Energy Information Administration predicts.[52] While NDPC claims that Bakken supply is practically immune from price drops, the reality is that the production in the Bakken is already affected by lower crude prices.[53]

Second, if the transportation savings of pipelines as compared to rail are really as significant as NDPC claims, other pipelines proposals will inevitably be made, either by NDPC or others, and the Commission can use its discretion to ensure that those pipelines are suitably located. NDPC relies upon the testimony of its witness, Mr. Rennicke, to show that pipelines are

[49] See, e.g., ex. 50 at 13:11-15:17 (noting flat or declining demand for crude oil nationally).
[50] T. Vol. I at 64:24-65:28.
[51] NDPC Initial Brief at 92-93.
[52] E-docket Document No. 20151-106576-01 (Public Comments dated Jan. 23, 2015, attachment 1 at 4, "This Week In Petroleum," Jan. 14, 2015, U.S. Energy Information Administration).
[53] *See, e.g.,* "N.D. Sees Second Consecutive Monthly Drop in Oil Output," Shaffer, David, *Star Tribune*, April 15, 2015, attached as Attachment C. While FOH understands that this article is outside the public record, the oil price drop is a recent trend, and the themes of decreased oil production in the Bakken have become far more clear since the administrative hearing. The PUC has the discretion to taken note of such trends, especially one such as this that is widely reported in the media. Minn. R. 1400.811, subp. 2.

$5-10 per barrel less costly to utilize than rail.[54] If that is indeed the case, then other pipeline proposals – or this proposal, simply in a different location - will present themselves in the future if the supply and demand of Bakken oil warrants it.

Third, even if it was conclusively shown by an objective, third-party analysis (and such an analysis has not been done yet in Minnesota) that an oil pipeline would significantly reduce oil transport by train, this analysis would be irrelevant with respect to locating the Sandpiper on this *particular* route. If a pipeline alleviates train traffic, other pipelines could do so, as well.

C. The ALJ ignores the burden of proof, an essential element of this case, to the detriment of the public interest.

The ALJ's Findings of Fact skirt the burden of proof question. If the Commission does the same, it has made most of this proceeding a waste of time for hundreds of citizens and underfunded nonprofit groups, and will have effectively excluded the public from any meaningful participation in future certificate of need proceedings. This is another defining moment for the Commission. The Commission must determine whether it accepts the claim that the only "reasonable and prudent alternative" is the one that an energy company has proposed and is prepared to build.[55] The ALJ, without ever evaluating the relevant burden of proof, adopts NDPC's proposed findings of fact, including the premise that because the system alternatives are less developed than the proposed route and FOH is not a pipeline company willing to build them, they are not valid alternatives. FOH does not believe, given its prior actions in this case, that the Commission is prepared to exclude the public from meaningful participation in need proceedings by holding that any "reasonable and prudent alternatives" must be as developed and detailed as the company's proposal, and must be submitted by a company that is willing to build it.

[54] Ex. 15, Sch. 2, Figure II-4 at 13.
[55] Findings of Fact at ¶ 509.

It is self-evident that the citizens groups and state agencies that have expressed concerns about the Sandpiper and offered alternatives to the proposed route are not in a position to put together a proposal that takes years to prepare and costs millions of dollars, let alone the interest or ability to actually build a competing pipeline proposal. It is an absurd conclusion to suggest that a citizens group should be required to do so to offer "reasonable and prudent alternatives," and it is not supported in law, regulation or common sense. Adopting the ALJ's interpretation puts Minnesota at the mercy of the pipeline companies. Under NDPC's and the ALJ's interpretation of Minnesota Rule 7853.0130(B), only another pipeline company could successfully challenge the location of a proposed pipeline, and the public could never do so, robbing the public of the opportunity to ever present "reasonable and prudent alternatives."

The ALJ's Findings of Fact render the entire contested case hearing process for the CON an expensive exercise in futility for all parties, except perhaps NDPC. The MPCA and MDNR recommended that the system alternatives be studied further because they did offer advantages for the state, and based on those recommendations, this Commission ordered that the the system alternatives be studied as part of the need proceeding. Although its proposed alternatives received high marks from the MPCA and MDNR, FOH's goal in introducing system alternatives was not to make a formal pipeline proposal. The goal was to demonstrate that reasonable alternative locations are available, and the Commission and NDPC should consider them further, rather than cutting off consideration simply because NDPC does not want to engage in it. Such consideration could include evaluating market demand for alternative locations and ultimately developing a proposal for a pipeline in a different location.

And yet the ALJ held that the system alternatives were invalid because "[n]one 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."[56] Further, the ALJ concluded that "[n]o party, participant, or commentator stated that it would develop one of the System Alternatives if the Commission signaled its willingness to grant it a CN."[57]

And, to point out the obvious, of course there was no evidence in the record that a pipeline company was willing to build the system alternatives. The only entity involved in the proceedings with the ability to offer direct proof on such a matter – NDPC – had a very strong incentive *not* to offer any such proof, because it had, years ago, determined that its preferred route was the best option for it financially. Nor, it is safe to say, does NDPC wish to submit a new application for a different pipeline, as it is already developed a full application and found a partner for its existing proposal. But if the fact that a company has invested time and effort into developing a particular proposal means that it must *by law* be accepted by the regulators, then the process of evaluating such a proposal becomes a farce indeed.

FOH's approach to Minnesota law, described in Section II.A. of its Initial Brief, provides an alternative approach and a solution to this problem. The Commission should make clear that, consistent with the Certificate of Need statute, the pipeline company retains the burden or proof in any need proceeding. This includes circumstances such as here, where evidence is offered establishing alternatives that can meet the overall objectives of the proposed project – to deliver petroleum to a particular market in an environmentally preferable manner. While parties other than the project proposer may bear some burden in establishing alternatives as "reasonable and prudent," once such evidence is offered, it must remain with the pipeline proponent to demonstrate, based on the factors in the rule, that its proposal is preferable. Any other

[56] Findings of Fact at ¶ 508.
[57] *Id.* at ¶ 509.

interpretation eliminates any benefit of offering alternatives and eviscerates the Commission's authority over pipeline construction.

This situation demonstrates why an Environmental Impact Statement ("EIS") is an essential tool for evaluating the various system alternatives. Under the Minnesota Environmental Policy Act, the Responsible Governmental Unit must evaluate alternatives to the proposal, including alternative sites, as part of an EIS.[58] The Responsible Governmental Unit, not the project proposer, determines the alternatives and whether they reasonable. This process is designed to avoid precisely the type of manipulation that occurred here, where a company artificially narrowed the range of "reasonable alternatives" by defining its project so narrowly and providing such an inadequate analysis of the alternatives, that no other sites could be seriously considered. In the EIS process, companies don't have the luxury of telling the agency that they won't consider real alternatives. FOH understands that the Commission does not wish to complete an EIS prior to deciding the Certificate of Need. But an EIS would fulfill FOH's and the Commission's interest is to create a robust record on the system alternatives, something the contested case hearing failed to do, in part because the ALJ ignored the burden of proof and expected FOH and other citizens' groups to do the impossible.

D. The ALJ recommendations are in direct conflict with MPCA and MDNR expert conclusions regarding the environmental impacts of NDPC's preferred route and system alternatives.

Environmental issues are central to these proceedings based on governing state law. The Minnesota Legislature has directed that "to the fullest extent practicable the policies, rules and public laws of the state shall be interpreted and administered in accordance with the policies set

[58] Minn. R. 4410.2300, A(7).

forth in [the Minnesota Environmental Policy Act]."[59] It is the state's objective to "discourage ecologically unsound aspects of population, economic and technological growth, and develop and implement a policy such that growth occurs only in an environmentally acceptable manner."[60] In particular, it is the state's policy to "minimize the environmental impact from energy production and use."[61] State agencies are required to ensure that "environmental amenities and values . . . will be given at least equal consideration in decision making along with economic and technical considerations."[62]

1) The ALJ erroneously ignored the testimony of the two state agencies tasked with protecting Minnesota's environment.

There is substantial evidence in the record to conclude that NDPC's Preferred Route is the worst of all the proposed routes, particularly the statements of MPCA and MDNR. By neglecting entirely the expert testimony offered by the parties and the agencies, the ALJ's report is rendered meaningless and ignores perhaps the most important evidence in the record. It is not that the Findings of Fact reviewed the expert opinions in the record and rejected them, on balance, in favor of NDPC's arguments. The expert opinions were never addressed at all, as if they were never offered. This is a very troublesome approach.

There is a strong and consistent chorus of expert voices in the record stating that there *are* significant environmental differences between the routes. The Findings of Fact states that "none of the System Alternatives present a clear advantage over the proposed Project."[63] But the record is replete with testimony and statements from expert sources on behalf of FOH, CCLS, MDNR and the MPCA that NDPC's proposed route poses the greatest environmental risks. When

[59] Minn. Stat. § 116D.03, subd. 1.
[60] Minn. Stat. § 116D.02, subd. 2.
[61] *Id.*
[62] Minn. Stat. § 116D.03, subd. 2.
[63] Findings of Fact ¶ 504.

comparing the effects on the natural environment among these alternatives, there are several important considerations:

- The landscape surface features and land uses that result in oil releases that rapidly spread away from the leak or rupture site and that thus can cause exponential increases in consequences. These include hilly terrain, moving water, locations with difficult access, situations where leaks occur under the ice, and locations containing natural resources that can be affected by oil releases.[64]

- The locations where the consequences of oil releases are lower or more likely to be mitigated. These include landscapes and land uses that tend to have little topographic relief, that have slower or more widespread water channels, that have numerous roads and open country for rapid containment , and that are set back from human populations and natural resources that are more difficult to mitigate.[65]

- The time frame for such risks as the project life. This is on the order of 40 or 50 years.[66]

- The underground landscape features that result in small leaks (sometimes referred to as "pinhole" leaks) that can go undetected by pipeline pressure monitoring, especially for longer period of time. Such features include locations with rapid groundwater flow away from the leak location, and areas of deep underground burial, such as under lakes or rivers where the pipeline can be 20-40 or more feet under the river or lake.[67]

- The locations where there are closely adjacent facilities also transporting oil products that are susceptible to damage from a pipeline rupture and accompanying ignition.[68]

With the above considerations, and others, in mind, *every* independent expert who compared the System Alternatives concluded that NDPC's Preferred Route was the most environmentally damaging of all of the System Alternatives. Both MPCA and MDNR concluded that NDPC's Preferred Route posed the greatest environmental risk compared with all of the System Alternatives. MDNR concluded that "[w]ithin Minnesota, more southern routes (south of I-94 corridor) have less concentration of natural resources (regardless of length) within the 2-mile corridor. . . . From a natural resource perspective, the more southern routes appear to be

[64] Ex. 180 at 31:8-12.
[65] *Id*. at 35:25-36:9.
[66] *Id*. at 41:34.
[67] Ex. 184 at 10:13-11:11.
[68] Ex. 180 at 18:32-36; 27:29-30.

feasible and prudent System Alternatives that merit consideration."[69] Similarly, MPCA concluded "that with respect to protection of the highest-quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the System Alternatives."[70] Indeed, "the Applicant's proposed route encroaches on higher quality resources, superior wildlife habitat, more vulnerable ground water, and more resources unique to the State of Minnesota than do many of the proposed System Alternatives."[71]

In addition, CCLS witness Dr. Chapman conducted a GIS study of the various System Alternatives and analyzed the actual impacts of pipelines on those features based on his expertise as an ecologist.[72] Based on his study and analysis, he concluded that NDPC's Preferred Route posed the greatest environmental risk:[73]

> The weighting analysis of important oil pipeline effects showed that the Preferred Alternative has the potential for the greatest effects both in Minnesota and also the multi-state area. . . . In Minnesota, this was because the Preferred Alternative has the greatest potential effect on: (1) rare habitats, (2) forest fragmentation and degradation, (3) alteration and spread of product in wetlands with little surface water, and (4) encroachment on public and conservation lands.[74]

These experts also noted that the potential impacts of spills in NDPC's preferred location will be more significant when compared to the System Alternatives sponsored by FOH.[75] FOH witness Stolen documented in detail how certain landscapes, such as the Lake Country

[69] Ex. 185 at 2.
[70] MPCA Comments, dated January 23, 2015 at 4.
[71] *Id*.
[72] Ex. 110.
[73] Ex. 112 at 9.
[74] *Id.*
[75] Ex. 185; MPCA Comments, dated January 23, 2015.

environmentally sensitive resources, may be more sensitive to oil spills, harder to clean up, or more difficult to access than other landscapes.[76] Similarly, MPCA stated that:

> An Alternative that avoids or impacts fewer sensitive ecosystems and water bodies than SA-Applicant will have a smaller likelihood of incurring significant response costs. As documented by the U.S. Environmental Agency ("USEPA"), **it costs considerably more to restore or rehabilitate water quality than to protect it.** The areas of the state traversed by the SA-Applicant have waters and watersheds that are currently subject to protection in the state's "Watershed Restoration and Protection Strategy" program, financed through the Clean Water Fund and aided by significant volunteer participation of Minnesota citizens. **By keeping these waters as clean as possible before they become impaired, extensive costs of restoring waters to state standards can be avoided. Location of oil pipelines in these areas place their pristine waters at risk, and also place potentially millions of dollars in state and federal funds allocated for protection of these areas at risk.[77]**

MPCA continues: "[L]ong-term impacts from a spill can be much more damaging in areas containing features such as environmentally sensitive areas and those with limited access."[78]

NDPC's Preferred Route presents many problems, including a greater number of pristine areas near natural water bodies. "A primary rule of thumb when planning for response to an oil leak is that a release in soil is better than a release in water, and a release in stagnant water is better than a release in flowing water."[79] MPCA noted that when evaluating spill response costs, certain factors make one corridor preferable to another, including: "fewer crossings of flowing water; fewer adjacent water bodies; quality of those waters; presence of especially sensitive areas or habitats or species or uses; better access to downstream oiled areas; tighter soils; and closer and more equipped and prepared responders."[80] MPCA concluded that "[f]rom the perspective of

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[77] MPCA Comments, dated January 23, 2015, footnotes omitted, emphases added.
[78] *Id.* at 7.
[79] *Id*. at 13.
[80] *Id.* at 3.

minimizing risk of major environmental incidents due to inability to access potential leak sites in Minnesota, **the proposed Sandpiper route fares more poorly than any of the proposed System Alternatives**."[81]

Ultimately, MPCA concluded that the consequences of building a pipeline in NDPC's preferred location were worse for all factors analyzed, including high quality surface waters, the potential for release at or near a water crossing, potential damage during construction and testing, threats to groundwater and potential drinking water supplies, and threats to wild rice and native forests.[82] MPCA concluded that FOH's System Alternatives were superior to NDPC's Preferred Route as well as SA-03, which MPCA had originally proposed.[83]

The relative environmental effects of NDPC's Preferred Route and the System Alternatives demonstrate that there is evidence of a more reasonable and prudent alternative in the record, but the ALJ simply ignored it, instead concluding that all the routes looked about the same, and so he should approve NDPC's proposal. Given the evidence in the record directly contradicting NDPC's proposal, the ALJ's conclusion should be given no weight. Based on the evidence, NDPC's CON application for its Preferred Route must therefore be denied.

In his recommendations, the ALJ came to a conclusion that misstates the record and distorts the positions of the parties. He stated that the record did not demonstrate that the System Alternatives would decrease the risk of catastrophic failure of the pipeline.[84] This claim is unsupported in the record. Different landscapes, including terrain and the presence of water bodies, result in different configurations of the pipeline system. In other words, the risks of failure are related to the engineered system and are thus unique to the route selected. And if the

[81] *Id.* at 14 (emphasis added).
[82] *See Id. generally*.
[83] *Id.* at 7.
[84] Findings of Fact ¶ 502.

various alternatives were actually subjected to any analysis, the analysis would reveal these differing risks.[85] Here, Mr. Stolen provided clear testimony as to the need for such risks to be determined. No such information has been prepared. The ALJ then turns this testimony on its head and uses this failure to say there is no difference between the routes.

2) The ALJ's report relies only on NDPC's experts and the DOC-EERA report, neither of which provide any substantive conclusions about environmental impacts of NDPC's Preferred Route or the System Alternatives.

Environmental considerations are largely dismissed in the ALJ's Findings of Fact. And it is not surprising, given that he relied only on the information supplied to him by the DOC-EERA and NDPC. Both DOC-EERA and NDPC presented reports summarizing environmental data, but this evidence is meaningless without additional analysis because they are based on strictly "numerical" comparisons of natural features. Neither DOC-EERA nor NDPC provided analysis of their accounting results. For instance, based on NDPC's findings of fact, the ALJ concludes that NDPC's Preferred Route:

> Has the least number and lowest acreage of first downstream lakes; lowest topographic slopes and drainages; least amount of susceptible water table aquifer crossed; least amount of acreage of principal aquifer crossed; no fractured carbonated bedrock over which to cross; and the fewest sites with nearby potential groundwater contamination.[86]

Meanwhile, the DOC-EERA reported that the Preferred Route has the largest percentage of forested land, the largest percentage of wetlands, and the largest percentage of shrubland.[87] One cannot conclude, based on this information, whether the route is comparatively better or worse without knowing more about these features, or how to evaluate the potential impacts on these features. The information provided by NDPC and DOC-EERA is qualitative, not quantitative.

[85] Ex. 184 at 7, 10:19-11:11, 13:10-14:5.
[86] Findings of Fact at ¶ 500.
[87] "Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives," DOC-EERA Report, December 2014, Table 6.1 at 249.

Indeed, NDPC's self-described approach was not to present any environmental questions to the ALJ, starting with the witnesses it chose to put on the stand. The head of its environmental team, Ms. Ploetz, had never conducted an environmental review process before.[88] Ms. Ploetz was either unable or unwilling to identify any differences between a shallow lake and a man-made ditch.[89] Ms. Ploetz's testimony was sadly consistent with NDPC's theme throughout the proceeding—that it is impossible to differentiate between impacts on natural resources because that is a "value judgment," using the example of deciding whether it is worse to impact waterways than cities.[90] The ALJ made the unfortunate decision to parrot this conclusion in his Findings of Fact, noting that "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."[91] But that is a radical oversimplification that is disproved by the fact that MPCA, MDNR, CCLS witness Dr. Chapman and FOH witness Stolen were able to make substantial, reasoned conclusions about the various routes.

Without the assistance of the expertise of the MPCA, the MDNR, Mr. Stolen or Dr. Chapman, these numerical comparisons are meaningless. An expert is able to provide context and analysis that provides some meaning to those numbers. Indeed, once expertise is applied, an alternative that appears quite attractive in a numeric sense might be turn out to be a very poor alternative, if the resources impacted are sensitive, valuable or rare. Thus, the Commission should turn to the expertise available in the record in order to make a reasoned comparison between NDPC's Preferred Route and the System Alternatives.

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[88] T. Vol. 5 at 8:15 – 9:8.
[89] T. Vol. 5 at 113:19-116:13; 118:1-11.
[90] T. Vol. 5 at 41:7-22 stating that giving "weights" to various environmental features would be "an extremely difficult, if not impossible, task to achieve."; *see also* T. Vol. 5 42:21-24 stating that a weighting system would "introduce subjectivity or one's own values, essentially, into that analysis."
[91] Findings of Fact at ¶ 504.

3) The ALJ erred when he relied on the DOC-EERA report, which does not provide the analysis that the Commission requested.

The Findings of Fact incorrectly describe DOC-EERA report as an "analysis,"[92] and do not address the fact that DOC-EERA's report simply does not meet the requirements of the PUC's Order of October 7, 2014. The Commission considered the issues raised by FOH and others about the poorly-chosen location of NDPC's Project to be significant enough to order that the environmental features of the System Alternatives be considered and compared as part of the CON decision.[93] The Commission specifically instructed the DOC-EERA to prepare a report that "examines and evaluates the potential impacts of the proposed project."[94] The Commission stated that the report should investigate the "natural and socioeconomic *impacts*" and would evidence "the relative risks and merits of choosing a different system alternative."[95]

But the study conducted by the DOC-EERA did not evaluate or examine the impacts of a pipeline in the various locations. It did not evaluate how NDPC's Preferred Route and the System Alternatives compare to one another. Rather, the study was merely a data compilation and was not an analysis of impacts.[96] DOC-EERA did not attempt to come to *any* conclusions about the various alternatives, but instead simply stated that its data compilation could be used by others to argue for or against the alternatives.[97] As Ms. Pile testified, DOC-EERA did not attempt to place any "values" on environmental features but instead simply counted the number of features in a two-mile wide corridor for proposed alternatives.[98] Therefore, the document cannot be used to evaluate and analyze the environmental effects of the System Alternatives, as

[92] Findings of Fact at 18.
[93] Ex. 48.
[94] *Id.* at 11.
[95] *Id.* (emphasis added).
[96] Ex. 184 at 9:3-18.
[97] Ex. 80 at 12.
[98] T. Vol. VII at 242:11-15.

the Commission requested. As noted by the MDNR, "due to the limited scope requested for this document, the broad geographic area, and challenges related to the type of data and analysis used, MDNR was not able to use this document alone to identify the least environmentally impacting System Alternatives."[99] MPCA also noted that the tool used by DOC-EERA—ArcGIS—does not demonstrate the quality of the resources when comparing corridors.[100]

NDPC also prepared its own comparison of System Alternatives using similar methods.[101] However, its report was also a "data" report, and not an assessment or analysis of impacts.[102] Furthermore, testimony from Enbridge indicated that studies in the vicinity of the proposed route over a several-year period resulted in a significant number of route modifications to avoid sensitive features and reduce impacts.[103] This means that a bias in favor of the proposed route would result, since the System Alternatives were not subject to the same degree of study.

The expertise brought to bear by MPCA, MDNR, FOH, and CCLS, the only competent testimony in the record regarding environmental impacts, requires a decision that the certificate of need for NDPC's Preferred Route must be denied. The DOC-EERA report itself cannot be relied upon as a basis for granting or denying the certificate of need, as it does not comply with the Commission's Order and only counts; it does not analyze. By the description of its own manager, Ms. Pile, it was designed *not* provide the kind of information the Commission requested. The findings of the experts of MDNR, MPCA, FOH and CCLS in the record provide the most independent and scientifically based information concerning environmental impacts the System Alternatives to be found in the current record.

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[99] Ex. 185 at 1.
[100] MPCA Comments, dated January 23, 2015 at 14.
[101] Ex. 17, Sch. 1.
[102] *Id*.
[103] T. Vol. V at 94:19-23.

II. The ALJ Improperly Denied Requests To Issue Subpoenas For Witnesses From The Department Of Natural Resources And The Pollution Control Agency, Refusing To Grant What Should Have Been A Routine Request To Present Relevant Evidence.

The ALJ tainted these proceedings irreparably when he denied subpoena requests from FOH to allow MPCA and MDNR staff to testify at the evidentiary hearing. Both MPCA and MDNR have been heavily involved in the Sandpiper proposal from the beginning. When this Commission bifurcated the need and routing proceedings, it was based in part on recommendations from those agencies.[104] When ordering EERA to draft an environmental report, MPCA offered to support that effort, backed by decades of expertise in environmental review.[105] Similarly, MDNR made specific recommendations about the type of environmental review that should occur, as well as the resources that should be evaluated.[106]

On the strength of these recommendations, the Commission entrusted the need proceedings to the ALJ. Yet the comments of these agencies were not only ignored in the Findings of Fact - the ALJ made an active effort to exclude these agencies from the proceedings.

Granting subpoena requests should be a routine matter. In fact, both Minnesota and Federal rules for civil proceedings were recently changed to allow attorneys to issue subpoenas directly because the role of the court in issuing subpoenas was ministerial at best.[107] In administrative matters, a party must request the ALJ to sign the subpoena.[108] But to stay consistent with the federal rules, as long as minimal explanation of relevance has been offered, the judge is expected to sign the subpoena.[109]

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[104] Ex. 47 at 4-6
[105] *Id.* at 9.
[106] *Id.* at 10.
[107] David Siegel Practice Commentary, Rule 45 at 13 attached as Attachment D.
[108] Minn. R. 1400.7000.
[109] David Siegel, Practice Commentary at 13.

In this case, the ALJ refused to sign the subpoenas, even though no party objected to their issuance. In his refusal, he cited a Second Circuit case from 1976, in which a judge expressed skepticism about a party's efforts to avoid hiring an outside expert by asking the court to subpoena an outside expert who was unaffiliated with the case.[110] The United States government motioned to quash the subpoena.[111] This case is not applicable here. As FOH pointed out in its refiling, FOH did not subpoena MDNR and MPCA witnesses to get free expertise from outside experts with no affiliation or knowledge of the matter (FOH already retained both paid and volunteer experts of its own). It subpoenaed them because the opinions of these agencies are extremely important to these proceedings, as the Commission clearly stated.[112] Agency witnesses have not only expertise but also factual knowledge of this specific case, and had submitted multiple sets of comments throughout the process. No other witnesses could testify about the positions of these agencies; thus the presence of these particular witnesses was crucial to create a full evidentiary record that FOH desired and the Commission itself explicitly stated it wanted. Indeed, every party who chose to go on record commented that these agency witnesses would offer relevant testimony, including NDPC.[113] Thus Judge Lipman arbitrarily and erroneously denied these subpoenas even though neither the agencies themselves nor any other party raised any objections to them whatsoever.

As a secondary matter, the ALJ's Findings of Fact incorrectly recount the sequence of events surrounding the denial of the subpoena requests. The ALJ fails to state that FOH

[110] Twentieth Prehearing Order, January 16, 2015.
[111] *Kaufman v. Edelstein*, 539 F.2d 811, (2d Cir. 1976).
[112] Letter from MCEA and FOH to Judge Lipman renewing request for subpoenas, January 20, 2015, attached as Attachment E.
[113] Transcript of January 22, 2015 Telephonic Hearing, attached as Attachment F, 13:9 (Statement by Mr. Von Korff that the agency testimony is "tremendously relevant"); 22:23 (Statement by Mr. Bibeau that the agency witnesses are "very important"); 24:24-25:1-4 (Statement by Ms. Brusven that there is "value" in agency witnesses being available for questioning).

resubmitted its request pursuant to his invitation and that he denied the request again. This error appears have been adopted wholesale from NPDC's submissions; its proposed Findings of Fact suffered from the same oversight.[114]

When reviewing the ALJ's Findings of Fact, excluding this relevant testimony had a significant impact on the outcome of the proceedings. As a result, the ALJ found it possible to ignore the agencies' positions entirely. The MDNR merited mention only six times in the Findings of Fact. Three of those were in connection to the denied subpoenas,[115] and the remaining times were only in relation to features that the agency managed, i.e. the Public Waters Inventory. MDNR's public comments and testimony were never mentioned.

As for MPCA, it also merited only a few mentions, again mostly in connection with the denied subpoenas. Most significantly, the ALJ favored NDPC's testimony over MPCA's comments, without even giving MPCA the opportunity to testify. The ALJ quoted MPCA's position from a comment letter that SA-03 is a better alternative than the proposed alternative due to the proximity of high quality surface waters and other natural resources to NDPC's alternative, but then rejected MPCA's explanation in favor of NDPC's statement that SA-03 would travel near residential areas.[116] The ALJ discredited MPCA's comments while simultaneously refusing to admit relevant evidence from MPCA witnesses that could have addressed his concerns. Furthermore, the comments from MPCA were not even the most recent, as MPCA's position evolved throughout the process and it conducted additional studies.

MPCA and MDNR submitted comments on the central issue in these proceedings – whether the system alternatives are environmentally preferable to NDPC's proposed route. And both agencies agreed that the system alternatives are environmentally preferable to NDPC's

[114] NDPC Proposed Findings of Fact, Conclusions of Law and Recommendations, February 27, 2015, at 9, ¶ 69.
[115] *See e.g.* Findings of Fact ¶ 116
[116] Findings of Fact ¶ 361-362.

Preferred Route. Yet the ALJ discounted these comments entirely, even as he actively sought to exclude the participation of agency witnesses in the evidentiary hearings. For these reasons, the ALJ's opinion as to environmental issues should receive no weight because critical evidence was excluded and ignored.

III. The Commission Should Not Approve A Pipeline Proposal Where The Proposer Has Been Demonstrably Unwilling To Show Proof That It Will Protect Minnesota's Taxpayers.

To date, NDPC has not provided to the Department of Commerce sufficient evidence of financial assurance or insurance to protect Minnesota from the financial impact of a pipeline catastrophe. As MDOC stated in its reply brief, NDPC has fallen short on its commitments for financial assurance, which should be sufficient to clean up and remediate a spill of the magnitude of the spill in Kalamazoo "through insurance, third party guaranties and/or other means acceptable to the Commission."[117] The cleanup costs for the Kalamazoo River spill in Michigan are now predicted to exceed $1 billion. [118] MDOC recommended that the granting of a certificate of need be conditioned on a showing that the applicant is willing to provide such financial assurance, but the applicant has not done so.

In a follow-up letter on April 7, 2015, the MDOC reported that it does not consider the documents that NDPC has provided to satisfy MDOC's recommendation that financial assurance be "adequate and enforceable."[119] MDOC stated that it will continue to work with NDPC. Judge Lipman's only acknowledgement of this issue in the Findings of Fact is to state that the conversations between MDOC and NDPC are "constructive and helpful."[120] He then

[117] Minnesota Department of Commerce Reply Brief at 7.
[118] Ex. 180 at 32:13-14; 56:37-37.
[119] Doc. No. 20154-109034-01 (Letter from Department of Commerce to Judge Lipman dated April 7, 2015).
[120] Findings of Fact ¶ 591.

recommended that NDPC file a document describing the financial arrangements it has made,[121] which falls far short of MDOC's recommendation that NDPC "provid[e] sufficient financial assurances of its ability and commitment to fund all cleanup and remediation of a Minnesota oil spill from the Project of the magnitude of the Kalamazoo spill…"[122]

This failure alone justifies denial of the application for a CON. FOH questions why the Commission would continue a permit process for a company that is demonstrably unwilling to protect the state of Minnesota and its taxpayers from the significant risks of its operations. Unless NDPC is willing to provide a bond, Letter of Credit, or other financial collateral to insulate the public from the risks of a catastrophic incident in this sensitive environment, the Commission should deny its application. There is no reason to proceed with the routing permit. Unless NDPC is able to provide this kind of assurance, the Commission should reject its request for Minnesota to bear all of the risks of the Sandpiper Pipeline while it reaps all of the rewards.

IV. NDPC Did Not Meet The Burden Of Proof Required Under Minnesota Law To Justify A Certificate Of Need.

A. The question before the Commission is whether there is a need for a pipeline in NDPC's preferred location.

The Commission should evaluate the question of need in the way that NDPC has framed it – tied to the specific location. The ALJ's Findings of Fact accept unquestioningly NDPC's position that the pipeline cannot be relocated, despite evidence that a different location would be environmentally preferable and even potentially economically viable, based on the final destination of most of the crude oil that would be shipped in the Sandpiper. The Commission must therefore decide whether there is a need for oil transportation via the specific pipeline project, in the specific corridor proposed by NDPC. NDPC's allegations on "need" are based on

[121] Findings of Fact ¶ 592.
[122] Minnesota Department of Commerce Response Brief at 7.

the pressure to transport crude oil, specifically "Bakken oil" via pipeline out of the Bakken formation in the Williston Basin of North Dakota. Despite this general need to get oil out of the Bakken—a need that FOH does not dispute—NDPC insists that this need can *only* be satisfied by transporting oil via a pipeline in one particular corridor. NDPC has inextricably bound the question of need to the location of the pipeline.

NDPC proffered three reasons as to why there is a "need" for its pipeline:

- Rising production in the Williston Basin has resulted in a need to move crude oil from the Basin to refineries;
- Additional pipeline capacity will allow shippers to ship via pipeline rather than other modes of transportation; and
- Connections at Clearbrook and Superior "optimize" the performance of Enbridge's pipeline system as a whole and increases reliability of delivery to St. Paul refineries.[123]

Of these three arguments, only the third relates to the need for a pipeline at the particular location proposed by NDPC.

NDPC has claimed that it needs a pipeline at this particular location and that no other location will serve the needs of its shipper(s). Thus, NDPC must show why the Project must be built *at the proposed location* to meet its burden of proof as required by law, and it must show why the significant disadvantages to the public interest from a route that cuts through environmentally sensitive areas of the state is outweighed by the private business interests of the very few shippers that might benefit from the Project. NDPC has not met its burden of proof regarding this aspect of establishing need.

[123] Ex. 6 at 4:108-21.

B. The probable result of denial will not adversely affect the future adequacy, reliability, or efficiency of energy supplied to the Applicant, the Applicant's customers, or to the people of Minnesota and neighboring states.

1) NDPC has not shown that refineries need or want the oil delivered to Clearbrook or Superior.

NDPC has failed to show that there is adequate demand for this pipeline. By rule, the Commission must consider "the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility."[124] In the context of a CON for a pipeline, this means NDPC must show that its customers want this pipeline—both in Clearbrook and Superior.

The ALJ ignored the significant flaws in NDPC's case. The record contains strong evidence that NDPC is proposing a connection at Clearbrook that would serve only two refineries, but those refineries oppose the pipeline. Much of that evidence comes from the proceedings before the Federal Energy Regulatory Commission. Yet since the ALJ merely adopted NDPC's Findings of Fact, whose account of the Federal Energy Regulatory Commission ("FERC") proceedings omits any reference to the objections raised by shippers, including the St. Paul refineries, at the FERC proceedings.[125]

The only potential beneficiaries of the Clearbrook delivery point on NDPC's Preferred Route would be the two refineries in Minnesota—St. Paul Park Refining Co. ("SPPRC") and Flint Hills.[126] These refineries do not appear to be shippers,[127] and have not expressed support for the Project. Moreover, the shipping capacity between Clearbrook and these refineries will not

[124] Minn. R. 7853.0130(A)(1).
[125] Findings of Fact ¶¶ 11-42.
[126] Ex. 20 at 10:283-84.
[127] FOH does not have access to the Transportation Service Agreements ("TSAs") that form the entire basis of NDPC's case that the pipeline must be built along NDPC's Preferred Route. Those documents are being held within a separate docket that can only be viewed by state agencies, per NDPC's request. If FOH had access to the TSAs, it would be able to argue with certainty whether any shipper had committed to delivery at Clearbrook, and if so, whether that shipper is one of the Minnesota refineries, or might serve the refineries in Minnesota.

increase, nullifying any potential benefit to these refineries.[128] Although these refineries are already served by Line 81 to Clearbrook, NDPC stated that the Minnesota refineries would benefit from construction of the Sandpiper Pipeline because it would provide the benefit of redundancy.[129] NDPC also claims that Project, if it connects at Clearbrook, will provide the benefit of avoiding apportionment on the NDPC Pipeline System.[130]

But there is no evidence that the Minnesota refineries want the proffered benefit of redundancy or decreased apportionment from the Project as NDPC claims. Indeed, the two refineries have not been supportive of the pipeline at all, and in the case of SPPRC, have outright opposed it. In the FERC proceedings related to the tariff rates for the proposed Project, SPPRC opposed the pipeline stating that the Project upstream from Clearbrook is neither "necessary [n]or desirable to meet the transportation needs of SPPRC."[131] It also stated that SPPRC "has not suffered from chronic prorationing on the NDP system," and "has seen no operational evidence that the system is subject to persistent excess demand."[132] Moreover, SPPRC stated that the proposed Sandpiper Pipeline would have "no value" to it, but would only require it to pay a higher transportation cost than it pays now.[133] The effect of the pipeline, would be simply to "harm, not benefit, the business of SPPRC and its customers" due to increased costs.[134]

Similarly, Flint Hills Resources, the other Minnesota refinery, intervened in the Sandpiper docket at the FERC to express its concerns. While it did not oppose the project outright, it expressed concern about whether uncommitted shippers would bear financial responsibility for underutilization of the pipeline if NDPC's predictions about shipper demand

[128] Ex. 9 at 5:158-60.
[129] Ex. 7 at 10:287-92.
[130] *Id*. at 3:80-86.
[131] Ex.183, Sch. 4 at 42.
[132] *Id*.
[133] *Id*.
[134] *Id.* at 43.)

prove overly optimistic.[135] It also sought to ensure that the rights of non-committed shippers to challenge future rate changes were preserved if NDPC is forced to allocate costs associated with underutilization of the pipeline.[136] Notably, Flint Hills's concerns seemed aimed at whether shippers would in fact demand oil from the Sandpiper, or whether it would be underutilized compared to NDPC's projections.

The Department of Commerce also agreed that Minnesota does not benefit from the Clearbrook connection, and that Minnesota refineries would not benefit from the proposed pipeline.[137] MDOC's witness, Mr. Heinen, confirmed, based on his own independent analysis, that the pipeline is likely to increase the cost of crude oil to Minnesota refineries.[138] Mr. Heinen also responded to the alleged benefit of redundancy to Minnesota refineries. He stated that while redundancy is potentially a benefit, it is not clear whether Minnesota refiners would benefit from redundancy in this case.[139]

NDPC has also failed to prove that there is sufficient demand for a pipeline to Superior. Few shippers have shown interest in the Project, and fewer still have been willing to publicly support it.[140] The only shipper of record who has admitted publicly to shipping oil on the proposed Sandpiper pipeline to be delivered in Superior is Marathon,[141] who is also a 27% owner

[135] *Id*. at 159.
[136] *Id.* at 159-60.
[137] Ex. 50 at 24:1-19; Ex. 54 at 30:13-17.
[138] Ex. 50 at 25-26.
[139] *Id*. at 27-28.
[140] Ex. 183, Sch. 4 at 182-83.
[141] T. Vol. III at 77:13-18. The only other shipper who has come forward publicly in these proceedings is Enerplus Resources Corporation ("Enerplus"). Enerplus submitted comments in support of the project as part of the public comment period without revealing its volume commitment or preferred delivery location. However, the comments specifically addressed the importance of the Clearbrook connection to Enerplus, so it is reasonable to assume that Clearbrook is its preferred delivery point on the route. (Enerplus Comments, dated January 7, 2015.)

of the Project and therefore has a strong financial interest in its construction, independent of its shipping needs.[142]

Marathon, NDPC's largest, and possibly only, shipper that prefers delivery at Superior, will ship the oil either to, or through, Illinois.[143] The Superior refinery is very small, and does not need any crude oil beyond the 2.3 million bpd that Enbridge already ships into Superior.[144] Mr. Palmer stated that Marathon is upgrading its refinery in Robinson, Illinois to increase its capacity to refine light crude in expectation of the Project, and the expansion is expected to coincide with the construction of the Project.[145] Marathon is also investing in a Kentucky facility to increase the capacity of light, sweet crude that the facility can process.[146] The crude oil from the Project would travel via pipeline to these facilities.[147] This all demonstrates that Superior is not the final destination for any of this oil, as NDPC has confirmed.[148]

Despite what appears to be an obvious lack of demand for oil at Clearbrook or Superior, the FERC proceedings provide some insight into why Marathon and NDPC insist that they "need" a pipeline in this specific location. Three shippers filed a protest to the proposed Sandpiper Pipeline, arguing that the proposed rate structure "is inherently discriminatory and appears to be designed to confer economic benefits on an affiliated shipper, Marathon, at the expense of uncommitted shippers."[149] As the protesting shippers clarified, they are not opposed

[142] *Id*. at 183; T. Vol. III at 71:20-24.
[143] T. Vol. III at 77:13-18.
[144] T. Vol. II at 45:15-18.
[145] Ex. 13 at 7:179-84.
[146] *Id*. at 7:186-92.
[147] T. Vol. III at 45:13-21.
[148] *See, e.g.*, *North Dakota Pipeline Company LLC's Application for A Certificate of Need for the Sandpiper Project*, Application Summary, stating that from the Clearbrook and Superior terminals, the "crude oil can be shipped on various other pipelines, ultimately providing refineries in Minnesota, other states in the Midwest, upper Great Lakes regions and the East Coast with crude oil."
[149] Ex. 183, Sch. 4 at 11.

to NDPC building a pipeline; they are only opposed to NDPC doing so at the expense of other shippers who do not need or want the pipeline:

> It is in fact apparent that the major motivating factor of the Sandpiper project was an effort to assure Marathon Petroleum Company, an equity owner of the pipeline and the "anchor" committed shipper, that Sandpiper will enable it to deliver crude oil to its Illinois and Ohio refineries.[150]

This is why, the shippers point out, the entire contract is dependent upon the Southern Access Extension, which is designed to enable Marathon to supply crude oil to its Illinois and Ohio refineries.[151] In other words, Marathon wishes to ship crude oil on its own system from Superior to Illinois, and to leverage funds from uncommitted shippers while doing so. There is no evidence in the record that any other shippers have similar needs.

If Marathon, an investor in the project, is the *only* shipper demanding oil in Superior, or one of very few, that is an important, and perhaps deciding factor in the Commission's consideration. The question before the Commission is about whether there is a need to deliver oil through Clearbrook to Superior across some very sensitive and ecologically valuable areas. If the delivery to Superior has more to do with Marathon's business strategy than the needs of crude oil refineries as a whole, then that fact needs to be weighed against the risks of a large new oil pipeline in an ecologically sensitive and remote area of Minnesota.

In sum, according to the record in this case, NDPC has overstated the demand for this pipeline; furthermore, the record does not show that the probable result of denial would affect the reliability of delivery of crude oil to refineries in the Midwest.

[150] *Id.* at 41.
[151] *Id.*

2) "Conservation Programs" weigh against granting a CON.

NDPC cannot demonstrate that denial of the CON would adversely affect the adequacy of the crude oil supply if programs to conserve petroleum consumption and limit greenhouse gas emissions are considered.[152] For example, increased fuel economy and decreased vehicle miles traveled have resulted in flat or declining demand for crude oil nationally.[153]

The ALJ adopted NDPC's odd argument that existing conservation programs "will not eliminate Minnesota's near-term need for petroleum products."[154] The question here isn't whether Minnesota consumes some petroleum-based products now, or will continue to do so. It is whether Minnesota is conserving oil sufficiently that it does not need a new or additional source of petroleum. And the answer is yes, our conservation programs have successfully reduced demand and Minnesota does not need a new petroleum source, especially one that does not directly serve our state.

3) All of the impacts to denial of a CON that NDPC has alleged result from its own promotional practices, and should not be given any weight.

In this case, *all* of the alleged adverse effects of denying a CON for a pipeline in NDPC's Preferred Route are due to NDPC's promotional practices and should therefore be disregarded.[155] Prior to seeking state approval of its proposed pipeline location, NDPC took several calculated business risks. These are circumstances of the company's own making, and should not be taken into account when weighing whether to grant a CON for NDPC's Preferred Route. For example, NDPC obtained approval to increase its rates from FERC associated with the proposed Sandpiper Pipeline, and also signed contracts with two or more shippers to ship oil on a pipeline

[152] Minn. R. 7853.0130(A)(2).
[153] Ex. 50 at 13:11-15:17.)
[154] Findings of Fact, paragraph 178.
[155] Minn. R. 7853.0130(A)(3)

for which it did not have any state approval.[156] In addition, NDPC's two shippers of record, Marathon and Enerplus, also made calculated business decisions by upgrading refineries to accommodate oil shipped on an as-yet-hypothetical Sandpiper Pipeline, and signing railroad contracts expected to terminate at the time that the Sandpiper Pipeline could come on line.[157]

NDPC took several steps to drum up support for its project prior to submitting any applications for state approval. First, NDPC entered into its agreement with Marathon for Marathon to become an investor and "anchor shipper" in November 2013.[158] NDPC announced this relationship just prior to commencing the "open season" to solicit other shippers, giving the appearance of stability and support to the project.[159]

It is axiomatic that a company must bear its own risks, and the Commission should not consider the impacts to the applicant and its shippers where those risks were self-created.[160] These companies cannot foist the risks of their own business decisions upon this administrative body or the State of Minnesota, or use the fact that they took those risks to obligate the Commission to do as the companies ask. As a matter of law and public policy, the Commission discourages companies from using promotional practices to encourage use of their services.[161] While NDPC may not be encouraging use of refined petroleum projects, it is promoting a pipeline project across Minnesota that would be unnecessary, particularly at this location, absent its promotional activities.

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[156] T. Vol. II at 70:1-8, 69:3-6.
[157] T. Vol. III at 48: 8-18; Enerplus Comments, January 7, 2015.
[158] Ex. 13 at 4.
[159] T. Vol. III at 37:1-8.
[160] *See*, *e.g.*, *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (halting construction of a power plant despite $800 million investment because the company began construction before an Army Corps of Engineers permit had been granted); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (ordering injunction despite evidence of financial loss due to existing contractual obligations because the harm was largely self-inflicted caused by "entering into contractual obligations that anticipated a pro forma result").
[161] Minn. Stat. § 216B.243, subd. 3(4); Minn. R. 7853.0130(A)(3).

4) A System Alternative, or even no pipeline at all, will not affect the adequacy, reliability or efficiency of the shippers' crude oil supplies.

NDPC has not shown that current facilities cannot meet demand.[162] Although FOH does not oppose a pipeline in an environmentally appropriate location, it has also consistent stated that NDPC must prove its case, pursuant to Minnesota law. The fact remains that the record does not demonstrate that any shortage or other disruptions in the supply of crude oil to the shippers would actually occur, absent the Project. No shipper has gone on record saying that if the pipeline is not built, it will not be able to obtain crude oil. The reality is that there is a network of pipelines across the U.S. that service existing refineries with light crude oil from other sources, some of them domestic.

In fact, Marathon has stated only that the proposed Sandpiper pipeline could provide a more reliable and efficient source of *Bakken* crude, not light crude in general.[163] Marathon can supplement the supply of crude to its refineries with light crude from other sources, including domestic, Canadian, and non-Canadian foreign sources.[164] There is no evidence in the record that other sources of crude will not serve equally well for Marathon's needs for its Illinois refineries during the time required to assure that a pipeline is located correctly.

In short, not building the pipeline, or building in an alternate location, will not affect the "future adequacy, reliability, or efficiency of energy supplied" to any shippers, refineries or consumers.[165]

[162] Minn. R. 7853.0130(A)(4).
[163] Ex. 13 at 5:134-35.
[164] Ex. 13 at 10:253-58.
[165] Minn. R. 7853.0130(A).

C. The record demonstrates that there are more reasonable and prudent alternatives.

1) FOH's System Alternatives deliver oil where it is needed—to Illinois refineries. The record demonstrates that SA-04 and SA-05 would serve NDPC's shippers by way of the Flanagan Terminal.

In an issue largely ignored by the ALJ's Findings, the record contains no evidence that the size, type, or timing of NDPC's Preferred Route necessitates its selection over one of the System Alternatives.[166] Rather, the System Alternatives offer more appropriate locations for pipelines than NDPC's Preferred Route. The record demonstrates that much, if not all, of the oil to be shipped via the Project is destined for Illinois and the lower Midwest.[167] NDPC has attempted to short-circuit the alternatives discussion by claiming that its "need" is limited to delivery of crude oil at Clearbrook and Superior. But this ignores the ultimate destination of the crude oil. SA-04 and SA-05 actually serve the refineries'—and ultimately the consumers'—needs more effectively than SA-Applicant.

NDPC witness Earnest stated that the crude oil shipped via the Project would be refined in the Midwest.[168] When asked to clarify which refineries he meant, he stated that it would include up to 15 refineries, only one of which is located in Superior.[169] SA-04 and SA-05 are more appropriate alternatives to meet the need to ship oil to these refineries—all of which are located in Illinois or states to the east.[170]

In its comments, MPCA also stated that the record supports the potential need for a pipeline that directly serves the Chicago area.[171] MPCA strongly questioned whether alternatives through Clearbrook and Superior are the only alternatives that served the applicant's needs,

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[166] *See* Minn. R. 7853(B)(1).
[167] T. Vol. III at 48:19-24.
[168] Ex. 14 at 6:104-07.
[169] T. Vol. I at 123:2-17; *see also* Ex. 3, Table 7853.0240-C.1 at 6.
[170] *Id.*
[171] MPCA Comments, dated January 23, 2015 at 5.

noting that "Chicago appears to be a common destination for most if not all of the oil that is proposed to be moved through Minnesota," and that the record generally supports that need likely "can be achieved by several of the System Alternatives."[172] NDPC and Marathon may wish for the Sandpiper Pipeline to be located in a place that is most financially advantageous for their pipeline structure and their bottom line. But the System Alternatives are more reasonable and prudent when considering the ultimate goal of getting the oil where it needs to go: Midwest refineries.

2) **The cost of the alternatives has not been properly calculated, but may well favor alternatives.**

NDPC has not demonstrated that the "cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives" requires that the Project to be located in NDPC's Preferred Route.[173] However, Minnesota's environmental statutes make plain that this consideration in the CON rule, alone, cannot justify the selection of NDPC's Preferred Route. Environmental considerations must be paramount when comparing alternatives, and economics alone cannot justify the selection of an alternative.[174]

To the extent that NDPC attempts to make a cost comparison, the focus of NDPC's study is inappropriately narrow.[175] The focus of the cost impacts, according to Minnesota Rules, is not only on the applicant and the shipper; it is also on the consumer. A true cost comparison between the routes has not been completed. A true cost comparison between the routes would compare the cost of shipping oil on the proposed pipeline route or alternative pipeline route, and then to

[172] *Id*.
[173] Minn. R. 7853.0130(B)(2).
[174] Minn. Stat. § 116D.04, subd. 6.
[175] *See* Ex. 17, Sch. 1.

its final destination—a refinery. It would then determine how, if at all, those different routes would impact the shipper and consumer.

NDPC alleges that it compared the costs of the various routes based on mileage, and found that the other System Alternatives were more expensive because they are longer.[176] For instance, NDPC claimed that the additional cost of materials to build SA-03 is $210 million for additional pipe and a pumping station.[177] But this is only a small part of the equation under Subdivision B(2)—the cost of the facility. It does not compare the cost of the System Alternatives to the consumers. NDPC did not ask its economic expert to consider any of the indirect economic costs of the Project.[178] There is no consideration of the potential remediation costs or other costs in the event of a spill.[179] The citizens of the State of Minnesota are asked to bear the environmental costs of the pipeline; the costs for a longer pipeline that avoids its most sensitive natural areas should be understood before the state can agree to take on the risks of the applicant's Preferred Route.

NDPC's allegation that the cost to its shippers will increase based on increased mileage[180] is also flawed. There are no shippers who are shipping only the length of this pipeline. Clearbrook is only a transfer point to the Minnesota refineries, and Superior is only a transfer point to other Midwest refineries in Illinois, Ohio, Michigan and Kentucky. Thus, shippers will also need to ship oil from their transfer point to the final destination, and will incur additional costs when they do so. NDPC's study does not take these costs into account. Furthermore, if one wants to do a proper analysis of costs and impacts of alternatives, the fact that the Sandpiper route from Bakken to the Chicago area is longer than a route that goes to the Chicago area

[176] Ex. 6, Sch. 1.
[177] *Id.* at 32.
[178] T. Vol. IV at 59:15-60:6; 73:22-74:6.
[179] *Id.*
[180] Ex.6, Sch. 1.

directly, rather than the divergence to Superior, and then south through Wisconsin. Such a longer total route also increases the risk of oil releases.

Indeed, once total shipping costs are taken into account, it may well be that the proposed System Alternatives are *less* expensive because they deliver the crude oil to a location that is far closer to its final destination. For instance, SA-04 and SA-05 deliver the oil to the Flanagan terminal in Illinois,[181] which may soon be connected to the Patoka area by way of the Southern Access Extension pipeline.[182] It may be that refineries in the Midwest prefer a more direct pipeline rather than having to ship oil east on the Sandpiper, then south from Superior. A full and accurate cost comparison would take this into account.

A full and accurate cost comparison would also take into account the cost of future expansions between Superior and the Illinois refineries required to carry additional oil. Mr. Palmer stated that Marathon preferred the Superior shipping destination because Marathon thought that there was potential for future expansion of a pipeline that moves the oil from Superior to Patoka, Illinois.[183]

If the actual costs of the Project were fully and properly considered and then compared to the System Alternatives, it would be clear that the System Alternatives are more reasonable and prudent alternatives to the Project.

3) NDPC's Preferred Route has the greatest negative effect on the natural environment.

The Project's effects on the natural environment compared to the System Alternatives demonstrate that the System Alternatives are more reasonable and prudent.[184] As discussed in Section I.D., above, the ALJ abdicated his responsibility to evaluate the evidence in the record

[181] T. Vol. VII at 53:4-15.
[182] T. Vol. III at 50:3-16
[183] T. Vol. III at 77:13-18.
[184] Minn. R. 7853.0130(B)(3).

on the environmental impacts of the various system alternatives, instead declaring that "none of the System Alternatives present a clear advantage over the proposed route."[185]

FOH agrees that the evidence in the record could be developed more fully if nonprofit citizen organizations were blessed with the kind of unlimited economic resources that NDPC enjoys, but nevertheless there is significant evidence in the record that *all* of the system alternatives are environmentally preferable to the proposed route. The only experts who supported NDPC's proposal were NDPC's experts. Even in the event that the Commission determines that NDPC's witnesses have some bias as employees or consultants of the companies, and decides that Mr. Stolen and Dr. Chapman may have some bias because of their association with a particular group, still the neutral opinions of the MPCA and DNR as described in Section I.D., above, remain and must be followed.

4) Reliability concerns do not weigh in favor of granting a CON for a pipeline in NDPC's Preferred Route.

NDPC did not present any evidence that there is demand for a pipeline to go through Clearbrook to Superior or that current facilities cannot adequately meet that demand, as discussed in Section VI.B. As such, any delay caused by forcing NDPC to apply for a Certificate of Need for a System Alternative in an environmentally appropriate location will not cause any reliability concerns.[186] Moreover, the change in oil prices has, at a minimum, bought the Commission the time needed to evaluate this Project fully and determine the right location for the State of Minnesota—even if that means a delay while NDPC evaluates one or more System Alternatives more fully.

[185] Findings of Fact ¶ 504.
[186] *See* Minn. R. 7853.0130(B)(4) (requiring the Commission to compare the expected reliability of the proposed facility with reasonable alternatives).

D. NDPC has not proven that the consequences to society of granting a CON are more favorable than the consequences of denying a CON for a pipeline in this location.

1) The proposed pipeline does not serve state energy needs.

As demonstrated above in Section IV.B.2, the state of Minnesota does not need additional crude oil sources. While the state does consume petroleum, demand has been dropping and there is no evidence in the record to tie this proposed pipeline to any of the state's petroleum needs. In addition, as discussed in Section IV.B.1, there is no evidence that the St. Paul refineries, the only potential shippers in the state of Minnesota, want or need a connection at Clearbrook. Thus, the state's energy needs are wholly indifferent to location of this pipeline, or whether there is a pipeline at all.

2) The environmental effects of the Project require denial of the CON.

Consideration of the environmental effects of a pipeline in NDPC's Preferred Route weighs against approval.[187] The State of Minnesota is asked to bear the costs of these projects in the form of loss of habitat, wetlands, forested and recreational areas, and most significantly, the risk of a major oil spill over the project life. Major oil spill can cost billions of dollars to clean up, and can impact a huge area, can cause long-term damage, and, depending on location, cannot be fully or even significantly mitigated in certain areas, resulting in permanent damage. Approval of the Sandpiper project on the route desired by NDPC also greatly increases the likelihood that the replacement and expansion of Line 3 will be approved on the same corridor, increasing the risk even more. These risks are further heightened by NPDC's refusal to adequately respond to the MDOC regarding the need for financial assurance.

[187] Minn. R. 7853.0130(C)(2).

The record reflects that there are established techniques of conducting risk assessments that are used with many types of technologies, including pipelines. A fundamental principle of such assessments is that if the consequences of failure are very high, even very rare events must be closely examined as to both likelihood and to consequences.[188] There is no question that a crude oil pipeline presents a significant risk to the environment or that the risk of a spill is particularly significant. According to MPCA:

> Environmental risks are posed by all aspects of pipeline construction and operation, including post-spill recovery and restoration activities. The primary and most significant risks are associated with the long-term effects upon environmental and natural features that will be permanently altered, eliminated, or otherwise impacted by the presence of a pipeline, as well as the potential impacts of the release of crude oil as the result of a spill event during the potential 40 years or more that the pipeline will be operational. Those risks include environmental damages such as loss of wildlife, contamination of drinking water, destruction of fisheries, loss of habitat, and alteration of ecological systems.[189]

For instance, oil spills can be highly toxic and persistent.

> Compounds of particular concern present in light crude oils are within the group called the polycyclic aromatic hydrocarbons ("PAHs"). . . . These compounds may either evaporate into air, move into water providing an exposure field to organisms, or adhere to soil and wetland substrates for decades. They are also some of the more toxic compounds in oils, although toxicity depends on other factors, such as route and duration of exposure.[190]

PAH content can determine the extent of damage—both biologically (in terms of the numbers of organisms killed or harmed) and economically.[191]

Bakken oil is particularly toxic in its initial effects, and may persist for decades.[192] Bakken oil is chemically similar to diesel.[193] This gives it a tendency to spread quickly, more

[188] Ex. 180 at 9:34-10:2.
[189] MPCA Comments, dated January 23, 2015 at 4.
[190] Ex. 182 at 7:18-24.
[191] *Id*. at 8-9.

quickly than heavy crudes such as tar sands oil, for instance.[194] Additionally, diesel spills may cause immediate and widespread wildlife kills.[195] Diesel spills may also persist in the environment over decades, still impacting wildlife many years later.[196]

The ALJ's Findings of Fact erroneously relied upon the reports by Mr. Wuolo of Barr Engineering, ignoring the criticisms by the parties that significantly diminish the credibility and usefulness of this testimony. The Barr Engineering study entitled "Potential effects of the Operation of the Sandpiper Pipeline Project on Lakes" is not a study of "potential effects . . . of the Sandpiper Project."[197] Instead, it is merely *data* about lakes and watersheds in the area. "Data" are not an analysis—or even a rudimentary assessment—of potential impacts; data provide the underpinning for "analysis." Furthermore, the report contains insufficient data necessary to achieve its ambitious title, since it contains nothing about potential spill magnitude of the "worst-case" analysis that has been conducted by NDPC, as required by PHSMA rules.[198]

In his report, Mr. Wuolo noted that 171 of Minnesota's lakes are at risk from pipeline spills from the Project, and, further, 33 of these are immediately downstream.[199] While Mr. Wuolo attempts to minimize this number by suggesting that it is a small percentage of the total watershed, that percentage is meaningless because it only reflects the size and density of lakes in the total watershed. Thirty-three lakes still represent thirty-three aquatic communities, thirty-three ecosystems, and thirty-three recreational destinations (not to mention potentially thousands of Minnesotans who use any given lake). It only takes the destruction of one lake to constitute an

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[192] *See id*. at 7:21-24.
[193] *Id*. at 5:22-24.
[194] *Id.* at 6:1-10.
[195] *Id.* at 7:11-13; 8:25-28.
[196] *Id.* at 8:19-22.
[197] *Id.* at Sch. 2.
[198] Ex. 184 at 13:1-5; 14:26-27.
[199] *Id*. at 5:156-60.

unacceptable impact to Minnesota's natural resources. The conclusions of this study should be rejected as being nearly immaterial for the decisions on this Project.

With respect to groundwater, the impacts to groundwater are potentially much more significant than Mr. Wuolo acknowledges. Mr. Wuolo relied on U.S. Geological Survey ("USGS") analyses of the Bemidji oil site for his conclusion that natural attenuation, or microbes, would limit the impacts of a spill on groundwater.[200] While microbes may consume some compounds very effectively, they are naturally "finicky" and it is very challenging to predict how they react in different situations.[201] In addition, as Mr. Wuolo himself was forced to admit, each oil spill is unique.[202] Therefore, it stands to reason that the experience from the USGS study site therefore cannot necessarily be universalized.

Mr. Wuolo uses the USGS study site to reach two unsupported general conclusions: (a) that oil that reaches groundwater will biodegrade from microbial action and thus will reduce impacts to a non-significant level, and (b) that the USGS study site largely is representative of other groundwater sites along the NDPC route.[203] But Mr. Wuolo admitted that groundwater has movement rates of six or seven feet per day in the aquifers in the vicinity of Park Rapids.[204] Assuming that Mr. Wuolo's numbers are correct, this is a groundwater movement rate 35 times that of the Bemidji USGS study site. Furthermore, the rate of biodegradation—and its importance in reducing impacts to groundwater—is a function of the length of time before microbial populations adapt to the oil (which may be a matter of weeks), and how far the oil travels as the adaptation occurs.[205] The USGS study site contains oil that has been in

[200] *Id*., Sch. 3.
[201] Ex. 182 at 11:23-12:3.
[202] T. Vol. VI at 42:17-19; Ex. 182 at 12:4-7.
[203] Ex. 28 at 8:258-9:276, Sch. 3 at 13-14.
[204] T. Vol. VI at 57:7-12.
[205] Ex. 28, Sch. 3 at 10-11.

groundwater for 36 years and the plume has traveled about 650 feet.[206] Doing the simple math, groundwater could travel up to 73 feet per year at the USGS study site versus up to 2,550 feet, or almost one-half mile, per year in aquifers south of Park Rapids, a much more concerning rate of spread.

The record demonstrates that even small spills and leaks present a great risk.[207] Very small leaks, or pinhole leaks, can go undetected for months, resulting in potentially very large leaks over time (e.g. 35,300 gallons per month over several months).[208] NDPC's response to this disturbing figure was only to refer to its integrity management plan without any substantive details other than visual observation along the pipeline route. Neither these plans nor other submitted information adequately assess or characterize the magnitude, likelihood, or significance of this risk, which is quite significant.[209]

The record also demonstrates that oil spills are expensive, time-consuming endeavors.[210] Enbridge's recent highly publicized leak from a pipeline in Michigan has cost the company more than $1.2 billion to clean up.[211] In 2010, an Enbridge pipeline ruptured into a tributary of the Kalamazoo River.[212] Approximately 20,000 barrels of crude oil were released, and the cleanup costs now exceed $1 billion.[213] It took pipeline operators 17 hours to shut down the pipeline after its safety monitoring systems indicated that the rupture occurred.[214] Impacts occurred over 35 miles downstream.[215] Mr. Stolen's testimony also details other major spills since 2010, including two at Line 14 in Wisconsin that released over 2,500 barrels of oil even though Enbridge

[206] *Id.* at 13.
[207] *Id.* at 10:17-19.
[208] Ex. 184 at 23:18-26.
[209] *Id.*; MPCA Comments dated January 23, 2015 at p. 13; Ex. 180 at 30:1-35.
[210] Ex. 182 at 8; 9:1-15.
[211] Ex. 180 at 32:13-14.
[212] *Id.* at 56:37.
[213] *Id.* at 32:13-14; 56:37-37.
[214] *Id.* at 24:26-28.
[215] *Id.* at 24:22-30; App. 1.

mobilized a rapid response, a pipeline rupture in 2011 under the Yellowstone River that resulted in 1,509 barrels of oil released and cleanup costs at $135 million and rising, and a natural gas pipeline explosion in 2010 that was the direct result of a lack of oversight from the federal government.[216] At the Yellowstone River, ice on the river has greatly hampered the cleanup and response effort, a cautionary tale for Minnesota.[217]

Very little is currently known about how Bakken oil will behave when an oil spill inevitably occurs.[218] Bakken oil is highly variable in its content, and the content may dramatically change where oil goes, the damages it causes, and decisions on how and even whether to remediate a spill.[219] NDPC is asking Minnesota to bear the risk of the consequences of an oil spill based on very little information about those potential consequences. Therefore, NDPC's assurances that any impacts will be limited should ring hollow to any decision-maker given the lack of information.

Thus, it is clear that the environmental consequences of granting a CON for a pipeline in NDPC's Preferred Route are potentially catastrophic. In contrast, the socioeconomic consequences of denying a CON so that a pipeline can be constructed in a more appropriate location are minimal. NDPC provided testimony from several witnesses and sponsored an outside expert report espousing the economic benefits the Project will bring to Minnesota. But all of these purported benefits will come to Minnesota regardless of whether the pipeline is built in NDPC's Preferred Route (the most ecologically sensitive area) or in the location of one of the System Alternatives (the more resilient areas recommended by state agencies and FOH).[220] None

[216] *Id*. at 24-25.
[217] E-dockets 20151-106575, Public Comment at 11.
[218] Ex. 182 at 5:1-8.
[219] *Id*. at 7:1-14.
[220] T. Vol. I at 64:24-65:8.

of these alleged benefits weigh in favor of granting a Certificate of Need for a pipeline in the proposed location.

3) **Future pipelines will follow any corridor approved in this location, leading to future pipeline development in an ecologically sensitive part of Minnesota.**

Future development is already planned in NDPC's Preferred Route if a CON is granted for the Project.[221] If NDPC is successful in its bid to place a pipeline among the Lake Country sensitive resources, the Project will not be the only pipeline to be located in this corridor pursuant to NDPC plans. NDPC has already announced plans, including filing its Notice Plan, to locate a second pipeline, Line 3, along this corridor.[222] Line 3 will carry tar sands oil from the Alberta tar sands region, and may carry as much as 760,000 bpd.[223] Thus, in all, this corridor will carry over a million bpd, and the Lake Country environmental resources along this corridor will be at risk from both Bakken oil, which is light and may spread quickly, and tar sands oil, which is heavy and sinks.[224]

The construction of the Project and Line 3 will prompt further expansion of pipelines out of Superior, which is not the final destination for any of the oil NDPC plans to transport.[225] In order to get the crude oil shipped on the Sandpiper and Line 3, shippers will need additional pipeline capacity to carry the oil to refineries in the lower Midwest.[226] In contrast, FOH's proposed System Alternatives would transport the oil directly to Enbridge's Illinois locations and avoid the need for more capacity through Wisconsin's sensitive waters, including Lake Superior. Therefore, the FOH approach would not only spare Minnesota from some of the environmental

[221] *See* Minn. R. 7853.0130(C)(3).
[222] Ex. 184 at 22:16-28.
[223] Wuolo Cross at 27:3 (tar sands); Ex. 183, Sch. 2 at 24 (volume).
[224] Ex. 182 at 11.
[225] T. Vol. II at 114:18-115:10.
[226] T. Vol. II at 99:25-100:1-5.

threats posed by pipelines, it would also save our neighboring states from the future development that follows from granting a certificate of need for a particular corridor.

Minnesota Rule 7853.0130(C)(3) explicitly requires the Commission to consider the possibility that the proposed energy facility will induce future development. Additionally, the Commission has acknowledged the applicability of MEPA.[227] While it has declined to order an EIS, an agency must nevertheless consider cumulative effects under MEPA.[228] At the very least, the record is woefully inadequate on the question of the cumulative impacts of co-locating Line 3. If these cumulative effects are properly considered, it would become clear that the consequences to society of granting a Certificate of Need for NDPC's preferred location are significant.

This Commission has expressed concern in the past about the number of future pipeline proposals, as has the MDNR and MPCA.[229] If Minnesota is going to permit these projects, it makes sense to designate some corridors that minimize environmental impact. If the Commission approves this project as proposed, however, at least one corridor for which future use is almost guaranteed will already be designated, and it would be a corridor chosen by a pipeline company against the will of the public.

4) The socially beneficial uses, if any, of the output of the pipeline are not dependent on location.

The "output" of the Project – crude oil - does not have socially beneficial uses, particularly when considering if those uses are "to protect or enhance environmental quality."[230] To the extent that the output is beneficial, the system alternatives can provide the same benefit.

[227] Ex. 48 at 11.
[228] Minn. Stat. § 116D.04, subd. 7; Minn. R. 4410.2300(H).
[229] Transcript of Commission Agenda Meeting September 11, 2014 at 40:5-14; MPCA Letter to Commission dated August 6, 2014; Ex. 185 at 6.
[230] Minn. R. 7853.0130(C)(4).

E. The ALJ failed to acknowledge relevant state law in his decision, including MERA and MEPA. The design, construction, and operation of the Sandpiper Pipeline would not comply with Minnesota state law.

Even if the Commission does not agree that it needs to complete an EIS prior to considering the question of need, MEPA still governs the decision before the Commission. Specifically, MEPA requires that the Commission consider all "feasible and prudent" alternatives, and forbids the Commission from choosing a course of action that is "likely to cause pollution, impairment or destruction of the air, water, land or other natural resources," so long as there is a feasible and prudent alternative "consistent with the reasonable requirements of the public health, safe, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources…" "Economic considerations alone shall not justify such conduct."[231]

Similarly, the Minnesota Environmental Rights Act, another bedrock environmental statute that governs these proceedings, states that:

> In any such administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and **no conduct shall be authorized or approved which does, or is likely to have such effect so long as 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**. Economic considerations alone shall not justify such conduct.**[232]

NDPC's proposed route fails this test. Ultimately, the ALJ's reasons for rejecting the system alternatives came down to the company's financial interest. They have proposed a particular pipeline. They have devoted resources to the application, an "open season" process,

[231] Minn. Stat. § 116d.04, subd. 6.
[232] Minn. Stat. § 116B.09, subd. 2 (2014) (emphases added).

obtaining a financial partner, and the proceedings at the FERC. To ask them to evaluate a different route that is potentially more expensive for the company costs them money, and that is why they oppose it. It did not have to be this way, if NDPC has considered alternatives earlier. But even where NDPC's proposal stands now, these considerations are impermissible under state law. The ALJ's conclusions must be rejected.

1) The System Alternatives are "feasible and prudent" under MERA and MEPA.

The record demonstrates that there are alternatives to a pipeline in NDPC's Preferred Route that are "more reasonable and prudent" as that phrase is used in Minn. R. 7853.0130. The record also demonstrates that there are "feasible and prudent" alternatives to the proposed Sandpiper Pipeline as that phrase is used in MERA and MEPA.

"As interpreted by [the Minnesota Supreme Court], the prudent and feasible alternative standard is analogous to the principle of nonproliferation in land use planning."[233] Minnesota courts have followed the principle of nonproliferation of utility corridors.[234] According to the Minnesota Supreme Court, when considering alternatives, agencies must "comply with this policy of nonproliferation in choosing between alternative sites."[235] This policy reflects the state's "strongly held commitment to protecting the air, water, wildlife, and forests from further impairment and encroachment."[236] Based on the state's "strongly held commitment" to protect the environment and the policy of nonproliferation expressed in legislative enactments, the court stated:

[233] *People for Envtl. Enlightenment and Responsibility (PEER) v. Minn. Envtl. Quality Council*, 266 N.W.2d 858, 868 (Minn. 1978).
[234] *Id.*
[235] *Id.*
[236] *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W2d 808, 832 (Minn. 1977)).

> We therefore conclude that in order to make the route-selection process comport with the Minnesota's commitment to the principle of nonproliferation, the MEQC must, *as a matter of law*, choose a pre-existing route unless there are *extremely strong reasons* not to do so.[237]

This principle would prohibit choosing an alternative that encroaches or impairs greenfield areas rather than using existing corridors. As previously discussed, NDPC's Preferred Route has the highest percentage of greenfield of any System Alternative.[238] Based on this fact alone, the System Alternatives that use existing corridors, e.g. FOH's SA-04 and SA-05, are feasible and prudent alternatives to NDPC's Preferred Route unless there are "extremely strong reasons" to reject them. NDPC has not overcome that strong presumption against its Preferred Route.

NDPC proposed the *most* environmentally harmful location for the Sandpiper Pipeline and is now claiming that there are no feasible alternatives. This kind of attempt to box Minnesotans into a corner and force an environmentally destructive decision is precisely the reason that MERA and MEPA were passed. "Prior to the passage of these laws, holders of eminent domain rights could simply decide to construct new . . . facilities, decide on a route, and go ahead and acquire the rights of way."[239]

> With the passage of the environmental policy contained in c. 116, however, the legislature clearly intended to place conditions and limitations on further destruction of the environment. The legislature decided, with the wisdom which must guide the courts, that before generating and transmission facilities could be constructed the need for those facilities and the impact on the environment must be considered.[240]

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[237] *Id.* at 868 (emphases added).
[238] NDPC's Comments Regarding System Alternatives, August 21, 2014 at 2.)
[239] *No Power Line Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 331 (Minn. 1977) (Yetka, J, concurring specially).
[240] *Id.*

In *No Power Line*, Justice Yetka criticized the fact that a route for a power line was selected before there was any determination of need. Specifically, he stated that it is inappropriate to narrow possible alternatives by allowing a utility "to select the entry point from North Dakota and the terminal point."[241] As he stated, "It is entirely possible that if these two points had not been decided upon early in the game, new corridors could have been selected far from the point of actual selection."[242] MEPA and MERA were enacted to prohibit the type of behavior criticized in *No Power Line* and displayed by NDPC in this case—forcing the state to accept an environmentally destructive activity when less harmful alternatives exist.

2) Economic considerations do not justify selecting NDPC's Preferred Route.

The ALJ has offered no allowable basis for selecting its Preferred Route over a System Alternative. For instance, the ALJ notes that the cost of each system alternative is higher than the cost of the proposed route because the system alternatives are longer (although the system alternatives also terminate much closer to the refineries that are the final destination for the crude oil).[243] NDPC's argument that System Alternatives are not feasible is based on speculative financial harm to shippers.[244] For example, Marathon claims that the longer pipeline routes are not reasonable because they will result in increased costs to shippers of $0.33-$0.36 per barrel.[245] Similarly, NDPC claims that the System Alternatives are not reasonable because they put the viability of the TSAs and FERC approval at risk.[246] But NDPC admitted that it took a calculated business risk to enter into contracts that include these specific delivery points[247] and to seek

[241] *Id.*
[242] *Id.*
[243] *See, e.g.*, Findings of Fact ¶351 in relation to SA-03. There were similar findings for each of the system alternatives citing additional cost of pipe as a result of a longer pipeline.
[244] Ex. 14, Sch. 2 at 52.
[245] Ex. 22 at 2:47-48.
[246] Ex. 21 at 5:139-42; 166-69.
[247] T. Vol. II at 69:3-6.

regulatory approval for a rate structure that allegedly hinges on specific delivery points.[248] NDPC admitted it did not have state approval to construct a pipeline in this location when it took these risks.[249]

NDPC's arguments as to why the System Alternatives are not reasonable are purely economic. And even those arguments are speculative and not backed up in the evidentiary record with the kind of analysis that its resources would allow it to develop. NDPC has not provided any competent evidence; it only provided the record unsupported claims of self-inflicted economic harm to justify its Preferred Route over the System Alternatives. And the speculative economic harm alleged by NDPC does not take into account the potential costs of a spill in the Preferred Route as compared to a spill in the System Alternatives. In any event, the statutes are clear: economic considerations alone, even if based on credible factual evidence, are insufficient to justify an environmentally destructive choice under both MERA and MEPA.[250]

The law and the record in this case clearly support the conclusion that the System Alternatives are "feasible and prudent" under MERA and MEPA. Therefore, if NDPC's Preferred Route is granted a CON, the pipeline construction and operation will violate bedrock Minnesota environmental laws. Accordingly, NPDC cannot meet the requirement in Minn. R. 7853.0130 (D) and a CON for a pipeline in this location should be denied.

[248] T. Vol. II at 70:1-8). NDPC
[249] T. Vol. II at 68:24-69:2.
[250] Minn. Stat. §§ 116B.09, subd. 2, 116D.04, subd. 6.

CONCLUSION

For the foregoing reasons, FOH asks that the Commission deny the Certificate of Need for the Sandpiper Pipeline.

Dated: April 28, 2015

/s/ Kathryn M. Hoffman

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of North Dakota Pipeline Company, LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota	**FINDINGS OF FACT, SUMMARY OF PUBLIC TESTIMONY, CONCLUSIONS OF LAW, AND RECOMMENDATION**

North Dakota Pipeline Company LLC (NDPC or the Applicant) seeks a Certificate of Need (CN) from the Minnesota Public Utilities Commission (the Commission or MPUC) for the Sandpiper Pipeline project (Sandpiper or Project).

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on January 27, 28, 29, and 30, 2015. The hearing record closed on March 13, 2015, following the receipt of the last of the post-hearing briefs.

APPEARANCES IN THE CONTESTED CASE

Christina K. Brusven, John E. Drawz, and Patrick D.J. Mahlberg, Fredrikson & Byron, P.A.; Kevin Walli and John R. Gasele, Fryberger, Buchanan, Smith & Frederick, P.A.; James D. Watts, Enbridge Energy Limited Partnership; and Randy V. Thompson, Nolan, Thompson & Leighton, appeared on behalf of NDPC.

Byron E. Starns, Brian M. Meloy, and Andrew J. Gibbons, Stinson Leonard Street, appeared on behalf of Kennecott Exploration Company (Kennecott).

Gerald W. Von Korff, Rinke Noonan, appeared on behalf of the Carlton County Land Stewards (CCLS).

Frank Bibeau, Attorney at Law, and Peter Erlinder, International Humanitarian Law Institute, appeared on behalf of Honor the Earth (HTE).

Joseph Plumer and Jessica Miller, Tribal Attorneys, appeared on behalf of the White Earth Band of Ojibwe (WEBO).

~~Richard Smith and Eileen Shore, Steering Group Members~~Leigh K. Currie and Kathryn M. Hoffman, Minnesota Center for Environmental Advocacy, appeared on behalf of the Friends of the Headwaters (FOH).

Benjamin L. Gerber, Manager for Energy Policy, appeared on behalf of the Minnesota Chamber of Commerce (Minnesota Chamber).

Kevin Pranis, Business Representative, appeared on behalf of the Laborers' District Council of Minnesota and North Dakota (Laborers).

Ellen O. Boardman, O'Donoghue and O'Donoghue LLP, and David L. Barnett, Special Representative, appeared on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the UA).

Neil J. Roesler, Vogel Law Firm, Jon Godfread, Vice President of Governmental Affairs, and Helene Herauf, Government and Regulatory Affairs Specialist, appeared on behalf of the Greater North Dakota Chamber of Commerce (North Dakota Chamber).

Julia E. Anderson and Peter Madsen, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Commerce, Division of Energy Resources, Energy Regulation and Planning (DOC-DER).

Linda S. Jensen, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce, Energy Environmental Review and Analysis Unit (DOC-EERA).

INTRODUCTION

NDPC proposes to construct a pipeline and associated facilities that will transport crude oil from its Beaver Lodge Station, south of Tioga, North Dakota, to a terminal in Clearbrook, Minnesota, and later from Clearbrook on to Superior, Wisconsin.

Because of the size of the proposed project, Minnesota law conditions the siting and construction of such a pipeline upon NDPC first obtaining a Certificate of Need.

The Minnesota Public Utilities Commission issues these certificates if it is persuaded that the facilities are "needed," as defined by a special set of regulatory criteria. The criteria, found in Minn. Stat. § 216.243 (2014) and Minn. R. 7853.0130 (2013), weigh features of the proposed facility's societal costs, benefits, design, construction, operation and impacts.

NDPC's proposal is highly controversial. The parties diverge on a central point: whether the benefits of improving access to North Dakota crude oil are worth assuming the risks that there might later be a large-scale oil spill from the pipeline.

From NDPC's perspective, the key goals of the Project are to reduce shipping bottlenecks at its existing Clearbrook Terminal and to develop robust and flexible routes for transporting North Dakota crude oil to the refineries that want it. It argues that the risks of large-scale oil spill are small, and manageable, and should not impede development of a pipeline that would ~~greatly~~ financially benefit ~~Minnesota and the region~~its shippers. NDPC contends that none of the system alternatives should be

considered because it has already solicited support of committed shippers in the form of Transportation Service Agreements ("TSA").

Opponents of the Project maintain that the location of the pipeline in a pristine corridor is inappropriate when other locations are available. Opponents also maintain that the impacts of climate change are significant and Minnesota should not be complicit in the additional development of oil wells. Finally, opponents are concerned that both planned and accidental discharges of oil from the proposed pipeline will foul the air and water; and that these effects are not sufficiently addressed by NDPC's proposal.

STATEMENT OF THE ISSUE

~~Has NDPC met the criteria for~~Should the Commission grant a Certificate of Need for the Sandpiper project under Minn. Stat. § 216B.243 (2014) and Minn. R. 7853.0130?

SUMMARY OF CONCLUSIONS

The Commission ~~should grant~~ denies a Certificate of Need to NDPC for the Project.

Although NDPC has completed its application in ~~complied~~ compliance with ~~all~~ the relevant statutes and regulations regarding its Certificate of Need application,~~.~~ NDPC has not demonstrated that application of the criteria in Minn. Stat. § 216b.243 and Minn. R. 7853.0130, to the facts in the hearing record, support issuance of a Certificate of Need. Moreover, other ~~no~~ parties~~y~~ demonstrated, under Minn. R. 7853.0130(B), that there are~~was a~~ more reasonable and prudent alternatives to the proposed project that must be considered before a certificate of need is granted to this project.

Based upon the submissions of the parties, and the contents of the hearing record, the ~~Administrative Law Judge~~Commission makes the following:

FINDINGS OF FACT

I. THE APPLICANT AND ITS PARENT COMPANIES

1. NDPC is a Delaware limited liability company that is qualified to do business in Minnesota. NDPC is a joint venture between Enbridge Energy Partners, L.P., NDPC's former sole parent entity, and Williston Basin Pipeline LLC, a wholly- owned indirect subsidiary of Marathon Petroleum Corporation (Marathon).[1]

[1] Ex. 6, at 7:201-204 (Eberth Direct).

2. Enbridge, Inc. and its corporate affiliates form a leading energy and transportation company in North America. The various U.S. and Canadian entities are all commonly referred to as "Enbridge."[2]

3. As an integrated enterprise, Enbridge operates the longest crude oil pipeline system in the world, delivering nearly 2.2 million barrels of crude oil every day to markets in the United States and Canada.[3]

4. NDPC owns and operates an interstate crude oil transportation system (NDPC System) that gathers crude oil from points near producing wells in North Dakota and Montana and transports these products to both Enbridge Mainline System and Minnesota Pipe Line Company System (MPL or MPL System) at Clearbrook, Minnesota.[4]

5. The Enbridge Mainline System is the United States portion of an operationally integrated pipeline system that spans 3,300 miles across North America.[5]

6. Through the Enbridge pipeline systems, oil shippers in North Dakota have access to several crude oil refinery markets in the Midwestern United States.[6]

7. The NDPC System is operated by Enbridge Operating Services, LLC, which plans to construct and operate the proposed Project on behalf of NDPC.[7]

8. Marathon is an independent petroleum refining, transportation, and marketing company with more than 125 years of experience in the energy industry.[8]

9. Marathon purchases more than 50 million barrels of crude oil each month, from sources all over the world, for its seven-refinery system.[9]

10. In November 2013, just prior to the commencement of the "open season" for this pipeline, Marathon committed to funding 37.5 percent of the Project, as well as being an anchor shipper on the Project. In exchange, if the Project is placed into service, Marathon will have nearly a 27 percent

[2] Ex. 3, Part 7853.0230, at 2 (Revised CN Application).
[3] Ex. 6, at 7:222-25 (Eberth Direct).
[4] Ex. 6, at 7:204-~~2~~208 (Eberth Direct).
[5] Ex. 1, Part 7853.0230, at 2 (Application).
[6] *Id.*
[7] Ex. 7, at 1:7-9 (Steede Direct).
[8] Ex. 13, at 3:82-90 (Palmer Direct). Marathon's interest in NDPC is held through a wholly-owned indirect subsidiary. Marathon Petroleum Company, LP, also an indirect wholly-owned subsidiary of Marathon Petroleum Corporation, signed the Sandpiper Transportation Services Agreement. For ease of reference, all of the Marathon entities are referred to as "Marathon."
[9] Ex. 13, at 1:13-15 (Palmer Direct).

equity interest in the NDPC System. Marathon has also made a significant commitment to either ship or pay for capacity on the Project.[10]

II. PROCEDURAL HISTORY BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION (FERC)

~~A. MARKET CONDITIONS THAT PROMPTED NDPC'S REQUESTS FOR DECLARATORY ORDERS~~

11. Crude oil production in North Dakota has significantly increased over the last six years, rising from 138,000 barrels per day (bpd) in January 2008 to 911,000 bpd in August 2013. Supply forecasts from the North Dakota Pipeline Authority predict a continued growth in the Bakken production over the next 8 to 10 years, gradually declining over the decade after that, before stabilizing at production levels above 1 million bpd.[11] However, the recent significant drop in oil prices cast some doubt on at least the short-term validity of these forecasts.

12. As a result of increasing production in the Bakken and Three Forks formations prior to December 2014, NDPC is experiencing increasing demand for pipeline capacity out of North Dakota on the NDPC System.[12]

~~13. Because of the demand for shipments of crude oil from North Dakota to the Clearbrook Terminal, NDPC's tariff now makes only 10,500 bpd available to new shippers.[13]~~

~~14. New shippers include, for example, new producers in North Dakota, refineries seeking to start purchasing Bakken crude, new marketers in North Dakota, or existing shippers and refiners that would like to increase their utilization of Bakken crude oil. NDPC describes a "new shipper" as a firm that had nominated for transportation on Line 81 crude oil shipments in fewer than nine of the last twelve months.[14]~~

~~B. THE 2012 PETITION~~

~~15.~~13. In 2012, NDPC filed a Petition for Declaratory Order and Offer of Settlement in 2012 (the 2012 Petition) with FERC. In its Petition, NDPC detailed its interest in developing a pipeline from Tioga, North Dakota to Superior, Wisconsin. NDPC asked federal regulators to confirm that it would be permitted to recover the costs of developing the new

[10] *Id.* at 4:119-5:128 (Palmer Direct).
[11] Ex. 3, Part 7853.0240, at 3-4 (Revised CN Application).
[12] Ex. 7, at 2:62-67 (Steede Direct).
~~[13] Ex. 20, at 15:430-431 (Steede Rebuttal).~~
~~[14] *Id.* at 15:431-436 (Steede Rebuttal).~~

infrastructure through a cost-based surcharge on the shipments that were sent through the pipeline.[15]

~~16.~~14. By seeking pre-approval of rate and tariff structures through a declaratory order, an oil pipeline developer can mitigate its risk. Since 1996, FERC has signaled its willingness to render advance approvals of tariff structure for some "non-traditional" rates and terms of service, with "remaining inputs left to the traditional rate filing process." As the agency notes, "the declaratory order process allows the Commission to ensure that open seasons are conducted in a transparent and non-discriminatory manner and an oil pipeline's proposal conforms to the applicable statutes, regulations, and precedent."[16]

~~17.~~15. In the 2012 Petition, NDPC proposed that the pipeline would be funded through a cost-of-service surcharge on existing rates for all shippers using the Project for shipments between Beaver Lodge and Clearbrook, and new cost-of-service rate for the downstream pipeline segment between Clearbrook and Superior.[17]

~~18.~~16. In that Petition, NDPC proposed that all shippers on the Project would be uncommitted shippers.[18]

~~19.~~17. FERC denied the 2012 Petition without prejudice to refiling on the grounds that "the proposed rates have not been agreed to in writing by each person who is using the service on the day of the filing." The record presented to FERC did not confirm that all shippers endorsed NDPC's surcharge proposal.[19]

~~20.~~18. Following the denial of its Petition, NDPC engaged in a series of discussions with its shippers. The talks focused on whether NDPC could develop a revised tariff rate and service structure that would both meet FERC's regulatory requirements and enjoy broad support among its shippers.[20]

~~21.~~19. NDPC determined that the shippers who supported the Project fell into two groups: (1) shippers that were willing to commit to nominating substantial volumes of crude oil for shipment, under long-term "ship-or-pay" contracts; and (2) shippers that wanted access to additional pipeline

[15] Ex. 21, at 7:206-209 and Schedule 2 (MacPhail Rebuttal).
[16] *North Dakota Pipeline Company LLC,* 147 FERC ¶ 61,121, at 8-10 (2014); *see also*, *Express Pipeline P'ship*, 75 FERC ¶ 61,303, *reh'g and declaratory order*, 76 FERC ¶ 61,245, *reh'g denied*, 77 FERC ¶ 61,188 (1996).
[17] Ex. 21, Schedule 2, at 6 (MacPhail Rebuttal).
[18] Ex. 7, at 4:123-126 (Steede Direct); Ex. 21, Schedule 2, at 6-7 (MacPhail Rebuttal).
[19] *Enbridge Pipelines (North Dakota) LLC*, 142 FERC ¶ 61,212, at 9-10 (2013); Ex. 21, at 7:206-213 (MacPhail Rebuttal).
[20] Ex. 21, at 7:219-222 (MacPhail Rebuttal).

capacity, but, for various business reasons, could not make long-term, ship-or-pay commitments.[21]

~~22.~~20. Under a "ship-or-pay" contract, a shipper that agrees to ship specific quantities of crude oil, at particular times, on the NDPC pipeline, will be liable for "deficiency payments" in the event that the oil is not tendered for shipment.[22]

~~23.~~21. NDPC designed a rate structure for these two, distinct groups of shippers. For those firms that were able to become "committed shippers," the rates to be paid reflected the selected delivery point, the level of service requested, and the volume commitments.[23]

~~24.~~22. In addition to the revenues provided by the committed shippers, NDPC proposed to recover a portion of the costs of the Project through cost-based rate components charged to uncommitted shippers.[24]

~~25.~~23. NDPC created a pro-forma Transportation Service Agreement (TSA) that set forth the contractual obligations between NDPC and its committed shippers.[25]

~~26.~~24. This TSA was made available to interested shippers through the open season.[26]

~~27.~~25. NDPC proposed different rate components for the upstream portion of the Project between Beaver Lodge and Clearbrook and the downstream portion from Clearbrook to Superior.[27]

~~28.~~26. As to the upstream segment between Beaver Lodge and Clearbrook, NDPC proposed that uncommitted shippers would pay a surcharge that would be added to the existing transportation rates to Clearbrook after the Project begins transporting crude oil.[28]

~~29.~~27. Through this proposed rate structure, NDPC sought to recover the cost of the Project from both the shippers that used the new pipeline capacity and the shippers that used its existing pipeline capacity. NDPC

[21] *Id.* at 7:224-8:231 (MacPhail Rebuttal); Evid. Hr'g Tr. Vol. 2 at 73:3-17 (MacPhail).
[22] Ex. 21, Schedule 2, Attachment A, at 34 (MacPhail Rebuttal) (Sandpiper Project Transportation Services Agreement) ("8.01 Monthly Deficiency Payments. Commencing on the Shipper Commencement Date, if the volumes tendered by Shipper in any Month for transportation on the Pipeline from a TSA Receipt Point to a TSA Delivery Point total less than one hundred percent [100%] of the product of (a) the Committed Volume, multiplied by (b) the number of days in that Month, Shipper shall make a payment to Carrier in an amount [the 'Monthly Deficiency Payment'] equal to the Monthly Deficiency Quantity (determined in accordance with Section 8.02) multiplied by the applicable Deficiency Rate.").
[23] Ex. 21, Schedule 2, Attachment A, at 158-159 (MacPhail Rebuttal).
[24] Ex. 21, at 9:282-284 (MacPhail Rebuttal).
[25] *Id.* at Schedule 2, Attachment A, at 108-165 (MacPhail Rebuttal).
[26] Ex. 7, at 6:187-190 (Steede Direct).
[27] Ex. 21, at 9:284-86 (McPhail Rebuttal).
[28] *Id.* at 9:288-290 (MacPhail Rebuttal).

argued that because the Project would operate to expand deliveries to the Clearbrook Terminal and reduce congestion on the existing pipeline, it benefitted all users of the system.[29]

~~30.~~28. As to the segment of the Project between Clearbrook and Superior, the costs would likewise be recovered through the committed revenues and a new cost-based rate component applied to uncommitted shippers. NDPC proposed that the shippers to Clearbrook would pay the pre-existing Clearbrook rate plus the new upstream rate component. The firms that nominated shipments to Superior would pay this same rate plus a rate component that reflected a share of the downstream costs.[30]

~~31.~~29. The "open season" sought support from shippers for only the route proposed by NDPC that connects at Clearbrook and Superior. No other routes were presented to shippers.[31] Utilizing this structure, NDPC held an open season between November 26, 2013 and January 24, 2014, offering its customers an opportunity to enter into TSAs for deliveries to Clearbrook and Superior.[32]

~~32.~~30. NDPC received volume commitments totaling 155,000 bpd during the open season. In NDPC's view, this was a sufficient amount of committed volumes to ensure that the development of a new pipeline was a financially viable venture. ~~As Bruce MacPhail, Enbridge's Director of Bakken Asset Performance and Development, summarized, "unlike the tariff structure proposed in the 2012 Petition, the revised structure was funded in substantial part by shipper volume commitments."[33]~~

~~33.~~31. Marathon is the Project's "anchor shipper" – a term that ~~the parties and stakeholders~~NDPC and Marathon used to connote Marathon's substantial, contractual commitment to use the proposed pipeline for shipments of crude oil out of North Dakota.[34]

~~34.~~32. While NDPC entered into its equity agreement with Marathon prior to start of the November 2013 "open season," it did not appear to FERC that "any favoritism was shown to Marathon Petroleum during the open season or that it signed a contract or received contract terms that were different than those available to any other potential shipper."[35]

~~35.~~Likewise significant, although NDPC and Marathon have proposed a pipeline that terminates in Superior, Wisconsin, the final destination for the crude oil that Marathon wants shipped to Superior Wisconsin is actually

[29] *Id.* at 9:291-10:294 and 10:299-305 (MacPhail Rebuttal).
[30] *Id.* at at 10:307-312 (MacPhail Rebuttal).
[31] T. Vol. II at 66:14-25 (MacPhail Cross).
[32] Ex. 21 at 8:236-238 (MacPhail Rebuttal).
[33] ~~*Id.* at 8:245-250 (MacPhail Rebuttal).~~
[34] *Id.* at 8:246-248 (MacPhail Rebuttal); Ex. 13 at 4:119-5:128 (Palmer Direct).
[35] *Compare,* Ex. 13 at 4:119 - 5:124 and T. Vol. III at 37:1-8 with *North Dakota Pipeline Company LLC, supra*, at 10.

Illinois, Ohio, and Kentucky. ~~Marathon has structured significant business and capital plans around completion of the Sandpiper project. In addition to its purchase of an equity position in the Project (noted above),~~ Marathon will invest a total of $410 million dollars to upgrade the capabilities of three Midwestern refineries to process "light, sweet crude oil" from North Dakota. The improvements to Marathon's refineries in Robinson, Illinois, Canton, Ohio, and Catlettsburg, Kentucky, are all timed to be completed on, or before, the in-service date of the proposed pipeline.[36]

~~C. THE 2014 PETITION~~

~~36.~~33. After completion of the open season, NDPC filed a second Petition for Declaratory Order with the FERC on February 12, 2014 (2014 Petition).[37]

~~37.~~34. In its 2014 Petition, NDPC sought FERC approval of key features of the proposed rate structure, recovery of project costs and ordering of shipments. Specifically, NDPC requested:

(a) approval of its proposed tariff rate structure for the Project, including NDPC charging different rates to committed and uncommitted volumes;

(b) assurance that FERC would treat rates agreed to in TSAs during NDPC's open season as "settlement rates";

(c) approval of NDPC's method of recovery from uncommitted shippers amounts that are higher than the current base rates for service from Beaver Lodge to Clearbrook and from Clearbrook to Superior;

(d) approval of its methods for addressing any later apportionment on the Project; and

(e) confirmation that the terms of the TSAs were reasonable and not unduly discriminatory.[38]

35. The Saint Paul Park Refining Co. ("SPPRC") and Flint Hills are the two potential beneficiaries of the connection at Clearbrook. However, both refineries, along with other shippers, intervened in the FERC proceedings to express their concern or in some cases outright opposition to the Project.

36. SPPRC opposed the pipeline, stating that the Project upstream from Clearbrook is neither "necessary [n]or desirable to meet the transportation

[36] ~~Ex. 13, at 7:179-192 (Palmer Direct).~~
[37] Ex. 21, at 7:201-202 (MacPhail Rebuttal); *North Dakota Pipeline Company LLC, supra*, at 1.
[38] *Id.* at 8:254-9:279 (MacPhail Rebuttal).

needs of SPPRC." It also stated that SPPRC "has not suffered from chronic prorationing on the NDPC system," and "has seen no operational evidence that the system is subject to persistent excess demand." SPPRC stated that the proposed Sandpiper Pipeline would have "no value" to it, but would only require it to pay a higher transportation cost than it pays now. The effect of the pipeline would be simply to "harm, not benefit, the business of SPPRC and its customers" due to increased costs.[39]

37. Flint Hills Resources intervened in the Sandpiper docket at the FERC to express its concerns. It expressed concern about whether uncommitted shippers would bear financial responsibility for underutilization of the pipeline if NDPC's predictions about shipper demand prove overly optimistic. It also sought to ensure that the rights of non-committed shippers to challenge future rate changes were preserved if NDPC is forced to allocate costs associated with underutilization of the pipeline.[40]

38. On May 15, 2014, FERC approved NDPC's 2014 Petition, proposed rate structure, and terms of the TSAs.[41] In its approval, FERC noted the protests and concerns of SPPRC, Flint Hills, and other shippers. However, FERC noted that the protests "have no bearing on our determination here" because the Commission "does not have jurisdiction to grant certificates to oil pipelines or otherwise authorize or prevent construction, determining whether a pipeline is needed is not within its authority."[42]

~~38.~~39. The FERC Order put off SPPRC and Flint Hills' concerns for another day, stating that the "cost and rate issues raised by the protesters will be addressed after the Sandpiper Project expansion capacity is ready to begin service."[43]

~~39. The 155,000 bpd that is reflected in the TSAs represents approximately 70 percent of the new capacity between North Dakota and Clearbrook.[44]~~

~~40. When this volume of oil is added to the 150,000 bpd that now travels along NDPC's Line 81, the combined amounts represent approximately 80 percent of the system capacity between Clearbrook and Superior.[45]~~

~~41. NDPC proposes to allocate the remaining uncommitted capacity among historical and new shippers on the NDPC System.[46]~~

[39] Ex.183, Sch. 4 at 42-43.
[40] *Id.* at 159-60.
[41] *Id.* at 7:201-203 and *North Dakota Pipeline Company LLC, supra,* at 12.
[42] Order on Petition for Declaratory Order,147 FERC ¶ 61, 121, Federal Energy Regulatory Commission, May 15, 2014 at ¶ 23.
[43] *Id.* at ¶ 30.
[44] ~~Ex. 7, at 8:239-244 (Steede Direct).~~
[45] ~~*Id.* at 8:239-244 (Steede Direct).~~
[46] ~~*Id.* at 8:244-245 (Steede Direct).~~

~~42. If the Project is placed into service, 10 percent of the total combined volume on Line 81 and Sandpiper (approximately 44,500 bpd) will be available to new shippers – effectively doubling their access to capacity on the NDPC System.~~[47]

III. PROCEDURAL HISTORY BEFORE THE COMMISSION AND THE OFFICE OF ADMINISTRATIVE HEARINGS

~~43.~~40. On June 7, 2013, NDPC filed a Notice Plan for the Project with the Commission.[48]

[47] ~~Ex. 20, at 15:434-436 (Steede Rebuttal).~~
[48] Ex. 37 (CN Notice Plan).

44.41. On June 26, 2013, the DOC-DER recommended that the Commission accept NDPC's proposed Notice Plan, subject to certain revisions.[49]

45.42. On July 17, 2013, NDPC provided the revisions suggested by DOC-DER, and, on July 26, 2013, DOC-DER recommended that the Commission accept the proposed Notice Plan.[50]

46.43. On September 11, 2013, the Commission approved the Notice Plan.[51]

47.44. NDPC implemented the Notice Plan between October 4 and October 17, 2013.[52]

48.45. On October 4, 2013, NDPC completed direct mail notice to tribal governments, towns, statutory cities, home rule charter cities, and counties whose jurisdictions were reasonably likely to be affected by the Project.[53]

49.46. Between October 8 and October 16, 2013, NDPC completed direct mail notice to landowners pursuant to the Notice Plan.[54]

50.47. Between October 10 and October 17, 2013, NDPC published notice of its intent to file a CN Application in a series of local newspapers.[55]

51.48. On November 8, 2013, NDPC filed applications for a CN and a pipeline route permit to construct the Project. NDPC also submitted an environmental information report (EIR) for the Project.[56]

52.49. On November 14, 2013, the Commission established a comment period on the completeness of the NDPC applications.[57]

53.50. On December 5, 2013, DOC-DER recommended that the Commission declare NDPC's applications complete upon the submission of certain information.[58]

54.51. Also on December 5, 2013, Kennecott Exploration Company (Kennecott) filed a petition to intervene.[59]

[49] Comments of the Minnesota Department of Commerce, Division of Energy Resources (June 26, 2013) (eDocket No. 20136-88522-01).
[50] Ex. 38, at 1(Order Approving Notice Plan)
[51] *Id.* at 5 (Order Approving Notice Plan).
[52] Ex. 40 (Notice Plan Compliance Filing).
[53] NDPC Compliance Filing, at 90 (Dec. 15, 2013) (eDocket No. 201312-94648-02).
[54] *Id.* at 8, 61 and 84.
[55] *Id.* at 137-138.
[56] Ex. 1 (Application and EIR); MPUC Docket No. PL-6668/PPL-13-473, Application for Pipeline Routing Permit MPUC Docket No. PL-6668/PPL-13-474 (Nov. 8, 2013) (eDocket No. 201311-93532-03).
[57] Ex. 39 (Notice of Comment Period on Completeness).
[58] Comments of the DOC-DER (Dec. 5, 2013) (eDocket No. 201312-94356-01).

~~55.~~52. On January 31, 2014, NDPC filed revised CN and Route Permit Applications, as well as a revised EIR (collectively, the Application). The supplemental filing indicated that the company's name had changed from Enbridge Pipelines (North Dakota) LLC to NDPC and provided information regarding modifications to the proposed route through Carlton County, Minnesota.[60]

53. On January 31, 2014, the Commission established a comment period in the Route Permit proceeding from January 31, 2014, through April 4, 2014, to provide the public an opportunity to comment on potential human and environmental impacts and to suggest alternative pipeline routes to be considered in the comparative environmental analysis ("CEA") to be prepared by Department of Commerce, Energy, Environmental Review and Analysis unit ("DOC-EERA").

~~56.~~54. On February 11, 2014, the Commission issued an Order finding NDPC's Application to be substantially complete upon supplementation. On the same date, the Commission issued an Order finding that NDPC's Route Permit Application was substantially complete. In both orders, the Commission referred the matters to the Office of Administrative Hearings (OAH) for contested case proceedings. The Commission also granted party status to NDPC, DOC-DER, and Kennecott.[61]

~~57.~~55. On February 27, 2014, the matter was reassigned from the Honorable Tammy L. Pust to the ~~undersigned Administrative Law Judge (ALJ).~~Honorable Eric L. Lipman. In this same Order, a First Prehearing Conference was set for March 17, 2014.[62]

~~58.~~56. Between March 3 and March 13, 2014, staff from the Commission and the DOC-EERA conducted seven public information meetings on the NDPC proposal. These informational meetings occurred in six different counties along the route proposed by NDPC.[63]

~~59.~~57. On March 11, 2014, HTE filed a petition to intervene.[64]

~~60.~~58. On March 16, 2014, HTE filed a motion to dismiss NDPC's Application.[65]

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[59] Kennecott's Petition to Intervene (Dec. 5, 2013) (eDocket No. 201312-94358-01).
[60] Ex. 3 (Revised Application and EIR); Revised Application for Pipeline Routing Permit MPUC Docket No. PL-6668/PPL-13-474 (Jan. 31, 2014) (eDocket No. 20141-96101-01).
[61] Ex. 42 (Order Finding Application Substantially Complete Upon Supplementation and Varying Timelines; Notice of and Order for Hearing).
[62] First Prehearing Order (Feb. 27, 2014) (eDocket No. 20142-96862-01).
[63] MPUC Docket No. PL-6668/PPL-13-474, Notice of Application Acceptance and Public Information Meetings (Jan. 31, 2014) (eDocket No. 20141-96003-01).
[64] HTE's Petition to Intervene (Mar. 11, 2014) (eDocket No. 20143-97200-01).
[65] Notice of *Lis Pendens* and Motion to Dismiss for Lack of Jurisdiction (Mar. 16, 2014) (eDocket No. 20143-97361-02). It supplemented its motion with a brief, filed on April 8, 2014.

~~61.~~59. On March 19, 2014, NDPC filed supplemental information for sections 7853.0510 and 7853.0530 of its Application.[66]

~~62.~~60. On March 24, 2014, the Commission issued a letter deeming the Application complete as of March 19, 2014.[67]

61. The Commission hosted a comment period in the Route Permit proceeding from January 31, 2014, through April 4, 2014. The purpose of the comment period was to provide the public an opportunity to identify potential human and environmental impacts from the proposal and to suggest alternative routes that could be assessed in the DOC-EERA's comparative environmental analysis (CEA).[68]

~~63.~~62. Before the close of the initial public comment period, Friends of the Headwaters ("FOH") submitted alternative routes for consideration. FOH's routes (System Alternatives designated SA-04, SA-05, SA-06 and SA-07) follow existing pipeline rights-of-way to serve Midwestern refineries. The Minnesota Pollution Control Agency ("MPCA") also filed a preliminary alternative to the Project, designated SA-03.

~~64.~~63. On April 4, 2014, HTE submitted a Motion to Extend or Suspend the Current Deadlines for Alternative Routes and Add Community Public Hearings. The motion asked the Commission to schedule additional public hearings, extend the deadline for submitting comments on alternative pipeline routes, and bifurcate the CN and Route Permit proceedings.[69]

~~65.~~64. On April 8, 2014, the ALJ issued the Second Prehearing Order. The Second Prehearing Order granted HTE's petition to intervene and set forth a schedule and procedures for the contested case proceedings.[70]

~~66.~~65. On April 14, 2014, the Commission issued a notice extending the public comment period from April 4, 2014, to May 30, 2014. On the same day, the Commission denied HTE's request for additional public information meetings. Also on the same day, the Commission issued a notice of comment period on whether to separate the CN and Route Permit proceedings.[71]

[66] Ex. 4 (Supplemental Application Information Sections 0510 and 0530).
[67] Letter from the MPUC to Kevin Walli (Mar. 24, 2014) (eDocket No. 20143-97531-01).
[68] MPUC Docket No. PL-6668/PPL-13-474, Notice of Application Acceptance and Public Information Meetings (Jan. 31, 2014) (eDocket No. 20141-96003-01).
[69] MPUC Docket No. PL-6668/PPL-13-474, Motion to Extend or Suspend the Current Deadlines for Alternative Routes and Add Community Public Hearings (Apr. 4, 2014) (eDocket No. 20144-97971-01).
[70] Second Prehearing Order (Apr. 8, 2014) (eDocket No. 20144-98098-01).
[71] Ex. 43 (Notice of Comment Period on Motion to Separate Certificate of Need and Route Permit Proceedings).

~~67.~~66. On April 21, 2014, FOH submitted a petition to intervene in the CN proceeding.[72]

~~68.~~67. On April 22, 2014, the ALJ issued the Third Prehearing Order. The Third Prehearing Order established a date for oral argument on HTE's motion to dismiss and adjusted certain other dates in the schedule of proceedings.[73]

~~69.~~68. On May 1, 2014, WEBO submitted a petition to intervene.[74]

~~70.~~69. On May 5, 2014, the ALJ issued the Fourth Prehearing Order, which established procedures for the hearing on HTE's motion to dismiss.[75]

~~71.~~70. On May 7, 2014, the ALJ issued the Fifth Prehearing Order. The Fifth Prehearing Order certified to the Commission HTE's request to extend the comment period and bifurcate the proceedings.[76]

~~72.~~71. On May 9, 2014, the ALJ issued the Sixth Prehearing Order, which granted intervention to WEBO and FOH.[77]

~~73.~~72. On May 20, 2014, the ALJ issued the Seventh Prehearing Order, denying HTE's motion to dismiss NDPC's CN and Route Permit Applications.[78]

~~74.~~73. On May 28, 2014, the ALJ issued the Eighth Prehearing Order, which cancelled and rescheduled the next scheduling conference.[79]

~~75.~~74. On June 9, 2014, the ALJ issued the Ninth Prehearing Order, which suspended the deadlines set forth in the Second Prehearing Order and directed the parties to confer on a new schedule for the proceedings.[80]

~~76.~~75. On June 12, 2014, the Minnesota Chamber submitted a petition to intervene.[81]

~~77.~~76. On June 30, 2014, the Laborers submitted a petition to intervene.[82]

[72] Statement of FOH in Support of Intervention (Apr. 21, 2014) (eDocket No. 20144-98565-01).
[73] Third Prehearing Order (Apr. 22, 2014) (eDocket No. 20144-98602-01).
[74] Petition to Intervene (May 1, 2014) (eDocket No. 20145-99115-01).
[75] Fourth Prehearing Order (May 5, 2014) (eDocket No. 20145-99176-01).
[76] Fifth Prehearing Order (May 7, 2014) (eDocket No. 20145-99252-01).
[77] Sixth Prehearing Order (May 9, 2014) (eDocket No. 20145-99352-01).
[78] Seventh Prehearing Order (May 20, 2014) (eDocket No. 20145-99699-01).
[79] Eighth Prehearing Order (May 28, 2014) (eDocket No. 20145-99875-01).
[80] Ninth Prehearing Order (June 9, 2014) (eDocket No. 20146-100244-01).
[81] Chamber's Petition for Intervention (June 12, 2014) (eDocket No. 20146-100359-01).
[82] Laborers' Petition for Intervention (June 30, 2014) (eDocket No. 20146-100981-01).

~~78.~~77. On July 7, 2014, the Commission issued an Order reaffirming its decision to extend the comment period until May 30, 2014, and denying HTE's motion to bifurcate the proceedings.[83]

~~79.~~78. On July 8, 2014, the ALJ issued the Tenth and Eleventh Prehearing Orders. The Tenth Prehearing Order denied HTE's request for reconsideration of the Seventh Prehearing Order. The Eleventh Prehearing Order granted intervention to the Minnesota Chamber and Laborers.[84]

~~80.~~79. On July 11, 2014, the ALJ issued the Twelfth and Thirteenth Prehearing Orders. The Twelfth Prehearing Order was a Protective Order governing the use and handling of certain sensitive data. The Thirteenth Prehearing Order set forth an amended schedule for the contested case proceedings and public hearings.[85]

~~81.~~80. On July 17, 2014, DOC-EERA filed comments and recommendations summarizing the alternative route designation process. It identified 54 route alternatives and eight System Alternatives (SA-01 through SA-08). In addition, DOC-EERA suggested a modification to SA-03 so as to create a connection with the terminal in Clearbrook, Minnesota. This alternative was denominated "SA-03, as modified" (SA-03-AM).[86]

~~82.~~81. DOC-EERA recommended that the Commission consider the 53 route alternatives. DOC-EERA further recommended that the Commission not consider the eight system alternatives because "they do not meet the purpose of the project as identified in the permit application and are, therefore, not alternative routes for accomplishing the purpose of the project."[87]

82. DOC-EERA's report describes the System Alternatives as follows:

- **SA-03.** SA-03 was suggested by the Minnesota Pollution Control Agency (PCA) as a system alternative to avoid the lakes areas crossed by NDPC's preferred route and to provide for a new terminal in the Crookston area, so as to provide for greater routing flexibility for future pipeline projects.

  As proposed, this system alternative would follow the existing 24-inch Viking natural gas pipeline southward to Clay County, then southeast across the

[83] Ex. 44 (Order Reaffirming May 30, 2014 Comment Deadline and Denying Motion to Bifurcate Proceedings).
[84] Tenth Prehearing Order (July 8, 2014) (eDocket No. 20147-101294-01); Eleventh Prehearing Order (July 8, 2014) (eDocket No. 20147-101295-01).
[85] Twelfth Prehearing Order (July 11, 2014) (eDocket No. 20147-101387-01); Thirteenth Prehearing Order (July 11, 2014) (eDocket No. 20147-101390-01).
[86] MPUC Docket No. PL-6668/PPL-13-474, Comments and Recommendations of DOC-EERA Staff (July 17, 2014) (eDocket No. 20147-101573-01) (Staff Comments).
[87] Ex. 80, at 19 (EERA Report); *see also* Evid. Hr'g Tr. Vol. 7, at 245:17-18 (Pile). ("None of the system alternatives were recommended to go into routing.").

counties of Becker, Ottertail, Wadena, Todd, Morrison, Benton, Milles Lacs and Isanti before proceeding northward generally following either a 8-inch Magellan petroleum products pipeline or a Northern Natural Gas Pipeline, in proximity to I-35 through the counties of Chicago, Pine and Carlton before connecting with one of the proposed Sandpiper route alternatives in Carlton County. SA-03 as proposed is approximately 360 miles long.

Similar to other system alternatives proposed, it does not provide for a connection to a terminal in Clearbrook. If the new proposed Clearbrook terminal were moved westward to the Crookston area, as suggested by the proposer, a pipeline would still be required to extend from a Crookston terminal to Clearbrook in order to provide oil to MinnCan and Minnesota Pipeline for transport to refineries in the Twin Cities.

- **SA-04.** System alternative SA-04, suggested by Friend of the Headwaters (FOH), is proposed to follow the existing Alliance Pipeline, a hot gas natural gas pipeline, with an outside diameter of approximately 42-inches built in 2000 that traverses North and South Dakota, Minnesota, Iowa and Illinois and is approximately 1,050 miles in length. SA-04 does not connect with terminals in Clearbrook or Superior. This alternative was proposed to avoid the lakes areas traversed by the NDPC Sandpiper proposed route. The Alliance Pipeline route crosses the Minnesota counties of Traverse, Stevens, Swift, Chippewa, Kandiyohi, Renville, Sibley, Nicollet, Blue Earth, Waseca, Freeborn and Mower, crossing primarily agricultural land in Minnesota. The Alliance Pipeline was permitted by the Federal Energy Regulatory Commission (FERC) and was the first pipeline project in Minnesota to require an agricultural mitigation plan.
- **SA-05.** SA-05, also suggested by FOH, if it were to connect to Superior would be approximately 1,100 miles in length. As with SA-04, it also follows a gas pipeline, the Northern Border Natural Gas Pipeline that cuts across southwestern Minnesota, through the counties of Lincoln, Lyon, Murray, Cottonwood, Jackson and Martin.[88]
- **SA-06.** SA-06, also suggested by FOH, would follow Minnesota Highway 9 south, until it intersects an existing Magellan products pipeline, approximately 8 to 12-inches in diameter, that it would follow south and east to a point where it intersects with the existing 24-inch MinnCan crude oil pipeline. It would then follow the MinnCan route to the refineries, then continue north along the I-35 corridor in proximity to the 8-inch Magellan products pipeline and Northern Natural Gas Pipeline until it intersects with other Sandpiper route alternatives.

  As a part of this proposal it was also suggested that the pipeline route could follow an existing 8-inch Magellan products pipeline east into Wisconsin until it intersects the existing Enbridge right-of-way at which point a pipeline could be built to carry the oil back up to Superior or down to Chicago.

[88] As FOH witness Smith clarified in his oral testimony, SA-04 and SA-05 are designed to connect to NDPC's system at the Flanagan Terminal in Illinois. T. Vol. VII at 53:4-15.

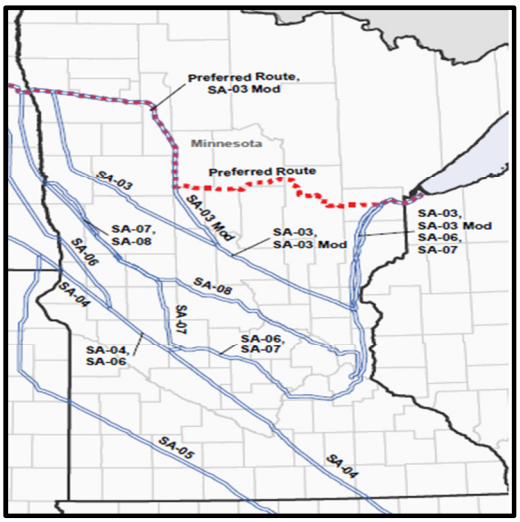
- **SA-07.** SA-07, also suggested by FOH, may be viewed as a combination of two different system alternatives: first, as a combination of SA-07 and SA-06, and the second as a combination of SA-07 and SA-08.

  SA-07 and SA-06 when combined to form SA-07 would follow I-29 in North Dakota to Fargo, then follow the same corridor east and southeast adjacent to I-94, then follow an existing Magellan product pipeline south and east to a point where it intersect with the MinnCan 24-inch crude oil pipeline and follow it to Minnesota's two refineries. At those points it is suggested that the pipeline can proceed northward to the Duluth area by following I-35 or the existing Magellan product and Northern Natural Gas pipelines to a point where it intersects with other Sandpiper route alternative and then proceed to the Superior terminal.

  The other system alternative would combine SA-07 and SA-08, by following SA-08 (I-94) and extending it through the Twin Cities along the freeway or existing Magellan product pipeline to 1) a point where it intersects I-35 and two other pipelines (Magellan and Northern Natural Gas) that proceed northward as described above, or 2) follow an existing Magellan Product pipeline east into Wisconsin until it intersect the existing Enbridge right-of-way at which point a pipeline could be built to carry the oil back up to Superior or down to Chicago.

- **SA-08.** As proposed by Honor the Earth, SA-08 would be located adjacent to or within the right-of-way of I-29 and I-94. Also, SA-08 does not connect to terminals in Clearbrook or Superior.

~~The System Alternatives make different cross-sections of Minnesota:~~[89]



83. On August 6, 2014, MPCA submitted comments to the Commission urging that the Commission expand the alternatives given the high potential for additional pipelines and replacement or upgrading of existing pipelines in the near future within the same corridor. MPCA commented that it is critical that the current effort consider multiple alternatives, including both

[89] ~~Ex. 17, Schedule 1, Figure 1 (Eberth Direct).~~

route and system alternatives**.** MPCA stated that limiting the alternatives to route options alone at this stage would unnecessarily narrow the scope of project options designed reduce environmental and public health risks.

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

~~83.~~85. On August 7, 2014, the Commission met to consider which route alternatives would be accepted for further consideration in the CEA and the Route Permit Application public hearings.[90]

~~84.~~86. On August 8, 2014, NDPC filed the direct testimony of the following individuals: Neil Earnest; A.J. Johnson; Robert Steede; Paul Eberth; Art Haskins; William Rennicke; John Glanzer; Michael Palmer; Dr. Richard Lichty; Barry Simonson; and Sara Ploetz.[91]

~~85.~~87. On August 12, 2014, the ALJ issued the Fourteenth Prehearing Order, which clarified several deadlines set forth in the Thirteenth Prehearing Order.[92]

~~86.~~88. On August 12, 2014, the Commission issued a notice providing for an additional 14-day comment period concerning review of the eight System Alternatives. [93]

~~87.~~89. On August 25, 2014, the Commission issued its Order Accepting Alternative Route and System Alternatives for Evidentiary Development, Requiring Notice, and Setting Procedures (August 2014 Order). In that order, the Commission accepted the 5~~4~~3 route alternatives recommended by DOC-EERA, as well as SA-03, as modified, for consideration in the Route Permit contested case hearing. The Commission also directed NDPC to prepare a "pipeline safety report" to be filed with direct testimony in the Route Permit proceeding.[94]

[90] MPUC Docket No. PL-6668/PPL-13-474, Notice of Commission Meeting (eDocket No. 20147-101743-02).
[91] Ex. 6 (Eberth Direct); Ex. 7 (Steede Direct); Ex. 8 (Glanzer Direct); Ex. 9 (Simonson Direct); Ex. 10 (Johnson Direct); Ex. 11 (Ploetz Direct); Ex. 12 (Haskins Direct); Ex. 13 (Palmer Direct); Ex. 14 (Earnest Direct); Ex. 15 (Rennicke Direct); and Ex. 16 (Lichty Direct).
[92] Fourteenth Prehearing Order (Aug. 12, 2014) (eDocket No. 20148-102215-01).
[93] Notice of Comment Period (Aug. 12, 2014) (eDocket No. 20148-102195-01).
[94] Ex. 46 (Order Accepting Alternative Route and System Alternatives for Evidentiary Development, Requiring Notice, and Setting Procedures).

~~88.~~90. On August 26, 2014, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (the UA) submitted a petition to intervene.[95]

~~89.~~91. On August 27, 2014, the North Dakota Chamber submitted a petition to intervene.[96]

~~90.~~92. On August 29, 2014, Carlton County Land Stewards submitted a petition to intervene.[97]

~~91.~~93. On September 4, 2014, the ALJ issued the Fifteenth Prehearing Order, which set a prehearing status and scheduling conference.[98]

~~92.~~94. On September 9, 2014, the ALJ issued the Sixteenth Prehearing Order, granting intervention to the UA, the North Dakota Chamber, and CCLS.[99]

~~93.~~95. On September 11, 2014, the Commission met to consider the additional comments it received regarding system alternatives SA-01 through SA-08. At that meeting, the Commission bifurcated the CN and Routing proceedings.[100]

96. On September 15, 2014, NDPC petitioned for reconsideration of the Commission's August 25, 2014 Order.

~~94.~~97. On September 19, 2014, the ALJ issued the Seventeenth Prehearing Order, which cancelled all deadlines in the Route Permit proceedings, set forth amended deadlines for the CN proceeding, and established other procedures for the CN proceeding.[101]

98. On October 7, 2014, the Commission issued a written order resulting from its September 11, 2014 meeting (October 2014 Order). The Commission separated the CN proceeding from the Route Permit proceeding and postponed action on the Route Permit Application until the Commission made a decision on the CN Application. In addition, the Commission ~~authorized environmental review~~requested that DOC-EERA prepare an environmental report of six System Alternatives (SA-03, SA-04, SA-05, SA-06, SA-07 and SA-08). The Commission requested that DOC-EERA staff complete the environmental report prior to the contested case proceeding in the CN docket. The Order stated that "The Commission anticipates that this review should evidence, from a broad environmental

[95] UA's Petition to Intervene (Aug. 26, 2014) (eDocket No. 20148-102526-01).
[96] The North Dakota Chamber's Petition to Intervene (Aug. 27, 2014) (eDocket No. 20148-102583-01).
[97] CCLS' Petition to Intervene (Aug. 29, 2014) (eDocket No. 20148-102617-01).
[98] Fifteenth Prehearing Order (Sept. 4, 2014) (eDocket No. 20149-102868-01).
[99] Sixteenth Prehearing Order (Sept. 9, 2014) (eDocket No. 20149-102950-01).
[100] Ex. 47 (Notice of Commission Meeting).
[101] Seventeenth Prehearing Order (Sept. 19, 2014) (eDocket No. 20149-103165-01).

perspective, the relative risks and merits of choosing a different system alternative. The analysis need not, and likely cannot, include the significant analytical detail used in the comparative environmental analysis to be conducted in the routing process."[102]

~~95.~~99. The Commission further stated that "to ensure that an environmental review is available to the public and the parties, the Commission requests that the EERA prepare an environmental review document that examines and evaluates the potential impacts of the proposed project with those of the six alternative system configurations, and other alternative methods to satisfy need."[103] The Commission requested that DOC-EERA staff complete the environmental review prior to the contested case hearings in the CN docket.[104]

100. On October 14, 2014, counsel for FOH withdrew from representation.

~~96.~~101. On October 15, 2014, NDPC submitted a petition for the creation of a separate docket for the filing of highly sensitive nonpublic data. It likewise requested a protective order governing the use, handling and disclosure of these materials.[105]

~~97.~~102. On October 27, 2014, NDPC, FOH, and the UA each submitted petitions for reconsideration of the Commission's October 2014 Order.[106]

~~98.~~103. On October 30, 2014, the Commission held a meeting at which it addressed ~~the parties'~~NDPC's petition~~s~~ for reconsideration of the August 2014 Order.[107]

~~99.~~104. On November 5, 2014, the ALJ issued the Eighteenth Prehearing Order, which granted NDPC's petition for a separate docket and protective order for highly sensitive nonpublic data.[108]

~~100.~~105. On November 6, 2014, NDPC, CCLS, HTE, FOH, and WEBO submitted responses to the October 27, 2014, petitions for reconsideration.[109]

[102] Ex. 48.
[103] Ex. 48.
[104] Ex. 48 (Order Separating Certificate of Need and Route Permit Proceedings and Requiring Environmental Review of System Alternatives).
[105] NDPC's Petition for a Separate Docket and Protective Order for Highly Sensitive Nonpublic Data (Oct. 15, 2014) (eDocket No. 201410-103862-01).
[106] NDPC's Petition for Reconsideration of the Commission's Oct. 7, 2014 Order (Oct. 27, 2014) (eDocket No. 201410-104166-01); Seven Letters from Minnesota Members of the UA (Oct. 27, 2014) (eDocket No. 201410-104174-01); Friends of the Headwaters' Petition for Reconsideration and Amendment of the Commission's October 7, 2014 Order (Oct. 27, 2014) (eDocket No. 201410-104176-01).
[107] Ex. 49 (Notice of Commission Meeting).
[108] Eighteenth Prehearing Order (Protective Order) (Nov. 5, 2014) (eDocket No. 201411-104464-01).

~~101.~~106. On November 7, 2014, the Commission issued an order denying ~~the parties'~~NDPC's petition~~s~~ for reconsideration of the August 2014 Order.[110]

~~102.~~107. On November 19, 2014, the following parties submitted direct testimony: the Minnesota Chamber; the North Dakota Chamber; CCLS; DOC-DER; FOH; THE; UA; and the Laborers.[111]

108. On November 26, 2014, substitute counsel for FOH, the Minnesota Center for Environmental Advocacy, filed its notice of appearance.

~~103.~~109. On December 1, 2014, HTE submitted a Request for PUC to Modify CN Calendar Milestones to the Commission.[112]

~~104.~~110. On December 4, 2014, the Commission held a meeting at which it addressed the parties' petitions for reconsideration of the October 2014 Order.[113]

~~105.~~111. On December 5, 2014, the Commission issued an order denying parties' petitions for reconsideration of the October 2014 Order.[114]

~~106.~~112. On December 15, 2014, the Commission published in the *State Register* a Notice of Filing and Comment Period. The notice provided that public hearings on NDPC's Application for the Project would be held between January 5 and January 9, 2015, in five regional centers: St. Paul, Duluth, Bemidji, Crookston, and St. Cloud. The notice further provided that interested persons could submit written comments on the Project through 4:30 p.m. on January 23, 2015.[115]

~~107.~~113. On December 17, 2014, the Commission referred HTE's Request for PUC to Modify the CN Calendar of Milestones to the ALJ.[116]

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[109] CCLS Response to Request for Reconsideration (Nov. 6, 2014) (E-Dockets Document Number 201411-104498-01); NDPC's Response in Opposition to FOH's Petition for Reconsideration and Amendment of the Commission's October 7, 2014 Order (Nov. 6, 2014) (E-Dockets Document Number 201411-104489-01); FOH's Response to NDPC's Petition for Reconsideration of the Commission's October 7, 2014 Order (Nov. 6, 2014) (eDocket No. 201411-104485-01); HTE's Response to Motions for Reconsideration of NDPC's Petition for Reconsideration of the Commission's October 7, 2014 Order (Nov. 6, 2014) (eDocket No. 201411-104509-02); Chamber's Comments on the Requests for Reconsideration (Nov. 6, 2014) (eDocket No. 201411-104490-01); WEBO's Response to Petition for Reconsideration (Nov. 7, 2014) (eDocket No. 201411-104532-01); Laborers' Response to NDPC Petition for Reconsideration of Order (Nov. 7, 2014) (eDocket No. 201411-104508-01).

[110] Ex. 100 (Order Denying Reconsideration and Clarifying Procedural Posture).

[111] Exs. 50-52 (Heinen Direct); Ex. 110 (Chapman Direct); Ex. 130 (LaDuke Direct); Ex. 180 (Stolen Direct); Ex. 181 (Smith Direct); Ex. 200 (Blazar Direct); Ex. 201 (Younggren Direct); Ex. 210 (Olson Direct); Ex. 211 (Engen Direct); Ex. 212 (Duncombe Direct); Ex. 220 (Barnett Direct); Ex. 230 (Herauf Direct).

[112] HTE's Motion to Expand the Time Allotted for Milestones for the Schedule Established by the Seventeenth Prehearing Order dated Sept. 19, 2014 (Dec. 1, 2014) (eDocket No. 201412-105064-02).

[113] Notice of Commission Meeting (Nov. 21, 2014) (eDocket No. 201411-104822-23).

[114] Ex. 101 (Order Denying Reconsideration).

[115] Ex. 104 (Notice in State Register).

[116] Letter to the Honorable Eric L. Lipman Regarding HTE's Motion (Dec. 17, 2014) (eDocket No. 201412-105478-02).

~~108.~~114. On December 18, 2014, DOC-EERA filed the Comparison of Environmental Effects of Reasonable Alternatives (the EERA Report), along with related maps and appendices. The EERA Report ~~analyzed~~ quantified the environmental features present in a two-mile wide Study Area for SA-03 through SA-08 and the Preferred Route.[117] The DOC-EERA report did not describe or compare the environmental impacts of the System Alternatives on the environment.

~~109.~~115. Also on December 18, 2014, FOH filed a Request for Continuance asking the ALJ to modify the schedule for the CN proceedings based on the accelerated schedule and FOH's recent substitution of counsel. WEBO and CCLS submitted similar requests on December 24 and December 29, respectively. NDPC submitted a response in opposition to the requests on December 29, 2014.[118]

~~110.~~116. On January 2, 2015, the ALJ issued the Nineteenth Prehearing Order, which denied the requests for a continuance.[119]

~~111.~~117. On January 5, 6, 7, 9, and 12, the ALJ presided over public hearings in St. Paul, Duluth, Bemidji, St. Cloud, and Crookston.[120]

~~112.~~118. On January 5, 2015, NDPC filed its rebuttal testimony. Included in NDPC's rebuttal testimony was its environmental and engineering analysis of two-mile wide corridors (the Study Areas) for each System Alternative, SA-03, as modified, and the Preferred Route.[121]

~~113.~~119. On January 6, 2015, DOC-DER filed rebuttal testimony.[122]

~~114.~~120. On January 7, 2015, CCLS and HTE filed rebuttal testimony.[123]

~~115.~~121. On January 15, 2015, FOH submitted a series of subpoena requests. FOH sought to compel certain officials of the Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Natural Resources (MDNR) to attend the evidentiary hearing and render expert testimony.[124]

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[117] Ex. 80 (EERA Report).
[118] FOH's Request for Continuance (Dec. 18, 2014) (eDocket No. 201412-105533-02).
[119] Nineteenth Prehearing Order, at 5-6 (Jan. 2, 2015) (eDocket No. 20151-105869-01).
[120] *See* Bemidji Tr.; Crookston Tr.; Dulth Tr.; St. Cloud Tr.; St. Paul Tr.
[121] Ex. 17 (Eberth Rebuttal); Ex. 18 (Earnest Rebuttal); Ex. 19 (Glanzer Rebuttal); Ex. 20 (Steede Rebuttal); Ex. 21 (MacPhail Rebuttal); Ex. 22 (Palmer Rebuttal); Ex. 23 (Simonson Rebuttal); Ex. 24 (Trade Secret Simonson Rebuttal); Ex. 25 (Haskins Rebuttal); Ex. 26 (Baumgartner Rebuttal); Ex. 27 (Ploetz Rebuttal); Ex. 28 (Wuolo Rebuttal); and Ex. 29 (Rennicke Rebuttal).
[122] Ex. 53 (Heinen Rebuttal).
[123] Ex. 111 (Chapman Rebuttal); Ex. 131 (LaDuke Rebuttal).
[124] Requests for Subpoenas to be Served on Employees of the MPCA filed on behalf of the FOH (Jan. 15, 2015) (E-Docket Document No. 20151-106203-01); Requests for Subpoenas to be Served on Employees of the MDNR filed on Behalf of the FOH (Jan. 15, 2015) (E-Docket Document No. 20151-106253-01); *see also,* Minn. R. 1400.7000, subp. 1 (2013) ("Requests for subpoenas for the attendance of witnesses or the production of documents, either at a

~~116.~~122. On January 16, 2015, the ALJ issued the Twentieth Prehearing Order. This Order denied the subpoena requests without prejudice to refiling.[125]

123. On January 20, 2015, FOH renewed its subpoena requests providing additional supporting information and argument.

~~117.~~124. The following parties filed surrebuttal testimony on January 21, 2015: NDPC, FOH, CCLS, and DOC-DER.[126]

125. On January 22, 2015 the ALJ denied FOH's renewed subpoena request at a prehearing conference.

~~118.~~126. On January 21~~2~~, 2015, FOH submitted the sworn testimony of certain MDNR and MPCA officials. However, only the surrebuttal testimony of Jamie Schrenzel from MDNR was offered as an exhibit at the evidentiary hearing.[127]~~[128]~~ MPCA refused to appear at the evidentiary hearing absent a subpoena, but MDNR agreed to offer Jamie Schrenzel as a witness to answer questions about the comments MDNR had offered in this matter subject to the stipulation of all parties that Ms. Schrenzel would be appearing on behalf of MDNR rather than on behalf of any party.[129]

127. On January 23, 2015 both MDNR and MPCA submitted comments on the relative environmental impacts of the System Alternatives.[130] Both agencies concluded that NDPC's Preferred Route presented greater environmental risks than the System Alternatives.

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hearing or for the purpose of discovery, shall be made in writing to the judge, shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought, shall identify any documents sought with specificity, shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena.").

[125] Twentieth Prehearing Order (Jan. 16, 2015) (eDocket No. 20151-106270-01); The Administrative Law Judge concluded that FOH's requests were not clear. The requests did not demonstrate that it was necessary, or just, to compel an unwilling expert to testify in this matter. Additionally, it was not clear from the phrasing of the requests whether FOH would satisfy the requirement that expert testimony be filed in advance of the hearing. The Administrative Law Judge permitted resubmission of the requests if these matters could be shown. *See* Second Prehearing Order and Seventeenth Prehearing Order; *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir. 1976) (An order compelling an expert to render opinion testimony at trial may be appropriate in cases in which the witness is a unique expert; it is unlikely that any comparable witness will willingly testify; the sought-after testimony is a previously formed or expressed opinion; and, there is small likelihood that the witness will be later asked to testify in similar matters); *accord, Mitzel v. Employers Ins. of Wausau*, 878 F.2d 233, 235 (8th Cir. 1989).

[126] Ex. 183 (Smith Surrebuttal); Ex. 30 (Crane Surrebuttal); Ex. 184 (Stolen Surrebuttal); Ex. 31 (Earnest Surrebuttal); Ex. 112 (Chapman Surrebuttal); Ex. 54 (Heinen Surrebuttal); Ex. 182 (Reddy Surrebuttal).

[127] Ex. 185.

~~[128] MDNR also made an agency representative available for questions at the evidentiary hearing; MPCA declined to do so. Testimony of Scott Lucas, MPCA (Jan. 22, 2015) (eDocket No. 20151-106473-01); Ex. 185 (Schrenzel Direct); Testimony of Nathan Kestner, MDNR (Jan. 22, 2015) (eDocket No. 20151-106470-01); Testimony of Stephen Lee, MPCA (Jan. 22, 2015) (eDocket No. 20151-106473-02); Testimony of Bill Sierks, MPCA (Jan. 22, 2015) (eDocket No. 20151-106473-03); MPCA's Response to Subpoena from FOH (Jan. 22, 2015) (eDocket No. 20151-106470-03).~~

[129] Transcript of the Evidentiary Hearing ("T.") Vol. I.

[130] *Id.*

128. Between January 27 and January 30, 2015, the ALJ held evidentiary hearings in St. Paul, Minnesota.[131]

~~119.~~129. On January 29, 2015 FOH moved for disclosure of the TSA between NDPC and Marathon filed in Docket No. 14-954 based on the fact that Marathon had waived its right to enforce the prohibition on NDPC's disclosure of the contents of that TSA by voluntarily appearing at the hearing and disclosing the strategically favorable contents of the TSA. The ALJ denied the motion on the record at the hearing.[132]

[131] Evidentiary Hearing Transcripts, Volumes 1 - 7.
[132] *Id.* at Vol. VII at 135:15-16.

IV. PROJECT DESCRIPTION

~~120.~~130. The Project consists of a pipeline and associated facilities that will transport crude oil from NDPC's Beaver Lodge Station, south of Tioga, North Dakota, to Clearbrook, Minnesota, and then on to an existing Enbridge terminal in Superior, Wisconsin.[133]

131. The Project is approximately 616 miles long. NDPC proposes to construct a 24-inch diameter pipe for the approximately 300 mile route in North Dakota. It further proposes to construct 24-inch diameter pipe across the 73-mile distance between the North Dakota border and Clearbrook, Minnesota, and to run a 30-inch diameter pipe the 229 miles between the Clearbrook Terminal and the Wisconsin border. Lastly, NDPC proposes to extend this same 30-inch pipe across the 14 miles from the edge of the Wisconsin border to the Superior terminal.[134]

~~121.~~132. The proposed route from Clearbrook to Superior is only partially in an existing right-of-way for pipelines.[135] Some of the route also follows existing right-of-ways, but approximately 25 percent of the route is a "greenfield" route. There is no analysis in the record regarding the compatibility of the pipeline with non-pipeline linear facilities, such as whether or not there will be overlap with existing areas disturbed by the non-pipeline linear facilities.

~~122. The North Dakota portion of the Sandpiper Project has already been approved by the North Dakota Public Service Commission.[136]~~

~~123.~~133. NDPC also proposes construction of a new Clearbrook West Terminal and additional facilities at Pine River, Minnesota.[137]

~~124.~~134. The proposed Clearbrook West Terminal would be sited approximately 3.8 miles west of the existing Enbridge Clearbrook Terminal, and include:

(a) Two storage tanks;

(b) Two sets of receiver and launch traps;

(c) Two 450 horse power (HP) injection pumps;

(d) One 300 HP transfer pump;

(e) A pump station, including four 5,500 HP pumps with four variable frequency drives, a 24-inch Pipeline Inspection

[133] Ex. 1, Application Summary, at 1 (CN Application).
[134] Ex. 3, Part 7853.0230, at 1 (Revised CN Application).
[135] *Id.* at 3-4.
~~[136] Evid. Hr'g Tr. Vol. 3, at 103:24 - 104:3 (Steede).~~
[137] Ex. 6, at 2:51-59 (Eberth Direct).

Gauge (PIG) receiver, a 30-inch PIG launcher, and association pump station piping and valves;

(f) Associated terminal piping, interconnections, valves, manifold, and sumps;

(g) A fire suppression system;

(h) Maintenance, pump shelter, and cold storage buildings;

(i) Metering equipment; and

(j) Power and communications equipment.[138]

~~125.~~135. The proposed facilities in Pine River, Minnesota, include a receiver and launcher trap, Coriolis metering equipment, and an electrical service building.[139]

~~126.~~136. Today, some of the stocks of light crude oil that are purchased and refined by Minnesota's two oil refineries are transported from North Dakota along Enbridge's Line 81. As noted above, Line 81 transports oil to the Clearbrook Terminal, which is a connection point to the MPL system.[140]

~~127.~~137. From the proposed Clearbrook West Terminal, barrels of crude oil would be received into tankage and could be routed south on the MPL System or re-injected for further transportation east to Superior, Wisconsin.[141]

~~128.~~ The initial capacity of the pipeline will be 225,000 bpd into Clearbrook and 375,000 bpd from Clearbrook into Superior.[142] However, the Project is designed to accommodate a future expansion to 406,000 bpd into Clearbrook, and 711,000 bpd from Clearbrook to Superior.[143] ~~The Project will have the capacity to transport 225,000 barrels bpd of crude oil from North Dakota to Clearbrook, Minnesota.[144]~~

~~129. With the addition of oil stocks from Line 81, the project would have a total annual capacity of 375,000 bpd from Clearbrook, Minnesota to Superior, Wisconsin.[145]~~

~~130. NDPC determined that a 30-inch pipe from Clearbrook to Superior would allow for the transportation of these combined volumes of oil – specifically, the oil sent from the Beaver Lodge Station to the Clearbrook~~

[138] Ex. 10, at 3:86 - 4:125 (Johnson Direct).
[139] Ex. 10, at 4:122-25 (Johnson Direct).
[140] Ex. 8, at 4:137-140 and 6:160-165 (Glanzer Direct).
[141] Ex. 3, Part 7853.0240, at 2 (Revised CN Application); Ex. 8, at 4:125-129 and 6:160-165 (Glanzer Direct).
[142] Ex. 3 at 6.
[143] *Id.* at 7, Table 7853-0230-1-D.5-1.
~~[144] Ex. 6, at 2:62-65 (Eberth Direct).~~
~~[145] *Id.*~~

~~Terminal, plus oil shipments from Line 81, minus any quantities that are sent south of Clearbrook on the MPL.~~[146]

~~131. Likewise, in the event of an outage on either Line 81 or the Sandpiper Line, shipments of oil could proceed from North Dakota to Clearbrook on the other, operating pipeline.~~[147]

~~132.~~138. NDPC proposes constructing the Project along the route NDPC submitted with its January 31, 2014 Revised Pipeline Routing Permit Application, as revised by its later route alternative filings. NDPC submitted Route Alternative filings on April 4, May 30, and June 27, 2014. In combination, these proposals comprise NDPC's Preferred Route.[148] NDPC's Initial Filings did not address any of the proposed System Alternatives, which were brought forth during the public comment period.

V. ~~APPLYING THE CRITERIA OF MINN. R. 7853.0130~~APPLICABLE LEGAL FRAMEWORK

~~133.~~139. Minn. Stat. § 216B.243 governs the issuance of CNs for large energy facilities, including crude oil pipelines. Under Minnesota law, a "large energy facility" may not be sited or constructed without a CN from the Commission.[149]

140. It is the applicant's burden to justify the need for the facility. Minn. Stat. § 216B.243, subd. 3. The legislature identified a number of criteria for the Commission to use when assessing need and empowered the Commission to adopt, through rule, assessment of need criteria. *Id.*, subds., 1, 3. Minnesota's Administrative Rules also place the burden of proof on the party proposing the action. "The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." Minn. R. 1400.7300.

141. Minnesota Environmental Policy Act ("MEPA") and Minnesota Environmental Rights Act ("MERA") prohibit the construction of any project that would cause pollution, impairment or destruction of any of the state's natural resources "so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare of the state's paramount concern for the protection of [its natural resources]. Economic considerations alone shall not justify such conduct." Minn. Stat. § 116D.04, subd. 6; *see also* Minn. Stat. § 116B.03 (establishing private cause of action for pollution, impairment or destruction of natural resources). The statutes define "pollution,

[146] ~~Ex. 8, at 4:133-5:144 (Glanzer Direct).~~
[147] ~~*Id.* at 6:163-165 (Glanzer Direct).~~
[148] Ex. 17, Schedule 1, at 181 (Eberth Rebuttal).
[149] Minn. Stat. § 216B.243, subds. 1, 2, 3; *see also,* Minn. R. 7853.0030 (2013).

impairment or destruction" to include "any conduct which materially adversely affects or is likely to materially adversely affect the environment." Minn. Stat. § 116B.02, subd. 5.

142. Minnesota law contains two strong policy preferences: (1) a preference for the public interest over private interests; and (2) an overarching state policy in favor of environmental protection. The legislature has specifically instructed that it intends for Minnesota laws to be interpreted "to favor the public interest as against any private interest." Minn. Stat. § 645.17. The legislature has expressed similar intent to protect the environment. "The legislature . . . directs that, to the fullest extent practicable the policies, rules and public laws of the state shall be interpreted and administered in accordance with the policies set forth in [the Minnesota Environmental Policy Act]." Minn. Stat. § 116D.03, subd. 1. It is the state's objective to "discourage ecologically unsound aspects of population, economic and technological growth, and develop and implement a policy such that growth occurs only in an environmentally acceptable manner." Minn. Stat. § 116D.02, subd. 2. In particular, it is the state's policy to "minimize the environmental impact from energy production and use." *Id.* State agencies are required to ensure that "environmental amenities and values . . . will be given at least equal consideration in decision making along with economic and technical considerations." Minn. Stat. § 116D.03, subd. 2.

143. Environmental considerations must be paramount when comparing alternatives, and economics alone cannot justify the selection of an alternative. Minn. Stat. § 116D.04, subd. 6.

~~134.~~144. Minn. Stat. § 216B.243, subd. 1, ~~further~~ directs the Commission to "adopt assessment of need criteria to be used in the determination of need for large energy facilities …."[150]

~~135.~~145. The criteria that the Commission promulgated are found in Minn. R. 7853.0130.[151]

~~136.~~146. Because NDPC proposes to construct a new pipeline "greater than six inches in diameter and having more than 50 miles of its length in Minnesota used for the transportation of … crude petroleum or petroleum fuels or oil," a Certificate of Need is required for the project.[152]

~~137.~~147. Under Minn. R. 7853.0130, review of a Certificate of Need application involves inquiries into four key areas – namely, whether:

[150] Minn. Stat. § 216B.243, subd. 1.
[151] *See* Minn. R. 7853.0020 (2013) (The purpose of this chapter is to specify the contents of applications for certificates of need and to specify criteria for assessment of need for large oil and LPG storage facilities, large petroleum pipelines, and oil refineries for petroleum suppliers pursuant to Minnesota Statutes, section 216B.243.).
[152] *Id;* Minn. Stat. § 216B.2421, subd 2(4) (2014).

(a) 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;

(b) a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant;

(c) the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate; and

(d) it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.

Additionally, within each of these broad areas, there are distinct sub-issues that the regulation obliges the Commission to address.[153]

148. The requirement in Minn. R. 7853.0130(B) that a reasonable and prudent alternative must be demonstrated "by a preponderance of the evidence on the record by parties or persons other than the applicant" must be read in light of the authorizing statute and legislative intent. A rule "adopted in pursuit of legislative goals cannot subvert the primary purpose behind the legislation." *Weber v. City of Inver Grove Heights*, 461 N.W.2d 918, 922 (Minn. 1990). "[W]hile administrative agencies may adopt regulations to implement or make specific the language of a statute, they cannot adopt a conflicting rule." *Green v. Whirlpool*, 389 N.W.2d 504, 506 (Minn. 1989). Thus, to the extent that Minnesota Rule 7853.0130 appears to shift the burden of proof for need to the other parties that are not proposing a pipeline, it is inconsistent with Minn. Stat. § 216B.243.

A. The Probable Result of Denial of the Application 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.

~~138.~~149. When assessing whether denying the Applicant's request for a Certificate of Need will adversely affect the future adequacy, reliability or

[153] Minn. R. 7853.0130, subps. A, B, C, D.

efficiency of the energy supply, the Commission considers a number of sub-factors:

(a) The accuracy of NDPC's forecast of demand for the type of energy that would be supplied by the proposed facility;

(b) The effects of NDPC's existing or expected conservation programs and state and federal conservation programs;

(c) The effects of NDPC's promotional practices that may have given rise to the increase in the energy demand;

(d) The ability of current facilities and planned facilities not requiring certificates of need, and to which NDPC has access, to meet the future demand; and

(e) The effect of the proposed facility, or a suitable modification of it, in making efficient use of resources.[154]

~~Each of these sub-factors is addressed, in turn, in the Findings below.~~

150. NDPC has failed to prove that "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" under Minn. R. 7853.0130(A).

1. The accuracy of NDPC's forecast for oil demand.

151. NDPC has not proven that current facilities cannot meet demand. Minn. R. 7853.0130(A)(4). There is no evidence in the record of crude oil shortages at either Clearbrook or Superior.

~~139.~~152. NDPC assessed three forecasts of North Dakota-produced crude oil supply in its evaluation of future pipeline capacity needs.[155]

~~140.~~153. It calculated the volume of crude oil that will be available for transportation on the NDPC System using a "base case" estimate and a "high case" estimate of oil production prepared by the North Dakota Pipeline Authority. NDPC also developed its own oil production forecast.[156]

~~141.~~154. All three forecasts show steady increases in North Dakota oil production over the next five years, followed by a sustained period of high production.[157] However, these forecasts were generated prior to a precipitous drop in oil prices starting in December 2014. While it is unclear

[154] Minn. R. 7853.0130 (A).
[155] Ex. 14, Schedule 2, at 7 (Earnest Direct).
[156] *Id.* (Earnest Direct).
[157] *Id.* at 7 and 27 (Earnest Direct).

how this change may affect NDPC's long-term forecasts, the drop in oil prices is likely to affect short-term production in the Bakken region, lessening the short-term demand for transportation of oil out of the region.

[31 paragraphs omitted]

2. The effects of conservation programs

155. The 2012 Quad Report does not demonstrate increased demand for petroleum products in Minnesota or in neighboring states. There is no evidence of demand in Minnesota for additional petroleum.[158]

156. The record does not demonstrate any positive consequences to the end consumer in Minnesota or across the U.S. as a result of the Project. The Energy Information Agency's 2014 Annual Energy Outlook "predicts flat to declining petroleum consumption in the United States between now and 2040."[159] In Minnesota, consumption of petroleum products decreased approximately 14% from 2005 to 2012.[160]

[13 paragraphs omitted]

3. The effects of the Applicant's promotional practices

157. NDPC took steps to solicit support for its project prior to submitting any applications for state approval. NDPC entered into its agreement with Marathon for Marathon to become an investor and "anchor shipper" in November 2013.[161] NDPC announced this relationship just prior to commencing the "open season" to solicit other shippers, giving the appearance of stability and support to the project.[162]

158. All of the alleged adverse effects of denying a CON for a pipeline in NDPC's Preferred Route are due to NDPC's promotional practices. A company must bear its own risks, and the Commission will not consider the impacts to the applicant and its shippers where those risks were self-created. *See*, *e.g.*, *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (halting construction of a power plant despite $800 million investment because the company began construction before an Army Corps of Engineers permit had been granted); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (ordering injunction despite evidence of financial loss due to existing contractual obligations because the harm was largely self-inflicted caused by "entering into contractual obligations that anticipated a pro forma result"). There would be no need

[158] Heinen Direct at 19:6-18.
[159] Ex. 50 at 13:13-14.
[160] *Id.* at 19:13-15.
[161] (Ex. 13 at 4.)
[162] (T. Vol. III at 37:1-8.)

for the Sandpiper Pipeline in NDPC's preferred corridor absent its promotional activities.

~~142.~~159. As a common carrier, NDPC responds to shipper demand for transportation services.[163]

~~143.~~160. Refineries have sought increasing levels of transportation of crude oil supplies from North Dakota, oil supplies that will replace stocks from other regions.[164]

~~144. NDPC has not undertaken promotional activities that would increase the demand for crude oil supplies in Minnesota or the surrounding region.~~[165]

4. The ability of current facilities and planned facilities to meet future demand.

161. NDPC has not shown that there is a need for additional oil at the Clearbrook Terminal.

162. The only potential beneficiaries of the Clearbrook delivery point on NDPC's Preferred Route would be the two refineries in Minnesota—St. Paul Park Refining Co. ("SPPRC") and Flint Hills.[166]

163. These refineries are served by Line 81 to Clearbrook and the Minnesota Pipe Line Company pipeline system south to the Minneapolis/St. Paul area.[167]

164. The shipping capacity between Clearbrook and these refineries will not increase, nullifying any potential benefit to these refineries.[168]

165. These refineries have not expressed support for the Project. NDPC admits that the Project will increase the costs paid by current users of Line 81, including Minnesota refineries.[169] NDPC acknowledges that the Project will increase costs to its existing shippers by approximately $0.40 per barrel.[170]

166. In the Federal Energy Regulatory Commission ("FERC") proceedings related to the tariff rates for the proposed Project, SPPRC opposed the pipeline stating that the Project upstream from Clearbrook is neither "necessary [n]or desirable to meet the transportation needs of

~~[163] *See* Ex. 7, at 3:91-98 (Steede Direct).~~
~~[164] Ex. 1, Part 7853.0250, at 4 (CN Application).~~
~~[165] *Id.*~~
[166] Ex. 20 at 10:283-84.
[167] Ex. 8 at 4: 104-18.
[168] Ex. 9 at 5:158-60.
[169] Ex. 50 at 26:7-9.
[170] *Id.* at 25:18-19.

SPPRC." It also stated that SPPRC "has not suffered from chronic prorationing on the NDPC system," and "has seen no operational evidence that the system is subject to persistent excess demand." SPPRC stated that the proposed Sandpiper Pipeline would have "no value" to it, but would only require it to pay a higher transportation cost than it pays now. The effect of the pipeline would be simply to "harm, not benefit, the business of SPPRC and its customers" due to increased costs.[171]

167. Flint Hills Resources intervened in the Sandpiper docket at the FERC to express its concerns. It expressed concern about whether uncommitted shippers would bear financial responsibility for underutilization of the pipeline if NDPC's predictions about shipper demand prove overly optimistic. It also sought to ensure that the rights of non-committed shippers to challenge future rate changes were preserved if NDPC is forced to allocate costs associated with underutilization of the pipeline.[172]

168. DOC-DER also concluded that Minnesota does not benefit from the Clearbrook connection, and that Minnesota refineries would not benefit from the proposed pipeline.[173] DOC-DER confirmed that the pipeline is likely to increase the cost of crude oil to Minnesota refineries.[174] DOC-DER's witness stated that while redundancy is potentially a benefit, it is not clear whether Minnesota refiners would benefit from redundancy in this case.[175]

169. NDPC is unable to quantify any of the alleged redundancy benefits that Minnesota refineries might receive.[176]

170. NDPC has not shown that there is a need for oil at the proposed endpoint of the pipeline, Superior, Wisconsin.

171. There are only two shippers on record supporting the Project: Marathon Petroleum Company, which (1) co-owns the Project,[177] (2) committed to ship the majority of the committed volume,[178] and (3) prefers delivery in Superior,[179] and Enerplus.

172. The Superior refinery is very small, and does not need any crude oil beyond the 2.3 million bpd that Enbridge already ships into Superior.[180]

[171] Ex.183, Sch. 4 at 42-43.
[172] *Id.* at 159-60.
[173] Ex. 50 at 24:1-19; Ex. 54 at 30:13-17.
[174] *Id.* at 25-26.
[175] *Id.* at 27-28.
[176] T. Vol. III at 92:1-8.
[177] Ex. 183, Sch. 4 at 183; T. Vol. III at 71:20-24.
[178] T. Vol. III at 40:12-41:1.
[179] *Id.* at 77:13-18
[180] T. Vol. II at 45:15-18.

173. Marathon plans to ship the oil that it receives in Superior through Wisconsin to Patoka, Illinois.[181]

174. Marathon is upgrading its refinery in Robinson, Illinois to increase its capacity to refine light crude in expectation of the Project, and the expansion is expected to coincide with the construction of the Project.[182] Marathon is also investing in a Kentucky facility to increase the capacity of light, sweet crude that the facility can process.[183] The crude oil from the Project would travel via pipeline to these facilities.[184]

175. The TSA between Marathon and NDPC is dependent upon the Southern Access Extension, which is designed to enable Marathon to supply crude oil to its Illinois and Ohio refineries.[185]

176. The record demonstrates that Marathon can supplement the supply of crude to its refineries with light crude from other sources, including domestic, Canadian, and non-Canadian foreign sources.[186]

[25 paragraphs omitted]

B. **A More Reasonable and Prudent Alternative to the Proposed Project Has ~~Not~~ Been Demonstrated by a Preponderance of the Evidence on the Record. ~~by Parties or Persons other than the Applicant.~~**

~~145.~~177. When comparing the Applicant's proposal against other reasonable alternatives, the Commission considers a number of sub-factors:

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

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

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

(d) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives.[187]

[181] T. Vol. III at 77:13-18.
[182] Ex. 13 at 7:179-84.
[183] *Id.* at 7:186-92.
[184] T. Vol. III at 45:13-21.
[185] Ex. 183, Sch. 4 at 41.
[186] Ex. 13 at 10:253-58.

Each of these sub-factors is addressed, with respect to the proposed project and each of the System Alternatives, in the Findings below.

[42 paragraphs omitted]

1. The System Alternatives

178. By the close of a public comment period that ended on May 30, 2014, the Commission received a series of alternative proposals for shipping oil. The principal object of these proposals was to route oil shipments from North Dakota to points east of Duluth, Minnesota, while not crossing high-value waters and lands in North Central Minnesota. As the DOC-EERA well-summarized at the time:

> A system alternative is an alternate that proposes a different configuration of pipelines for moving oil from the Williston Basin than the Applicant's proposal. It is a wholly separate or independent route from the Applicant's proposed route and is, in essence, a different project than the one proposed by the applicant.

179. Enbridge is requesting a route permit to transport oil produced in North Dakota to the terminals in Clearbrook, Minnesota, and Superior, Wisconsin. Minnesota Rule 7852.0100, subpart 31, defines a route as 'the proposed location of a pipeline between two end points.' In this docket, Enbridge has requested a route from the North Dakota border to Clearbrook and from Clearbrook to Superior. Thus, the project, for route permit application purposes, is defined by these three points.

180. However, eight alternatives proposed during the comment period do not connect with one or more of these three points. The proposed system alternatives include routing the pipeline far north or far south of the applicant's proposed route. None of the system alternatives would connect to the new Clearbrook terminal. Three of the system alternatives do not connect into Enbridge's Superior Terminal.[188]

181. The Commission determined that further analysis of six of the eight system alternatives would be valuable additions to the hearing record.

2. Size, Type, and Timing of the ~~Proposed Project~~System Alternatives

[187] Minn. R. 7853.0130(B).
[188] EERA Staff Comments and Recommendations, MPUC Docket No. PL-6668/PPL-13-374, at 12-13 (July 16, 2014) (eDocket No. 20147-101573-01) (Staff Comments).

182. NDPC's proposed project delivers crude oil to Clearbrook, Minnesota and Superior Wisconsin. However, none of the refineries that would use the crude oil are located in either of those places.

183. NDPC witness Earnest stated that the crude oil shipped via the Project would be refined in the Midwest.[189] When asked to clarify which refineries he meant, he stated that it would include up to 15 refineries, only one of which is located in Superior.[190]

184. In its comments, MPCA also stated that the record supports the potential need for a pipeline that directly serves the Chicago area.[191] MPCA strongly questioned whether alternatives through Clearbrook and Superior are the only alternatives that served the applicant's needs, noting that "Chicago appears to be a common destination for most if not all of the oil that is proposed to be moved through Minnesota," and that the record generally supports that need likely "can be achieved by several of the System Alternatives."[192]

~~146.~~185. SA-04 and SA-05 are more appropriate alternatives to meet the need to ship oil to these refineries—all of which are located in Illinois or states to the east.[193]

(b) Comparative Cost of the Proposed Project

186. NDPC estimates the cost of constructing the Project to be $2.6 billion. Of this amount, NDPC projects expenditures of $1.2 billion in Minnesota.[194]

187. NDPC has not demonstrated that the "cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives" necessitate the Project to be located in NDPC's Preferred Route.[195] The focus of the cost impacts, according to Minnesota Rules, is not only on the applicant and the shipper; it is also on the consumer. A true cost comparison between the routes has not been completed. A true cost comparison between the routes would compare the cost of shipping oil on the proposed pipeline route or alternative pipeline route, and then to its final destination—a refinery. It would then determine how, if at all, those different routes would impact the shipper and consumer.

[189] Ex. 14 at 6:104-07.
[190] T. Vol. I at 123:2-17; *see also* Ex. 3, Table 7853.0240-C.1 at 6.
[191] MPCA Comments, dated January 23, 2015 at 5.
[192] *Id.*
[193] *Id.*
[194] Ex. 6, at 3:89-90 (Eberth Direct).
[195] Minn. R. 7853.0130(B)(2).

188. Once the full cost of shipping along various System Alternatives is taken into account, it may well be that the proposed System Alternatives are *less* expensive because they deliver the crude oil to a location that is far closer to its final destination. For instance, SA-04 and SA-05 deliver the oil to the Flanagan terminal in Illinois,[196] which may soon be connected to the Patoka area by way of the Southern Access Extension pipeline.[197] It may be that refineries in the Midwest prefer a more direct pipeline rather than having to ship oil east on the Sandpiper, then south from Superior. A full and accurate cost comparison would take this into account.

189. A full and accurate cost comparison would also take into account the cost of future expansions between Superior and the Illinois refineries required to carry additional oil. Mr. Palmer stated that Marathon preferred the Superior shipping destination because Marathon thought that there was potential for future expansion of a pipeline that moves the oil from Superior to Patoka, Illinois.[198]

190. NDPC did not ask its economic expert to consider any of the indirect economic costs of the Project, and there is no consideration of the potential remediation costs or other costs in the event of a spill.[199]

~~147. If approved, the new pipeline would be among the largest construction projects in Minnesota history.[200]~~

~~148. The estimated tolls for uncommitted shippers transporting crude oil on the Project range from $2.01 per barrel to $3.93 per barrel, depending on the delivery point, type of service and the volume of oil that is shipped.[201]~~

(a) Comparatives Effect of the ~~Proposed Project~~System Alternatives upon the Natural Environments

~~149.~~191. Every independent expert who compared the System Alternatives concluded that NDPC's Preferred Route was the most environmentally damaging of all of the System Alternatives. Both MPCA and MDNR concluded that NDPC's Preferred Route posed the greatest environmental risk compared with all of the System Alternatives.

[196] T. Vol. VII at 53:4-15.
[197] T. Vol. III at 50:3-16.
[198] T. Vol. III at 77:13-18.
[199] T. Vol. IV at 59:15-60:6; 73:22-74:6.
[200] ~~*See* Ex. 16, at 1 (Lichty Direct).~~
[201] ~~Ex. 21, Schedule 2, at 158-159 (MacPhail Rebuttal).~~

~~150.~~192. MDNR concluded that "[w]ithin Minnesota, more southern routes (south of I-94 corridor) have less concentration of natural resources (regardless of length) within the 2-mile corridor. . . . From a natural resource perspective, the more southern routes appear to be feasible and prudent System Alternatives that merit consideration."[202]

193. Similarly, MPCA stated in its comments filed January 23, 2015 "that with respect to protection of the highest-quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the System Alternatives." MPCA stated that "the Applicant's proposed route encroaches on higher quality resources, superior wildlife habitat, more vulnerable ground water, and more resources unique to the State of Minnesota than do many of the proposed System Alternatives."

194. CCLS witness Chapman conducted a GIS study of the various System Alternatives and analyzed the actual impacts of pipelines on those features based on his expertise as an ecologist.[203] Based on his study and analysis, he concluded that NDPC's Preferred Route posed the greatest environmental risk.[204]

195. These experts also noted that the potential impacts of spills in NDPC's preferred location will be more significant when compared to the System Alternatives sponsored by FOH.[205]

196. FOH witness Stolen documented in detail how certain landscapes, such as the Lake Country Environmentally Sensitive Resources, may be more sensitive to oil spills, harder to clean up, or more difficult to access than other landscapes.[206]

197. MPCA stated: "An Alternative that avoids or impacts fewer sensitive ecosystems and water bodies than SA-Applicant will have a smaller likelihood of incurring significant response costs. As documented by the U.S. Environmental Agency ('USEPA'), **it costs considerably more to restore or rehabilitate water quality than to protect it.** The areas of the state traversed by the SA-Applicant have waters and watersheds that are currently subject to protection in the state's 'Watershed Restoration and Protection Strategy' program, financed through the Clean Water Fund and aided by significant volunteer participation of Minnesota citizens. **By keeping these waters as clean as possible before they become impaired, extensive costs of restoring waters to state standards can be avoided. Location of oil pipelines in these areas place their pristine waters at risk, and also place potentially millions of dollars**

[202] Ex. 185 at 2.
[203] Ex. 110.
[204] Ex. 112 at 9.
[205] Ex. 185; MPCA Comments, dated January 23, 2015.
[206] Ex. 184 at 11.

in state and federal funds allocated for protection of these areas at risk."[207] MPCA also stated that "[L]ong-term impacts from a spill can be much more damaging in areas containing features such as environmentally sensitive areas and those with limited access."[208]

198. MPCA noted that "A primary rule of thumb when planning for response to an oil leak is that a release in soil is better than a release in water, and a release in stagnant water is better than a release in flowing water."[209] MPCA stated that when evaluating spill response costs, certain factors make one corridor preferable to another, including: "fewer crossings of flowing water, fewer adjacent water bodies; quality of those waters; presence of especially sensitive areas or habitats or species or uses; better access to downstream oiled areas; tighter soils; and closer and more equipped and prepared responders."[210] MPCA concluded that "[f]rom the perspective of minimizing risk of major environmental incidents due to inability to access potential leak sites in Minnesota, **the proposed Sandpiper route fares more poorly than any of the proposed System Alternatives**."[211]

(d) Effect on of the Proposed Project on the Socioeconomic Environments

199. The socioeconomic benefits and costs would occur regardless of location of the project.

~~151.~~200. The total economic benefit of Project construction is estimated at $2.4 billion.[212]

~~152.~~201. The installation of the Project will require a construction schedule of approximately 12 months.[213]

~~153.~~202. NDPC has pledged to use union contractors and union labor for the Project.[214]

~~154.~~203. Because of the Project's size, hundreds of workers will be required. NDPC will source various construction jobs locally.[215]

[207] MPCA Comments, dated January 23, 2015 (footnotes omitted, emphases added.)
[208] *Id.* at 7.
[209] *Id.* at 13.
[210] *Id.* at 3.
[211] *Id.* at 14 (emphasis added).
[212] ~~Ex. 3, Part 7853.0240, at 12 (Revised CN Application).~~
[213] ~~Ex. 17, at 11:271 (Eberth Rebuttal).~~
[214] ~~Ex. 9, at 12:336-337 (Simonson Direct).~~
[215] ~~*Id.* at 12:335-342 (Simonson Direct).~~

~~155.~~204. The Project will provide beneficial impacts to local economies during construction and operation through new jobs, taxes, and increased demand for goods and services from local businesses.[216]

205. Richard W. Lichty, Ph.D, Professor Emeritus of the University of Minnesota – Duluth, testified credibly that, in the first year, the Project will result in approximately 2,513 jobs and $178,755,775 in labor income. On an annual basis it will total economic output of $609,187,632. The total "output impact" associated with the construction phase of the project is $2,092,083.[217]

~~156.~~206. NPDC did not ask its expert to evaluate potential negative impacts of the project. Therefore, Dr. Lichty's report provides an incomplete picture of the socioeconomic impacts of the project, and it is unknown whether the benefits will be positive or negative overall.

~~157.~~207. Unemployment in the Project area, regardless of location in the State, would be temporarily reduced and payroll taxes would temporarily rise. Local businesses would also benefit from the demand for goods and services generated by the workforce's need for food, lodging and supplies.[218]

~~158.~~208. In addition, NDPC expects to purchase some of the materials necessary for construction of the Project locally, including consumables, fuel, equipment, and miscellaneous construction-related materials.[219]

~~159.~~ NDPC would pay property taxes for a pipeline constructed anywhere in the state. ~~Based upon the anticipated Project cost and current tax schedules, NDPC estimates that it would pay approximately $24.9 million in annual additional property taxes in Minnesota beginning in 2016. This amount would grow to an estimated tax amount of $37.1 million in 2025.[220]~~

~~160.~~ ~~If approved, the Project would yield 2,069 person-years jobs and generate $450 million in economic impact. Typical operations from 2017 to 2025 are estimated to lead to 3,352 full-time equivalent jobs and create an additional $725 million per year in economic impact.[221]~~

(e) Reliability of the Proposed ~~Project~~System Alternatives

[216] ~~Ex. 16 at 2:29-39 and Schedule 1 (Lichty Direct); Ex. 212, at 3:74-86 (Duncombe Direct); Ex. 211, at 1:39-3:95 (Engen Direct); Ex. 210, at 1:25-2:91 (Olson Direct).~~
[217] Ex. 16, at 2:35-39, and Schedule 1 at 15 (Lichty Direct).
[218] ~~Ex. 1, Part 7853.0240, at 12 (CN Application); Ex. 16, Schedule 1, at 5-15 (Lichty Direct).~~
[219] ~~Ex. 3, Part 7853.0240, at 12 (Revised CN Application).~~
[220] ~~*Id.*~~
[221] ~~*Id.* at 12-13 (Revised CN Application); Ex. 16, Schedule 1, at 5-15 (Lichty Direct).~~

209. The record does not demonstrate that a pipeline built in a different location would be less reliable than NDPC's Preferred Alternative.

210. The Bakken Pipeline, a 1,100 mile pipeline that serves Patoka, Illinois from North Dakota, is at capacity because it has already received binding commitments of 320,000 bpd, a successful "open season" that shows greater support than the Sandpiper proposal received.[222] The project may be expanding due to additional demand.

211. Although it is not established in the record that there is shipper support for System Alternatives, the Commission encourages NDPC to explore these System Alternatives as well as additional locations for its pipeline as it sees fit.

212. To the extent that NDPC has proven that it is capable of building a safe, reliable pipeline, these benefits will adhere regardless of location.

[185 paragraphs omitted]

C. The Consequences To Society Of Granting The Certificate Of Need Are Not More Favorable Than The Consequences Of Denying The Certificate.

~~161.~~213. When assessing whether the consequences to society of granting the CN are more favorable than the consequences of denying the certificate, the Commission considers a number of sub-factors:

(a) The relationship of the proposed facility, or a suitable modification of it, to overall state energy needs;

(b) 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;

(c) The effects of the proposed facility, or a suitable modification of it, in inducing future development; and

(d) Socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its uses to protect or enhance environmental quality.[223]

~~**1. The relationship of the proposed facility, or a suitable modification of it, to overall state energy needs.**~~

[222] NDPC Initial Brief at 65.
[223] Minn. R. 7853.0130(C).

214. Under (a), the record does not demonstrate any positive consequences to the end consumer in Minnesota or across the U.S. as a result of the Project. The Energy Information Agency's 2014 Annual Energy Outlook "predicts flat to declining petroleum consumption in the United States between now and 2040."[224] In Minnesota, consumption of petroleum products decreased approximately 14% from 2005 to 2012.[225]

215. Under (b), "Environmental risks are posed by all aspects of pipeline construction and operation, including post-spill recovery and restoration activities. The primary and most significant risks are associated with the long-term effects upon environmental and natural features that will be permanently altered, eliminated, or otherwise impacted by the presence of a pipeline, as well as the potential impacts of the release of crude oil as the result of a spill event during the potential 40 years or more that the pipeline will be operational. Those risks include environmental damages such as loss of wildlife, contamination of drinking water, destruction of fisheries, loss of habitat, and alteration of ecological systems."[226]

216. Oil spills can be highly toxic and persistent. Bakken oil is particularly toxic in its initial effects, and may persist for decades. Bakken oil is chemically similar to diesel. This gives it a tendency to spread quickly, more quickly than heavy crudes such as tar sands oil, for instance. Additionally, diesel spills may cause immediate and widespread wildlife kills. Diesel spills may also persist in the environment over decades, still impacting wildlife many years later.[227]

217. Evaporation and natural attenuation may limit the impacts of oil spills in some locations, but the effects of these natural phenomena vary greatly based on the location of a spill, and may be quite limited.[228]

218. While microbes may consume some compounds very effectively, they are naturally "finicky" and it is very challenging to predict how they react in different situations.[229] In addition, each oil spill is unique.[230]

219. The record demonstrates that even small spills and leaks present a great risk.[231] Very small leaks, or pinhole leaks, can go undetected for months, resulting in potentially very large leaks over time (e.g. 35,300 gallons per month over several months).[232]

[224] Ex. 50 at 13:13-14.
[225] *Id.* at 19:13-15.
[226] MPCA Comments, dated January 23, 2015 at 4.
[227] Ex. 182
[228] *Id.* at 8-10.
[229] Ex. 182 at 11:23-12:3.
[230] T. Vol. VI at 42:17-19; Ex. 182 at 12:4-7.
[231] *Id.* at 10:17-19.
[232] Ex. 184 at 23:18-26.

220. Very little is currently known about how Bakken oil will behave if an oil spill occurs.[233] Bakken oil is highly variable in its content, and the content may dramatically change where oil goes, the damages it causes, and decisions on how and even whether to remediate a spill.[234]

221. Under (c), All of the economic benefits of building a pipeline will come to Minnesota whether the pipeline is built in NDPC's Preferred Route or in the location of one of the System Alternatives.[235]

222. NDPC has already announced plans to locate a second pipeline, Line 3, along this corridor.[236] Line 3 will carry tar sands oil from the Alberta tar sands region,[237] and may carry as much as 760,000 bpd.[238] Thus, in all, this corridor will carry over one million bpd. The section of the route from Clearbrook to the Park Rapids already has several other pipelines, and therefore will carry as much as 1.8 million bpd.[239]

223. The construction of the Project and Line 3 will prompt further expansion of pipelines out of Superior, which is not the final destination for any of the oil NDPC plans to transport.[240] In order to get the crude oil shipped on the Sandpiper and Line 3, shippers will need additional pipeline capacity to carry the oil to refineries in the lower Midwest.[241]

~~162.~~224. Under (d), NDPC has not demonstrated that the output of the petroleum pipeline is socially beneficial, especially to Minnesotans. Rather, it contributes to climate change. Minnesota state regulators have taken significant steps to decrease demand for petroleum products out of concern for their environmental impacts.

[29 paragraphs omitted]

B. It Has Not Been Demonstrated on the Record that the Design, Construction, or Operation of the Proposed Facility Will Fail to Comply With Those Relevant Policies, Rules, and Regulations of Other State and Federal Agencies and Local Governments.

~~163.~~225. The fourth criterion under Minn. R. 7853.0130 assesses whether the design, construction, or operation of the proposed facility will fail to comply with applicable regulatory standards.[242]

[233] Ex. 182 at 5:1-8.
[234] *Id.* at 7:1-14.
[235] T. Vol. I at 64:24-65:8.
[236] Ex. 184 at 22:16-28.
[237] T. Vol. VI at 27:3.
[238] Ex. 183, Sch. 2 at 24.
[239] Ex. 180 at 78.
[240] T. Vol. II at 114:18-115:10.
[241] *Id.* at 99:25-100:1-5.
[242] Minn. R. 7853.0130(D).

226. The Project is subject to regulation by a number of federal, state, and local agencies – including the United States Army Corps of Engineers, the Commission, MDNR, MPCA, to county-level governments.[243]

~~164.~~227. The operation of this pipeline will fail to comply with both MEPA and MERA.

228. NDPC alleges that System Alternatives are not feasible based on speculative financial harm to shippers.[244] Marathon claims that the longer pipeline routes are not reasonable because they will result in increased costs to shippers of $0.33-$0.36 per barrel.[245] NDPC claims that the System Alternatives are not reasonable because they put the viability of the TSAs and FERC approval at risk.[246] These are all economic considerations.

229. Building the Project in NDPC's Preferred Route will cause pollution, impairment, or destruction of the state's natural resources and NDPC cannot proceed with the Project under MERA or MEPA because feasible and prudent alternatives exist. NDPC's economic considerations alone are insufficient to warrant choosing its Preferred Route.[247]

~~165. NDPC's Application identifies the series of agencies from whom it must obtain approvals for the Project.[248]~~

~~166. The record demonstrates that NDPC has taken the actions needed to obtain the required approvals for the Project.[249]~~

~~167. NDPC provided updated information about the status of the various required state, federal, and local approvals for the Project.[250]~~

~~168. NDPC has pledged that it will abide by the conditions contained within any permit required by law.[251]~~

~~169. The record demonstrates that the design, construction and operation of the Project will meet the requirements of the applicable law.[252]~~

[243] Ex. 3, Part 7853.0230, at 9-11 (Revised CN Application).
[244] Ex. 14, Sch. 2 at 52.
[245] Ex. 22 at 2:47-48.
[246] Ex. 21 at 5:139-42; 166-69.
[247] Minn. Stat. §§ 116D.04, subd. 6; 116B.09, subd. 2.
~~[248] *Id.* at 10-11.~~
~~[249] *Id.* at 9-11; Ex. 27, at 1:13-4:14 (Ploetz Rebuttal).~~
~~[250] Ex. 27, at 1-3 (Ploetz Rebuttal).~~
~~[251] Ex. 9, at 12:348-51 (Simonson Direct).~~
~~[252] Exs. 3 (Revised CN Application), 4 (Supplemental Information), 6 (Eberth Direct), 7 (Steede Direct), 8 (Glanzer Direct), 9 (Simonson Direct), 10 (Johnson Direct), 11 (Ploetz Direct), 12 (Haskins Direct), 17 (Eberth Rebuttal), 19~~

[Section VI POTENTIAL CONDITIONS UPON THE CERTIFICATE OF NEED omitted]

VI. FINANCIAL RESPONSIBILITY FOR THE COST OF SPILLS

230. Department of Commerce has asked NDPC for financial assurance from an oil spill that is "adequate and enforceable."[253] Department of Commerce has evaluated the materials it has received from NDPC.[254]

231. NDPC has fallen short on its commitments for financial assurance, which should be sufficient to clean up and remediate a spill of the magnitude of the spill in Kalamazoo "through insurance, third party guaranties and/or other means acceptable to the Commission."[255] The cleanup costs for the Kalamazoo River spill in Michigan are now predicted to exceed $1 billion.[256]

~~VI.~~VII. SUMMARY OF PUBLIC COMMENTS

~~170.~~232. The Commission received numerous comments on NDPC's Application before the close of the comment period on January 23, 2015. Over 2,000 written comments regarding the Project were submitted, including comments from individual members of the public, state agencies, state legislators, counties, townships, cities, tribal groups, environmental organizations, chambers of commerce and other industry associations, watershed organizations, property owner associations, labor and trade unions, consulting, engineering, construction, and other professional service companies, and energy and power companies.[257]

~~(Glanzer Rebuttal), 20 (Steede Rebuttal), 23 (Simonson Rebuttal), 25 (Haskins Rebuttal), 26 (Baumgartner Rebuttal), 27 (Plootz Rebuttal) and 28 (Wuolo Rubuttal).~~

[253] Minnesota Department of Commerce Reply Brief at 7.

[254] *Id.*

[255] *Id.*

[256] Ex. 180 at 32:13-14; 56:37-37.

[257] *See e.g.,* eDocket Nos. 20151-106579-01; 20151-106581-01; 20151-106537-01; 20151-106577-01; 20151-106544-01; 20151-106522-01; 20151-106573-01; 20151-106574-01; 20151-106494-01; 20151-106385-01; 201412-105848-01; 201411-104630-01; 201411-104507-01; 201410-104213-01; 20151-106573-02; 20151-106573-03; 20151-106573-04; 20151-106573-05; 20151-106634-01; 20151-106628-02; 20151-106629-09; 20151-106631-01; 20151-106649-01; 20151-106628-14; 20151-106629-07; 20151-106628-12; 20151-106628-04; 20151-106628-06; 20151-106628-08; 20151-106629-05; 20151-106629-11; 20151-106629-13; 20151-106629-03; 20151-106629-01; 20151-106628-10; 20151-106575-01; 20151-106521-01; 20151-106523-01; 20151-106520-01; 20151-106576-01; 20151-106524-01; 201412-105617-01; 201412-105621-01.

~~171. Numerous counties, townships, cities, associations, and organizations passed resolutions in support of the Project or issued letters of support for the Project.[258]~~

233. During the initial comment period, 402 citizens and 55 organizations and businesses wrote to oppose the proposed pipeline, as did one local unit of government and one tribal entity. Only 30 citizens and five organizations or businesses wrote to support the project. Among the concerns raised, over 380 raised environmental concerns, over 350 comments expressed concern about water quality specifically, and 347 comments expressed a preference for an alternative route.

234. Written comments submitted in opposition to the Project generally included the following concerns: climate change and global warming; preference for renewable energy sources; risk of spills, fires, and leaks; existing or other proposed pipelines being adequate to transport oil; potential environmental impacts on lakes, rivers, wetlands, watersheds, aquifers, and wild rice; interference with tribal rights to hunt, fish, and gather; and potential impacts on tourism. Several comments referred to the oil spill on the Kalamazoo River in Michigan and the recent oil spill from the Bridger Pipeline LLC Poplar Pipeline on the Yellowstone River in Montana.

235. A number of comments questioned the need for the Project, citing the recent decline in oil prices and uncertainty of continued production from the Bakken field of North Dakota. Some comments also disagreed with statements that the pipeline would lead to a significant reduction in rail traffic because oil would continue to be transported by rail regardless of the Project. Other comments disagreed with statements about the economic benefits associated with job opportunities because many of the jobs created would be temporary in nature and filled by out-of-state workers.

236. A number of comments requested that a full Environmental Impact Statement ("EIS") be prepared for the Project. A number of comments also

~~[258] The resolutions included material from the: Aitkin County Board of Commissioners, Carlton County Board of Commissioners, Clearwater County Assessor, Clearwater County Board of Commissioners, Clearwater County Treasurer, Nelson County Board of Commissioners, Polk County Board of Commissioners, Red Lake County Board of Commissioners, Lake Pleasant Township, Red Lake County Township Association, Timothy Township Board, City of Crookston, City of Gonvick, White Earth Elders Council; Beltrami County Farm Bureau, Cass County Farm Bureau, Wadena County Farm Bureau, Bemidji Chamber of Commerce, Brainerd Lakes Chamber of Commerce, Dakota County Regional Chamber of Commerce, Duluth Area Chamber of Commerce, Grand Forks/East Grand Forks Chamber, Grand Rapids Area Chamber of Commerce, Hibbing Area Chamber of Commerce, International Falls Area Chamber of Commerce, Laurentian Chamber of Commerce, McGregor Area Chamber of Commerce, TwinWest Chamber of Commerce, Winona Area Chamber of Commerce, Belle Taine Lake Association, Conservationists with Common Sense, Duluth Seaway Port Authority, Grand Forks Region Economic Development, Gully Tri Coop Association, Mid America Chamber Executives Advocacy Alliance, Minnesota AgriGrowth Council, Minnesota-Wisconsin Petroleum Council, North Dakota Petroleum Council, and Up North Jobs Inc.~~

requested that additional consideration be given to the SA-04 and/or SA-03 system alternatives as environmentally preferable and feasible routes.

237.

~~172.~~238. The propriety of the Project divided members of the Minnesota Legislature who submitted comments. There were Minnesota legislators who submitted letters in support of, and in opposition to, granting a Certificate of Need.[259]

~~173.~~239. The comments in support of the Project frequently touched upon:

(a) the economic benefits of new job opportunities;[260]

(b) the economic benefits of new tax revenue;[261]

(c) the comparative safety of transporting oil through a pipeline compared to transporting these supplies by rail or truck;[262]

(d) the prospect of freeing up rail cars for transporting other commodities;[263]

[259] *See e.g.,* eDocket Nos. 20151-106626-09; 201412-105064-06; 20151-106578-01; 20151-106630-01.

[260] *See e.g.,* Bemidji Tr. at 56 (Bakkum); Bemidji Tr. at 109 (Folkers); Bemidji Tr. at 147 (D. Johnson); Crookston Tr. at 32 (Herauf); Crookston Tr. at 48 (G. Johnson); Crookston Tr. at 132 (Watkins); Duluth Tr. at 58 (L. Anderson); Duluth Tr. at 194 (Birkeland); Duluth Tr. at 50 (T. Dahl); Duluth Tr. at 228 (Dilger); Duluth Tr. at 207 (Gurske); Duluth Tr. at 74 (B. Hanson); Duluth Tr. at 36 (Korthals); Duluth Tr. at 121 (A. Kramer); Duluth Tr. at 216 (Liimatainen); Duluth Tr. at 66 (C. Olson); Duluth Tr. at 32 (John Peterson); Duluth Tr. at 32 (Norr); Duluth Tr. at 138 (Rossetter); Duluth Tr. at 200 (Rothe); St. Cloud Tr. at 206 (Geislinger); St. Cloud Tr. at 165 (P. Johnson); St. Cloud Tr. at 201 (Randolph); St. Cloud Tr. at 87 (Stai); St. Paul Tr. at 53 (Britz); St. Paul Tr. at 152 (Burkett); St. Paul Tr. at 124 (C. Johnson); St. Paul Tr. at 99 (W. Johnson); St. Paul Tr. at 39 (LaBorde); St. Paul Tr. at 79 (Melander); St. Paul Tr. at 91 (Muehlhausen); St. Paul Tr. at 141 (Pranis); St. Paul Tr. at 60 (Schott); Comments of Bernard J. Collins (January 15, 2015); Comments of Jake Fallos (January 23, 2015); Comments of Larry Gilbert (January 23, 2015); Comments of Donald Harper III (January 23, 2015); Comments of Chrystal Hawkins (January 15, 2015); Comments of Chaise Jokinen (January 23, 2015); Comments of Christopher Kraabel (January 23, 2015); Comments of Zac Lovedahl (January 23, 2015); Comments of Bob Molacek (January 23, 2015); Comments of Nancy McReady (January 15, 2015); Comments of Lois Paris (January 15, 2015); Comments of Justin Wallace (January 13, 2015).

[261] *See e.g.,* Bemidji Tr. at 49 (Collins); Crookston Tr. at 106 (Buness); Crookston Tr. at 126-27; Duluth Tr. at 115 (D. Olson); Comments of Calvin Johnson (January 14, 2015); Comments of Wendy Running (January 21, 2015); Comments of Warren Strandell (January 22, 2015); Comments of Vicki Stute (January 22, 2015).

[262] *See e.g.,* Bemidji Tr. at 156 (Chastan); Bemidji Tr. at 211 (Gurske); Bemidji Tr. at 112 (Illies); Bemidji Tr. at 173 (Leshovsky); Bemidji Tr. at 147 (Naastad); Bemidji Tr. at 33 (Schoneberger); Crookston Tr. at 101 (Keil); Crookston Tr. at 83 (G. Larson); Crookston Tr. at 108 (M. Lee); Crookston Tr. at 79 (Lerohf); Crookston Tr. at 107 (R. Olson); Crookston Tr. at 102 (Osmonson); Crookston Tr. at 91 (Shulind); Crookston Tr. at 126 (Strandell); Duluth Tr. at 90 (Cannata); Duluth Tr. at 50 (T. Dahl); Duluth Tr. at 216 (Liimatainen); Duluth Tr. at 31 (Norr); St. Cloud Tr. at 131 (Braford); St. Cloud Tr. at 66 (Erlander); St. Cloud Tr. at 141 (Fowler); St. Cloud Tr. at 173 (Hennen); St. Cloud Tr. at 214 (J. Kramer); St. Paul Tr. at 181 (Back); St. Paul Tr. at 72 (Busselman); St. Paul Tr. at 39 (LaBorder); St. Paul Tr. at 210 (Santori); St. Paul Tr. at 34 (Schulte); St. Paul Tr. at 69 (Zelenka); Duluth Tr. at 81 (Wagner); Comments of Larry Anderson (January 23, 2015); Comments of Harry Bloom (January 23, 2015); Comments of Phillip Borer (January 23, 2015); Comments of Jari Carlson (January 23, 2015); Comments of Beverly Roberts (January 23, 2015); Comments of Jake Swiggum (January 23, 2015); Comments of Tim Tanberg (January 23, 2015).

[263] *See e.g.,* Bemidji Tr. at 103 (Christiansen); Bemidji Tr. at 97 (Prushek); Crookston Tr. at 112 (Dragseth); Crookston Tr. at 66 (J. Lee); Crookston Tr. at 110 (Perry);Duluth Tr. at 154 (Vollbrecht); Duluth Tr. at 127 (Werner); St. Cloud Tr. at 95 (Moenck); St. Cloud Tr. at 221 (Ransom); St. Cloud Tr. at 150 (Whiteside); St. Paul Tr. at 151 (Burkett); St. Paul Tr. at 72 (Busselman); St. Paul Tr. at 203 (Ratka); Comments of Riley J. Braford (January 23,

(e) the benefits of moving toward energy independence by using domestic oil supplies;[264] and

(f) Enbridge's sound safety and construction practices.[265]

~~174.~~240. The comments in opposition to the Project frequently touched upon:

(a) the near-term dangers of climate change and global warming;[266]

(b) the need for additional consideration of alternative routes;

~~(b)~~(c) the need to encourage development of renewable energy sources and technologies;[267]

~~(c)~~(d) the benefits of using other pipelines to transport oil;[268]

~~(d)~~(e) the risk of spills, fires and leaks from an oil pipeline;[269]

2015); Comments of Dennis L. Krill (January 23, 2015); Comments of Craig Neal (January 12, 2015); Comments of Brian Nelson (January 22, 2015); Comments of Dustin Rinta (January 23, 2015); Comments of Allan Rudeck, Jr. (January 16, 2015); Comments of Norm Vorhees (January 23, 2015).

[264] *See e.g., See e.g.,* Bemidji Tr. at 156 (Chastan); Bemidji Tr. at 72 (Gordon); Bemidji Tr. at 63 (D. Peterson); Crookston Tr. at 102 (Osmonson); Bemidji Tr. at 135 (Stenseng); Duluth Tr. at 173 (Weidman); St. Paul Tr. at 119 (Braford); St. Paul Tr. at 189 (Geislinger); St. Paul Tr. at 159 (Horvath); St. Paul Tr. at 193 (O'Connor); Comments of Craig Allen (January 23, 2015); Comments of Ken Bedtka (January 23, 2015); Comments of Elbert Carlisle (January 23, 2015); Comments of Dan Jost (January 23, 2015); Comments of Susan Hill (January 23, 2015); Comments of James L. Reed (January 23, 2015); Comments of Vicki Stute (January 22, 2015); Comments of John Zager (January 23, 2015).

[265] *See e.g.,* Bemidji Tr. at 156 (Chastan); Bemidji Tr. at 72 (Gordon); Bemidji Tr. at 190 (Moenck); Bemidji Tr. at 162 (Stay); Crookston Tr. at 79 (Lerohf); Duluth Tr. at 190 (J. Anderson); Duluth Tr. at 42 (Courtemanche); Duluth Tr. at 132 (Hansen); Duluth Tr. at 95 (Meyer); Duluth Tr. at 164 (Swor); St. Cloud Tr. at 39 (B. Anderson); St. Cloud Tr. at 83 (Bohnen); St. Cloud Tr. at 138 (Lampa); St. Cloud Tr. at 39 (Representative Lueck); St. Paul Tr. at 181 (Backs); St. Paul Tr. at 158 (Horvath); St. Paul Tr. at 115 (Milburn); St. Paul Tr. at 168 (K. Miller); St. Paul Tr. at 111 (Randolph); St. Paul Tr. at 46 (Wallace); Comments of Keith Brandt (January 6, 2015); Comments of Mark D. Hires (January 21, 2015); Comments of John Peterson (October 21, 2014).

[266] *See e.g.,* Duluth Tr. at 38 (Andrews); Bemidji Tr. at 182 (Hautala); Bemidji Tr. at 208 (Shimek); Duluth Tr. at 118 (Bol); Duluth Tr. at 98 (Mittlefehldt); Duluth Tr. at 59 (Munter); Duluth Tr. at 203 (Sneve); Duluth Tr. at 49 (Laforge); Duluth Tr. at 93 (Sorenson); Duluth Tr. at 55 (Wilson); St. Cloud Tr. at 122 (Andrzejewski); St. Cloud Tr. at 203 (Dashke); St. Cloud Tr. at 152 (Hancock); St. Cloud Tr. at 104 (Schmid); St. Cloud Tr. at 88 (K. Smith); St. Paul Tr. at 75 (Adamski); St. Paul Tr. at 136 (Carlson); St. Paul Tr. at 155 (Cox); St. Paul Tr. at 64 (Romano); St. Paul Tr. at 175 (Geist); St. Paul Tr. at 122 (Hokenson); St. Paul Tr. at 126 (Hollander); St. Paul Tr. at 113 (Holmen); St. Paul Tr. at 36 (Kline); St. Paul Tr. at 101 (Langholz); St. Paul Tr. at 116 (Menzel); St. Paul Tr. at 48 (O'Keefe); St. Paul Tr. at 148-49 (Sattinger); St. Paul Tr. at 81-83 (Striegel); Public Hearing Exhibits 4, 14; Comments of Amy Blumenshine (January 14, 2015); Comments of Barbara Kaufman (January 23, 2015); Comments of Brad Knight (January 20, 2015); Comments of Mary Ludington (January 22, 2015); Comments of Karl Nowak (January 23, 2015); Comments of Alan Smith (January 23, 2015).

[267] *See e.g.,* Bemidji Tr. at 93 (Babcock); Bemidji Tr. at 217 (Thayer); Bemidji Tr. at 176 (Goodwin); Bemidji Tr. at 46 (Weber); Crookston Tr. at 62 (Rasch); Duluth Tr. at 141 (Herron); Duluth Tr. at 185 (Schulstrom); Duluth Tr. at 178 (Szymialis); Duluth Tr. at 141 (Tammen); Duluth Tr. at 232 (Thompson); St. Cloud Tr. at 42 (Kutter); St. Cloud Tr. at 145 (Rose); St. Cloud Tr. at 209 (Redig); St. Paul Tr. at 186 (Dimond); St. Paul Tr. at 196 (Teigland); Comments of Amy Blumenshine (January 14, 2015); Comments of Barbara Kaufman (January 23, 2015); Comments of Mary Ludington (January 22, 2015); Comments of Karl Nowak (January 23, 2015); Comments of Alan Smith (January 23, 2015).

[268] *See e.g.,* Duluth Tr. at 69 (M. Dahl); Duluth Tr. at 123 (Lindberg); St. Cloud Tr. at 175 (Fisher); St. Cloud Tr. at 145 (Rose); St. Paul Tr. at 29 (Erickson); Comments of Dave Butcher (January 23, 2015); Comments of Tonia Kittelson (January 23, 2015); Comments of Sharon Natzel (January 23, 2015).

~~(e)~~(f) the length, breadth and efficacy of Enbridge's responses to earlier spills – including the 2010 spill into Michigan's Kalamazoo River;[270]

~~(f)~~(g) potential impacts to Minnesota water resources including lakes, rivers, wetlands, watersheds, and aquifers;[271]

~~(g)~~(h) potential impacts on tourism;[272]

~~(h)~~(i) potential impacts to wild rice;[273] and

~~(i)~~(j) interference with tribal rights to hunt, fish, and gather.[274]

~~175.~~241. A number of commentators questioned the need for the Project, and ongoing demand for crude oil, because of the recent decline in oil prices.[275]

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[269] *See e.g.,* Bemidji Tr. at 151 (Knight); Bemidji Tr. at 125 (T. Olson); Bemidji Tr. at 100 (Shellack); Duluth Tr. at 140 (Herron); Duluth Tr. at 54 (Wilson); St. Cloud Tr. at 77 (Edelbrock); St. Cloud Tr. at 175 (Fisher); St. Paul Tr. at 191 (Brooks); St. Paul Tr. at 43 (Lindh); St. Paul Tr. at 108 (Neaton); Public Hearing Exhibit 35; Comments of Karin Arsan (January 21, 2015); Comments of Janet Lee (January 17, 2015); Comments of LeRoger Lind (January 22, 2015); Comments of Maurice Spangler (January 21, 2015); Comments of Irene Weis (January 23, 2015).

[270] *See e.g.,* Bemidji Tr. at 75 (Deanna Johnson); Bemidji Tr. at 201-02 (Plumer); Bemidji Tr. at 53 (Spangler); Crookston Tr. at 75 (Monicken); Duluth Tr. at 76 (Gordon); Duluth Tr. at 140-41 (Herron); Duluth Tr. at 134 (Kwako); Duluth Tr. at 34 (Larsen); Duluth Tr. at 111 (Richardson); Duluth Tr. at 129 (Skinaway); St. Paul Tr. at 165 (Zimmer); Comments of Jan Beck (January 23, 2015); Comments of Vicki Bibeau (January 23, 2015); Comments of Samantha Cook (January 12, 2015); Comments of Lee Fousee (January 23, 2015); Comments of Ann Galloway (January 23, 2015); Comments of Adam Hasbargen (January 23, 2015); Comments of Thodore Johnson (January 23, 2015); Comments of Julie Kilpatrick (January 23, 2015); Comments of Curtis Nordgaard (January 23, 2015); Comments of Thomas Nelson (January 22, 2015); Comments of Jesse Peterson (January 20 and January 23, 2015); Comments of Thora Reynolds (January 23, 2015); Comments of Ellen Schousboe (January 21, 2015); Comments of Maurice Spangler (January 22, 2015); Comments of Darril Wegscheid (January 22, 2015).

[271] *See e.g.,* Bemidji Tr. at 93 (Babcock); Bemidji Tr. at 36 (Baker-Knuttila); Bemidji Tr. at 31 (Cobenais); Bemidji Tr. at 86 (Diessner); Bemidji Tr. at 106 (A. Hanson); Bemidji Tr. at 110 (Lindquist); Bemidji Tr. at 141 (Natzel); Bemidji Tr. at 64 (Nelson); Crookston Tr. at 81 (Boyer); Crookston Tr. at 74 (Monicken); Duluth Tr. at 211 (Schuyler); St. Cloud Tr. at 97 (Jon Lee); St. Cloud Tr. at 172 (McCarter); Comments of Elizabeth Baker-Knuttila (January 23, 2015); Comments of Joshua Bruggman (January 23, 2015); Comments of Sharon Collins (January 23, 2015); Comments of Kyle Crocker (January 19, 2015); Comments of Deanna Johnson (January 21, 2015); Comments of Daniel Kittilson (January 23, 2015); Comments of Tonia Kittilson (January 23, 2015); Comments of Alysha Lee (January 23, 2015); Comments of Dan Wilson (January 23, 2015).

[272] *See e.g.,* Bemidji Tr. at 81 (Krueger); Bemidji Tr. at 69 (Reents); St. Cloud Tr. at 128 (Steen); Comments of Elizabeth Dugan (January 21, 2015); Comments of Kate Engelmann (January 21, 2015); Bonnie Farah (November 12, 2014); Comments of Loran Hillesheim (January 22, 2015); Comments of Gregory Johnson (January 20, 2015); Comments of LeRodger Lind (January 22, 2015); Comments of Ellen Shousboe (January 21, 2015); Comments of Darril Wegscheid (January 22, 2015); Comments of Thomas N. Watson (January 23, 2015); Comments of Dan Wilson (January 23, 2015).

[273] *See e.g.,* Crookston Tr. at 90 (Hanes); Bemidji Tr. at 202 (Plumer); Duluth Tr. at 197-98 (Howes); Comments of Elizabeth Baker-Knuttila (January 23, 2015); Comments of Bruce Brummitt (January 23, 2015); Comments of Jan Dalsin (January 23, 2015); Comments of Lea Foushee (January 19, 2015); Comments of Kat Engelmann (January 21, 2015); Comments of Jacqueline Hadfield (January 22, 2015); Comments of Carter Hedeen (January 20, 2015); Comments of Mark Herwig (January 23, 2015); Comments of Deanna Johnson (January 21, 2015); Comments of Barbara Kaufman (January 23, 2015); Comments of Mary Kowalski (January 22, 2015); Comments of Betty Larsen (January 22, 2015); Comments of Aimee Meyer (January 18, 2015); Comments of Jesse Peterson (January 20, 2015); Comments of Jack Sneve (January 22, 2015); Comments of Betty Tisel (January 23, 2015).

[274] *See e.g.,* Bemidji Tr. at 186-877 (Aubid); Crookston Tr. at 40 (LaDuke); Duluth Tr. at 197-98 (Howes); St. Cloud Tr. at 43 (Kutter); St. Paul Tr. at 171 (Tisel); Public Hearing Exhibit 53; Comments of Reyna Crow (January 22, 2015); Comments of Sharon Kutter (January 19, 2015); Comments of John Munter (January 23, 2015); Comments of Curtis Nordgaard (January 23, 2015); Comments of Sandy Sterle (January 22, 2015).

~~176.~~242. A number of commentators questioned the accuracy of projections as to future reductions in rail traffic if the Project was constructed.[276]

~~177.~~243. Many commentators requested that an EIS be prepared for the Project.[277]

Based upon these Findings of Fact, the ~~Administrative Law Judge~~Commission makes the following:

CONCLUSIONS OF LAW

244. NDPC has not established any of the four criteria it must prove to obtain a CON.

245. NDPC has failed to prove that "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" under Minn. R. 7853.0130(A).

246. NDPC's forecast of the demand to ship crude oil on the proposed Sandpiper Pipeline is not accurate. Minn. R. 7853.0130(A)(1). The only shipper that has requested the pipeline to go to Superior is Marathon, which actually wants the crude oil delivered to Illinois.

247. Consideration of programs to conserve petroleum consumption and limit greenhouse gas emissions weigh against granting the CON. Minn. R. 7853.0130(A)(2).

248. All of the alleged adverse effects of denying a CON for a pipeline in NDPC's Preferred Route are due to NDPC's promotional practices. Minn. R. 7853.0130(A)(3). A company must bear its own risks, and the Commission will not consider the impacts to the applicant and its shippers where those risks were self-created. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (halting

[275] *See e.g.,* Bemidji Tr. at 29 (Cobenais); Bemidji Tr. at 60 (Mosner); Bemidji Tr. at 51 (Spangler); Crookston Tr. at 39 (LaDuke); Duluth Tr. at 140 (Herron); Duluth Tr. at 166 (Hoppe); Duluth Tr. at 61 (Munter); St. Paul Tr. at 74 (Adamski); St. Paul Tr. at 191 (Brooks); St. Paul Tr. at 200 (Newton); St. Paul Tr. at 93 (Sterle); Comments of Elizabeth Baker-Knuttila (January 23, 2015); Comments of Lindsey Ketchel (January 23, 2015); Comments of Jon Lee (January 21, 2015); Comments of Sharon Natzel (January 23, 2015); Comments of Carolynne White (January 23, 2015).

[276] *See e.g.,* Bemidji Tr. at 60 (Mosner); Bemidji Tr. at 52 (Spangler); St. Cloud Tr. at 133 (Mizner); St. Paul Tr. at 201 (Newton); Comments of Katie Engelmann (January 21, 2015); Comments of Lindsey Ketchel (January 22, 2015); Comments of Sharon Kutter (January 19, 2015); Comments of Jesse Peterson (January 20, 2015); Comments of Jeffrey Sawyer (January 21, 2015); Comments of Ellen Shousboe (January 21, 2015); Comments of Thomas N. Watson (January 23, 2015).

[277] *See e.g.,* Bemidji Tr. at 118 (Mattison); Crookston Tr. at 78 (Monicken); St. Cloud Tr. at 70 (Adams); St. Paul Tr. at 92 (Sterle); Comments of State Senator Scott Dibble and State Representative Frank Hornstein (January 23, 2015); Comments of Elizabeth Dugan (January 21, 2015); Comments of Catherine Ferguson (January 23, 2015); Comments of Kevin Grubrud (January 22, 2015); Comments of Florence Hedeen (January 21, 2015); Comments of Lindsey Ketchel (January 23, 2015); Comments of Karl Nowak (January 23, 2015); Comments of Maurice Spangler (January 21, 2015).

construction of a power plant despite $800 million investment because the company began construction before an Army Corps of Engineers permit had been granted); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (ordering injunction despite evidence of financial loss due to existing contractual obligations because the harm was largely self-inflicted caused by "entering into contractual obligations that anticipated a pro forma result"). There would be no need for the Sandpiper Pipeline in NDPC's preferred corridor absent its promotional activities.

249. NDPC has not proven that current facilities cannot meet demand. Minn. R. 7853.0130(A)(4). There is no evidence in the record of crude oil shortages at either Clearbrook or Superior.

250. NDPC has failed to establish that a more reasonable and prudent alternative to building the Sandpiper Pipeline in the Preferred Route has not been demonstrated by a preponderance of the evidence in the record. Minn. R. 7853.0130(B). The System Alternatives that terminate in Illinois have been demonstrated to be more reasonable and prudent in light of the public interest and considering environmental effects, as required by the rule. NDPC has failed to establish that the System Alternatives that go to Illinois are not feasible alternatives to the Project.

251. The record contains no evidence that the size, type, or timing of NDPC's Preferred Route necessitates its selection over one of the System Alternatives. Minn. R. 7853(B)(1).

252. NDPC has not demonstrated that the "cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives" necessitates the Project to be located in NDPC's Preferred Route. Minn. R. 7853.0130(B)(2).

253. The Project's effects on the natural environment compared to the System Alternatives demonstrate that the System Alternatives are more reasonable and prudent. Minn. R. 7853.0130(B)(3).

254. NDPC has not presented any evidence that there is demand for a pipeline to go through Clearbrook to Superior or that current facilities cannot adequately meet that demand. Any delay caused by forcing NDPC to apply for a CON for a System Alternative in an environmentally appropriate location will not cause any reliability concerns. Minn. R. 7853.0130(B)(4).

255. NDPC has failed to demonstrate that "the consequences to society of granting the [CON] are more favorable than the consequences of denying the certificate." Minn. R. 7853.0130(C).

256. The record demonstrates that the Project does not serve the energy needs of the State of Minnesota. Minn. R. 7853.0130(C)(1).

257. Consideration of the environmental effects of a pipeline in NDPC's Preferred Route weighs against approval. Minn. R. 7853.0130(C)(2).

258. Future development is already planned in NDPC's Preferred Route if a CON is granted for the Project, and this weighs against NDPC's application. *See* Minn. R. 7853.0130(C)(3).

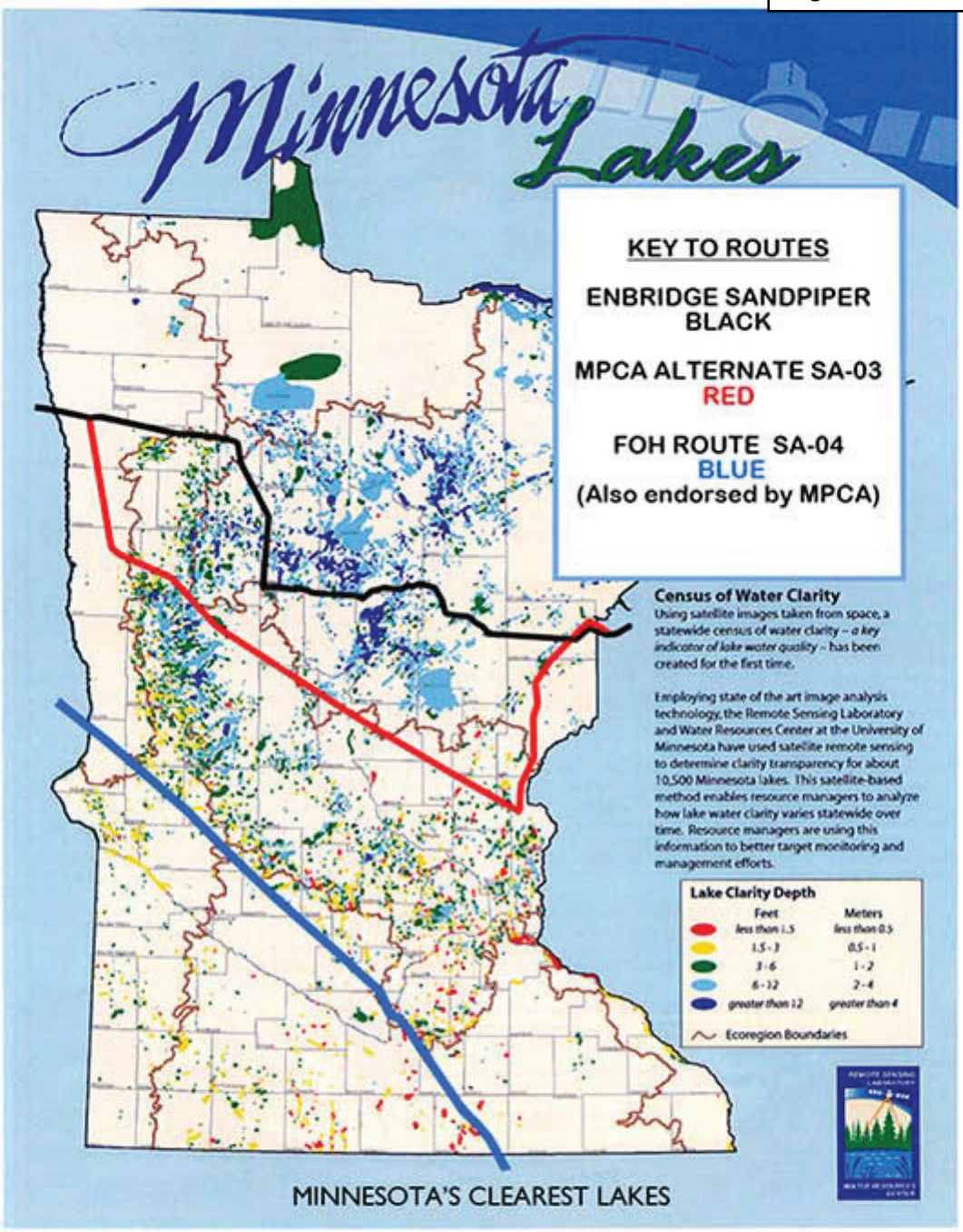
259. The "output" of the Project does not have socially beneficial uses, particularly when considering if those uses are "to protect or enhance environmental quality." Minn. R. 7853.0130(C)(4).

260. NDPC failed to establish that it "has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments." Minn. R. 7853.0130(D). The operation of this pipeline will fail to comply with both MEPA and MERA.

261. Building the Project in NDPC's Preferred Route will cause pollution, impairment, or destruction of the state's natural resources and NDPC cannot proceed with the Project under MERA or MEPA because feasible and prudent alternatives exist. NDPC's economic considerations alone are insufficient to warrant choosing its Preferred Route. Minn. Stat. §§ 116D.04, subd. 6; 116B.09, subd. 2.

~~178.~~262. Based on the foregoing, the Commission ***denies*** the requested Certificate of need.

Friends of the Headwaters
ROUTE COMPARISON MAP

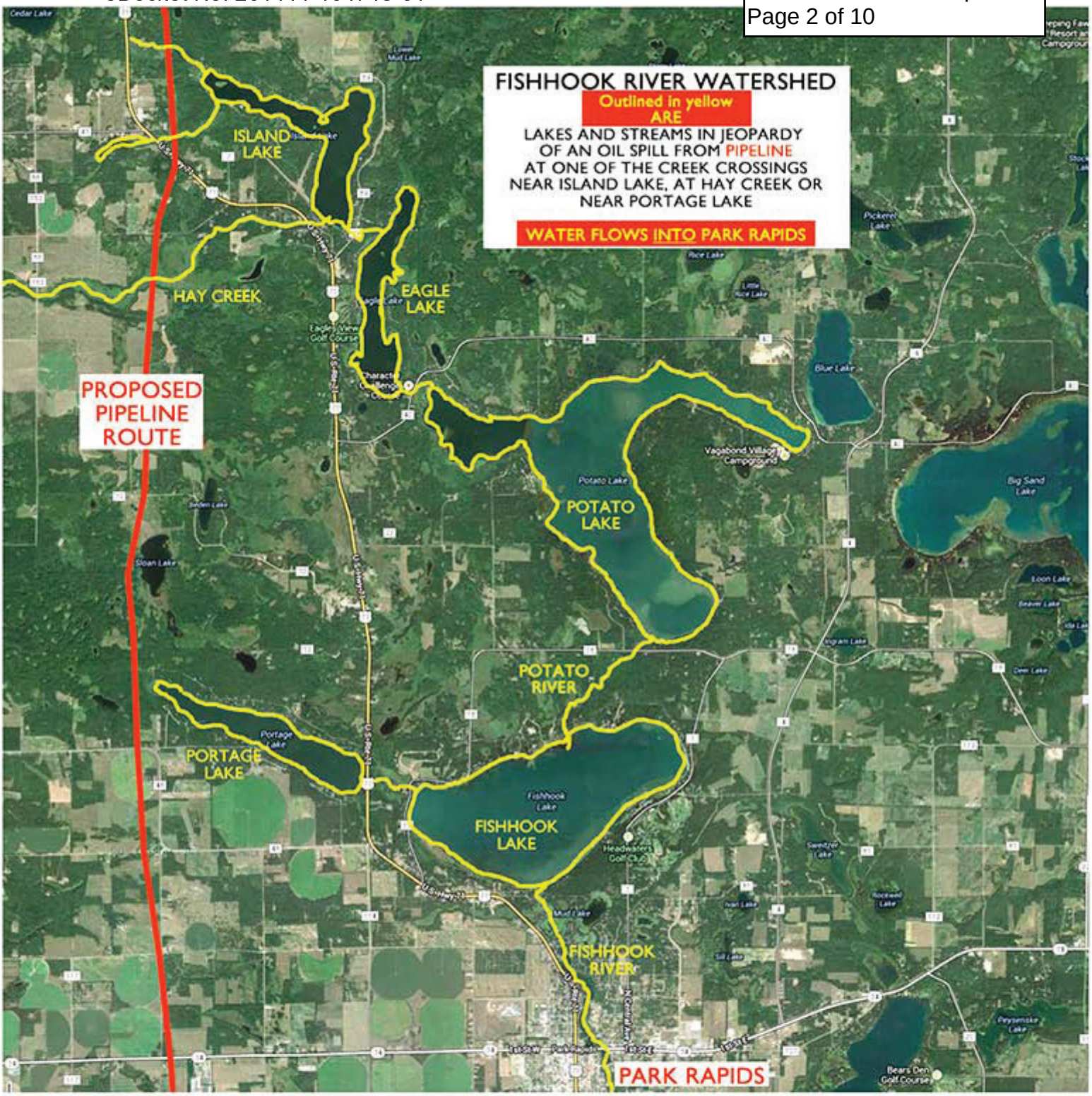


The Minnesota Water Resources Center at the University of Minnesota compiled the data on this map. Using satellite remote sensing they surveyed 10,500 lakes in the state, then ranked them for clarity. The dark blue lakes have the greatest clarity. A member of the Friends of the Headwaters found the map at a Minnesota Pollution Control Agency office. Using my Adobe Photoshop skills I scaled and overlaid the Enbridge/NDPC proposed Sandpiper route (in black) onto this map to indicate its proximity to these high value waters. I later added the two system alternative routes, SA-03 (red) and SA-04 (blue), to the map to illustrate how they compare in proximity to the state's clearest lakes.

Clear lakes are the key to Minnesota's tourism business. Fishing alone generates $342 million annually in tax revenue for the state. $4.3 billion in annual retail sales is earned from fishing, hunting and wildlife watching.*
*National Sportfishing Association

For Hubbard County tourism was $99M annually with 60% in June - Aug.
For Crow Wing County it was $150M with 49% in June - Aug.

www.exploreminnesota.com/industry-minnesota/research-reports/researchdetails/download.aspx?id=811

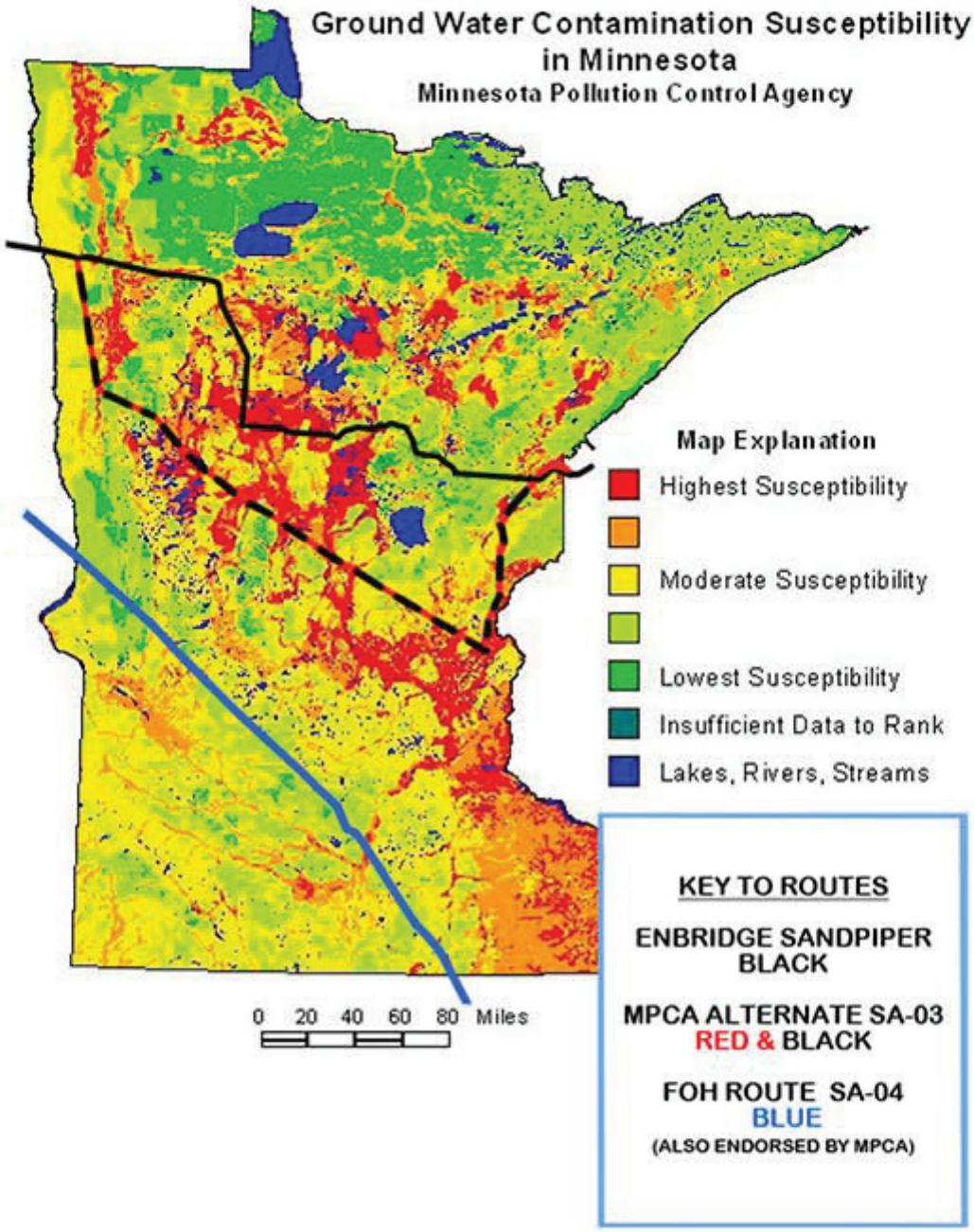


MINNESOTA'S CLEAREST LAKES MEAN HIGH PROPERTY VALUES

Clear lakes mean high lake shore property values which is a key factor in available property taxes to their respective counties.

Utilizing Google Maps I created this map of the Fishhook Watershed in Hubbard County. This map is my $2 Billion dollar map. That is the county's accessed property value of the water influenced properties along the yellow outlined shorelines of the watershed. The pipeline crosses three tributaries of this watershed as well as passing in close proximity to one of its lakes. Multiply those property values for the other lake chains and watersheds along the proposed Sandpiper route. Whitefish, Pine River, Fifty Lakes, Big Sandy, Lake Superior, and others.

Friends of the Headwaters
ROUTE COMPARISON MAP



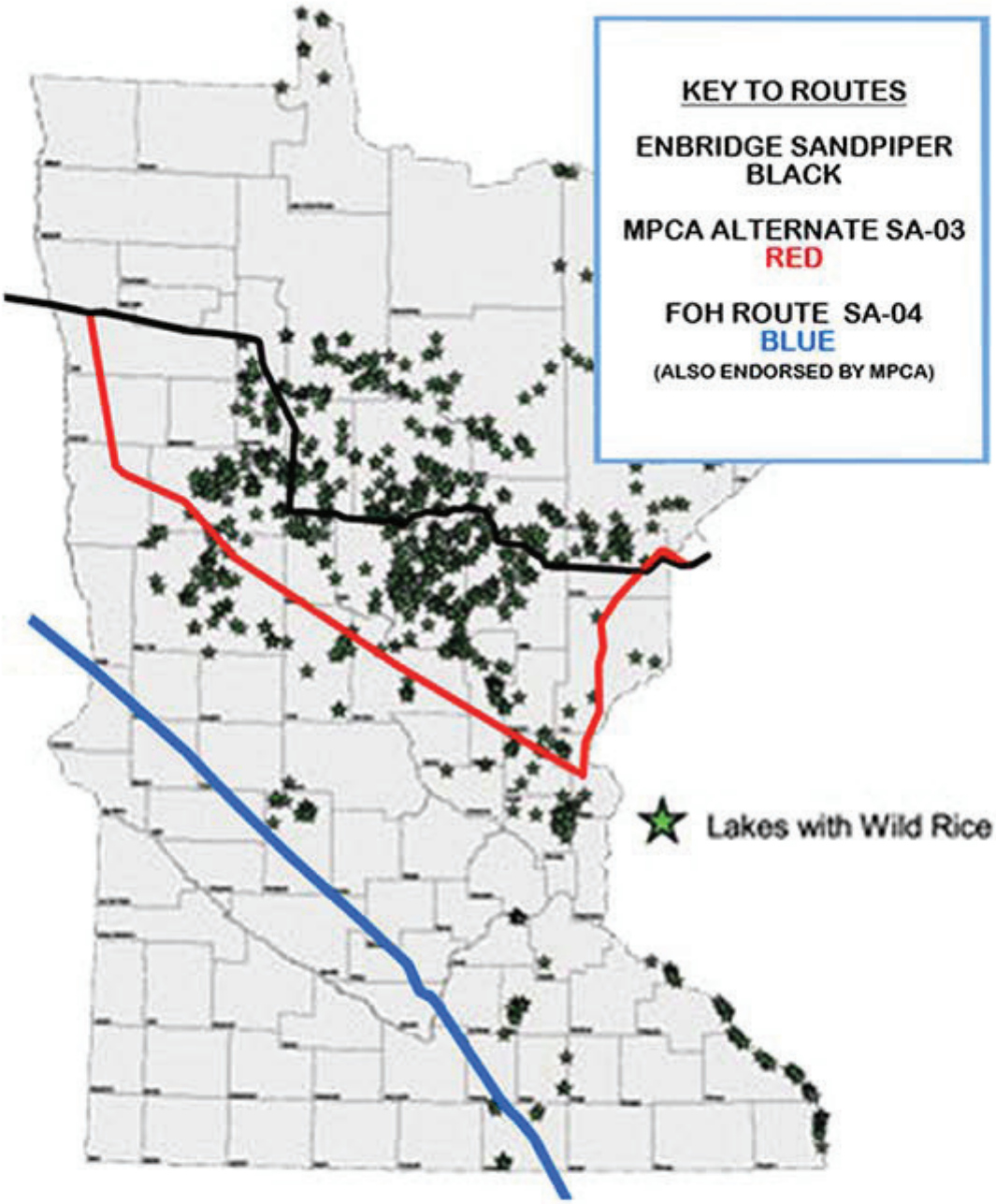
This map was found on the Minnesota Pollution Control Agency's website. Again, I overlaid the company's proposed route as well as the two system alternative routes.

Those bright red areas on the above map, besides being extremely susceptible to contamination, also just happen to be critical aquifers. Besides providing drinking water these aquifers also irrigate thousands of acres of farmland for Minnesota's farmers and the state's agri-business economy.

The Straight River aquifer supports the county's largest employer, the RDO/LambWeston Company, which grows and makes french fries for MacDonalds besides other potato products. The aquifer supplies all the drinking water for the county seat, Park Rapids and provides clear, cold water for a nationally renowned brown trout stream. All that at that right turn elbow in the Enbridge/NDPC route.

Nothing is more critical than our drinking water sources.

Friends of the Headwaters
ROUTE COMPARISON MAP

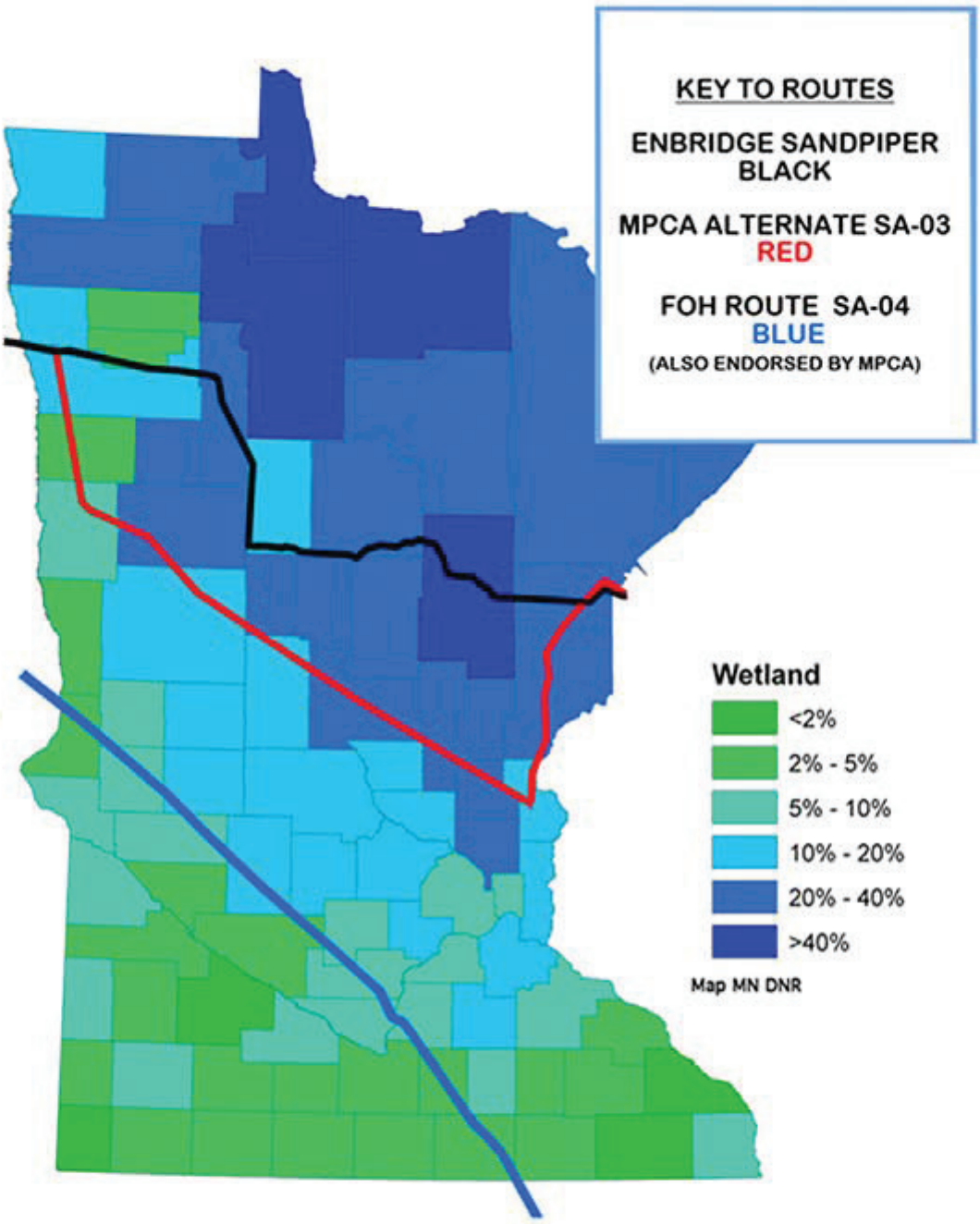


Located on the Minnesota Department of Natural Resources website, this map identifies the locations of Minnesota's wild rice lakes . Again, using my Photoshop skills I layered the company's proposed route as well as the two system alternative routes, SA-03 and SA-04. The intention was to illustrate the extreme risk to the state's wild rice waters by the proposed Enbridge/NDPC Sandpiper route. Could Enbridge have picked a worse route for jeopardizing the prime wild rice lakes and wetlands.

Wild rice is Minnesota's native grain and a part of our heritage and history. For the Ojibwe Nation it is their culture and identity. To them wild rice is priceless.

Wild rice is also critical to Minnesota's nesting and migratory waterfowl.

Friends of the Headwaters
ROUTE COMPARISON MAP



This comparative map juxtaposes the proposed Sandpiper route and the two system alternatives in relationship to the state's prime wetlands areas as identified on this map developed by the Minnesota Department of Natural Resources and found on its website. Again, the intention was to illustrate the risk to the state's wetlands. Note the correlation of this wetlands map to the previous wild rice map.

These wetlands are also critical to Minnesota's nesting and migratory waterfowl.

Friends of the Headwaters
ROUTE COMPARISON MAP

These three maps were located at various sources on the Internet. The maps identify the respective river basins and watersheds of Minnesota. Using Photoshop I wanted to show how the routes relate to these watersheds.

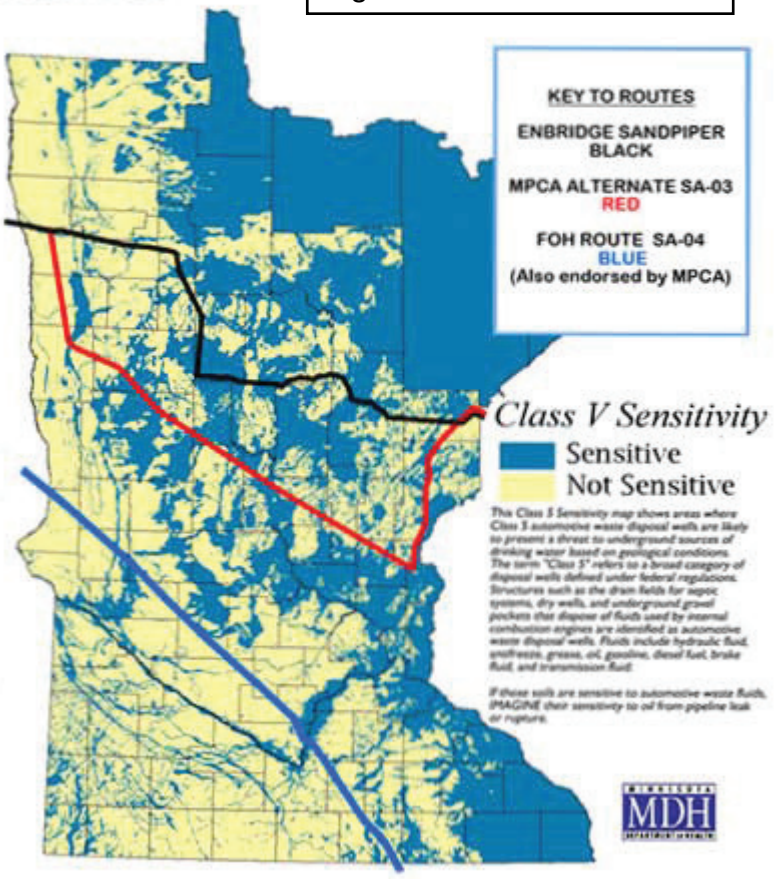
Enbridge's Sandpiper route has major risk exposure to the headwaters of three major watersheds, the Red River of the North, Lake Superior and the Mississippi River plus exposure to the St. Croix National Wild and Scenic River watershed.

Enbridge/NDPC's proposed route will cross the Mississippi River twice. A spill on the river will expose downriver communities dependent on the river as a drinking water source to a toxic mix of carcinogenic chemicals that are present in Bakken crude such as benzene, toluene, naphalene.

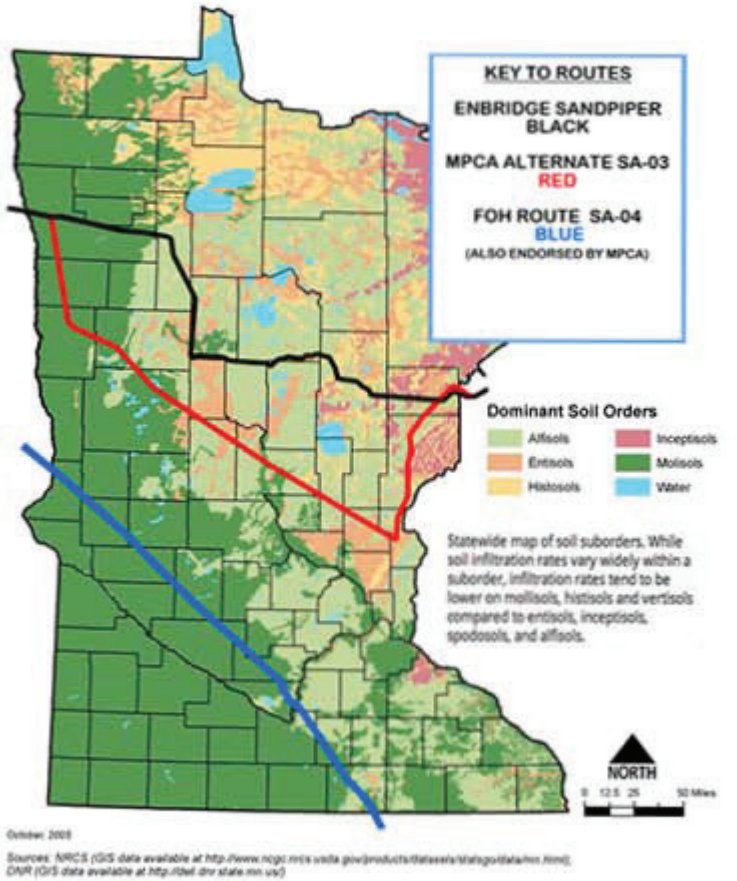
The first crossing point is a few miles downstream of our oldest state park, Itasca, home to the headwaters of the river. At that crossing the daily pipeline volume, 375,000 BPD or 15.750,000 gallons per day, will exceed the average daily volume of the young river by fourfold.

Friends of the Headwaters
ROUTE COMPARISON MAP

Retrieved from the Minnesota Department of Health's website, the Class V Sensitivity map regards soils especially sensitive to the discharge of petroleum based materials. Compare those 'sensitive' areas along the Sandpiper route to the similar bright red areas indicated on the "Soils susceptible to ground water contamination" map previously on page 3. Again, overlaying the routes allowed me to illustrate the environmental risk of the Sandpiper route as compared to the system alternatives.



The second soils map illustrates various soil types. The dark green area consists of mollisols, the soil order with lower infiltration rates. FOH's SA-04 traverses the lowest risk soils to infiltration, the migration and contamination of oil spill effluents. Sources for the soil orders map were the NRCS/USDA and the Minnesota DNR.



Note: Enbridge's Mark Curwin, Senior Director for Strategic Coordination of Major Project Executions in the US, stated their construction preference is to build pipelines across farmland.

He made these remarks at a public meeting in Park Rapids on Jan. 29, 2014.

Mr. Curwin gave the reasons
of better soils,
easier construction,
easier access,
less natural habitat destruction,
cheaper and quicker.

After construction the farmland can be put back into crop production.

Access to leaks and spills is much easier.

Winter wetland construction would be at a minimum.

Friends of the Headwaters
ROUTE COMPARISON MAP

These two maps were located on the Minnesota Department of Natural Resources' website.

Besides showing the environmental risks to Minnesota's watersheds and aquifers, its soil types, I also wanted to illustrate the routes as to how they traversed the state's land cover and ecological zones. The purpose was to compare the respective routes and their potential damage to our forest lands.

The Enbridge route will dramatically involve more forest cover than the system alternatives, SA-03 and SA-04.

The MPCA conducted a comparative environmental analysis of these proposed routes. A high score was least damaging to the environment, a low score the most damaging.

FOH's SA-04 scored the highest.

Enbridge Sandpiper - the lowest.

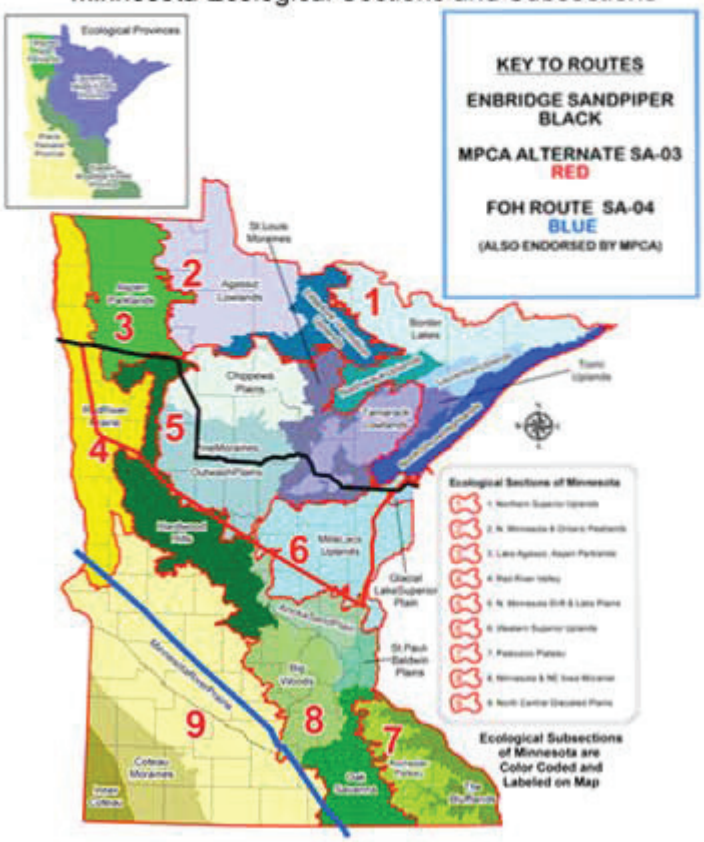
Should the state be sacrificing its natural resources to a new energy corridor when an existing corridor, the Enbridge/Alliance natural gas pipeline corridor, is already available and crosses the state at its lowest risk point to the environment and economy. The Enbridge/Alliance corridor is the proposed route of SA-04.

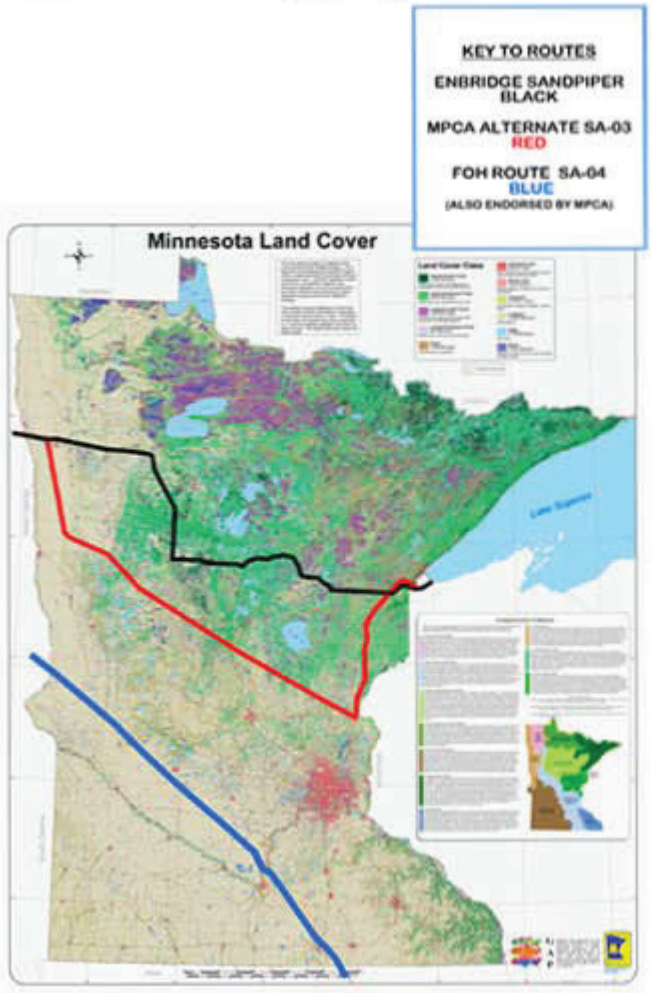
I produced these assembled maps because I believe Minnesota does not NEED Enbridge/NDPC's Sandpiper pipeline route as currently proposed traverse the state's northern water resources

AT RISK: MINNESOTA'S

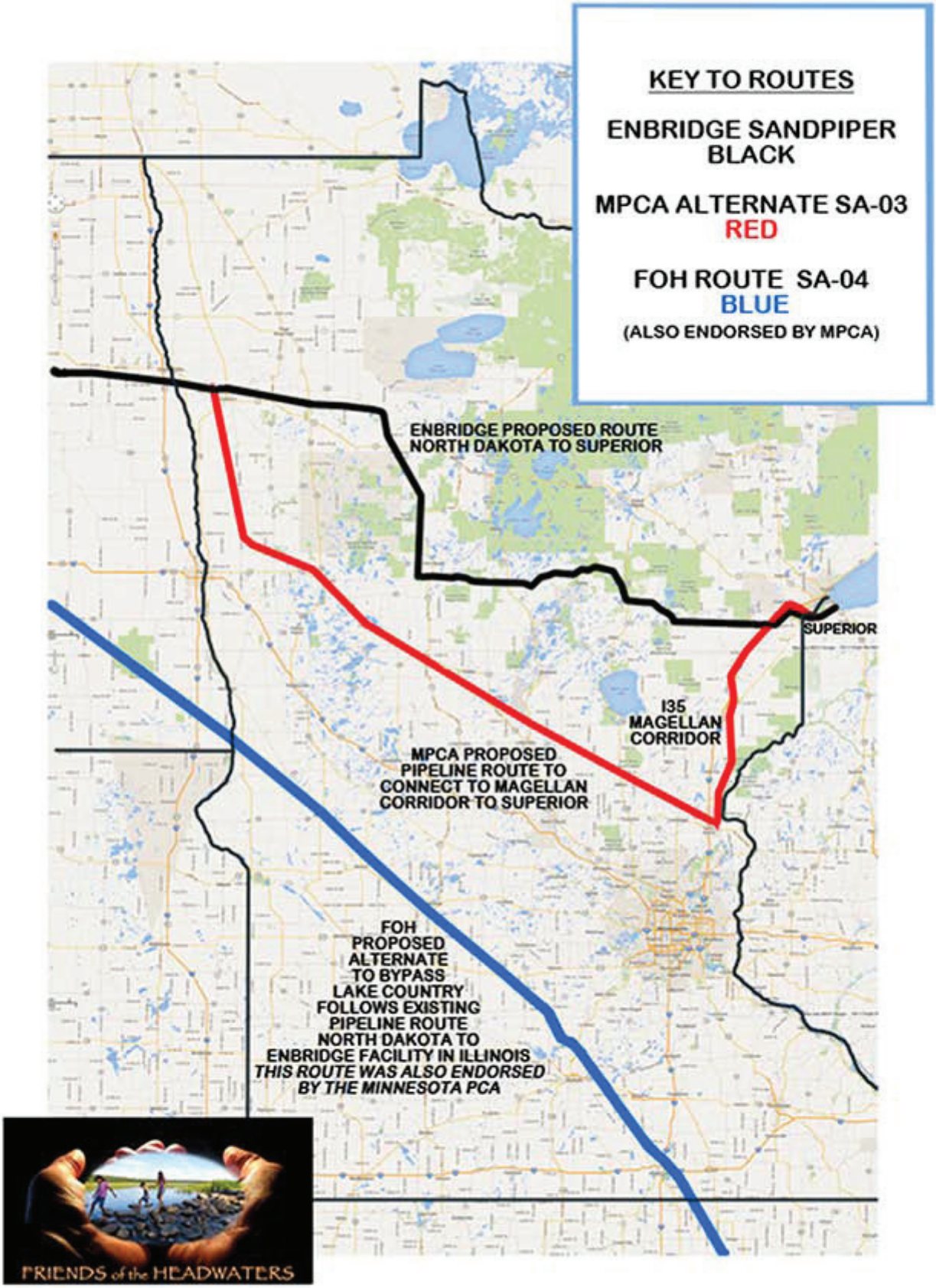
CLEAREST AND CLEANEST LAKES
GROUND WATER AQUIFERS
WILD RICE LAKES
WETLANDS
MOST SENSITIVE SOILS TO SPILLS
DIVERSITY OF VEGETATION
SENSITIVE ECOLOGICAL ZONES
THE LAKE SUPERIOR BASIN
THE HEADWATERS OF THE MISSISSIPPI RIVER AND ITASCA STATE PARK
HIGH VALUE RECREATIONAL AND RESIDENTIAL WATERS

Minnesota Ecological Sections and Subsections



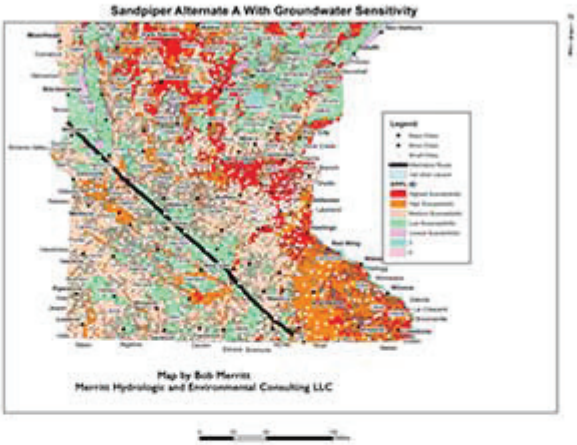


Friends of the Headwaters
ROUTE COMPARISON MAP



I produced this map to show the relationship of the Company route and the two system alternatives in relationship to a roadmap of the state. The maps on the next page provide more detail yet for SA-04 and the justification for my reasoning.

Two additional maps by Bob Merritt, hydrologist, showing FOH SA-04 in better detail.

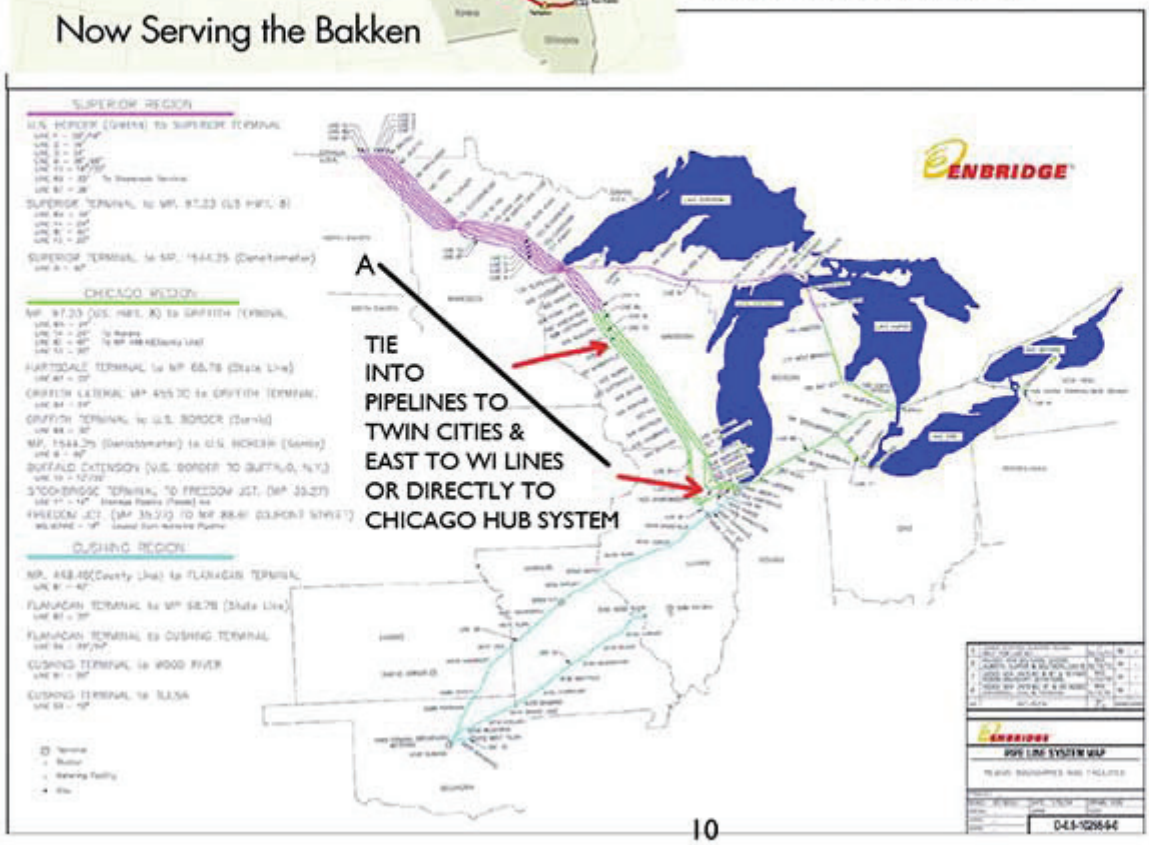


Minnesota still gets to keep jobs the construction will provide as well as North Dakota plus Iowa and Illinois.

Although the route does not end in Superior, it still ties into the existing Enbridge system in Illinois with routing options to Michigan and Ontario that avoid our greatest freshwater lakes of Lake Superior and the Mackinac Straits of Lakes Michigan and Huron.

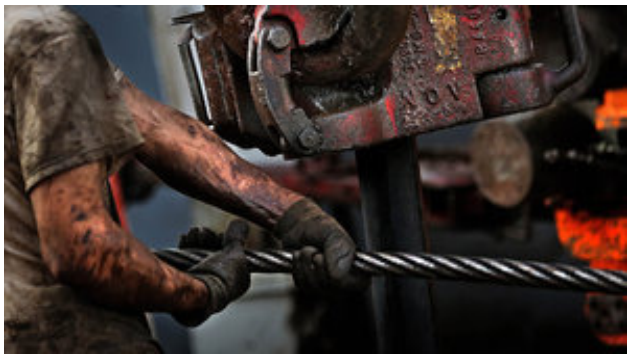
Since it's an existing corridor the company should have access to the mapping previously done for the pipeline already there. FOH SA-04 also intersects pipelines in southern Minnesota owned and operated by other companies which provide the option of re-routing Bakken crude to the refineries in Rosemont and Saint Paul Park in the south Twin Cities Metro.

The Illinois Hub also allows Enbridge access to its pipelines to Oklahoma and points south.



StarTribune

North Dakota rigs take a big hit from oil's steep fall



Floor hand Ray Gerrish worked to make repairs on a drilling rig as the sun rose near the site outside Watford City in October 2013.

Jim Gehrz, Star Tribune

Article by: David Shaffer
Star Tribune
April 6, 2015 - 10:14 PM

The number of oil-drilling rigs in North Dakota has fallen to the lowest level in six years, triggering an estimated 3,000-4,000 oil field job losses that could get worse, a top state official said Thursday.

“It is becoming painful out there in the oil patch,” Lynn Helms, director of the North Dakota Department of Mineral Resources, said on a monthly conference call with reporters.

The department, which tracks and regulates the oil industry, also reported that North Dakota oil production declined to just under 1.2 million barrels per day in January, the most recent period for which data are available.

Helms forecasts lagging oil output for a few months because the 111 operating drilling rigs — down from 193 rigs a year ago — aren’t enough to sustain production growth. He said the rig count is the lowest since February 2009 and could drop to 100 rigs this year, resulting in more layoffs.

Hundreds of North Dakota wells also have been drilled but not completed, he said. Oil companies are saving money, and awaiting a potential major tax savings, by delaying hydraulic fracturing on 825 wells — a number that likely will increase, Helms said.

Hydraulic fracturing, or fracking, pumps pressured water, chemicals and sand into shale to release oil and gas.

Tax policy is contributing to this practice. Helms said it’s “very likely” that a major, automatic state tax break designed to help the oil industry during tough times will be triggered by persistent low oil prices. The tax benefit, along with a state-mandated deadline, could bring a surge of well completions and significant increases in oil output in June, he added.

As a result, companies that specialize in fracking operations are not furloughing workers, he said. Anticipating an upcoming rush to frack already drilled wells, “they are hanging on to their employees,” Helms added.

As North Dakota released its bleak production outlook, U.S. crude oil prices fell to a six-week low Thursday after energy intelligence firm Genscape reported the glut of domestic crude oil is filling up a key storage terminal in Cushing, Okla.

“Now the concern is that people are still producing like gangbusters and where are you going to put it?” Brian Milne, energy editor for global energy management firm Schneider Electric, said in an interview. “If you run out of space to put it, you have to keep it in the ground.”

Milne said fear of running out of mid-continent storage is one of several forces at work in oil markets. War in Libya and seasonal outages of U.S. refineries also are influencing supply and demand, he said.

Some North Dakota operators already are choosing to stop pumping, Helms said. So far, it amounts to about 12,000 to 15,000 barrels per day, he added. Overall, he predicted that North Dakota likely will regain its 1.2 million barrels of daily output later this year.

North Dakota and other major oil-producing states also are taking a hit on oil- and gas-related taxes, which often are tied to the price.

The U.S. Energy Information Administration reported Thursday that Texas, the nation’s No. 1 oil producer, had a 40 percent

decline and No. 2 North Dakota a 21 reduction in oil and gas tax revenue from August to January. Oklahoma's oil and gas tax receipts dropped roughly 30 percent in that period, the EIA said.

David Shaffer • 612-673-7090 Twitter: @ShafferStrib

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 45

Rule 45. Subpoena

Currentness

(a) In General.

(1) ***Form and Contents*****.**

(A) *Requirements--In General*. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(B) *Command to Attend a Deposition--Notice of the Recording Method*. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information*. A command to produce documents, electronically stored information, or tangible things or to permit

the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations*. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issuing Court.*** A subpoena must issue from the court where the action is pending.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(4) ***Notice to Other Parties Before Service.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom and How; Tendering Fees.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(2) ***Service in the United States.*** A subpoena may be served at any place within the United States.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition*****.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery*****.** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions*****.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection*****.**

(A) *Appearance Not Required*. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections*. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena*.**

(A) *When Required*. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted*. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative*. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information*.** These procedures apply to producing documents or electronically stored information:

(A) *Documents*. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified*. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form*. The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information*. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not

reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection*****.**

(A) *Information Withheld*. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced*. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) Transferring a Subpoena-Related Motion. When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(g) Contempt. The court for the district where compliance is required--and also, after a motion is transferred, the issuing court--may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; April 29, 1985, effective August 1, 1985; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 25, 2005, effective December 1, 2005; April 12,

2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 16, 2013, effective December 1, 2013.)

PRACTICE COMMENTARIES

by David D. Siegel

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C45-26. Contempt.

C45-1. Introductory.

Rule 45 of the Federal Rules of Civil Procedure governs subpoena practice in the federal courts, as to both deposition subpoenas and subpoenas used for the trial or hearing itself. It prescribes on matters of issuance right through matters of enforcement.

Rule 45 was extensively amended in 1991, effective December 1st of that year. Because of that, the ensuing Commentaries, in treating the rule generally, will stress changes made by the 1991 amendment.

A subpoena, like a summons, is a jurisdiction-getting paper. The summons secures jurisdiction of a defendant in an action, subjecting the defendant to the jurisdiction of the court so that any judgment that may be rendered in the action will bind the defendant. The mission of the subpoena is to secure jurisdiction of a witness, who is usually not a party to the action, so as to obtain from the witness testimony or documents (or other things) needed by one of the parties.

The incentive of the summoned defendant is to appear in the action so as to avoid a default judgment. The incentive of the subpoenaed witness is to obey the subpoena so as to avoid punishment for contempt, the sanction that backs a subpoena. See Commentary C4-26 below.

There are two kinds of subpoenas. The common one that seeks the testimony of the witness is usually referred to simply as a "subpoena". It's full Latin name is "subpoena ad testificandum". The other one is the "subpoena duces tecum", which usually keeps its Latin name in practice to distinguish it from the testimonial subpoena. The subpoena duces tecum seeks documents and other tangible things instead of testimony. If both testimony and things are sought from the same person, a single subpoena, containing both testificandum and duces tecum clauses, can be used. The form presently used is a simplified one in which the user need merely check off the applicable boxes and fill in the appropriate blanks. Commentary C45-2, below, discusses the form.

As a general rule a subpoena is used only on a nonparty. (A party can of course be subpoenaed, too, if need be.) A mere notice or request ordinarily suffices to get testimony or things from a party, with the sanctions of Rule 37 of the Federal Rules of Civil Procedure standing by to assure the party's compliance.

Rule 37 is a component of the "Depositions and Discovery" segment (Part V) of the Rules, embracing Rules 26-37. That part interplays with Rule 45 frequently, an interplay that will be noted at a number of junctures in the ensuing Commentaries. Rule 34, for example, in requiring the production of documents and other tangibles, applies only against a party. It is Rule 45 that must be turned to when those things are sought from a nonparty. The 1991 amendment of subdivision (c) of Rule 34 recognizes this with a cross-reference to Rule 45. See Commentary C45-6 below.

The attorney consulting these Commentaries on any point will do well to consult the table of Practice Commentaries immediately above. An effort has been made to break the subject down into specific constituents, so that a scanning of their captions may quickly highlight the topic the reader is after.

The power of administrative agencies and arbitrators to issue subpoenas or their equivalent does not come from Rule 45. But if the subpoena power has been conferred on such bodies by other sources, enforcement of the subpoena may be sought in the courts. Special provisions can be found so instructing. See, for example, § 7 in U.S.C.A. Title 9, in respect of arbitrators, and Rule 81(a)(3) of the Federal Rules of Civil Procedure, in respect of federal officers and agencies.

For enforcement purposes, therefore, Rule 45, as the courts' main provision on subpoenas, may become relevant on an administrative or arbitration subpoena (or "summons", as it may be called, see 9 U.S.C.A. § 7, not just a judicial one.

Subdivision (a)

C45-2. Content of Subpoena; Form.

The content of the subpoena is prescribed by subdivision (a) of Rule 45, which was among the provisions substantially amended in 1991.

In addition to the caption of the action, subdivision (a) previously directed that the subpoena state the name of the court, which was automatically taken to mean the name of the court in which the action was pending. It now prescribes more specifically, in subdivision (a)(1), that the subpoena state the name of the court "from which it is issued". This recognizes that the court in which the action is pending, while it will still most often be the court "from" which the subpoena "issues", will not necessarily be the only one. Under paragraph (2) of subdivision (a), a deposition subpoena will now issue "from" the court in the district in which the deposition is to be taken, even though it may not be "issued" by the court at all, but by the attorney for the party seeking the data or material. It is no longer necessary, for a deposition subpoena, that an application be made for its issuance to the court in the district where the deposition is to be held. See Commentaries C45-4 and C45-5 below.

Under the old rule, the subpoena called for testimony--i.e., it was a "testificandum" subpoena--and if it sought documents or other tangibles, it would "also" contain a duces tecum clause. This was for the reason that old subdivision (b) provided that the subpoena could "also" direct the production of papers and other tangibles, which implied that it could do so only as an adjunct of an ordinary testimonial subpoena. The new subparagraph (C) of subdivision (a)(1) clearly allows the duces tecum subpoena to stand as an independent process, no longer limited to service as a mere appendage of a testimonial subpoena. See Commentary C45-6 below.

Hence the subpoena can contain either the testimonial clause, or the duces tecum clause, whichever the server seeks. It can of course contain both, and would, if the person served is both the custodian of the papers or tangibles as well as a person from whom testimony is sought. Another possible mission of a subpoena may be to require the person in control of real property to permit an inspection of it. See Commentary C45-7 below.

The simplified form of subpoena issued by the district courts in fulfillment of the requirements of the 1991 amendment of Rule 45, entitled "SUBPOENA IN A CIVIL CASE", contains paragraphs covering all four of the subpoena's possible functions:

(1) trial testimony;

(2) deposition testimony;

(3) document or chattel production (for trial or pretrial); and

(4) inspection of premises.

The issuer of the subpoena merely fills in the blanks in the relevant paragraphs and checks off the small box immediately preceding each paragraph used. If the issuer wants both the deposition of the person served as well as the production of documents in that person's control, for example, the second and third boxes as listed above would be checked.

Subdivisions (c) of the amended Rule 45, entitled "protection of persons subject to subpoena", and (d), entitled "duties in responding to subpoena", are concerned with advising subpoenaed persons of both their obligations and their rights. (They are discussed in Commentaries C45-20 through C45-25 below.) In order to assure that the subpoenaed person has all of this information at hand, it is explicitly required that the text of both subdivisions be set forth verbatim in the subpoena. The form of subpoena devised in satisfaction of the 1991 amendment reprints both subdivisions in small print.

The subpoena need no longer bear the court's seal. See Commentary C45-5 below.

C45-3. Subject Matter Scope of Subpoena.

Although the subpoena purports in Rule 45 to stand by itself, it is tied in with two other realms: the rules of evidence applicable at the trial and the rules of pretrial discovery supplied by Part V of the Federal Rules of Civil Procedure, which covers Rules 26-37. The discovery rules in turn refer to the standards of evidence applicable at the trial. Rule 26(b)(1) allows discovery of any unprivileged matter "relevant to the subject matter involved in the pending action", but does not insist that the material sought itself qualify as "evidence". It permits pursuit of any "information ... reasonably calculated to lead to the discovery of admissible evidence". It is this language that accounts for the broad scope of pretrial discovery in the federal courts, and the federal standard has had great influence on pretrial discovery in the state courts as well.

These broad standards also govern what a subpoena can seek. While the explicit reference to Rule 26(b) that the old Rule 45(d)(1) contained is omitted from the amended rule, specific references to privileged matter, trade secrets, expert opinions, materials prepared for litigation, and the like, see subdivisions (c)(3) and (d)(2), which developed in and around the Rule 26 standards, indicate that Rule 26 is still to be the criterion. Nothing in the amendment itself or in the Advisory Committee notes indicates any intention to curtail that scope. The trade secrets, expert opinions, litigation materials, and like things just noted have so profuse a protective case law built around them under the discovery rules themselves that the effort to list them in the subpoena rule, with yet a repetition of the protections, seems more like an excess of caution than a needful part of Rule 45. An adoption of the Rule 26 standards and case law, in a terse statement, would probably have done just as thorough a job, and left Rule 45 with a trimmer figure to boot.

If a further assist from the Advisory Committee as a source is needed to clarify that the scope of subpoena discovery under Rule 45 is to be the same as that applicable under the general discovery rules, a statement appears to that effect in the committee's notes on the 1970 amendment of Rule 45, reprinted following these Commentaries. And as already noted, there is no evidence, in conjunction with the 1991 amendment, of any intention to retreat from that adoption.

All this has dealt with the subject matter scope of the subpoena. Its geographical scope--i.e., the area within which the subpoena may be served--is discussed in Commentary C45-12 et seq., below.

C45-4. Issuance; From What Court?

Under the old (pre-1991) version of Rule 45, there was no need to determine the court "from" which the subpoena would issue. One had to apply to the clerk for a subpoena, and each clerk would issue a subpoena captioned only out of the clerk's own court. If a subpoena had to be used in some distant district, such as to take the deposition of a witness in that district, the application for the subpoena had to be made to the clerk of the district court in that district, not in the district in which the action was pending, and the subpoena would be captioned out of that district. Because each subpoena issued only "from" the district court of the clerk that issued it, there was nothing special that the rule had to say about the matter.

There now is. Under the amended Rule 45, a subpoena may now be issued and signed by the attorney without any application at all to the court or clerk, although the clerk of course retains issuance powers and will exercise them when a party seeks a subpoena itself rather than through an attorney. (See Commentary C45-5 below.) The attorney must issue it "from" the right district court, however. That will most often be the court of the district in which the action is pending. But when the subpoena seeks testimony or materials from a witness beyond the territorial reach of the action-pending district (see Commentary C45-12 et seq. below), it must issue "from" the district court of the district in which the deposition or production is sought. See subdivision (b)(2). The attorney must be careful to caption the subpoena "from" the appropriate district, as to both the testimonial and duces tecum subpoenas. This merely entails inserting the name of the appropriate district in the space provided on the subpoena form.

It is the court "from" which the subpoena issues--either the trial court or the court in the distant district--that has the needed jurisdiction to enforce the subpoena. Motions to quash, modify, or condition the subpoena are also made to the district court of the district from which the subpoena issued. See subdivisions (c)(1), (c)(3)(A), and (e), and Commentaries C45-21, C45-22, and C45-26, below.

C45-5. Who "Issues" Subpoena?

No court order is necessary for the issuance of a subpoena, and under the 1991 amendment no request for a subpoena need even be made of the clerk: a significant achievement of the 1991 amendment is that it allows the attorney to issue the subpoena, without even a pro forma application to the court. Subdivision (a)(3).

This merely carries to fruition a practice that had taken place for years in all but form. Under old Rule 45, it had to be the clerk that issued the subpoena, but the clerk would issue it "in blank" just about for the asking. The attorney would then fill it in and arrange for its service. Hence it was the attorney who was doing everything, with the clerk doing nothing more than furnishing the form. The 1991 amendment recognizes this by relieving the clerk of the issuance duty altogether, at least when the party seeking the subpoena has an attorney.

The clerk will still issue the subpoena when a party itself applies for it, and in that event the party can fill it in and have it served.

The attorney empowered to issue a subpoena must be an attorney admitted to practice (even if only pro haec vice) in the district in which the action is pending. As long as the attorney is admitted in that district, the attorney can issue the subpoena. The attorney can issue it in the name of that court, or, when the subpoena seeks a deposition or discovery in a distant district, under the name of the court in the distant district. Hence an attorney not admitted in the distant district may, under subdivision (a)(3)(B), issue a subpoena captioned in that distant district, as long as

the subpoena "pertains to an action pending in a court in which the attorney is authorized to practice".

Thus an attorney admitted to practice before the Southern District of New York may, in an action pending there, issue a subpoena captioned out of the District of Nevada when the deposition is sought of a Nevada witness. This is clearly a convenience that dispenses with having to apply to the Nevada federal court to get the subpoena, or with having to retain an attorney admitted before the Nevada federal court to make the application for it. And presumably the New York attorney can conduct the deposition in Nevada. But should an application of some kind have to be made there, such as a motion to compel the testimony of a recalcitrant witness, or to punish the witness for contempt, the rule does not say that the New York lawyer can make that motion to the Nevada federal court if she is not admitted there. It would seem that an application would first have to be made to admit her pro haec vice, and only upon that admission would she be able to argue the merits of the motion to the Nevada court.

A two-part motion might be made, asking for the pro haec vice admission in the first breath and presenting the merits of the subpoena motion in the other. If the court promptly rules on the first part of the motion, and grants the pro haec vice admission (holding off the merits part of the motion until oral argument can be had on it), the fact of the grant can be communicated to the New York lawyer, who can then travel out to Nevada, if disposed to, to make the argument. But if the court elects to rule on both parts of the motion at the same time, the New York lawyer who has traveled out to argue the merits on the assumption that the pro haec vice application would be granted may be on a fool's errand if the unexpected happens, and the pro haec vice application is denied.

The lawyer (the New York lawyer in our example) must note carefully that while it is convenient to be able to issue the subpoena in the name of the Nevada court, the subpoena does not enjoy nationwide service and does not operate to compel a Nevada witness to come to New York for the testimony. It is subject to the other restrictions of Rule 45 concerning both the place where the subpoena may be served and the place where the deposition may be scheduled. These are sometimes complicated questions, as Commentaries C45-12 through C45-17 manifest. The deposition has to take place in the Nevada area, as those Commentaries explain.

Hence the enthusiastic assertion that Rule 45 now "effectively authorizes service of a subpoena anywhere in the United States", made in the committee's "Second" comment on subdivision (a) of the amended rule, may be a bit puffy. Rule 45 now permits a New York lawyer in a New York federal action to caption a deposition subpoena out of the Nevada federal court, but that subpoena is by no means servable "anywhere in the United States", nor can it set up a deposition "anywhere in the United States". Both service of the subpoena and the situs of the deposition are clearly limited. See Commentary C45-14 below.

Not even for a trial subpoena (as opposed to a mere deposition subpoena) can a simple nationwide service be spelled out. Under clause (iii) of subdivision (c)(3)(B) of Rule 45, there does appear to be authority for the court to direct a witness to travel far, clearly within a state and possibly far beyond state lines as well, but only when there is a special need of a witness's live testimony. The circumstances apparently have to be super special, and even when they are there is some doubt about whether clause (iii) really goes all that far. There is a 100-mile restriction, contained in clause (ii) of subdivision (c)(3)(A) of Rule 45 and measured from the witness's base, beyond which the witness may not be required to travel unless the court exercises its special discretion under clause (iii) of subdivision (c)(3)(B), and it can be argued that all clause (iii) does is permit a stretch of the 100 miles from one point to another within the same state. See Commentary C45-16 below. If that's the construction of clause (iii) that prevails, then the revisors' comment that Rule 45 now "effectively authorizes service of a subpoena anywhere in the United States" will prove puffier still.

Further discussion on the interplay of the various provisions affecting who issues the subpoena, what court must be named in its caption, where it can be served, and how far a witness can be made to travel to honor it, will have to await the cited Commentaries (Commentaries C45-12 through C45-17), below.

When a deposition has to be taken in a distant district, and a motion to enforce it becomes necessary, many lawyers deem it wiser to retain local counsel to make the motion in the distant court rather than bother with a pro haec vice application. Which course to take is likely to depend on how important the witness is, how important the motion is, how high the stakes are, etc.

The attorney must "sign" the subpoena, but the seal of the court is no longer required. Under the mere signature of the attorney the subpoena acts as process of the court, fully backed by the sanction provisions of Rule 45, including the ultimate sanction of contempt now found in subdivision (e).

Since a subpoena is of course a judicial "process", an infrequently cited statute, § 1691 of Title 28, still recites that it must be under the seal of the court, which the prior rule required but which the present rule deliberately does not. No argument should arise on that point, however, since the matter is entirely procedural and another statute in Title 28--subdivision (a) of § 2072--authorizes the U.S. Supreme Court to promulgate rules of practice, and an issue of sealing is an issue of practice. While the rules promulgated by the U.S. Supreme Court under subdivision (a) of § 2072 may not, under subdivision (b), "abridge, enlarge or modify any substantive right", to the extent that they address only procedure they supersede "[a]ll laws in conflict". (An analogous issue, and resolution, arises in conjunction with summons service. See Commentary C4-16 on Rule 4 in the 28 U.S.C.A. set.) The form of subpoena that the federal courts distributed after the new Rule 45 took effect on December 1, 1991, requires no seal when the attorney is the issuer.

For the court "from" which the attorney must issue the subpoena, see Commentaries C45-4 above and C45-12 et seq. below.

As to who may serve the subpoena, see Commentary C45-8 below.

C45-6. Document Production.

Under Rule 45 as amended in 1991, a subpoena duces tecum seeking the production of documents (or other materials) from a nonparty may be used independently of the regular testimonial subpoena; the two are no longer wedded, as they were under the prior version of Rule 45.

Document production under Rule 34 of the Federal Rules of Civil Procedure operates, and has long operated, to get documents and other tangibles from a party wholly independent of a deposition of that party, but Rule 34 applies only to a party, not to a nonparty. Rule 45, on the other hand, did make document production available from a nonparty, but only in conjunction with a deposition to be taken of the nonparty. Hence, the seeking party had to set up what was often an unwanted deposition of the nonparty under old Rule 45, just to get the desired documents or other things of which that nonparty had custody or control. Subdivision (c) of old Rule 34 authorized an "independent" action against the nonparty to secure documents, but what a bother that was as against what a simple

subpoena or application within the context of the pending action would be.

A simple subpoena duces tecum is now available for service on a nonparty under Rule 45, without any purported scheduling of a deposition of the nonparty. An amended subdivision (c) of Rule 34 recognizes this by dropping the reference to an independent action and leaving the matter to Rule 45. (An independent action would still be available, but should seldom be necessary. One instance in which the bar may be thankful to have a separate action available, however, with which to seek a document production from a nonparty is where the sometimes awkward geographical restrictions imposed by the 1991 amendment of Rule 45 make it possible for a witness to avoid a subpoena--even a pretrial subpoena--just by remaining more than 100 miles from his own residence and place of business. See the elaboration of this point in Commentary C45-14, below.)

Hence, where the desired documents or other tangibles are in the custody of a nonparty, a subpoena duces tecum can get them. And it can get them for use at the trial itself or for use in conjunction with a deposition. If testimony is also sought from the custodian of the documents, the subpoena served on the custodian of course can, as before, include both testimonial and document-production (duces tecum) clauses. Insofar as they discuss the subpoena duces tecum as being available for service on a nonparty only in concert with a deposition, old cases are now irrelevant.

The scope of a subpoena duces tecum is intended to be as broad against a nonparty as against a party, a point the Advisory Committee makes by citing Rule 34 (which governs parties) as also governing Rule 45.

As long as the subpoena is served on the subpoenaed person within the proper territorial range of the subpoena (for the subpoena's range, see Commentaries C45-12 et seq. below), it makes no difference that the materials sought are located beyond that range. Control of the documents or other things sought is the key, and if the entity servable locally has control, it must exercise that control to bring the materials in. Perhaps the most common example of this in practice is where a broad-based corporation present and served locally is required to produce locally records that it maintains at some distant place (e.g., at its main office, some other branch, etc.).

Expenses connected with the production of the materials can be adjusted by the court if need be, and are likely to be if the matter is brought to the court's attention and the subpoenaed person is a nonparty, a matter treated in Commentary C45-21 below.

While a party can of course approach a document custodian and simply ask permission to inspect designated papers, the party who has to rely on a subpoena under Rule 45, or for that matter on any other judicial process, to get those papers can't do it without notice to all other parties to the action. Under the last sentence of subdivision (b)(1) of Rule 45, the party who seeks a pretrial production of documents from a nonparty through use of a subpoena duces tecum must serve notices on all the other parties. The notice should spell out for the parties the essentials of the directed production, so that any interested party can attend at the time and place of the discovery, review the produced documents or other things itself, and otherwise monitor the proceedings. These notices may be served on the other parties through the usual within-the-action methods of Rule 5(b) (mail to the other parties' attorneys being the most common method).

This requirement of notice of a pretrial subpoena duces tecum is analogous to what Rule 30(b)(1) requires when it is a deposition that is sought of a person (a party or nonparty): all the other parties must be given notice of the time

and place of the examination and of all related particulars. Indeed, Rule 30(b)(1) may even be repetitive of Rule 45 when the person being deposed is a nonparty witness from whom document production is also sought. It says that if the person to be examined is also served with a subpoena duces tecum seeking tangible materials, the notice of the deposition served on the other parties must also identify the materials that the subpoena duces tecum has demanded.

The requirement that other parties be notified enables them to object to the production of the documents or other things if they find ground, as with a motion to quash or modify the subpoena under subdivision (c)(3), or to take their own steps to secure the production of yet other documents that they deem important in conjunction with the pending discovery. It enables them in any event to monitor proceedings so as to protect their own interests.

When a deposition is sought, as opposed to a document production, Rules 30 and 31 (which apply to parties and nonparties alike) contain analogous protections, relieving Rule 45 of having to prescribe them.

C45-7. Inspection of Premises.

It may sometimes become necessary, in connection with a litigation, to conduct an inspection of real estate, improved or not. An inspection of premises is allowed by the Federal Rules of Civil Procedure on the same terms and through the same devices that a production of documents is, both as against a party, where Rule 34 governs, and against a nonparty, where Rule 45(a)(1)(c) governs.

In respect of the nonparty, this is new. The inspection can now be compelled by subpoena, dispensing with the need of a separate action (as prior law required) to secure the inspection of premises controlled by a nonparty. The subpoena would be directed to the person who has control of the premises and the authority to permit entry and inspection. If testimony is also sought of that person, the same subpoena that commands the inspection of premises can also require the subpoenaed person to testify, either at a trial or hearing or at a deposition. On that score, too, then, the rule with the inspection of premises is the same as that for the production of documents and other personal property.

In some state practices, a court order may be needed for the inspection of realty owned or controlled by a nonparty, as in New York under Rule 3120(b) of its Civil Practice Law and Rules. Under Rule 45 of the Federal Rules of Civil Procedure, no preliminary court order is needed for the issuance of the subpoena or for permission in any other form to inspect a premises. But, in common with the procedure for the production of documents and other tangibles, the recipient of the "inspection" subpoena can temporarily undo his obligation to obey the subpoena and make a court order necessary just by serving the seeking party with objections to the inspection, pursuant to subdivision (c)(2)(B) of Rule 45. On that point see Commentary C45-21 below.

The availability of that automatic cancellation of the obligation to comply, or at least its suspension, makes the federal procedure similar to one that requires a court order in first instance. The difference lies in who has the initiative. In the New York practice the seeking party must apply for the order in first instance. In the federal practice under Rule 45, the seeker just issues and effects service of a subpoena, but if the recipient then takes the modest initiative of serving the seeking party with objections, that simple doing shifts back to the seeking party the more demanding initiative of a court application. Without this federal "shifting" feature, the person served could still attack the subpoena before complying, but would have to do so with a motion to quash or modify, i.e., assume

the burden of a court application himself.

The same points made in the discussion of the production subpoena, Commentary C45-6 above, and stressed in Commentary C45-11 below, apply to the inspection of premises as well. While a party can seek an inspection of relevant real estate just by asking its proprietor for permission, and would ordinarily need no court process for that, any invocation of judicial process (subpoena or otherwise) to authorize the inspection must be on notice to the other parties to the action. Rule 45(b)(1).

Subdivision (b)

C45-8. Who Serves Subpoena?

The subpoena may be served by any person over the age of 18 who is not a party to the action. That was so under subdivision (c) of the old Rule 45 and remains so under subdivision (b)(1) of the rule as amended in 1991. The prior rule also referred to the marshal. The amended rule drops the reference to the marshal, but, simply as a person over 18, a marshal or deputy can still serve the subpoena under the amended rule. That is, if the marshal is willing to. Nothing in the amended rule imposes this function on the marshal's office as any kind of duty.

The nonparty over 18 is also the one who may serve a summons under Rule 4(c)(2)(A).

Since a corporation is an entity distinct from its officers and staff, a corporate employee would apparently be able to serve a subpoena in behalf of the corporation. Rule 45 says nothing to indicate otherwise, but it may not be a good idea, at least as a general practice. Some lawyers prefer to use independent process servers in all circumstances just on the outside chance that an issue may arise about whether the subpoena was served, or was served properly, and the issue may turn in some measure on credibility. Their theory is that the testimony of an independent process server in such circumstances may come off a mite stronger than that of a party's officer or employee.

C45-9. Method of Subpoena Service.

Service of a subpoena is made "by delivering a copy" to the person named. That was the requirement before the 1991 amendment and it remains the requirement under subdivision (b)(1) of the amended Rule 45. Personal delivery is the only method specified, and this differs substantially from service of the summons under Rule 4, for which a variety of methods are made available. The recently adopted mail method for summons service, for example, which does not even entail use of a process server, Rule 4(c)(2)(C)(ii), is not available for subpoena service.

Mail would ordinarily be inadvisable even if it were available, especially when the return time of the subpoena is limited. (See Commentary C45-10 below on the return time of subpoenas.) The use of the mails delays the process, reducing the preparation time of the subpoenaed person (who may have to rearrange a schedule, prepare materials, etc.), and it consequently reduces the likelihood of a contempt penalty for disobedience by giving the witness excuses for non-compliance.

One immediate alternative for summons service under Rule 4(d)(1) is the delivery of the summons to a person of suitable age and discretion at the defendant's residence, but that alternative, too, is unavailable for subpoena service, either directly or even with a court order. See Federal Trade Commission v. Compagnie de Saint-Gobian-Pont-A-Mousson, 636 F.2d 1300 (D.C.Cir.1980). Lawyers report that this and other methods are nevertheless sometimes used when the witness can't be readily located, and that it frequently happens that the witness so served will honor the subpoena anyway, unaware of the service deviation, or, if aware of it, too intimidated to chance disobedience. Rule 45 authorizes only "delivering" a copy, however, and the party relying on the subpoena had best be mindful that if the subpoenaed person has the courage to disobey the subpoena because of the defective service, the court is not likely to punish the disobedience; the defect is likely to be held jurisdictional.

At least when there is ample time for service before the subpoena is returnable (and there often is), it would of course be helpful to be able to use a method of service other than personal delivery, especially something like the delivering of the subpoena to someone at the witness's residence or place of business. Indeed, the fact that subpoena service is restricted to the method of personal delivery contributes to the situation, discussed in Commentaries C45-12 through C45-14 below, in which a witness may be able to frustrate all efforts to obtain his testimony just by remaining physically more than 100 miles from his residence or place of business. An effort by the revisors to expand the methods of service, at least in designated circumstances, would have been welcome. It was not to be, however, and personal delivery remains the sole method prescribed.

If a particular person in the employ of a corporation or other entity is the person sought as a witness, the subpoena should of course be delivered to that person, but if the corporation itself is the subpoenaed person, as on a subpoena duces tecum that seeks only materials and it doesn't matter who actually produces the materials, the subpoena can be directed to the corporation and served on any appropriate corporate agent. It is a good idea in that case to have the subpoena delivered to a person who could be served with a summons in the corporate (or other entity's) behalf, such as an officer or managing agent (see Rule 4[d][3]), which will clarify that the subpoena has reached someone of responsibility. Serving a person in some menial position in the corporate employ, while it may work, reduces the prospect of a contempt punishment for disobedience if the corporation should claim that it never got notice. The cited rule, Rule 4(d)(3), allows summons service on corporate agents designated by law, like certain state officials under state statutes, and some case law has also sustained subpoena service through such officials, but recourse to that should always be a last resort only.

Attorneys often report that here, too--as long as the intended person, corporate or otherwise, has gotten the requisite notice--subpoenaed persons often respond to the subpoena on the merits without making an issue of the method of service. It is often economically better to do that. If they choose instead to make a motion to quash, for example, attorneys understand, rightly, that the motion will cost time, effort, and money, and that even if it is granted the seeking party will often just turn around and serve the subpoena again, with the service defect cured. Their attitude is that there's nothing to be gained; that it's better to respond to the subpoena without raising these technical objections.

Service of the subpoena on a witness's attorney is not permissible, even if the attorney-client relationship is known, and this is so of individual as well as corporate subpoenas. Hence the effort must be made to serve the party.

Rule 45(b)(1) also addresses the situation in which the subpoena is a duces tecum subpoena being served on a nonparty for the production of documents, the inspection of premises, etc. It requires that notice of such production

or inspection also be given to each party. The notice served on the party need only follow the Rule 5(b) methods of service, however, which are the usual intra-action methods used for serving non-jurisdictional papers. Among those methods is the commonly used ordinary mail to the party's attorney.

A party is also entitled, of course, to notice of a deposition being set up of a nonparty witness (on whom the ordinary testimonial subpoena is used). The procedure for notifying the parties of a nonparty's deposition comes directly from Rule 30 and is therefore not addressed in Rule 45.

Fees in the proper sum must accompany the subpoena. Fees are discussed in Commentary C45-19 below.

C45-10. When and Where Subpoena Returnable.

There is no specific time period set forth in Rule 45 for when the subpoena is returnable, i.e., for the notice time the recipient must be given before compliance is called for. The bar understands the rule to be that a "reasonable" time must be allowed, and the 1991 amendment makes no change on that front. Under subdivision (c)(3)(A)(i), for example, one of the grounds for quashing a subpoena is that it "fails to allow reasonable time for compliance". What is reasonable is not defined. It depends on the circumstances.

Some lawyers try to give at least 10 days notice time as a rule of thumb, giving less only when it is unavoidable. Others report using five days as a general standard. Still others report that as long as the time is available, they will give notice time of 30, or even 45 days. That may be a lot easier to do on subpoenas seeking a deposition or a pretrial production of documents than on trial subpoenas, at least where the trial date has not been rigidly set. And even when it has been, it can be changed on any of a variety of contingencies, all of them of course requiring that previously subpoenaed persons be notified of the change.

There are instances when notice of only a day or two will be possible, of course, and some lawyers report having sometimes had to use a "forthwith" subpoena, as when the need of something comes up without warning right in the middle of a complicated trial. Whether any of these shortened return times is "reasonable" depends on the context, and the court will of course be the judge of that if the point should arise, as on a motion to quash, for example, or to punish for contempt.

From the witness's point of view, it remains safer to move to quash the subpoena if it is claimed that there is inadequate time to meet its requirements, as where it is a subpoena duces tecum requiring the production of materials that the witness has not been allowed enough time to gather up. Subdivision (c)(2)(B) even has a special remedy for subpoenaed persons in that situation, sparing them altogether the need to take the initiative of a court application. It provides, as subdivision (d)(1) of the prior rule did, that the subpoenaed person need only serve on the party or attorney designated in the subpoena a "written objection" to the production of the documents: the mere service of the objection then shifts the initiative to the party in whose behalf the subpoena was issued to move to compel compliance.

The subpoenaed person who fails to serve such an objection, or move to quash or modify the subpoena, may confront a contempt application without a defense, unless perhaps the time was so tight that there was not even an opportunity to draw and serve a written objection to the subpoena.

The specific date and time of return should be set forth in the appropriate box allotted to it on the form.

There is also a box entitled "place" in each of the alternative paragraphs on the subpoena form. The issuer should of course be as specific as possible in filling in this box. The person served with the subpoena should not be left to guess about any detail. If it's a subpoena seeking trial testimony, the issuer should not only identify and include the address of the courthouse, but also the very courtroom involved if it is possible to do that in advance. If it's a duces tecum subpoena seeking the production of documents or things for the trial, designation of the trial courtroom may do, as long as the return time is set for the time and place of the trial. Otherwise the issuer should ascertain where in the particular courthouse it is customary to have a witness bring documents and other subpoenaed items, and designate that place (by room number or other identification).

The same applies to the deposition and pretrial production subpoena. If a deposition is to take place in a lawyer's office, for example, the lawyer's address including suite or room number should be included. When both testimony and the production of documents or other things are sought from the same person, the subpoena can just repeat in the production clause the same place specified in the testimonial clause.

Under the 1991 amendment of Rule 45, the production of documents and things even from a nonparty may be subpoenaed independently of a deposition. See Commentary C45-6 above. There, too, of course, the specific place of production should be set forth. And the issuer of the subpoena must at all times remember to give all other parties timely notice of pretrial subpoena proceedings, including, as required by subdivision (b)(1), those attending the pretrial subpoena duces tecum. Failure to give that notice can carry heavy consequences. See Commentary C45-11 below.

C45-11. Attempt to Bypass Notice Requirement.

A clear theme present in Rule 45 as well as in Part V of the Federal Rules of Civil Procedure (the discovery provisions covering Rules 26 through 37) is that any discovery from any source, party or nonparty, that has to enlist judicial process in its cause must be done on notice to all other parties to the action, or in any event to those who have appeared in the action. (See Rule 5[a] of the Federal Rules of Civil Procedure.) An attempt to bypass this notice requirement through any subterfuge at all can carry heavy consequences. A recent case in the New York courts, built around analogous provisions, can illustrate. The case is Matter of Weinberg, 129 A.D.2d 126, 517 N.Y.S.2d 474, reargument denied with further opinion In Matter of Beiny, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1st Dep't 1987).

For document discovery (as opposed to a mere deposition) from a nonparty, New York requires a motion under Rule 3120(b) of its Civil Practice Law and Rules (CPLR). But no court order is necessary for a mere deposition of the nonparty. The seeking party need only subpoena the witness to the deposition and give other parties notice of it. In conjunction with the deposition, the seeking party can include a document demand under CPLR 3111.

Because CPLR 3111 is an adjunct of a deposition, and notice of the deposition must be given to all parties, all parties are also entitled to notice of whatever documents or materials are sought of the deponent in conjunction with the deposition under CPLR 3111.

In Weinberg, the seeking party set up a deposition of a nonparty witness and served a subpoena duces tecum on the witness to elicit key materials as a deposition appendage under CPLR 3111. The party then cancelled the deposition, but, without advising the other side, collected up the materials that the subpoena produced, armed itself with a thorough ex parte review of them, and then used them tellingly in deposing--and surprising--the other side. An irate appellate court suppressed all of the materials, disqualified the offending law firm from continuing to represent the client in the proceedings, and remitted the matter to the local disciplinary committee for investigation.

What is contemplated by the New York provision in point, CPLR 3111, is that the materials produced be produced at the deposition, or in any event at such time and place as will give access to all parties equally, and more or less simultaneously. The same is of course contemplated, even more explicitly, in the requirements that Rule 45 and the discovery provisions of the Federal Rules of Civil Procedure impose on the party who seeks materials from a nonparty through the use of a subpoena: all other parties must be given notice. The failure to give that notice can lead to penalties just as severe as those imposed in the Weinberg case.

With the permission that Rule 45 now confers for the service of a pretrial subpoena duces tecum on a nonparty independently of a deposition subpoena, a party may be tempted to try some kind of maneuver that will give that party an exclusive review of the materials sought, or even just an earlier review than the other parties can have. Rule 45(b)(1) will tolerate neither attempt; it mandates that all parties be notified of any production or inspection, and its aim is to assure that the other parties' opportunity to review the subpoenaed materials be concurrent with and just as extensive as that of the party issuing the subpoena.

C45-12. Territorial Reach of Subpoena; Background.

Paragraph (2) of subdivision (b) addresses the geographical reach of a subpoena, but it can be misleading if not immediately considered in light of clause (ii) of subdivision (c)(3)(A), clause (iii) of subdivision (c)(3)(B), and the new final sentence added to the contempt provision in subdivision (e). That's quite a mouthful, and it makes the subject a complicated and often confusing one, a misfortune all the more because it is also one of the most important subjects in Rule 45 and, indeed, in all of civil practice. It determines how effective judicial process can be in securing testimony and evidence from a nonparty, not only for the trial itself, but in advance of it as an aid in trial preparation.

On the criminal side of the court, the subpoena can be served nationwide. See Rule 17(e)(1) of the Federal Rules of Criminal Procedure. No such facile rule obtains on the civil side, where service is much more localized. When testimony or things are needed from a far-off witness who is not willing to assist voluntarily--far off, that is, from the courthouse in which the action is to be tried--attorneys have had to rely on depositions, and discoveries in conjunction with depositions, bringing the fruits of their efforts back with them and relying at the trial on the deposition as a substitute for live testimony.

That is still likely to be the case in most instances of the distant but recalcitrant witness, but, under the new rule, apparently not always. In special circumstances, described in subdivision (c)(3)(B)(iii), there appears to be the possibility of compelling a distant witness to attend at the trial, but from the phraseology of the rule itself and even more so from the timidity with which the point is broached, the circumstances would have to be very special, indeed. The point is separately discussed in Commentary C45-16 below. There is much to be said before then.

The Advisory Committee observes that Rule 45 now "effectively authorizes service of a subpoena anywhere in the United States" (the quote comes from the committee's "Second" comment on subdivision (a) of the amended rule), and this nationwide service may be carried out, presumably, regardless of what district the action is pending in. But the subpoena's issuer must also consider, before issuance and service, what district an application would have to be made in to enforce the subpoena, or to quash or modify it, or to move to punish for a contempt if the witness defies it. Asking and answering those questions at the outset may well affect the decision about which district court to issue the subpoena "from", which in turn plays a role in determining where the subpoena may be served.

In addition to offering the district of issuance itself for subpoena service, and in some circumstances the state in which that district is located, Rule 45 speaks at one point about serving the subpoena "within 100 miles" of the site of the trial or of a deposition. Subdivision (b)(2). At another point, however, it insists that the subpoena take the subpoenaed person no farther than 100 miles from that person's residence or place of employment. Subdivision (c)(3)(A)(ii). And at yet another it imposes a 100-mile restriction without prescribing at all the point from which the 100 miles is to run. Subdivision (c)(3)(B)(iii). These provisions, moreover, are not independent ones governing different things; they interplay, and dependence on one may create difficulty if not negotiated alongside the other. In some situations when one consults Rule 45 for guidance about the territorial reach of a subpoena and starts to hop back and forth among the several provisions just cited, the rule comes off like a Tower of Babel, an inferno with shrill voices jabbering simultaneously in a confusion of tongues.

With this interplay in mind nevertheless, and prepared to make the necessary cross-references with all the profuse and unpleasant subdivisioning they require, the ensuing sections treat, or at least try to, the territorial reach of the subpoena under the 1991 amendment of Rule 45. Some of the territorial language is new; some of it is carried over from the prior rule. Our treatment will address the present rule and what it does, referring to the prior rule only if helpful to an understanding of the present one.

C45-13.Territorial Reach of Subpoena; Where to Serve Trial Subpoena.

Under the explicit terms of subdivision (b)(2), the subpoena can be served anywhere within the district of the court from which the subpoena is issued, anywhere within 100 miles of the place of "deposition, hearing, trial, production, or inspection", or, if state law would so allow for a subpoena issued out of a state court of general jurisdiction, anywhere within the state. The district referred to is the district "by which" the subpoena issued. As earlier noted in Commentary C45-5, the attorney may issue the subpoena, and in doing so must specify the district court "from" which it is issued. So states subdivision (a). While a better coordination of prepositions would have been welcome, the district "from" which the subpoena is issued under subdivision (a)(2) is apparently the district that subdivision (b)(2) means with its "by which" provision.

Which district is that to be? We should divide the subject into two parts at this point, one addressed to a trial (or hearing) subpoena, the other addressed to a deposition or pretrial production subpoena. Here we treat the trial subpoena. The deposition subpoena is the subject of the next Commentary, Commentary C45-14.

Under subdivision (b)(2), inquiry must be made into where the witness is. (The troublesome creature is the nonparty witness. Over parties, the court has all kinds of leverage, which makes for an infrequency of geographical problems. Discussion will thus assume that the witness being sought is not a party to the action, and we will use

"witness" to include a person from whom documents or other tangibles are sought as well as a person from whom testimony is sought.)

If the witness is amenable to service within the district in which the trial court is situated, that will be the court "from" which to issue the subpoena. But right here at the outset, a cross-reference must be made to subdivision (c)(3)(A)(ii) (which subdivision [b][2] itself refers to), which manifests that the subpoena may not be effective if it purports to require the witness to travel more than 100 miles from the witness's residence or place of employment or business. Hence, service within the district in which the action is pending, even though it may be made upon the witness--as where the witness is temporarily passing through, or in for a visit, etc.--will not insulate the service from a motion to quash under subdivision (c)(3)(A)(ii) if the witness resides and works elsewhere and the elsewhere is more than 100 miles from the courthouse. To make the matter all the more critical, the contempt provision of subdivision (e) says that obedience of the subpoena is excused if the geographical limits of subdivision (c)(3)(A)(ii) are exceeded.

If the witness's residence or employment is more than 100 miles from the place of trial but nevertheless within the state in which the trial court sits, the court can "command" the witness, pursuant to subdivision (c)(3)(A)(ii), to appear for the trial. But that takes a court order. If the subpoena is simply ignored by the witness, it would appear that no contempt punishment would lie under subdivision (e).

For these reasons, the geographical reaches of "service", as prescribed in subdivision (b)(2), may be misleading. If the subpoena is captioned out of the district court of the trial district, and is served on a transient witness within the district, all in conformity with subdivision (b)(2), the subpoena can apparently be disregarded by the witness nevertheless, and safely, if it turns out that the witness lives and works more than 100 miles from the courthouse. The reason once again is that if the witness disobeys the subpoena, contempt will apparently not lie under subdivision (e). And if a motion is made under subdivision (c)(3)(A)(ii) to "quash or modify" the subpoena, the court, according to that provision, "shall" grant the motion.

Perhaps the "shall", if used in conjunction with the "modify" in that situation, would give the court, even in a district more than 100 miles away from the witness's residence or employment, at least some measure of leverage to exact performance from the witness with a court order. (If a court order issues and is disobeyed, presumably the order will not be subject to the restrictions on the contempt punishment that subdivision (e) imposes on direct disobedience of the subpoena.)

Keep in mind that we are concerned here with a trial subpoena; that we are looking to get the witness into the courtroom to testify, not into a mere deposition session. If the witness lives and works more than 100 miles from the courthouse, and beyond the state in which the action is pending, can the witness be directed to attend? The answer is an apparent yes, but only if the requirements of yet another provision are met. The other provision is subdivision (c)(3)(B)(iii), which permits the court to direct such distant attendance on the special showing that adequate substitutes are not available and that hardship will otherwise result to the party who issued the subpoena. (See the discussion of that point in Commentary C45-16 below.)

Which court can issue such a direction? Subdivision (c)(3)(B) doesn't say. Subdivision (c)(3)(A), just preceding it, however, does. It refers to the court "by which" (which equals "from" which) the subpoena issued. If subparagraph (B) means to import this from subparagraph (A), then the court that is empowered to make the distant-appearance direction against the witness is the court from which the subpoena issued. Would that include any court from which

the subpoena issued? Suppose it issued from a court that is not the trial court, or anywhere near it, or any other court anywhere near the residence or employment of the witness; suppose the subpoena issued "from" a court hundreds of miles from the witness's base. Can that court make the necessary direction? If the subpoena issued "from" that court, and was served on the witness within the geographical area surrounding that court under subdivision (b)(2), that court would presumably have the in personam jurisdiction of the witness requisite to any kind of court order. If that court makes an order that requires something of the witness, whether an appearance at a designated place or anything else, it would be a foolhardy witness who would chance disobeying it.

In other words, while a subpoena requiring an appearance more than 100 miles from the witness's residence or employment may be a disobeyable item under the terms of subdivision (e) (the contempt provision), a court order issued by a court that has jurisdiction of the witness is not. We are apparently supposed to assume that any court from which the subpoena issued, if served on the witness while the witness is physically--though perhaps only transiently--present in the area surrounding that district has obtained the requisite jurisdiction of the witness, even if that area is a thousand miles from the trial court in one direction and the witness's residence and employment in the other. It would then be that court that would have the power to require the witness to travel to the trial court.

Clearly, under subdivision (b)(2), the subpoena can be served on the witness within the district of the subpoena's issuance. But does subdivision (a)(2) authorize the subpoena's issuance from a district merely because the witness is physically present there? Insofar as subdivision (a)(2) authorizes the issuance of a subpoena from the trial court, subdivision (b)(2) permits the service of that subpoena only in the area surrounding the trial court. How, then, do we get authority to issue a subpoena from the only court that would seem to have jurisdiction to make the witness do anything, which is the court in the area in which the witness is now present, if that court is a thousand miles from the trial court? When it speaks of a subpoena "commanding attendance at a trial", subdivision (a)(2) says that the subpoena "shall" issue from the trial court. Subdivision (a)(2) lists other courts from which a deposition subpoena may issue, but not a trial subpoena. When no deposition is involved, therefore, and the witness is sought only for the trial, and that witness is far away from the trial court, to which court is it that an application would be made, in the contemplation of subdivision (c)(3)(B)(iii), to have the witness ordered to attend the trial?

To make sense of these provisions, perhaps we have to find implicit authority, whether in subdivision (a), or (b), or (c), or (e), or some combination of them, to issue a subpoena "from" a court that is neither the trial court nor a deposition-connected court, but just a court in a district where the witness can be reached with process. That would at least furnish the party in pursuit of the witness a court that can lay hands on the witness under the service restrictions of subdivision (b)(2), so as to give the court jurisdiction to issue the directive contemplated by subdivision (c)(3)(B)(iii). One might be disposed to suggest that if, because of these issuance/service barriers, a subpoena can't do the job of making the witness travel in for the trial, then perhaps a separate action or proceeding of some kind, in the district court of a district where the witness may be found, can do it. But that would seem negated in that it is subdivision (c)(3)(B)(iii) that authorizes this distant-travel order, and that provision is built entirely around subpoena service, not independent proceedings. Back to square one.

Perhaps the villain here is subdivision (b) with its restrictions on place of "service". An argument can be made that the geographical restrictions on place of service contained in subdivision (b)(2) are only illusory, anyway; that service of the subpoena can be made on the witness anywhere in the country, and regardless of proximity to the issuing court, as long as it requires the witness to travel no farther than 100 miles from the witness's home or employment to the place of trial or deposition. The argument is fleshed out in Commentary C45-14 below, but the point should be kept in mind here, too, in considering the trial subpoena.

Subdivision (b)(2), speaking directly of where a subpoena may be served, has its own 100-mile provision. (Each of these 100-mile provisions, by the way, including the one that Rule 4 uses for summons service, is commonly known as the "100-mile bulge" provision in federal practice. See Commentary C4-31 on Rule 4 of the Federal Rules of Civil Procedure set.) The 100 miles under subdivision (b)(2) is measured from the place of the deposition, trial, hearing, etc. Since we're concerned in this part only with the trial subpoena, we'll restrict discussion to that.

The subpoena may be served anywhere within 100 miles of the trial courthouse. If it is, however, and it turns out that the witness lives and works more than 100 miles from the courthouse, the same problem arises as discussed above with service within the district itself: any hope of backing the subpoena with the contempt punishment--the only teeth that the subpoena has when used on a nonparty witness--is lost under the language of the second sentence of subdivision (e), which harks back to the language of subdivision (c)(3)(A)(ii). This means that if the witness lives and works more than 100 miles from the courthouse, the witness has an excuse for disobedience, and never mind that the subpoena was served on the witness while the witness was physically within the 100-mile bulge around the courthouse.

Dwelling on subdivision (c)(3)(A)(ii) for a moment, note that it speaks of the witness having to travel more than 100 miles "from the place where that person resides, is employed or regularly transacts business". The word "or" in that quotation was probably intended to be "and". It was probably intended to say that if the courthouse is within a 100-mile radius of any of those places, compliance is mandatory.

Suppose, for example, that the action is pending in Manhattan, in the Southern District of New York. The witness lives in Poughkeepsie, within 100 miles of the courthouse, but commutes to work in Albany, which is substantially more than 100 miles from the Manhattan courthouse. Can the witness disobey the subpoena, on the authority of subdivision (e) as applied to subdivision (c)(3)(A)(ii), because while residing within 100 miles of the courthouse, the witness works more than 100 miles from it? Compliance ought to be obligatory in that situation, but in the linguistic structure of subdivision (c)(3)(A)(ii) that would require an "and" rather than an "or". As it stands, the language suggests that the witness is free of compliance if the courthouse is more than 100 miles away from the residence or the employment. If intent, which in this case seems clear enough, is allowed to control language, the "or" should be read as "and", and witnesses should be promptly warned by case law that if the courthouse is within 100 miles of either residence or employment, compliance is required and contempt under subdivision (e) will be ready to back it up.

Of course, subdivision (c)(3)(A)(ii) has a cross-reference of its own to make. It refers to subdivision (c)(3)(B)(iii), which in turn allows the court to "order [the] appearance" of the witness at a place beyond the 100-mile bulge. Under this series of cross-references, then--subdivision (b)(2) and subdivision (e) referring to subdivision (c)(3)(A)(ii) and subdivision (c)(3)(A)(ii) referring in turn to subdivision (c)(3)(B)(iii)--it may be possible to arrive at the conclusion that everything comes back into the court's hands anyway, including a power in the court to direct a witness to travel far to testify at a trial. But if that's so, Rule 45 goes about saying it in oblique fashion. Key points are made by indirection rather than head-on. And Rule 45 on subpoena service, like Rule 4 on summons service, is not some obscure provision hiding in a corner of the Federal Rules of Civil Procedure with an occasional guest dropping by. Rule 45 is a daily fundamental in civil trial practice, and yet it sometimes appears to require at least a college minor in mathematics just to figure out safely what court to issue the subpoena "from" and where to effect its service with some assurance that the subpoena will be backed by the contempt sanction if it should be disobeyed.

While some attorneys report that even subpoenas served on nonparty witnesses by a technically improper method,

or beyond their proper geographical scope, are usually complied with by nonparty witnesses without objection, the attorney who wants to be secure about the force that backs the subpoena should not be relying on voluntary compliance--on the simple "in terrorem" effect of a subpoena. The attorney should be able to assume that if the subpoena is disobeyed, contempt will be available.

The attorney who effects service of the subpoena within the surroundings of the trial court instead of the witness's residence or employment, or who has any uncertainty for any other reason about whether the witness will show up at the courthouse, had best have taken the precaution of deposing the witness before trial. And if the witness is truly a key one, but also an uncooperative one, the attorney, even before commencing the action, would do well to consider, under 28 U.S.C.A. § 1391, whether the venue of the action might be set in a district in which, or within 100 miles of which, the witness's residence or employment lies.

The third alternative stated by subdivision (b)(2) for service of a trial subpoena is anywhere in the state in which the trial court is sitting, as long as it is shown that a court of general jurisdiction in that state would have such statewide subpoena power. But here, too, the invitation may be misleading. Like the earlier parts of subdivision (b)(2)--those allowing service in the district or within the 100-mile bulge--this one, too, is subject to clauses (A)(ii) and (B)(iii) in subdivision (c)(3), and to the second sentence of subdivision (e). There may be a slight benefit in this service-in-the-state situation, however. Under subdivision (c)(3)(A)(ii), attendance can be compelled from anywhere within the state in which the trial is taking place even if it exceeds the 100-mile measure from the courthouse, and whether state law so provides or not.

If some special federal statute should provide for nationwide service of a subpoena in the particular case, the statute by itself would permit such service without further dependence on subdivision (b)(2), as the latter itself acknowledges. But be wary of any restriction the special statute itself may have. Section 1984(c) of 38 U.S.C.A., for example, permits nationwide service of a subpoena in suits involving veterans' insurance, but insists on court permission if the service is to be made more than 100 miles from the court.

Service of a U.S. subpoena on an alien outside the country is a nullity, but service outside the country on a United States citizen is permissible under a special, albeit rarely used, statute, § 1783 of Title 28, discussed in Commentary C45-17 below.

C45-14. Territorial Reach of Subpoena; Where to Serve Deposition and Pretrial Production Subpoena.

Subdivision (b)(2), discussed in the prior Commentary as it applies to the trial or hearing subpoena, applies also to the deposition subpoena and to the subpoena that seeks the pretrial production of documents or other intangibles or an inspection of premises. These "pretrial" subpoenas, if we may call them that as a convenient handle, are subject to similar but not identical restrictions. They also involve, necessarily, less tension than the trial subpoena does, for the obvious reason that time is not as tight, but in point of geography they pose some special questions.

The areas within which the pretrial subpoena may be served under subdivision (b)(2), also as discussed in the prior Commentary, are the same or similar to the three alternative areas that the provision supplies for the trial subpoena:

(1) anywhere within the district of the court "by which" the subpoena is issued; or

(2) anywhere within a 100-mile radius of the site selected for the deposition, production, or inspection; or

(3) anywhere within the state containing that site.

It is necessary to issue the subpoena in the name of a distant (from the place of trial) district court whenever the witness from whom testimony or a document or other tangible is sought can't be reached within any of the three enumerated areas as measured from the trial court. But that happens often enough. In the common situation, for example, well known under prior Rule 45 as well, in which the witness resides hundreds or thousands of miles from the trial court and will not travel "in" voluntarily or otherwise cooperate, the attorney in need of the witness's testimony or documents has little choice but to travel "out" to the witness's base and subpoena the witness to a deposition there. That is still generally true, but, at least in respect of the trial, there now does appear to be a way, under a very special showing, to have the court direct the witness to travel "in". That's where the court--in the witness's (not the trial court's) area--has been prevailed on to apply subdivision (c)(3)(B)(iii), a matter discussed in Commentary C45-16 below.

That should of course be rare, so that there is the comfort of knowing that some of the problems we now discuss will arise only in unusual situations.

In seeking out the proper district from which to issue a pretrial subpoena--when the witness is not amenable to service within the stated areas measured from the trial court--the attorney should be careful to choose a district whose geography fully satisfies not only subdivision (b)(2), which governs place of service of the subpoena, but also subdivisions (c)(3)(A)(ii) and (e), if that is at all possible. The latter two references (elaborated in respect of the trial subpoena in the prior Commentary) clarify the importance of seeing to it that the site of the deposition or production is within 100 miles of the witness's residence or place of employment or business. No contempt backs the subpoena unless it is.

Technically, for example, under subdivision (b)(2), the subpoena can be served on the witness anywhere within 100 miles of the place the attorney has selected for the deposition, but in selecting that place the attorney had best assure that it is within 100 miles of the witness's residence or employment. Suppose, for example, that the action is pending in the federal district court in Boston, Massachusetts, and a party's attorney wants to depose a witness who lives in Albany, New York, more than 100 miles from Boston. If the attorney happens to be able to serve the witness in Philadelphia, where the witness is attending a convention, the attorney may be tempted to issue the subpoena in the name of the district court for the Eastern District of Pennsylvania, which embraces Philadelphia, and schedule the deposition to take place in that area. But that subpoena can apparently be disobeyed with impunity if the witness both lives and works in Albany. See subdivisions (c)(3)(A)(ii) and (e).

Perhaps the subpoena in that example should be issued under the name of the district court of the Northern District of New York, which embraces Albany. That would satisfy the two cited provisions, which seek to assure the witness's convenience by requiring the deposition or production to be within 100 miles of the witness's base. But here is another enigma under this peculiar amendment of Rule 45. If the Northern District of New York is selected as the issuer court, as it should be, isn't the subpoena restricted to service only in the Northern District of New York, or within 100 miles of Albany, or somewhere in New York State, under the three alternatives for service authorized by subdivision (b)(2)?

One might argue that it is, but the most reasonable construction of subdivision (b)(2) in the example just used, where the deposition or production has been set for a site within the subdivision (b)(2) boundaries as measured from Albany, is to read the provision as permitting service of the subpoena on the witness anywhere, even if the "anywhere" turns out to be Philadelphia, St. Louis, or Anchorage. Any other construction would stultify Rule 45 and its geography altogether by enabling a witness to avoid the subpoena just by remaining outside the witness's home state and beyond 100 miles from the witness's own residential and employment base. That was manifestly not the intention of subdivision (c)(3)(A)(ii), which is referred to explicitly by subdivision (b)(2).

That explicit reference ought to be taken as authority to effect service of the subpoena anywhere at all, within or without--and even far without--the boundaries explicitly listed in subdivision (b)(2), as long as the performance that the subpoena calls for satisfies the convenience standards of subdivision (c)(3)(A)(ii). The latter is concerned not with the distance from the place of service to the deposition site, but with the distance from the place of residence or employment to the deposition site.

A balancing of all relevant provisions together, in other words, suggests that it is really not subdivision (b)(2) that sets the boundaries for service. In reality there are no boundaries on service, at least not as long as service is made in the United States. The most meaningful boundaries are the residential and business boundaries that enclose the site of the deposition or production--the boundaries contained in subdivision (c)(3)(A)(ii). If that site is properly selected, it should make little difference where the witness may be reached with the subpoena. A construction any more rigid than that would allow subdivision (b)(2) to undermine rather than implement the aims of subdivision (c)(3)(A)(ii).

One may point also to the first alternative offered by subdivision (b)(2) as a proper place for service: any place within the district of the court from which the subpoena issued. The trouble with this is that it harks back to subdivision (a)(2) and its list of proper "issuance" districts. If the issuing attorney, in choosing the district from which to issue the subpoena, tries to satisfy the 100-miles-from-the-witness's base rule contained in subdivision (c)(3)(A)(ii), but the witness can't be served within that district at the present time, should the attorney issue the subpoena instead from a district within which the witness can be presently served, even if it is not within 100 miles of the courthouse, or of the witness's residence or employment, or within the state of either?

This seems to be a problem created by the interweaving and apparent interdependence of these several provisions. Under the prior Rule 45, a simple statement was made, in the provision governing the pretrial subpoena, old subdivision (d)(2), that the deposition (with its adjunct of a document production if documents were also sought) could be initially set up at any place within 100 miles of the place where the witness was "served". No such site-setting measured from the place of service is provided for under the new Rule 45. Trying to set the site so as to pick out the issuing court under subdivision (a)(2), figure out where to make the service under subdivision (b)(2), and satisfy the ultimate requirement of seeing to it that the site selected does not exceed the witness's convenience limitations set by subdivision (c)(3)(A)(ii), creates a circle from which escape is difficult.

It will be difficult, that is, if subdivision (b)(2) is narrowly construed in point of geography, i.e., construed as imposing an outright limit on the court's jurisdiction. If the courts will recognize this occasional geographical dilemma faced by a party using a pretrial subpoena, perhaps they will withhold the "jurisdictional" label from deviations under subdivision (b)(2) and will regard jurisdiction as having been acquired as long as the witness was properly served anywhere in the country. The matter can then be left to the more flexible realm of the court's

discretion, which will much better comport with rearranging things to satisfy the rule's more positive indications, such as those about the witness's convenience set forth in subdivision (c)(3)(A)(ii). As long as the courts do not affix a "no jurisdiction" label to the proceedings, and they have the subpoenaed person in front of them, the courts can proceed to implement Rule 45 with an application of its clear intentions.

Avoidance of a "jurisdictional" stamp should be possible simply by taking account of Rule 45's unfortunate ambiguities, manifest in the quadruple by-play among subdivision (a)(2), subdivision (b)(2), subdivision (c)(3)(A)(ii), and subdivision (e)'s second sentence. A court can't be expected to implement the ultimate aim underlying all of them if its hands are tied by a rigid jurisdictional stamp appended to just one of them.

Another thing the courts will of course have to guard against is putting a nonparty witness to the burden of appearing in a distant district just to respond to a motion, such as a motion to compel testimony or production or a motion to punish for contempt. Those motions have to be made to the court from which the subpoena issued. If other jurisdictional questions are resolved in favor of allowing a pretrial subpoena issued from any district court within the requisite range of the witness's residence or employment to be served anywhere in the country, then even if the witness is served farther than 100 miles from that place, the burden of responding to a motion in the district of issuance is once again mitigated by the proximity the court of issuance will have to the witness's base, if not to the place where the witness had to be served.

If these points are well taken--indeed, whether they are or not--the attorney should always make it a point to set the deposition for a place within 100 miles of the witness's residence or employment, without regard to what subdivision (b)(2) itself purports to provide about where the subpoena can be delivered to the witness. Reading subdivision (b)(2)'s own geographical prescription as rigidly preemptive of place of service can otherwise become a prescription for futility. The fact that subdivision (b)(2) explicitly makes itself "subject to" subdivision (c)(3)(A)(ii) should be warrant enough to avoid such rigidity.

This would seem to be corroborated further by the fact that all Rule 45 permits by way of method of service is the personal delivery of the subpoena to the witness. (This problem is discussed more fully in Commentary C45-9 above.) A witness who is not available for a "delivery" within the geographical confines set out in subdivision (b)(2) would be able to flout the judicial process of subpoena altogether, even if the subpoena calls for performance well within the 100-mile circle that surrounds the witness's home and employment.

One may even argue, in fact, that subdivision (b)(2)'s statement of where service can be made is superfluous, and even damaging to the revisors' own intent. A brief statement could have been included in subdivision (b)(2) to the effect that service anywhere is okay, as long as the deposition or production of which it gives notice is scheduled to take place no farther than 100 miles from the witness's residential or employment base. That's what subdivision (c)(3)(A)(ii) requires, anyway, and the cross-reference to it contained in subdivision (b)(2) seems to do nothing so much as cancel out subdivision (b)(2)'s own pronouncement in deference to the geographical pronouncement of subdivision (c)(3)(A)(ii). And then there's the second sentence of subdivision (e) to put the icing on the cake: unless the geography of subdivision (c)(3)(A)(ii) is satisfied, it says, there can be no contempt for the disobedience of the subpoena, which means that in some cases a subpoena served literally where subdivision (b)(2) prescribes can be ignored as a nullity by a canny witness.

A comforting factor, once again, is that problems of this kind should arise only in a rare case. In all but the unusual one the witness will be amenable to service within the witness's own bailiwick, and when that's the case the district

court in that area should be the one from which to issue the subpoena. The surrounding area will then be one that satisfies the witness's convenience requirements, as established by subdivision (c)(3)(A)(ii), as well as an area within which the subpoena can be "served", as prescribed by subdivision (b)(2).

In the "rare" case, however, in which the witness is physically servable only beyond the areas described by subdivision (c)(3)(A)(ii), the attorney may have to use some imagination, especially if the courts do not accept the proposition, stated above, that service should be permissible anywhere as long as the contacts requirements of subdivision (c)(3)(A)(ii) are satisfied. What district should the subpoena issue "from" in that case? Subdivision (b)(2) allows service anywhere within the district of the issuing court, and one of the issuing courts subdivision (a)(2) allows is the one in the district "designated by the notice of deposition [see Rule 26(b)(1)] as the district in which the deposition is to be taken".

Should the attorney schedule the deposition to take place within the district in which the witness can be served, even if that district does not satisfy the contacts requirements of subdivision (c)(3)(A)(ii)? If the witness disobeys, citing the want of contacts as an excuse for disobedience under subdivision (e) (the contempt provision), the court should at least have jurisdiction of the witness, who was, after all, physically served in the district. With that jurisdiction, wouldn't the court, while not invoking contempt, be able to direct the witness to appear within the witness's own district, allowing the parties to reschedule the deposition for that district and leaving all further jurisdiction, for follow-up orders as needed, to the court of that district?

We put these matters as questions, because even those of us who have spent much time and effort trying to analyze these interweaving strands of Rule 45 can't offer any guarantee to the lawyer who gets tied up in the strands.

If the witness is away, and can't be served within the witness's own home or employment base, the best idea is of course to wait until the witness returns home and then issue the subpoena from the home district court and serve it in that district. That would answer and satisfy everyone: (a)(2), (b)(2), (c)(3)(A)(ii), and (e). But that can only be done if time is available, which is something the attorney who wants to use the subpoena has to figure out. And if the witness shows no sign of returning, the waiting solution won't do and the problems we have been dwelling on are right back with us. (Perhaps, if the geographical restrictions imposed by the cited clause (ii) prove an absolute barrier to nonparty discovery in a given case, the seeking party can resort instead to the plenary action previously authorized by Rule 34(c) explicitly and still apparently available as an alternative to simple subpoena service. See Commentary C45-6 above. The action should help for a pretrial discovery, but for reasons of time would seem to offer less hope if the discovery is needed for an impending trial.)

As applied to the pretrial subpoena, subdivision (b)(2)'s reference to the "state" as an alternative area for subpoena service means the state in which the deposition or production is scheduled. It offers with that permission a further geographical option. If the subpoena issues from and sets up a deposition or production in the Southern District of New York (Manhattan), for example, where the witness lives or works, the subpoena can be served on the witness while the witness is temporarily in Buffalo or Rochester, cities that are more than 100 miles from New York City but still within New York State.

At this point another question arises. When subdivision (c)(3)(A)(ii) seeks to have the court relieve a nonparty from having to travel "more than 100 miles from the place where that person resides [etc.]", what exactly does it mean? Does it mean to assume that the person will be starting out from home to go to the site of the deposition (production, etc.)? That is apparently its assumption, or else we have another calculus to go through, measuring

distances not from residence or employment, as the cited provision does, but from the point of actual service or from yet some other point.

On whether a corporation is amenable to service of a subpoena--i.e., is "servable"--at a given geographical point, the most appropriate test to apply is the usual "corporate presence/doing business" test evolved for personal jurisdiction and summons service. See Commentary C4-28 on Rule 4 of the Federal Rules of Civil Procedure in this U.S.C.A. set.

C45-15. The 100-Mile "Bulge".

We can center here on a few observations about the 100-mile "bulge" provision mentioned several times in Rule 45 and noted at a number of points in the prior Commentaries.

The reason for the 100-mile limitation is of course historic, premised on the slowness of transportation years ago and the great inconvenience and expense to the witness to have to go far to attend a trial or deposition. Apparently a civil action was not deemed sufficiently important to impose this burden on a witness. (The criminal case has been heard to sound a higher call, and the subpoena in a criminal action can go all around the nation with nothing like the complications of Rule 45. See Rule 17(e)(1) of the Federal Rules of Criminal Procedure.)

Times have obviously changed, and it is often easier and more comfortable today to cross a continent than it was back in colonial times to cross a county, but arguments on that score are best left to the rule-makers and the legislature. The 100-mile restriction exists, and our purpose here is the practical one of how to make do with it.

The better rule is that the 100 miles should be measured by air rather than by surface transportation with its twists and turns, i.e., that it should be measured "as the crow flies". The more recent decisions so hold. See, e.g., SCM Corp. v. Xerox Corp., 76 F.R.D. 214 (D.Conn.1977), holding that the measure should be the same as that applied to the 100-mile bulge used to measure personal jurisdiction in Rule 4. See Rule 4(f). The SCM case has been followed elsewhere, see, e.g., Hill v. Equitable Bank, 115 F.R.D. 184 (D.Del.1987), and the Second Circuit cited it in observing, on an analogous point, that a debate on how to apply a surface transportation measure, and whether that or an air measure is best, is best avoided. United States v. Ofarril, 779 F.2d 791 (C.A.2 1985) cert. denied 475 U.S. 1029, 106 S.Ct. 1231 (1986).

C45-16. Requiring Nonparty to Appear in Distant Trial District.

Among the parties themselves, there is the general assumption that each will appear at the trial, which relieves Rule 45 of any special concern about that. If it should for any reason become necessary to have a party appear at the trial who it turns out will not appear voluntarily--including a person who is in the control of a party, which sweeps the corporation under this category as well--the court has all the leverage it needs to compel the party's appearance. If the court directs the attendance of the party, disobedience can be compelled with something the seeking party would enjoy even more than the invoking of the contempt penalty: a default judgment against the recalcitrant party. Hence Rule 45 shows little tension when a party is involved.

It more than compensates for that relaxation by working hard, and often, on the nonparty witness, addressing at several points the protections erected for the convenience of nonparties and then adding a provision that allows even the nonparty to be directed to travel far to the courthouse, apparently even across the country if need be, but only on a very strong showing. That provision is subdivision (c)(3)(B)(iii), but it again takes some background to lead up to it. (One comes away from the language of the amendment and from the Advisory Committee's oblique notes on it with the impression that on this point the committee wanted the travel-far authorization, but, lest it prove a red flag in some quarters, the less said about it the better. A more head-on approach to this key matter, with a more detailed statement of intent and a few good examples, would have been more helpful to bench and bar.)

When a special statute authorizes nationwide service, a nonparty witness served anywhere in the country can be compelled to appear in the action even if it entails a trip of thousands of miles. There may even be a statute permitting a United States citizen to be subpoenaed home from a foreign country. Such statutes are rare, however (see Commentary C45-17 below). The path to compelling an unwilling nonparty witness to appear at a distant place of trial, even from point to point within the United States, is a cluttered one in Rule 45.

If the witness lives or works, and is servable, within the trial district, or within 100 miles of its courthouse, or within the state in which the trial court sits, Rule 45, now and under its pre-1991 amendment form as well, makes the compelling of an in-person appearance easy enough. The subpoena will generally do the job readily. When the witness is beyond that range, and won't leave it to appear at the trial voluntarily, the dilemma of securing the witness's testimony for use at the trial has been traditionally resolved through the deposition route. The seeking attorney has to go to the witness's base, exploiting the district/100-mile-bulge/state alternatives as measured now from the witness's residence or employment instead of the trial courthouse.

That produces a deposition, and it is the deposition that the attorney relies on at the trial.

The deposition is often a poor substitute for the live testimony of the witness before the jury or judge. The questions and answers are read by others, sometimes even actors, with no opportunity to observe demeanor, etc., but the geographical restrictions on the civil subpoena have nevertheless made the deposition the main alternative. It is still likely to be the alternative, with increasing help from the video tape, but there is at least a crack in the door of the new Rule 45 through which a court can force the witness to travel to a courthouse located wholly beyond the witness's own residential and employment base, and without help from a statute. It takes quite a showing to get to that point, but the authority for it appears in clause (iii) of subparagraph (B) of paragraph (3) of subdivision (c). It's quite a mouthful just to cite the provision--we may henceforth call it clause (iii) without necessarily including its superstructure--and other parts of Rule 45, as several times already noted, have to be negotiated before one arrives at it.

It takes a court order to compel this distant appearance under the terms of clause (iii), and the order can be granted only "if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.... "

In the Advisory Committee note on clause (iii) there is no explicit statement that this is the provision that provides for ordering a witness to give in person testimony at a distant place of trial. The note just assumes that it so provides, addressing explicitly only the fact that the clause requires the court to see to it, in what would amount to a conditional order, that the witness is given "reasonable compensation" for the effort.

Clause (iii) of subdivision (c)(3)(B) interplays with clause (ii) of subdivision (c)(3)(A). The latter assumes that a subpoena can direct a witness to attend a trial held beyond the stated limits measured from the witness's own base. So assuming, it then requires the court to quash or modify a subpoena that contains such a direction, but "subject to the provisions of clause (c)(3)(B)(iii)". In that "subject to" reference is the link that apparently permits the court to order a distant appearance.

Reading the language of clause (ii) of subdivision (c)(3)(A) strictly, it might be urged that the clause's assumption that the witness may have been subpoenaed to a place more than 100 miles from the witness's residence or employment relates only to the state in which the trial court sits. Under subdivision (b)(2), statewide service of the subpoena is permitted as long as the state courts in that state have such statewide subpoena powers (assume they have), and the more-than-100-miles situation contemplated by clause (ii) of subdivision (c)(3)(A)--the argument would run--relates only to this in-the-state service provision of subdivision (b)(2). An example of this would be where the trial court is in New York City in the Southern District of New York but the witness resides and works in Buffalo, well beyond 100 miles from the courthouse but nevertheless within the state. The witness would be properly served in Buffalo under subdivision (b)(2) in that situation, but would presumably be entitled to a quashing of the subpoena under clause (ii) of subdivision (c)(3)(A) unless the court acts to suspend the latter's geographical limits with an exercise of its powers under clause (iii) of subdivision (c)(3)(B).

Is that the sole assumption of subdivision (c)(3)(A)(ii)--the assumption that the exceeding of the 100-mile limit has occurred only because the subpoena was served at some more distant point within the same state? If it is, one may conclude that the court's power to order the 100-mile limit exceeded under clause (c)(3)(B)(iii) applies only if the further travel is to be directed to some other place in the same state.

The answer to that, however, is that clause (c)(3)(A)(ii) does not have to rely on clause (c)(3)(B)(iii) for an authorization to extend travel within the state; the final segment of clause (c)(3)(A)(ii), its "except" clause, itself authorizes that. The "except" clause is itself "subject to the provisions of clause (c)(3)(B)(iii)", but this is done just to assure that the court will be authorized to include conditions and to direct compensation for the witness who has to travel far even from one point to another within the state. (Clause [iii] is the provision that contains the conditioning and compensation authorization.) In authorizing the court to make a conditional order directing the witness to appear at a distant point, clause (iii) does not recite anything about being limited to points of travel entirely within a single state. It appears to apply to the entire federal court system, which means the entire nation.

Buttressing that conclusion is the very demanding showing that must be made under clause (c)(3)(B)(iii) before a court will order a nonparty to travel more than 100 miles to attend the trial. It must be shown that the party seeking the testimony has "substantial need" of it and that the need cannot be met "otherwise" than by the witness's in person testimony except with "undue hardship". Lawyers know that formula from Rule 26(b)(3), from which Rule 45 borrowed it. It's the formula that lifts immunity from trial preparation materials and requires discovery of the materials. Would so demanding a formula be settled on just to spare a nonparty the burden of traveling from one place to another within the same state? Was the provision drafted only with Alaska, Texas, California, Montana, and perhaps a few other very large states in mind? There's nothing at all in the Advisory Committee notes to suggest that. A more logical explanation is that the formula was used with the whole country in mind.

One might tentatively cite, as pointing in the other direction--as pointing to the conclusion that the court's power under clause (iii) to order a distant appearance does apply only to travel within the state--the brief statement at the

very outset of the Advisory Committee's notes, where, in enumerating in summary form the main features of the 1991 amendment, the committee lists as number four a purpose "to enable the court to compel a witness found within the state in which the court sits to attend trial.... "

Reading that revisors' statement alone, it might appear to mean the state in which the trial court sits. But that's not what it says, and, more importantly, that's not what the rule itself says in the several parts of subdivision (c)(3) that relate to the matter. The court referred to in subdivision (c)(3) is the court that issued the subpoena--the court to which a motion to quash or modify would be made under subdivision (c)(3)(A)--which would be the court "from" which the subpoena issued, most likely the court in the district or state in which the witness was served under subdivision (b)(2). It is that court which has jurisdiction of the witness and hence it is obviously only that court which can direct the witness to do something. Among the things it can direct the witness to do under clause (iii) of subdivision (c)(3)(B) is leave the state, travel to the distant place specified by the court, and give testimony there.

If the witness is to be subjected to such a direction, as already noted, it will take quite a showing, and on this point the language of clause (iii) is clear. The showing must be of "substantial need" of the testimony and the unavailability of a substitute for the witness's live testimony except with "undue hardship". Among the supportive findings would apparently have to be that a deposition would not do the job, and in that regard there are likely to be many arguments under Rule 45. If the witness is a strong one, the attorney who would be helped by the testimony would want the witness before the jury in person. That attorney should make every effort to obtain the witness's attendance without having to rely on a subpoena. Bring the witness in on a path of roses, well compensated for lost time and effort as well as transportation, and put up comfortably for the entire stay required. Only if the witness resists such blandishments should the subpoena, and a court order as a follow-up under subdivision (c)(3), be relied on. (And of course the seeking attorney, hedging against a court's potential refusal to direct such distant travel, must be sure to have taken the precaution of a full deposition of the witness.)

Subdivision (c)(3)(B)(iii) refers to a witness having to travel "more than 100 miles to attend trial". We now ask, 100 miles from where? Is the residence or employment, as used in subdivision (c)(3)(A)(ii), to be the measuring point here as well? Perhaps it isn't. But if it isn't, then what is?

Shall the 100 miles of clause (iii) be measured simply from where the witness was at the moment of service? If the witness was 1000 miles from the courthouse at service time, but lives only 200 miles away from it and returned home after the subpoena was served but before its return day, that construction, as well as assuming a geographical scope of subpoena service broader than what subdivision (b)(2) contemplates on its face, would have the court measuring travel compensation not from residence to trial court (200 miles here), but from point of service (1000 miles). Or should the 100 miles be measured from where the witness happens to be when now required to stop present activity and go off to the trial? If the witness happens at that moment to be on a mission some 3000 miles away, that construction would suggest compensation for a 3000-mile trip, despite the fact that the witness lives only 200 miles from the courthouse.

The rule has not made things very clear. Suppose the application for a distant-travel order is now before the court, and, to simplify matters--if that's at all possible under Rule 45--assume the court has jurisdiction of the witness, however that may have come about. The court is now asked to make an order to assure compensation for the travel. From what point should the court now measure the required travel? From the place where the witness was served two weeks ago, although the witness has now left that place and is not returning to it? From the place where the witness happens to be staying now, when the subdivision (c)(3) motion is being argued? From the place from which the witness will be starting out to go to the courthouse at trial time? A reasonably fixed starting point is the

residence or employment referred to in clause (c)(3)(A)(ii), but is a fixed point required for clause (c)(3)(B)(iii)?

Perhaps the best construction of all is that clause (c)(3)(B)(iii), by not specifying its own measuring point, does not care to "fix" one at all, preferring to stay flexible enough to permit the court to consider all relevant factors sui generis and base compensation on what strikes the court as reasonable on the particular facts. If it is shown, for example, that the witness will be on some mission in Seattle when required to break away and go to the trial court in Atlanta to satisfy the subpoena, the court can note that, and direct compensation accordingly. Since clause (c)(3)(B)(iii) orders will not be granted for the mere asking, but will require a special showing of need, perhaps most consistent with the court's obligation to assure that this need has been demonstrated is a concomitant power in the court to shape a clause (iii) order without fetters from any rigid directive about where the 100 miles has to be measured from.

It will have to be left to case law to determine whether the standards of clause (iii) have been met in the subpoena context. There is a large body of case law on Rule 26(b)(3), and its similar standards, that will offer some guidance, but only some. The requisite findings made under Rule 26(b)(3) require the production of materials, while such findings made under Rule 45(c)(3)(B)(iii) require a nonparty witness to travel a great distance to give testimony in person. The main indication of underlying intent, in any event, is that it must be a very special case indeed to warrant an order directing the witness to travel far to the trial, and the court must of course see to it that the witness is "reasonably compensated" for the trouble.

The compensation need not be directed in advance, but it will usually be the best time for it. Enough should be directed in advance, in any event (even if the rest is saved for later), to cover any actual travel expenses the witness may confront, especially if the witness's own resources are limited.

C45-17. Serving U.S. Citizen Outside Country.

Section 1783 of U.S.C.A. Title 28 provides for the service of a subpoena (including a subpoena duces tecum) outside the country, but only on a person who qualifies as a "national or resident" of the United States. It doesn't apply to an alien who does not have the requisite United States residence. Subdivision (c)(2) of Rule 45 cites and leaves entirely to § 1783 the matter of extra-national service.

While used only infrequently, and mainly in criminal cases at that, § 1783 does apply in civil actions when a proper showing is made. Treatment of § 1783 and its associated provisions is not part of our present mission. Since Rule 45 takes § 1783 as it finds it, we will do the same, but at least a few observations are in order.

The first is that a subpoena under § 1783 requires a court order. The new feature of Rule 45 that enables the attorney to issue a subpoena does not apply to the § 1783 subpoena.

A second is that even when the travel from one distant point to another that is directed of a nonparty pursuant to clause (iii) of subdivision (c)(3)(B) of Rule 45 is to be entirely within the country, the rule manifests great hesitancy and exacts a heavy showing. See Commentary C45-16 above. Its hesitancy can be expected to be all the greater, and hence the still heavier burden placed on the seeking party, when the travel the court is asked to direct is from a foreign country pursuant to § 1783. The attorney seeking testimony or the production of a document or other

tangible from such a witness will in most cases have to rely on the deposition and pretrial discovery devices, seeking implementation of them, or the likes of them, in the foreign country, through a commission or letter rogatory (see 28 U.S.C.A. § 1781) if necessary.

The § 1783 subpoena, in the rare case when it does issue, is backed by the contempt punishment under § 1784 of Title 28, including rem proceedings against the witness's local property as a spur to getting the witness to cooperate.

A reciprocal section, § 1782, along with part of § 1781, addresses the use of the United States district courts to aid discovery from persons in the United States when the discovery is needed by a foreign tribunal.

C45-18. Serving Parties with Notices of Subpoena; Proof of Service.

When a subpoena under Rule 45 is served on any person, and sets up a deposition (as opposed to a production or inspection), Rule 30(b)(1) of the Federal Rules of Civil Procedure requires that notices be served on the parties advising of the subpoena, including a designation of any materials the subpoena may require (as when it also contains a duces tecum clause). Since Rule 30 covers the point for a deposition subpoena, Rule 45 need not address it, and doesn't; the Rule 30 requirement of notice applies whether it is a party or a nonparty who is to be deposed.

But while the discovery rules (of which Rule 30 is part) cover the point for the nonparty witness who is to be deposed, they don't cover it when what is sought of the nonparty is a production of documents or other things, or an inspection of premises, unconnected with a deposition. (Production and inspection in the pretrial discovery segment of the Rules is governed by Rule 34, but, unlike Rule 30, Rule 34 applies only when the production or inspection is sought of a party.) Hence it falls to Rule 45, which now permits pretrial production and discovery from a nonparty witness independent of a deposition (see Commentary C45-6 above), to impose the notice requirement itself. This Rule 45 does in subdivision (b)(1). It requires that the other parties to the action be notified of any pretrial production or inspection subpoena. These notices can be served in the usual manner of within-the-action papers: pursuant to Rule 5(b), with ordinary mail being the most usual method.

Under prior Rule 45(d)(1), proof that these notices were duly served on the other parties had to be filed with the clerk before the clerk would issue the subpoena. Now, of course, the attorney does not have to seek the subpoena from the clerk; the attorney can issue the subpoena with no clerk application at all. Rule 45(a)(3). Hence a preliminary filing of proof of service of the notices is not necessary. And perhaps it will not be necessary to file proof of service of the subpoena at all, as where no issue is ever made of it. For this reason, while the amended Rule 45, in subdivision (b)(3), still provides for proof of service, it speaks of the filing only when the filing becomes "necessary", which may never happen.

Whenever the filing is undertaken, necessary or not, it consists of "a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service". Rule 45(b)(3). A form of proof of service appears as part of the subpoena form distributed by the federal courts when the 1991 amendment of Rule 45 took effect. So does a "declaration" by the person who served the subpoena, in fulfillment of the certification requirement.

Old Rule 45(d)(1), which addressed proof of service, was concerned with proof that the parties were notified of the subpoena process being undertaken, not with the act of subpoena service itself. It is not entirely clear, but the new Rule 45(b)(3) seems to be addressing proof of service of the subpoena. The Advisory Committee note states its belief that the former provision is being retained, and is merely being extended to apply to the trial as well as the pretrial subpoena. The Committee may have confused proof of service of the subpoena with proof of service of the notice that must be served on the parties advising of the subpoena, but the point should rarely prove urgent. Whichever it is, subdivision (b)(3) does not prescribe when proof of service must be filed, but only what it must consist of if some other provision or exigency requires its filing.

The significant thing about the proof of service requirement under old Rule 45 is that it had to be filed as a condition to the clerk's issuance of the subpoena. Under the new rule no proof of anything need necessarily be given to the clerk prior to the issuance of the subpoena, for the obvious reason that it is now the attorney who can do the issuing under Rule 45(a)(3).

The court "from" which the attorney issues the subpoena, see Rule 45(a)(2), is the one with which a filing of proof of service is made.

C45-19. Fees and Mileage.

If the person served with the subpoena is required to attend somewhere, the fee for one day's attendance plus mileage "allowed by law" must be tendered to that person. Rule 45(b)(1). The tender should be made "concurrently with the subpoena". Tedder v. Odel, 890 F.2d 210 (C.A.9 1989). If the person does attend and is then required to continue in attendance, the party in whose behalf the subpoena issued should make appropriate accommodation with the witness at that time. If the attendance to be continued is attendance at the trial, the court should be in a position to see to the accommodation, if necessary.

No fees or mileage need be tendered if the subpoena is issued in behalf of the United States or its officers or agencies. As the Tedder case shows, this applies only when the government or its agency or official is the issuing party, and not a mere conduit assisting in service of a subpoena being made in behalf of a private person.

Section 1821 of 28 U.S.C.A. provides for fees and mileage. At the present moment the fee for a day's attendance is $40 under subdivision (b) of § 1821. Subdivision (c) addresses mileage, providing that for travel by common carrier the actual expense for transportation "reasonably utilized" is allowed. For travel by private vehicle, the statute leaves the actual figures to be set by the Administrator of General Services, of whom inquiry has to be made if the presently applicable figures are not known.

Failing to tender the applicable sums in advance, with the subpoena, has been held to make the subpoena invalid. See, e.g., CF & I Steel Corp. v. Mitsui & Co., 713 F.2d 494 (C.A.9 1983). As the case also shows, however, the sum tendered for the mileage segment need only be "estimated". The subpoenaed person is on perilous ground, however, who disobeys the subpoena on a close argument about what the sum should be. Lawyers consulted by the witness should not counsel disobedience on such a pretext.

Many lawyers tender the money by check, which should pose no problem if the subpoena is not returnable until the

check has had sufficient time to clear. But if time is close, it is probably best to make the tender in cash, lest the witness be heard to argue that the money could not be used for the needed transportation because the check was not allowed enough time to clear. Again, however, a witness is taking a chance on a contempt penalty by playing things too tight on the money issue.

While the mileage computation should be that of the actual approximated distance the witness has to travel on a round trip to the point of testimony, deposition, production, inspection, etc., and that will usually be no more than the routine limits stated on subpoena service in Rule 45--within the district, or within 100 miles, or within the state of the issuing court--it has to be remembered that under the 1991 amendment of Rule 45 distances can more often exceed what they were before. Travel entirely within a state can be compelled under Rule 45(c)(3)(A)(ii), for example, and apparently from far beyond the state as well under Rule 45(c)(3)(B)(iii). See Commentary C45-16 above. Those increased distances are now part of the "mileage allowed by law" that subdivision (b)(1) of Rule 45 requires, and attorneys issuing subpoenas should be aware of it.

Often--but not always--the situations in which such extra distances are involved will be those in which the court is directing the travel on applications of clause (ii) of subdivision (c)(3)(A) or clause (iii) of subdivision (c)(3)(B). There the court can direct payment of the sums as part of its disposition of the application. But most of those situations also contemplate that a subpoena has already been served, and the issuer should be sure that appropriate mileage went with it. Else the witness may not even show up on the application, and be subject to no penalty for the failure.

Issues of proper witness and mileage fees seem to arise more often on applications to tax costs under 28 U.S.C.A. § 1920 after things are over than on motions that test the subpoena while things are still under way. Attorneys should be aware of that, too. That a case in which a court in its discretion has allowed substantial witness fees as part of a costs award--even actual expenses rather than just those enumerated in § 1821--does not mean that the attorney using that witness can tender anything at all in advance and expect to be able to tax it all as a cost afterwards.

If witness expenditures are expected to be heavy, and any context before the court--such as a motion for a subpoena to be served abroad on a U.S. citizen pursuant to 28 U.S.C.A. § 1783--offers an opportunity to have the court pass on the costs question, it is usually best to secure such preliminary approval before incurring the expense. See, e.g., Fleet Investment Co. v. Rogers, 620 F.2d 792 (C.A.10 1980). There is otherwise no guarantee that the sum actually paid will be recoverable later as part of the taxation of costs. It surely won't be if the court on such a later review finds the expense profligate.

The U.S. Supreme Court has held that a district court does have discretion to allow, as costs, witness expenses exceeding the bare fees and mileage expenses authorized by Rule 45, Farmer v. Arabian American Oil Co., 379 U.S. 227, 85 S.Ct. 411 (1964), but the Court admonished that this discretion should be "sparingly exercised" and in any event applied in light of the limited sums that Rule 45 contemplates.

Subdivision (c)

C45-20. Duty to Avoid "Undue Burden" on Subpoenaed Person; Sanctions for Abuse.

Certain parts of subdivision (c) have already been discussed, often and in detail. These are subparagraphs (A)(ii) and (B)(iii) of paragraph (3), provisions that play a key role in determining whether the witness can be compelled to travel far from the witness's home base (residence or employment) to give testimony or produce documents, etc. They became relevant in earlier discussions of related matters and had necessarily to be treated at those junctures. See Commentaries C45-13 and C45-14 above.

We now examine subdivision (c) in general, treating its other divisions. The whole subdivision is new, designed to protect subpoenaed persons in various ways.

The theme of the new subdivision (c) is sounded in its first paragraph, paragraph (1), which imposes on the attorney, or on a party acting pro se, the obligation of taking "reasonable steps to avoid imposing undue burden or expense" on the subpoenaed person. The provision then instructs as follows:

"The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee."

With Rule 11 of the Federal Rules of Civil Procedure on the books, authorizing sanctions in a variety of contexts generally, and Rule 26(g), authorizing sanctions specifically for discovery abuses, to which the abuse of a subpoena is even more analogous, the bar needs little reminding about how meaningful the threat of a sanction can be. Here Rules 26(g) and 11 were apparently not deemed sufficient from their own positions to cover sanctions for subpoena abuse, so the sanction power was conferred in Rule 45 explicitly.

Cases on the other rules will serve in some measure as guides to what would qualify as improper conduct under Rule 45. For good measure, however, the Advisory Committee calls attention to the widely and frequently cited New York case of Board of Education v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278, a 1975 decision from the New York Court of Appeals holding that the misuse of the subpoena process for purposes of harassment and the like supports an action for abuse of process.

With all those reminders in place, the issuers of subpoenas must be alert at every juncture to use the subpoena reasonably, with the court to determine what's reasonable on a case by case basis whenever the issue is brought to the court's attention. The matter is a sensitive one, and will be especially so during the early months or years of the new Rule 45's operation, while some of its more ambiguous parts are being tested.

We went through long discourses in Commentaries C45-13 and C45-14, among others, in determining how far a subpoena can go, geographically, to reach a witness. Rule 45 is not exactly lucid on the point, and yet it appears very lucidly to allow the court to impose a "sanction" on the issuer if the court should afterwards find that the subpoena went too far. Only after authoritative case law develops on some of the more ambiguous issues arising under Rule 45 should a court impose a sanction when a position taken by a party is a fair reading of the rule, even if the case law should ultimately resolve the point at issue the other way. The standard of subdivision (c)(1) is that the steps the subpoena user takes must be "reasonable", and only a step taken under a given provision that is so far beside the mark as to be patently unreasonable should invoke a sanction.

Suppose, for example, that the user of the subpoena, well aware of subdivision (c)(3)(A)(ii) and its directive that a witness should not be compelled to travel more than 100 miles from residence or employment to accommodate the subpoena, schedules the deposition for well within that range, but, unable to find the witness within that range at the time service is attempted, serves the subpoena beyond, while the witness is at a convention or on holiday. Is that a breach of the territorial restriction of subdivision (b)(2)? Isn't (b)(2) qualified by (c)(3)(A)(ii)? Or is the latter invocable only upon a motion to quash, so that the initial service of the subpoena beyond the borders listed in subdivision (b)(2) is altogether prohibited? Unless the subpoena is somehow served on the witness, though, how can a motion to quash under (c)(3)(A)(ii) come about in the first place? On the motion of a party before the subpoena is served? Or on the motion of the witness, which would necessarily contemplate that the subpoena has already been served?

All questions about that territorial range, and about yet other things under the new Rule 45, should have definitive answers from decisional law before attorneys who must guess at the answers start getting sanctioned for guessing wrong.

The court that has the sanction power under subdivision (c)(1) parlance is the court "on behalf of" which the subpoena was issued. That would mean, in subdivision (a)(2) parlance, the court "from" which the subpoena issued, or, in subdivision (c)(3)(A) parlance, the court "by which" the subpoena issued. For a rule that has sanctions to apply for a misreading, that's an awful lot of parlances. Perhaps the courts can recognize that the rule is no more perfect than the bar is, and that attorneys should no more be condemned for guessing wrong on an ambiguous matter than the rule should be for making the matter ambiguous.

The attorneys' fees that may be collected under subdivision (c)(1) include not only attorneys' fees incurred in resisting the subpoena, but also attorneys' fees incurred in seeking to collect attorneys' fees, loss of earnings, and whatever else may reasonably accompany the sanctions application. That appears to be the import of the Advisory Committee note, to the effect that "liability may include the cost of fees to collect attorneys' fees" incurred for breach of subdivision (c)(1).

And lest anything contained in Rule 45(c) be found to go in the other direction, cutting back on protections witnesses are entitled to under the disclosure part of the Federal Rules of Civil Procedure (Rules 26-37), the committee offers the statement that Rule 45 "is not intended to diminish rights conferred by Rules 26-37 or any other authority".

C45-21. Complying with Subpoena Duces Tecum; Objections by Subpoenaed Party; Motion to Compel.

It is subdivision (d), not (c), that bears the caption of "Duties in Responding to Subpoena", but the caption applies in equal or even greater measure to subdivision (c) as well. In prescribing "Protection of Persons Subject to Subpoenas", subdivision (c) also necessarily involves the subpoenaed person's duties.

It has already been observed (Commentary C45-6 above) that Rule 45 now allows a duces tecum subpoena to be served on a nonparty independently of a testimonial subpoena. Subdivision (c), while phrased to govern any person served with the subpoena, is especially concerned with the rights of nonparties. To assure, in fact, that the subpoenaed person be aware of these rights, the rule requires that the text of subdivision (c) (as well as of subdivision [d]) be set forth in the subpoena itself. See Rule 45(a)(1)(D).

If the person served with the subpoena has objections to it, the person (we will henceforth call that person the servee) must take some step, promptly, in order to avoid facing contempt for disobedience. One such step would be a motion to quash or modify the subpoena, under subdivision (c)(3), but that would entail the servee's taking the initiative of a court application, which, in the case of the nonparty servee, may make it necessary for the servee to retain an attorney. The servee can contact the other party--the adversary of the one issuing the subpoena--to discuss the matter, and perhaps that party will make the motion to quash or modify, at least where that party has its own basis for doing so. It has been held, for example, with respect to a documents subpoena, that if the party has no "personal right or privilege with respect to the materials subpoenaed", it will not have "standing" to make the motion. See Brown v. Braddick, 595 F.2d 961, 967 (C.A.5 1979).

Paragraph (B) of subdivision (c)(2), also speaking of a documents subpoena, has better news for the servee: The servee can shift the burden of making a court application to the party who issued the subpoena, merely by serving written objections on that party. (This procedure is carried over from what was subdivision (d) of the prior Rule 45, but there it addressed the duces tecum clause added to a testimonial subpoena, while in its present niche in subdivision (c)(2)(B) of Rule 45 it also addresses a duces tecum subpoena drawn independently.)

By serving written objections, the servee suspends its obligation to comply until after the court rules on the seeking party's motion, which would normally be a motion to compel. Drawing objections can also be a sticky business, of course, entailing the skill of an attorney and hence the use of one by the servee.

The time for serving such objections can be tight. If it is not, the servee should have ample time for drawing the objections. When the return time of the subpoena is more than 14 days away, the rule gives the servee 14 days for serving objections, but only 14 days. If the return day is 30 days off, for example, the servee must draw and serve the objections before the 14th day after service of the subpoena, which will give the party issuing the subpoena more time to consider its next step, which will usually be a motion to compel compliance. This is another good reason for the issuer of a subpoena to set a return day amply into the future.

The servee who must respond with objections within 14 days, but fails to, runs the risk of being held to have waived the objections. See, e.g., Deal v. Lutheran Hospitals & Homes, 127 F.R.D. 166 (D.Alaska 1989).

If the return day--the rule calls it the day on which "compliance" is required--is less than 14 days off, the objections, service of which shifts the burden of a motion from the servee to the issuer, can be served at any time before the return day. This may make things so tight for the issuer that the very mechanics of a motion to compel, invoking the time demands of motion practice under Rule 6(d), may automatically put off the return day, which can be bad news indeed if the subpoena is being used for the trial rather than just a pretrial discovery. Hence the lesson to the issuer once again: try to give ample notice of the return time whenever possible.

The motion to compel may be made "at any time" under subdivision (c)(2)(B), and in a pinch the motion can of course be brought on by order to show cause, with the court setting an abbreviated return time. The court may not be happy with the application, however, if it finds that the applicant has created its own tight spot by giving too little notice time, unnecessarily, in the first place. This can take its toll on how the court responds to the application.

The committee notes on subdivision (c)(2)(B) say that the reason that the period for serving objections is set at 14 days after service of the subpoena (it was 10 days under the prior rule) is to make it unnecessary to factor in intermediate weekends and holidays, which must be done (see Rule 6[a]) when the applicable period is less than 11 days.

Subdivision (c)(2)(B) explicitly requires that the motion to compel be made "upon notice to the person commanded to produce". This requirement, also carried over from the prior rule, is designed to assure that a nonparty servee be notified; it does not dispense with service of the notice of motion on the parties as well, which Rule (5)(a) of the Federal Rules of Civil Procedure requires for papers generally.

Attorneys often ask what means of service have to be used for motion papers (such as on a motion to compel compliance) that have to be served on a nonparty, such as the subpoenaed person in our example. Since that person has not been made a party by summons service, which would then easily invoke the usual intra-action methods of service such as ordinary mail under Rule 5(b), need the motion papers be served on the nonparty in the same manner as a summons, i.e., pursuant to Rule 4?

Some attorneys take the precaution of doing that, at least with Rule 4 methods that result in immediate notice and that don't entail any long delays (such as the mail method of Rule 4[c][2][C][ii] does). Unlike some state courts, the federal courts seem more concerned with whether the nonparty had reasonable and adequate notice of the motion rather than with the specific method used to give the notice. It can be argued that since the subpoena is a jurisdiction-getting paper, and was presumably served by delivery to the servee under Rule 45(b)(1), subsequent proceedings to enforce the subpoena, such as by a motion to compel or a motion to punish for contempt, are really ancillary to the subpoena and ought to enjoy whatever jurisdiction the subpoena service earned; that is, whatever form the application to compel takes (motion within the action, separate proceeding, etc.), the question on the ancillary application should be whether the nonparty has been given adequate notice of it, not whether the court has acquired a new "jurisdiction" of the nonparty distinct from the jurisdiction that was secured when the subpoena was served. As long as the method used to get the motion papers into the hands of the subpoenaed person appears reasonable in the context of the particular case and can in any event be shown to satisfy due process, the service should be held good. See and compare Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (C.A.8 1975).

The attorney in any doubt about this can avoid the problem by seeing to it, if it is possible, that personal delivery of the motion papers is made to the nonparty, which would satisfy Rule 4(d)(1) on summons service and, by analogy, Rule 45 in what it prescribes for service of the subpoena itself. (We have already noted that for service of the subpoena itself, personal delivery is the only recognized method. The reader should keep in mind that in the present discussion the service of the subpoena is not the issue, but rather the service of a motion that seeks to affect the already served subpoena in some way.)

The motion to compel supplied by paragraph (2)(B) of subdivision (c) should, like the motion to quash or modify set forth in paragraph (3)(A), be made to the court from which the subpoena issued. That will presumably be a court in a district convenient to the nonparty, see Rule 45(b)(2), and it is of course the nonparty whose convenience Rule 45 is most concerned about protecting.

If Rule 45 is relied on as the source of the motion, then the motion should of course be labeled as one made under Rule 45. But there is often an overlap between Rule 45 and its subpoenas on the one side and Rules 26-37 and its pretrial discovery devices on the other. This occasionally leads to the mislabeling of a motion, citing one provision

when one of the others is technically applicable. If what is meant is clear, and if there is no prejudice to any person, the court can disregard the mislabeling defect, and usually will.

If the court does grant the motion, and makes an order to compel, and the person against whom it is made is not a party, the court is required to ("shall") include in the order a provision for defraying the expenses that the production, inspection, copying, etc., may require. Ordinarily, the order should arrange for the defraying before the nonparty incurs the expense, but the Advisory Committee notes say that this is not a rigid rule; that costs, notably "uncertain" costs, can be left to future ascertainment and payment. Any postponement in payment must in any event consider the financial strength of the nonparty involved.

It has been held that a post-compliance application for costs is permissible, at least when the nonparty has reserved, in the course of the earlier proceedings, the right to make the later application; that to hold otherwise might very well interrupt the parties' discovery proceedings by compelling costs motions before costs can even be reasonably estimated; and that the seeking of costs should therefore not be restricted to the pre-compliance context of a motion to compel or quash. See United States v. Columbia Broadcasting System, Inc., 666 F.2d 364 (C.A.9) cert. denied 457 U.S. 1118, 102 S.Ct. 2929 (1982).

C45-22. Motion to Quash or Modify Subpoena.

Paragraph (3)(A) of subdivision (c) authorizes the motion to quash or modify the subpoena, listing diverse grounds. It applies to both the testimonial and the duces tecum subpoenas. And it applies to both parties and nonparties, except for certain parts that zero in on the nonparty alone, such as clause (ii) of paragraph (3)(A).

The motion to quash is made to the court "by which" the subpoena was issued, which means the court "from" which it issued under the language of subdivision (a)(2). That will not necessarily be the court in which the action is pending.

The first ground listed (clause [i]) is that the subpoena does not allow a "reasonable" amount of time for compliance. This "reasonable" standard is as much as the rule says about the return time that a subpoena can set. The rule prescribes neither a minimum nor a maximum. See Commentary C45-10 above. The exigencies of the case determine. The longer the notice time given, however, the greater the likelihood that a failure to comply will support a contempt citation. It will at least divest the subpoenaed person of the excuse that there was insufficient time to prepare.

The inconvenience of a nonparty that is the subject of clause (ii) was investigated earlier, in Commentaries C45-13 and C45-14. Extensive address to clause (ii) may be found in those earlier treatments. It is clause (ii) that protects a nonparty from having to travel inordinate distances to satisfy the subpoena. Fulfilling the distance limits imposed by clause (ii) is important for the additional reason that it will also keep the contempt punishment on tap as a penalty for the subpoenaed person's disobedience. Exceeding those limits excuses compliance. See subdivision (e)'s last sentence. The limits stated in clause (ii) can be by-passed by the court's invoking of its powers under clause (iii) of subdivision (c)(3)(B), however, an interplay that is also the subject of the cited Commentaries.

Clause (ii) itself, in paragraph (3)(A), without help from clause (iii) of paragraph (3)(B), authorizes the court to

compel travel from any place within the state in which the trial court is located to any other place within the same state, even if the 100-mile limit is exceeded, and permits this whether the state law of that state permits it or not. (Under the predecessor provision, subdivision (e)(1) of the prior rule, permission for this stretch had to be found in state law.) Making this power "subject to" clause (iii) just assures that if the 100-mile limit is exceeded even within the state, the court can make a conditional order exacting (among other things) payment of the nonparty's expenses as a condition to upholding the subpoena.

Clauses (iii) and (iv) return to application to parties and nonparties alike.

Clause (iii) in paragraph (3)(A) guards against the disclosure of privileged matter (unless a waiver of the privilege has occurred). The law governing privileges that will apply here is of course that applicable under the rules of evidence and under the disclosure rules.

The fourth ground listed (clause [iv]), is that the subpoena subjects the person to "undue burden", a repetition of the phrase contained in subdivision (c)(1), discussed above in Commentary C45-20. This is a catch-all category that enables the court to grant the motion to quash or modify in any other situation in which it finds, sui generis, what it believes to be an "undue burden" imposed by the subpoena. The Advisory Committee said of subdivision (c)(3) generally that it is designed to track Rule 26(c), the principal protective order provision applicable in federal discovery. The provision that most broadly implements that overall intention is this clause (iv) of subdivision (c)(3)(A). The committee also notes that while the existence of those discovery protections may make their statement here in subdivision (c) repetitious, the repetition is a good way to make the subpoenaed person alert to these protections for the reason that the text of subdivision (c) has to be included in the subpoena itself. See subdivision (a)(1)(D).

The reference to Rule 26(c) in the committee notes is helpful for a number of reasons. One is that several illustrative protections are enumerated in that provision, and clearly all should be available, if relevant, for subpoena protection under Rule 45. The second and perhaps more important reason is that Rule 45 lists only a few specific grounds for quashing a subpoena, with the "undue burden" category added as a kind of general one, while the experience of the cases is that there may be numerous grounds for quashing or modifying, all dependent on the facts of the particular case. The citation to Rule 26(c) in the revisors' notes will make it easy to import for application on a motion to quash or modify under Rule 45 just about everything that would support a vacating, quashing, modifying, conditioning, or other protection under the disclosure segment of the Federal Rules of Civil Procedure (Rules 26-37). Through that open door from the discovery rules to Rule 45 come also the standards of disclosability itself, such as those set forth in Rule 26(b).

The specific example that the committee cites of a protective order that the court can consider under clause (iv) of paragraph (3)(A) is one that insulates even an adverse party from having to attend the trial as a witness, as where that party has no personal knowledge of the facts. That can happen, for example, when the person who is formally the "party" is a decedent's personal representative with no personal knowledge of the matters in dispute, or an assignee with a like disability, etc.

The motion to quash or modify must be made by or in behalf of the subpoenaed person. If the subpoenaed person is a nonparty, that presents some questions. The nonparty must ordinarily be the movant, whether pro se or with a lawyer. What if the adverse party is contacted by the nonparty, as sometimes happens? Can the adverse party make the motion? The answer would be yes if that party has its own rights to assert in suppressing the subpoena, as

where the subpoena seeks materials that would fall under one of the privileged categories (involving the party's privilege, of course). But it bears repeating that if the party can't show "any personal right or privilege with respect to the materials subpoenaed", it will not have "standing" to make the motion. See, e.g., Brown v. Braddick, 595 F.2d 961 (C.A.5 1979).

Can a nonparty appeal an order that fails to quash or modify a subpoena as the nonparty requested? The rule of appealability contained in 28 U.S.C.A. § 1291, authorizing appeals only from final dispositions (construed generally to mean the final disposition of the entire case), ordinarily forecloses appeal. See, e.g., Kaufman v. Edelstein, 539 F.2d 811 (C.A.2 1976), which notes with citations that "an order in a civil or criminal case denying a motion by a non-party witness to quash a subpoena is not appealable until the witness has subjected himself to contempt."

The doctrine known as the "collateral order" rule, however, which is an exception to the finality principle, has been held by some courts to make a nonparty's appeal from a subpoena disposition possible in some situations. See, e.g., United States v. Columbia Broadcasting System, Inc., 666 F.2d 364 (C.A.9) cert. denied 457 U.S. 1118, 102 S.Ct. 2929 (1982).

C45-23. Conditional Order.

Subparagraphs (A) and (B) of subdivision (c)(3) overlap. Subparagraph (B) authorizes a conditional order explicitly, but the power that subparagraph (A) affords to "modify" the subpoena, especially in view of the broad "undue burden" standard set forth under clause (iv) of subparagraph (A), would authorize much of what subparagraph (B) purports to with a conditional order. We may thus take the particulars set forth in subparagraph (B) to be matters of special consequence to the Advisory Committee--matters the committee deemed important enough to earn individual attention.

This attention is given not only in the rule itself, but in the committee's notes as well, where detail is offered in a measure that other parts of Rule 45 can't boast. The detail in the notes will spare some effort in this Commentary, but several points should be noted about the content of subparagraph (B).

Clause (i) guards against the disclosure of a trade secret or other confidential business data, merely duplicating the content of paragraph (7) of Rule 26(c)'s list of protective order examples applicable in the discovery realm generally.

Clause (ii) addresses the problem, perceived to be an increasing one, of the attempt to extract expert testimony from a nonparty witness. It applies only to a person not retained as an expert by a party. (With a party-retained expert, the extensive provisions of Rule 26(b)(4) are left to govern.) If such an unretained expert is called, clause (ii) seeks to guard against anything that can amount to an expert opinion from that person if no compensation has been arranged for it. The opinion is deemed to fall within the realm of intellectual property, and the revisors were concerned that any effort to coerce an opinion from the expert without compensation would amount to a "taking" of the property in the constitutional sense. One possibility, to avoid the problem, especially when the expert is receptive, is for the court to make an order under clauses (ii) and (iii) of paragraph (3)(B) making reasonable compensation of the witness a condition to the compelling of the expert opinion.

In a different category, however, are facts that the expert knows, as where the expert had previously reviewed the facts on some other occasion, as in conducting a study in some academic channel or in the preparation of expert testimony in some other context, a study or preparation not made at the hiring of any party to the present action. It is primarily to facts rather than opinion that clause (ii) is referring with the language "specific events or occurrences in dispute". Different considerations apply to facts, and testimony and discovery from the nonparty are more readily extractable. It may happen, for example, that much has occurred since the expert studied the facts and prepared an opinion in some other case or situation a long while back, and that no one else is available now who can attest to the facts. Judge Friendly's opinion in Kaufman v. Edelstein, 539 F.2d 811 (C.A.2 1976), treating these and related issues in depth, is cited by the Advisory Committee for its review of the relevant factors that the court must consider.

Clause (iii), a key part of paragraph (3)(B), and, indeed, of Rule 45 in general, applies only to a nonparty. This is the provision that allows the court to direct a nonparty to travel more than 100 miles to attend the trial. The court that can make this direction is the court from which the subpoena issued. Clause (iii), in that and a number of other particulars, was discussed at length earlier, in the course of treating the question of where a subpoena can be served. See Commentaries C45-13 and C45-14, and especially Commentary C45-16, above.

The "substantial need" and "undue hardship" standards set forth in clause (iii) are taken verbatim from their niche in the work product and litigation materials segment of the discovery part of the Federal Rules of Civil Procedure, Rule 26(b)(3). There is extensive case law on that provision to guide the court.

Paragraph (2)(B) of subdivision (c) is the provision that explicitly requires the court, when it compels a nonparty to produce documents or other tangible things, to protect that person from "significant expense" incurred in carrying out the direction. In its notes on paragraph (3)(B), the committee again calls attention to that situation, explicitly referring to paragraph (2)(B)--inadvertently identifying it as in subdivision (b) instead of subdivision (c)--and thus highlighting once again the committee's concern, and perhaps even preoccupation, with protecting nonparties from undue expense connected with carrying out a subpoena duces tecum.

Subdivision (d)

C45-24. Responding to Document Subpoena.

Most of a subpoenaed person's duties are covered in earlier subdivisions, notably subdivision (c), which, in treating protections that a subpoenaed person is entitled to, says just as much, by negative implication, about what a subpoenaed person is not entitled to. Production of the unprotected matters are the subpoenaed person's duties. Subdivision (d), entitled "Duties in Responding to Subpoena", is therefore over-named. With a title like that, one would expect a statement of a variety of things that constitute a subpoenaed person's "duties", but subdivision (d) touches on only two narrow things.

Barring an obvious exceeding of the prescriptions of Rule 45 or the intervention of the court with a protective or conditional order under subdivisions (c) or (e), the subpoenaed person's duties can be summed up in a word: compliance. The risk of non-compliance is contempt, the subject of subdivision (e) (treated in Commentary C45-26 below).

Paragraph (1) of subdivision (d) addresses only the subpoena duces tecum, and is even narrower than that: it addresses only the subpoena duces tecum that seeks documents. It is concerned with the custodian's manner of compliance. The documents sought may be produced just as they are kept, or they can be organized and labeled "to correspond with the categories in the demand" contained in the subpoena. The choice is apparently left to the subpoenaed party, at least in first instance.

The provision comes from its counterpart in Rule 34, the rule on document production sought from a party. (Rule 45 extends document production to apply to nonparties as well.) It was added to Rule 34, where it is presently the last paragraph of Rule 34(b), in 1980, and the Advisory Committee's 1980 note enlightens us on its purpose. Quoting from an American Bar Association study, the note says that "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance". Paragraph (1) of subdivision (d) hopes to prevent that mix, but this is of course a difficult thing for a court to monitor. The rule seeks to require the custodian to produce the records exactly as they are kept in the "usual course of business", unblended with anything not usually kept with them, or else to reorganize the records to meet the progression in which they are demanded in the subpoena.

If the court should find an effort on the part of the witness to obfuscate the records in violation of this rule, that can of course be taken into consideration on an application to punish for contempt.

The reference to the usual course of "business" suggests that only business records are aimed at by this provision, although there can of course be occasions when non-business records, even voluminous ones, may be involved. What subdivision (d)(1) seeks to accomplish seems to be clear enough on all fronts, however, and it can reasonably be applied as well to records of other than the strictly "business" category.

C45-25. Withholding Matter on Grounds of Privilege.

Paragraph (2) of subdivision (d), like paragraph (1), also has a narrow mission, but it applies to both the testimonial and duces tecum subpoenas. It is more likely to have bearing on the latter.

Paragraph (2) is designed to require a person who is resisting disclosure based on a claim of privilege, or on a claim that the materials are immunized from disclosure as trial materials (see Rule 26[b][3]), to make the claim "expressly", supplying a sufficient description about it to enable the seeking party to address it and gather up opposing information with which to resist it.

When documents are sought, the rule's requirement is that the "nature of the documents, communications, or things not produced" be described. That may prove unreasonable or impractical to fulfill when the demand in the subpoena is too sweeping. There are remedies contemplated in each of these situations.

There is of course a tension here in exactly how far the resister has to go in explaining the claim of privilege without actually being compelled, in that guise, to surrender the privilege. The notes are clear, however, that the resisting person may not be allowed to "decide the limits of [its] %... ... own entitlement". When the point is

disputed, there may be nothing for it but to have the court decide, and the court may have to review the materials in camera. The court will doubtless be alert to evidence of bad faith on the part of the claimant, and the revisors' notes contemplate a variety of cures for that condition.

In the second paragraph of their notes on subdivision (d), the revisors unleash a short barrage of warnings to the resisting party. First, the resister who claims the privilege without offering the requisite elaboration runs the risk of having the court hold that the claim of privilege is waived, and the discovery obligatory. Second, the resister faces a contempt application by the seeking party. And third, the resister faces a sanction under Rule 7 (see Rule 7[b][3]) or 11 (the sanctions rule) of the Federal Rules of Civil Procedure in conjunction with any motion on which the court is required to address the claim of privilege. (Rule 45's own sanction provision, contained in subdivision (c)(1), which is addressed to the party who issued the subpoena, was apparently deemed inapplicable to the person served with the subpoena; hence this reference to outside provisions for imposing sanctions on the person served.)

The Advisory Committee's notes say that paragraph (2) "corresponds to the new Rule 26(b)(5)", which does not exist. A paragraph (5) for addition to Rule 26(b) was submitted to the U.S. Supreme Court as part of the same package as Rule 45, but while Rule 45 got through, the Rule 26 addition did not. It was among several key amendments that the U.S. Supreme Court did not accept and submit to Congress in 1991, and there was hence no paragraph (5) added to Rule 26(b).

In addition to threatening the subpoenaed person with the variety of remedies briefly listed above, the revisors acknowledge the dilemma the subpoenaed person may face when the subpoena's demand is too broad in the first place. The subpoenaed person's remedy in that situation is to serve objections pursuant to Rule 45(c)(2)(B), which then entitles that person to refrain from any further disclosure until a court application is made by the seeking party. See Commentary C45-21 above.

Subdivision (e)

C45-26. Contempt.

It is the contempt remedy that backs a subpoena. There is nothing new about that. When the subpoenaed person is not a party to the action, the threat of contempt is the only remedy, whether the disobedience is of the subpoena itself or of a court order entered somewhere further along the way directing the nonparty to do something. With a party there may be a variety of other sanctions available as well--in the case of a party, more often for the disobedience of a court order than of a subpoena--up to and including the declaration of a default, see Rule 37(b)(2), but these are threats that impact on the party's interests in the action and they therefore hold no terror for a nonparty. Hence the special role that contempt plays in enforcing subpoenas against nonparty witnesses.

Subdivision (e) of Rule 45, the contempt provision, nevertheless applies to parties as well as nonparties when, in its first sentence, it declares it to be contempt to disobey a subpoena "without adequate excuse". Hence, should one of the civil penalties of Rule 37 that would ordinarily work effectively enough against a party be found ineffective for some special reason in a given case, the court can turn to the contempt remedy even against the party. In its second sentence, however, which will be returned to later, subdivision (e) addresses only a nonparty.

No general effort is made in Rule 45 to elaborate what an "adequate excuse" is. The issue must always turn on the facts of the particular case, and any effort to offer a detailed prescription would amount to nothing but an endless progression of illustrations and would cover a tome. The issue is thus left to the case law, and the case law on the matter is abundant. The reader will find a number of illustrative cases, in annotations 201 to 219 set out in Subdivision VI, "Contempt", of the Notes of Decisions following these Commentaries and annotation 395 following Rule 37, reflecting one way or the other on whether a contempt punishment is warranted on particular facts.

The contempt most often associated with the disobedience of a subpoena is the category of "civil" contempt, the purpose of which is to enforce compliance in the particular case, with any penalty imposed designed to further the rights of the party in whose behalf the subpoena issued. When it is still within a person's power to comply, for example, and the person wilfully refuses to, the person can be jailed until compliance is offered. Even the jailing in that case is an aspect of civil, not criminal, contempt. The category of "criminal" contempt is designed to vindicate the courts' authority and to discourage the defiance of judicial process in general, not just for the case at hand but for all litigation generally. Hence, at least in practice if not in theory, only rarely is a disobedience held to reach that level. See, e.g., Blake Associates, Inc. v. Omni Spectra, Inc., 118 F.R.D. 283 (D.Mass.1988). When it does reach it, the penalty may be a fine not measured by the damages suffered by a party, but rather by the punitive standard of what it takes to make the contemnor more sensitive to judicial process in the future and to send a signal out to all others about the disadvantages of noncompliance.

A person's inability to comply with the subpoena is an adequate excuse for disobedience, unless the witness has taken deliberate steps to make its own performance impossible. There, not only will contempt lie; it may well enter the "criminal" category.

The second sentence of subdivision (e) is new, added as part of the 1991 amendment and addressed only to a nonparty who has been subpoenaed. It recites, as an adequate excuse for not appearing in response to a subpoena, that the subpoena "purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A)". The latter is the provision that imposes restrictions on how far the subpoena can require the witness to travel; it is of course calculated to serve the subpoenaed person's convenience. If it were not for the fact, and a healthy fact it is, that witnesses do not lightly disobey federal subpoenas with nice interpretations about their requirements, this provision of subdivision (e) would be a potent source of trouble.

The language in the first sentence of subdivision (e) speaks of the witness having an "adequate excuse". This keeps the witness guessing about whether the court will deem the excuse "adequate", and this is good for judicial process. The witness is not likely to chance contempt by indulging in meticulous calculations. But a meticulous calculation may indeed strike a witness as a viable source of disobedience under the new second sentence of subdivision (e). The rule assures the witness that contempt can't be imposed if the subpoena would have compelled the witness to travel, for example, more than 100 miles from the witness's residence or employment. It would be better for the witness to use a motion in that case, rather than a yardstick. Unless the witness has secured a judicial determination of whether the subpoena is valid, the witness usually does best to obey it.

The witness who has any doubts on that score, in other words, should move to quash the subpoena rather than just disregard it. Of course the witness can secure the advice of an attorney, but the attorney must also be circumspect in handing out that advice. While the fact that a person has disobeyed a subpoena on the advice of counsel does affect a court's judgment when contempt is moved for, it is not per se an excuse for disobedience. And when an order rather than a mere subpoena has been disobeyed, and that order was made on proper notice to the alleged

contemnor, the citation of counsel's advice as a reason for disobedience is likely to avail not at all.

Additional discussion of the second sentence of subdivision (e) may be found in the Commentaries discussing the geographic reach of the summons. See Commentaries C45-13 and C45-14 above.

Recognizing the situation of the nonparty, the Advisory Committee note on subdivision (e) stresses that the court should use the contempt remedy only "sparingly" against a nonparty, especially where the nonparty has been "overborne by a party or attorney". But in its final statement--in which it inadvertently refers to subdivision (e) as subdivision (f) (the amended rule has no subdivision [f])--the committee does seem to put the yardstick measure firmly in place. If the witness is willing to risk disobeying the subpoena based on the witness's own measurement of distances, without any preliminary motion for a court ruling on the matter, and the measurement turns out to be correct, subdivision (e) purports to let the witness off.

The attorney who subpoenaed the witness should be alert to these possibilities and should try to remain in contact with the witness to ascertain in fact what the witness's intentions are. If the witness is cooperating, these issues should not arise, as when the subpoena has been served on the witness as a mere formality, such as for purposes of having the fact of subpoena service in place in conjunction with a potential cross-examination, or to enable the witness to get off work, etc.

Much in the way of protection for an unsophisticated witness without ready access to counsel can be read into the "overborne" phrase contained in the committee's notes. It appears to make the court in some measure the unrepresented witness's guardian, but that role is nothing new to the court. The committee apparently felt that this indulgence may be all the more warranted during the initial stages of the new Rule 45's operation, for the reason that attorneys are now permitted to issue subpoenas on their own. (But does that make so much difference? When the clerks had to be the issuers, did they not issue the subpoenas just for the asking, leaving it to the attorneys to devise their content?)

If the subpoena is a duces tecum subpoena, and the witness objects to it, we have noted that the witness can serve written objections on the seeking party and then do nothing further for the time being; serving the objections throws onto the issuing party the burden of making a court application. See subdivision (c)(2)(B) and Commentary C45-21 above. Presumably the recipient of the duces tecum subpoena who has that option will use it, rather than refrain from responding at all and risk contempt. But the cited provision doesn't apply to the testimonial witness. If that witness has some excuse for not appearing, the witness, for her own protection, does best either to appear or to move to quash before an appearance is due. The party at all queasy on these matters does well to keep in contact with the witness.

While technically there is no automatic stay of compliance upon the mere making of a motion to quash a subpoena, there is a general understanding that compliance may be withheld until the court rules on the motion. Here, too, those involved should be in contact and a specific understanding reached. If time is of the essence, a motion to quash by the subpoenaed person or a motion to compel by the issuer of the subpoena can be brought on by order to show cause. Issues about the jurisdictional validity of the subpoena, its propriety, scope, etc., should be resolved among parties and witnesses by voluntary contact, and if that doesn't work then by the court on motion. Activity or inactivity based on an ex parte assumption would risk, on the part of the issuer, loss of the benefit of the subpoena, or, on the part of the subpoenaed person, contempt.

Rule 45 does not prescribe any of the procedures for bringing on a contempt application. The body of case law elaborated over the years is applicable here, under Rule 45, just as it is under Rule 37. As a general principle it has been observed that "[a]lthough there are no specific procedural steps to follow in civil contempt proceedings, due process requires that the [alleged contemnor] be given the opportunity to be heard 'at a meaningful time and in a meaningful manner'." See, e.g., Fisher v. Marubeni Cotton Corp., 526 F.2d 1338, 1343 (C.A.8 1975). A motion within the action should do the job when the alleged contemnor is a party. When the alleged contemnor is not a party, a motion might still do, but some question may arise about how the motion papers have to be served, i.e., whether in the same manner as a summons, under Rule 4, or in the manner of intra-action papers, under Rule 5(b). See the discussion of this matter in Commentary C45-21 above.

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U.S.C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U.S.C., Title 15, § 49 (Federal Trade Commission)

U.S.C., Title 15, §§ 77v(b), 78u(c), 79r(d) (Securities and Exchange Commission)

U.S.C., Title 16, §§ 797(g) and 825f (Federal Power Commission)

U.S.C., Title 19, § 1333(b) (Tariff Commission)

U.S.C., Title 22, §§ 268, 270d and 270e (International Commissions, etc.)

U.S.C., Title 26, §§ 614, 619(b) [see 7456] (Board of Tax Appeals)

U.S.C., Title 26, § 1523(a) [see 7608] (Internal Revenue Officers)

U.S.C., Title 29, § 161 (Labor Relations Board)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]C., Title 41, § 6507 (Secretary of Labor)

U.S.C., Title 45, § 157 Third. (h) (Board of Arbitration under Railway Labor Act)

U.S.C., Title 45, § 222(b) (Investigation Commission under Railroad Retirement Act of 1935)

U.S.C., Title 46, § 1124(b) (Maritime Commission)

U.S.C., Title 47, § 409(c) and (d) (Federal Communications Commission)

U.S.C., Title 49, § 12(2) and (3) [now 10321] (Interstate Commerce Commission)

U.S.C., Title 49, § 173a [see 1484] (Secretary of Commerce)

Note to Subdivisions (a) and (b). These simplify the form of subpoena as provided in U.S.C., Title 28, [former] § 655 (Witnesses; subpoena; form; attendance under); and broaden U.S.C, Title 28, [former] § 636 (Production for books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena duces tecum, compare N.Y.C.P.A. (1937) § 411.

Note to Subdivision (c). This provides for the simple and convenient method of service permitted under many state codes; e.g., N.Y.C.P.A. (1937) §§ 220, 404, J.Ct.Act, § 191; 3 Wash.Rev.Stat.Ann. (Remington, 1932) § 1218. Compare former Equity Rule 15 (Process, by Whom Served).

For statutes governing fees and mileage of witnesses see:

U.S.C., Title 28 former sections:

600a[now 1871] (Per diem; mileage)

600c[now 1821, 1823] (Amount per diem and mileage for witnesses; subsistence)

600d[former] (Fees and mileage in certain states)

601[former] (Witnesses' fees; enumeration)

602[now 1824] (Fees and mileage of jurors and witnesses)

603[see Title 5, §§ 5515, 5537] (No officer of court to have witness fees)

Note to Subdivision (d). The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning v. Boyle*, S.D.N.Y.1901, 112 F. 397. The requirement of an order for the issuance of a subpoena duces tecum is in accordance with U.S.C., Title 28, [former] § 647 (Deposition under dedimus potestatem; subpoena duces tecum). The provisions of paragraph (2) are in accordance with common practice. See U.S.C., Title 28, former § 648 (Deposition under dedimus potestatem; witnesses, when required to attend); N.Y.C.P.A. (1937) § 300; 1 N.J.Rev.Stat. (1937) 2:27-174.

Note to Subdivision (e). The first paragraph continues the substance of U.S.C., Title 28, [former] § 654 (Witnesses; subpoenas; may run into another district). Compare U.S.C., Title 11, [former] § 69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

U.S.C., Title 15:

§ 23 (Suits by United States; subpoenas for witnesses) (under antitrust laws).

U.S.C., Title 38:

§ 445[now 784] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (Veterans' insurance contracts).

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U.S.C., Title 28, §§ 711 [now 1783] (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and 713 [now 1783] (Service of Subpoena on witness in foreign country).

Note to Subdivision (f). Compare [former] Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

1946 Amendment

Note to Subdivision (b). The added words, "or tangible things" in subdivision (b) merely make the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the words "or modify" in clause (1) affords desirable flexibility.

Subdivision (d). The added last sentence of amended subdivision (d)(1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d)(1)--to the effect that leave of court should be obtained for the issuance of such a subpoena--has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it had been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See *Application of Zenith Radio Corp.*, E.D.Pa.1941, 4 F.Rules Serv. 30b.21. Case 1, 1 F.R.D. 627; *Fox v. House*, Okla.1939, 29 F.Supp. 673; *United States of America for the Use of Tilo Roofing Co., Inc. v. J. Slotnik Co.*, Conn.1944, 3 F.R.D. 408.

The changes in subdivisions (d)(2) give the court the same power in the case of residents of the district as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule.

1948 Amendment

The amendment effective October 1949, substituted the reference to "Title 28, U.S.C., § 1783" at the end of subdivision (e)(2) for the reference to "the Act of July 3, 1926, c. 762, §§ 1, 3 (44 Stat. 835), U.S.C., Title 28, § 713."

1970 Amendment

At present, when a subpoena duces tecum is issued to a deponent, he is required to produce the listed materials at the deposition, but is under no clear compulsion to permit their inspection and copying. This results in confusion and uncertainty before the time the deposition is taken, with no mechanism provided whereby the court can resolve the matter. Rule 45(d)(1), as revised, makes clear that the subpoena authorizes inspection and copying of the materials produced. The deponent is afforded full protection since he can object, thereby forcing the party serving the subpoena to obtain a court order if he wishes to inspect and copy. The procedure is thus analogous to that provided in Rule 34.

The changed references to other rules conform to changes made in those rules. The deletion of words in the clause describing the proper scope of the subpoena conforms to a change made in the language of Rule 34. The reference to Rule 26(b) is unchanged but encompasses new matter in that subdivision. The changes make it clear that the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules.

1980 Amendment

Subdivision (d)(1). The amendment defines the term "proof of service" as used in the first sentence of the present subdivision. For want of a definition, the district court clerks have been obliged to fashion their own, with results that vary from district to district. All that seems required is a simple certification on a copy of the notice to take a deposition that the notice has been served on every other party to the action. That is the proof of service required by Rule 25(d) of both the Federal Rules of Appellate Procedure and the Supreme Court Rules.

Subdivision (e)(1). The amendment makes the reach of a subpoena of a district court at least as extensive as that of the state courts of general jurisdiction in the state in which the district court is held. Under the present rule the reach of a district court subpoena is often greater, since it extends throughout the district. No reason appears why it should be less, as it sometimes is because of the accident of district lines. Restrictions upon the reach of subpoenas are imposed to prevent undue inconvenience to witnesses. State statutes and rules of court are quite likely to reflect the varying degrees of difficulty and expense attendant upon local travel.

1985 Amendment

Present Rule 45(d)(2) has two sentences setting forth the territorial scope of deposition subpoenas. The first sentence is directed to depositions taken in the judicial district in which the deponent resides; the second sentence addresses situations in which the deponent is not a resident of the district in which the deposition is to take place. The Rule, as currently constituted, creates anomalous situations that often cause logistical problems in conducting litigation.

The first sentence of the present Rule states that a deponent may be required to attend only in the *county* wherein that person resides or is employed or transacts business in person, that is, where the person lives or works. Under this provision a deponent can be compelled, without court order, to travel from one end of that person's home county to the other, no matter how far that may be. The second sentence of the Rule is somewhat more flexible, stating that someone who does not reside in the district in which the deposition is to be taken can be required to attend in the county where the person is served with the subpoena, *or* within 40 miles from the place of service.

Under today's conditions there is no sound reason for distinguishing between residents of the district or county in which a deposition is to be taken and nonresidents, and the Rule is amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person's residence, place of business, or where the person was served. The 40-mile radius has been increased to 100 miles.

1987 Amendment

The amendments are technical. No substantive change is intended.

1991 Amendment

Purposes of Revision. The purposes of this revision are (1) to clarify and enlarge the protections afforded persons who are required to assist the court by giving information or evidence; (2) to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties; (3) to facilitate

service of subpoenas for depositions or productions of evidence at places distant from the district in which an action is proceeding; (4) to enable the court to compel a witness found within the state in which the court sits to attend trial; (5) to clarify the organization of the text of the rule.

Subdivision (a). This subdivision is amended in seven significant respects.

First, Paragraph (a)(3) modifies the requirement that a subpoena be issued by the clerk of court. Provision is made for the issuance of subpoenas by attorneys as officers of the court. This revision perhaps culminates an evolution. Subpoenas were long issued by specific order of the court. As this became a burden to the court, general orders were made authorizing clerks to issue subpoenas on request. Since 1948, they have been issued in blank by the clerk of any federal court to any lawyer, the clerk serving as stationer to the bar. In allowing counsel to issue the subpoena, the rule is merely a recognition of present reality.

Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions. In *ICC v. Brimson*, 154 U.S. 447 (1894), the Court upheld a statute directing federal courts to issue subpoenas to compel testimony before the ICC. In *CAB v. Hermann*, 353 U.S. 322 (1957), the Court approved as established practice the issuance of administrative subpoenas as a matter of absolute agency right. And in *NLRB v. Warren Co.*, 350 U.S. 107 (1955), the Court held that the lower court had no discretion to withhold sanctions against a contemnor who violated such subpoenas. The 1948 revision of Rule 45 put the attorney in a position similar to that of the administrative agency, as a public officer entitled to use the court's contempt power to investigate facts in dispute. Two courts of appeals have touched on the issue and have described lawyer-issued subpoenas as mandates of the court. *Waste Conversion, Inc. v. Rollins Environmental Services (NJ), Inc.*, 893 F.2d 605 (3d Cir., 1990); *Fisher v. Marubent Cotton Corp.*, 526 F.2d 1338, 1340 (8th Cir., 1975). Cf. *Young v. United States ex rel Vuitton et Fils S.A.*, 481 U.S. 787, 821 (1987) (Scalia, J., concurring). This revision makes the rule explicit that the attorney acts as an officer of the court in issuing and signing subpoenas.

Necessarily accompanying the evolution of this power of the lawyer as officer of the court is the development of increased responsibility and liability for the misuse of this power. The latter development is reflected in the provisions of subdivision (c) of this rule, and also in the requirement imposed by paragraph (3) of this subdivision that the attorney issuing a subpoena must sign it.

Second, Paragraph (a)(3) authorizes attorneys in distant districts to serve as officers authorized to issue commands in the name of the court. Any attorney permitted to represent a client in a federal court, even one admitted pro haec vice, has the same authority as a clerk to issue a subpoena from any federal court for the district in which the subpoena is served and enforced. In authorizing attorneys to issue subpoenas from distant courts, the amended rule effectively authorizes service of a subpoena anywhere in the United States by an attorney representing any party. This change is intended to ease the administrative burdens of inter-district law practice. The former rule resulted in delay and expense caused by the need to secure forms from clerks' offices some distance from the place at which the action proceeds. This change does not enlarge the burden on the witness.

Pursuant to Paragraph (a)(2), a subpoena for a deposition must still issue from the court in which the deposition or production would be compelled. Accordingly, a motion to quash such a subpoena if it overbears the limits of the subpoena power must, as under the previous rule, be presented to the court for the district in which the deposition would occur. Likewise, the court in whose name the subpoena is issued is responsible for its enforcement.

Third, in order to relieve attorneys of the need to secure an appropriate seal to affix to a subpoena issued as an officer of a distant court, the requirement that a subpoena be under seal is abolished by the provisions of Paragraph (a)(1).

Fourth, Paragraph (a)(1) authorizes the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced. A party seeking additional production from a person subject to such a subpoena may serve an additional subpoena requiring additional production at the same time and place.

Fifth, Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials in that person's control whether or not the materials are located within the district or within the territory within which the subpoena can be served. The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34.

Sixth, Paragraph (a)(1) requires that the subpoena include a statement of the rights and duties of witnesses by setting forth in full the text of the new subdivisions (c) and (d).

Seventh, the revised rule authorizes the issuance of a subpoena to compel the inspection of premises in the possession of a non-party. Rule 34 has authorized such inspections of premises in the possession of a party as discovery compelled under Rule 37, but prior practice required an independent proceeding to secure such relief ancillary to the federal proceeding when the premises were not in the possession of a party. Practice in some states has long authorized such use of a subpoena for this purpose without apparent adverse consequence.

Subdivision (b). Paragraph (b)(1) retains the text of the former subdivision (c) with minor changes.

The reference to the United States marshal and deputy marshal is deleted because of the infrequency of the use of these officers for this purpose. Inasmuch as these officers meet the age requirement, they may still be used if available.

A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

Paragraph (b)(2) retains language formerly set forth in subdivision (e) and extends its application to subpoenas for depositions or production.

Paragraph (b)(3) retains language formerly set forth in paragraph (d)(1) and extends its applications to subpoenas for trial or hearing or production.

Subdivision (c). This provision is new and states the rights of witnesses. It is not intended to diminish rights conferred by Rules 26-37 or any other authority.

Paragraph (c)(1) gives specific application to the principle stated in Rule 26(g) and specifies liability for earnings lost by a non-party witness as a result of a misuse of the subpoena. No change in existing law is thereby effected. Abuse of a subpoena is an actionable tort, *Board of Ed. v. Farmingdale Classroom Teach. Ass'n,* 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (1975), and the duty of the attorney to the non-party is also embodied in Model Rule of Professional Conduct 4.4. The liability of the attorney is correlative to the expanded power of the attorney to issue subpoenas. The liability may include the cost of fees to collect attorneys' fees owed as a result of a breach of this duty.

Paragraph (c)(2) retains language from the former subdivision (b) and paragraph (d)(1). The 10-day period for response to a subpoena is extended to 14 days to avoid the complex calculations associated with short time periods under Rule 6 and to allow a bit more time for such objections to be made.

A non-party required to produce documents or materials is protected against significant expense resulting from involuntary assistance to the court. This provision applies, for example, to a non-party required to provide a list of class members. The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. See, *e.g.*, *United States v. Columbia Broadcasting Systems, Inc.*, 666 F.2d 364 (9th Cir.1982).

Paragraph (c)(3) explicitly authorizes the quashing of a subpoena as a means of protecting a witness from misuse of the subpoena power. It replaces and enlarges on the former subdivision (b) of this rule and tracks the provisions of Rule 26(c). While largely repetitious, this rule is addressed to the witness who may read it on the subpoena, where it is required to be printed by the revised paragraph (a)(1) of this rule.

Subparagraph (c)(3)(A) identifies those circumstances in which a subpoena must be quashed or modified. It restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1), with one important change. Under the revised rule, a federal court can compel a witness to come from any place in the state to attend trial, whether or not the local state law so provides. This extension is subject to the qualification provided in the next paragraph, which authorizes the court to condition enforcement of a subpoena compelling a non-party witness to bear substantial expense to attend trial. The traveling non-party witness may be entitled to reasonable compensation for the time and effort entailed.

Clause (c)(3)(A)(iv) requires the court to protect all persons from undue burden imposed by the use of the subpoena power. Illustratively, it might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens.

Subparagraph (c)(3)(B) identifies circumstances in which a subpoena should be quashed unless the party serving the subpoena shows a substantial need and the court can devise an appropriate accommodation to protect the interests of the witness. An additional circumstance in which such action is required is a request for costly production of documents; that situation is expressly governed by subparagraph (b)(2)(B)[1].

Clause (c)(3)(B)(i) authorizes the court to quash, modify, or condition a subpoena to protect the person subject to or affected by the subpoena from unnecessary or unduly harmful disclosures of confidential information. It corresponds to Rule 26(c)(7).

Clause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, whose information is subject to the provisions of Rule 26(b)(4). A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts. Experts are not exempt from the duty to give evidence, even if they cannot be compelled to prepare themselves to give effective testimony, *e.g.*, *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir.1972), but compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services. See generally Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA.L.REV. 71 (1984); Note, *Discovery and Testimony of Unretained Experts*, 1987 DUKE L.J. 140. Arguably the compulsion to testify can be regarded as a "taking" of intellectual property. The rule establishes the right of such persons to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B); that requirement is the same as that necessary to secure work product under Rule 26(b)(3) and gives assurance of reasonable compensation. The Rule thus approves the accommodation of competing interests exemplified in *United States v. Columbia Broadcasting Systems Inc.*, 666 F.2d 364 (9th Cir.1982). See also *Wright v. Jeep Corporation*, 547 F.Supp. 871 (E.D.Mich.1982).

As stated in *Kaufman v. Edelstein*, 539 F.2d 811, 822 (2d Cir.1976), the district court's discretion in these matters should be informed by "the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify...."

Clause (c)(3)(B)(iii) protects non-party witnesses who may be burdened to perform the duty to travel in order to provide testimony at trial. The provision requires the court to condition a subpoena requiring travel of more than 100 miles on reasonable compensation.

Subdivision (d). This provision is new. Paragraph (d)(1) extends to non-parties the duty imposed on parties by the last paragraph of Rule 34(b), which was added in 1980.

Paragraph (d)(2) is new and corresponds to the new Rule 26(b)(5) [paragraph (5) in Rule 26(b) was a proposed paragraph which was withdrawn by the Supreme Court]. Its purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified. The person claiming a privilege or protection cannot decide the limits of that party's own entitlement.

A party receiving a discovery request who asserts a privilege or protection but fails to disclose that claim is at risk of waiving the privilege or protection. A person claiming a privilege or protection who fails to provide adequate information about the privilege or protection claim to the party seeking the information is subject to an order to show cause why the person should not be held in contempt under subdivision (e). Motions for such orders and responses to motions are subject to the sanctions provisions of Rules 7 and 11.

A person served a subpoena that is too broad may be faced with a burdensome task to provide full information regarding all that person's claims to privilege or work product protection. Such a person is entitled to protection that may be secured through an objection made pursuant to paragraph (c)(2).

Subdivision (e). This provision retains most of the language of the former subdivision (f).

"Adequate cause" for a failure to obey a subpoena remains undefined. In at least some circumstances, a non-party might be guilty of contempt for refusing to obey a subpoena even though the subpoena manifestly overreaches the appropriate limits of the subpoena power. *E.g.*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967). But, because the command of the subpoena is not in fact one uttered by a judicial officer, contempt should be very sparingly applied when the non-party witness has been overborne by a party or attorney. The language added to subdivision (f) is intended to assure that result where a non-party has been commanded, on the signature of an attorney, to travel greater distances than can be compelled pursuant to this rule.

2005 Amendments

This amendment closes a small gap in regard to notifying witnesses of the manner for recording a deposition. A deposition subpoena must state the method for recording the testimony.

Rule 30(b)(2) directs that the party noticing a deposition state in the notice the manner for recording the testimony, but the notice need not be served on the deponent. The deponent learns of the recording method only if the deponent is a party or is informed by a party. Rule 30(b)(3) permits another party to designate an additional method of recording with prior notice to the deponent and the other parties. The deponent thus has notice of the recording method when an additional method is designated. This amendment completes the notice provisions to ensure that a nonparty deponent has notice of the recording method when the recording method is described only in the deposition notice.

A subpoenaed witness does not have a right to refuse to proceed with a deposition due to objections to the manner of recording. But under rare circumstances, a nonparty witness might have a ground for seeking a protective order under Rule 26(c) with regard to the manner of recording or the use of the deposition if recorded in a certain manner. Should such a witness not learn of the manner of recording until the deposition begins, undesirable delay or complication might result. Advance notice of the recording method affords an opportunity to raise such protective issues.

Other changes are made to conform Rule 45(a)(2) to current style conventions.

2006 Amendments

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide

that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

2007 Amendment

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or

inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

2013 Amendment

Rule 45 was extensively amended in 1991. The goal of the present amendments is to clarify and simplify the rule. The amendments recognize the court where the action is pending as the issuing court, permit nationwide service of a subpoena, and collect in a new subdivision (c) the previously scattered provisions regarding place of compliance. These changes resolve a conflict that arose after the 1991 amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial; such testimony may now be required only as specified in new Rule 45(c). In addition, the amendments introduce authority in new Rule 45(f) for the court where compliance is required to transfer a subpoena-related motion to the court where the action is pending on consent of the person subject to the subpoena or in exceptional circumstances.

Subdivision (a). This subdivision is amended to provide that a subpoena issues from the court where the action is pending. Subdivision (a)(3) specifies that an attorney authorized to practice in that court may issue a subpoena, which is consistent with current practice.

In Rule 45(a)(1)(D), "person" is substituted for "party" because the subpoena may be directed to a nonparty.

Rule 45(a)(4) is added to highlight and slightly modify a notice requirement first included in the rule in 1991. Under the 1991 amendments, Rule 45(b)(1) required prior notice of the service of a "documents only" subpoena to the other parties. Rule 45(b)(1) was clarified in 2007 to specify that this notice must be served before the subpoena is served on the witness.

The Committee has been informed that parties serving subpoenas frequently fail to give the required notice to the other parties. The amendment moves the notice requirement to a new provision in Rule 45(a) and requires that the notice include a copy of the subpoena. The amendments are intended to achieve the original purpose of enabling the other parties to object or to serve a subpoena for additional materials.

Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving it or the person served to obtain such access. The rule does not limit the court's authority to order notice of receipt of produced materials or access to them. The party serving the subpoena should in any event make reasonable provision for prompt access.

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been moved to new Rule 45(a)(4).

Rule 45(b)(2) is amended to provide that a subpoena may be served at any place within the United States, removing the

complexities prescribed in prior versions.

Subdivision (c). Subdivision (c) is new. It collects the various provisions on where compliance can be required and simplifies them. Unlike the prior rule, place of service is not critical to place of compliance. Although Rule 45(a)(1)(A)(iii) permits the subpoena to direct a place of compliance, that place must be selected under Rule 45(c).

Rule 45(c)(1) addresses a subpoena to testify at a trial, hearing, or deposition. Rule 45(c)(1)(A) provides that compliance may be required within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. For parties and party officers, Rule 45(c)(1)(B)(i) provides that compliance may be required anywhere in the state where the person resides, is employed, or regularly conducts business in person. When an order under Rule 43(a) authorizes testimony from a remote location, the witness can be commanded to testify from any place described in Rule 45(c)(1).

Under Rule 45(c)(1)(B)(ii), nonparty witnesses can be required to travel more than 100 miles within the state where they reside, are employed, or regularly transact business in person only if they would not, as a result, incur "substantial expense." When travel over 100 miles could impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court can condition enforcement of the subpoena on such payment.

Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing parties and party officers. *Compare* *In re Vioxx Products Liability Litigation*, 438 F.Supp. 2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), *with* *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state.

Depositions of parties, and officers, directors, and managing agents of parties need not involve use of a subpoena. Under Rule 37(d)(1)(A)(i), failure of such a witness whose deposition was properly noticed to appear for the deposition can lead to Rule 37(b) sanctions (including dismissal or default but not contempt) without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena. These amendments do not change that existing law; the courts retain their authority to control the place of party depositions and impose sanctions for failure to appear under Rule 37(b).

For other discovery, Rule 45(c)(2) directs that inspection of premises occur at those premises, and that production of documents, tangible things, and electronically stored information may be commanded to occur at a place within 100 miles of where the person subject to the subpoena resides, is employed, or regularly conducts business in person. Under the current rule, parties often agree that production, particularly of electronically stored information, be transmitted by electronic means. Such arrangements facilitate discovery, and nothing in these amendments limits the ability of parties to make such arrangements.

Rule 45(d)(3)(A)(ii) directs the court to quash any subpoena that purports to compel compliance beyond the geographical limits specified in Rule 45(c).

Subdivision (d). Subdivision (d) contains the provisions formerly in subdivision (c). It is revised to recognize the court

where the action is pending as the issuing court, and to take account of the addition of Rule 45(c) to specify where compliance with a subpoena is required.

Subdivision (f). Subdivision (f) is new. Under Rules 45(d)(2)(B), 45(d)(3), and 45(e)(2)(B), subpoena-related motions and applications are to be made to the court where compliance is required under Rule 45(c). Rule 45(f) provides authority for that court to transfer the motion to the court where the action is pending. It applies to all motions under this rule, including an application under Rule 45(e)(2)(B) for a privilege determination.

Subpoenas are essential to obtain discovery from nonparties. To protect local nonparties, local resolution of disputes about subpoenas is assured by the limitations of Rule 45(c) and the requirements in Rules 45(d) and (e) that motions be made in the court in which compliance is required under Rule 45(c). But transfer to the court where the action is pending is sometimes warranted. If the person subject to the subpoena consents to transfer, Rule 45(f) provides that the court where compliance is required may do so.

In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are present. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion. Judges in compliance districts may find it helpful to consult with the judge in the issuing court presiding over the underlying case while addressing subpoena-related motions.

If the motion is transferred, judges are encouraged to permit telecommunications methods to minimize the burden a transfer imposes on nonparties, if it is necessary for attorneys admitted in the court where the motion is made to appear in the court in which the action is pending. The rule provides that if these attorneys are authorized to practice in the court where the motion is made, they may file papers and appear in the court in which the action is pending in relation to the motion as officers of that court.

After transfer, the court where the action is pending will decide the motion. If the court rules that discovery is not justified, that should end the matter. If the court orders further discovery, it is possible that retransfer may be important to enforce the order. One consequence of failure to obey such an order is contempt, addressed in Rule 45(g). Rule 45(g) and Rule 37(b)(1) are both amended to provide that disobedience of an order enforcing a subpoena after transfer is contempt of the issuing court and the court where compliance is required under Rule 45(c). In some instances, however, there may be a question about whether the issuing court can impose contempt sanctions on a distant nonparty. If such circumstances arise, or if it is better to supervise compliance in the court where compliance is required, the rule provides authority for retransfer for enforcement. Although changed circumstances may prompt a modification of such an order, it is not expected that the compliance court will reexamine the resolution of the underlying motion.

Subdivision (g). Subdivision (g) carries forward the authority of former subdivision (e) to punish disobedience of subpoenas as contempt. It is amended to make clear that, in the event of transfer of a subpoena-related motion, such disobedience constitutes contempt of both the court where compliance is required under Rule 45(c) and the court where the action is pending. If necessary for effective enforcement, Rule 45(f) authorizes the issuing court to transfer its order after the motion is resolved.

The rule is also amended to clarify that contempt sanctions may be applied to a person who disobeys a subpoena-related order, as well as one who fails entirely to obey a subpoena. In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena. Often contempt proceedings will be initiated by an order to show cause, and an order to comply or be held in contempt may modify the subpoena's command. Disobedience of such an order may be treated as contempt.

The second sentence of former subdivision (e) is deleted as unnecessary.

Notes of Decisions (791)

Footnotes

[1]

So in original. Probably should be "subparagraph (c)(2)(B)".

Fed. Rules Civ. Proc. Rule 45, 28 U.S.C.A., FRCP Rule 45
Including Amendments Received Through 3-1-15

End of Document

Minnesota Center for Environmental Advocacy
26 East Exchange Street • Suite 206 • Saint Paul, MN 55101-1667 • 651.223.5969

January 20, 2015

The Honorable Eric L. Lipman
Administrative Law Judge
Office of Administrative Hearings
600 North Robert Street
P.O. Box 64620
St. Paul, MN 55164-0620

VIA ELECTRONIC SERVICE

Re: In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota
MPUC Docket Nos. PL-6668/CN-13-473
OAH Docket Nos. 8-2500-31259

Dear Honorable Judge Lipman,

Friends of the Headwaters submits this letter in response to the Twentieth Prehearing Order in the above-captioned proceeding in which Your Honor denied requests for subpoenas for six witnesses in this proceeding. Your Honor denied the requests without prejudice and indicated that you would consider renewed requests if additional information were provided. Friends of the Headwaters disagrees that there is any requirement by rule or otherwise that permits Your Honor to deny the subpoena requests or requires this information to be included in a subpoena request. The refusal to admit the relevant testimony of these witnesses, who possess scientific, technical and other specialized knowledge that will assist the judge, as well as relevant factual information regarding the various system alternatives under consideration, constitutes reversible error that taints the entire proceedings. Minn. R. Evid. 402, 702. On this basis, FOH requests that Your Honor grant the subpoena requests for these witnesses.

In the alternative, FOH has provided the information requested by Your Honor in support of these requests.

I. THE SUBPOENA REQUESTS MUST BE ISSUED AS SUBMITTED

A. The Requests Complied With All Form And Content Requirements.

Minn. R. 1400.700 states that:

> [r]equests for subpoenas for the attendance of witnesses or the production of documents, either at a hearing or for the purpose of discovery, shall be made in writing to the judge, shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought, shall identify any documents sought

> with specificity, shall include the full name and home or business address of all persons to be subpoenaed and, if known, the date, time, and place for responding to the subpoena.

Similarly, the Federal Rules of Civil Procedure, on which Your Honor relies, require a subpoena to include basic information such as the title of the court case and the actions commanded of the person. *See* Fed. R. Civ. P. 45. Friends of the Headwaters' subpoena requests complied with these requirements.

Minnesota law is clear that subpoenaing witnesses is allowed in a contested case. "In a contested case hearing, any means of discovery available pursuant to the Minnesota Rules of Civil Procedure is allowed. Minn. R. 1400.6700, subpt. 2 (1991). Discovery entitles a party to request subpoenas for the attendance of witnesses or the production of documents. Minn. R. 1400.7000, subpt. 1 (1991)." *In re License Application of Rochester Ambulance Service*, 500 N.W.2d 495, 499 (Minn. Ct. App. 1993).

Both Minnesota and Federal Rule of Civil Procedure 45 also state that "[t]he clerk *must* issue a subpoena, signed but otherwise in blank, to a party who requests it." Fed. R. Civ. P. 45(a)(3) (emphasis added); *see also* Minn. R. Civ. P. 45.01. Moreover, these rules state that "[a]n attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court." *Id.* These rules are clear that a request for a subpoena is a routine procedure and that, absent an objection or timely motion, any person must comply with the subpoena as issued.

B. There Is No Basis For Denial In The Absence Of An Objection Or Motion To Quash.

A person subject to a subpoena may object to a subpoena under Minn. R. 1400.7000, but none of the persons for whom subpoenas were sought in this case have objected. Moreover, the provisions of Fed. R. Civ. P. 45 cited by your Honor and Minn. R. Civ. P. 45 require a *motion* to quash or modify a subpoena. Specifically, part (3)(B) of Rule 45 states that "[t]o protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, *on motion*, quash or modify the subpoena." (Emphasis added.) No such motion was made in this case. Rather, attorneys for FOH were in contact with attorneys for both MPCA and DNR prior to requesting the subpoenas and counsel for these agencies have never expressed intent to object to these subpoenas. In any event, the burden and the right to object, should they wish to do so, lies with the subpoenaed persons, not with Your Honor.

There is simply no basis for your Honor to *sua sponte* deny the requests without an objection or motion by any of the persons named in the requests. *See, e.g.*, *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976) (reviewing a district court's denial of a motion to quash subpoenas issued to expert witnesses). The refusal to allow Friends of the Headwaters to enter relevant and admissible testimony by denying these subpoena requests is reversible error.

C. There Is No Basis To Quash The Subpoenas.

Even if there were an objection from the persons named in FOH's subpoena requests, there would be no basis to quash the subpoenas. While *Kaufman* identifies factors for a district court to consider on a motion to quash a subpoena, the Second Circuit makes it clear that the general rule is that a witness may be subpoenaed to testify. 539 F.2d at 822 (referring to the "general principle of testimonial compulsion").

FOH is seeking not only the expertise of these particular witness, but also testimony on facts about this proceeding uniquely within the personal knowledge of these witnesses. The fact that they also each have personal knowledge of the case at hand weighs in favor of denying a request to quash the subpoenas. As stated by the court in *Kaufman*,

> We can find no justification for a federal rule that would wholly exempt experts from placing before a tribunal *factual knowledge relating to the case at hand*, opinions already formulated, or even, in the rare case where a party may seek this and the witness feels able to answer, a freshly formed opinion, simply because they have become an expert at a particular calling.

539 F.2d at 821 (emphasis added). There are no "experts" who could testify to the preparation and methodology used in developing the comments submitted by these state agencies other than the employees of the agencies themselves. Accordingly, there is no basis for quashing these subpoenas under Rule 45 or the test laid out in *Kaufman*. Regardless, FOH explains below how these witnesses provide the type of information that is necessary for the development of the factual record and why protection from Your Honor is not warranted.

II. FOH'S RENEWED REQUEST FOR SUBPOENAS

Without conceding that this information is required by rule or Second Circuit case law, and without waiving its right to appeal this error, Friends of the Headwaters provides the information requested by Your Honor.

(a) FOH asserts that its requests to subpoena employees of MPCA and DNR relate to a "specific occurrence in dispute" to which the witness can testify from personal knowledge. On August 21, 2014 MPCA filed comments on the environmental impacts of system alternatives proposed in this case. These comments were signed by MCPA employee Bill Sierks, one of the persons for whom a subpoena is sought. Friends of the Headwaters understands, however, that Scott Lucas and Stephen Lee assisted in the preparation of these comments as well as additional comments that MPCA is currently preparing. If this understanding is incorrect, these employees are free to state as much in their responses to the questions posed by Friends of the Headwaters in the subpoena requests.

These comments have become a subject of dispute in this matter. As stated in the initial subpoena request, Ms. Sara Ploetz questions the basis for MPCA's conclusions in her rebuttal testimony filed January 5, 2015. Specifically, Ms. Ploetz states that "MPCA's analysis does not present a complete picture of the human and environmental features that could be impacted by

the System Alternatives or the Preferred Route." Ploetz Rebuttal at 16. Ms. Ploetz goes on to state that MCPA "did not consider and analyze a number of human and environmental features, including, for example, human settlement (cities and towns) and cultural resources." *Id.* Ms. Ploetz claims that MPCA's methodology "is not as precise or accurate of a method for determining the number or amount of features in a certain area as the use of GIS software." *Id.* at 17. Ms. Ploetz asserts that MPCA "does not explain how it created" the point system it uses in its comments. The criticisms continue, but the point is that the applicant has created a dispute about the weight MPCA's comments should be given by Your Honor. It is in the interest of the parties, Your Honor, the Public Utilities Commission and the public to create as robust a record as possible for the determination of whether a certificate of need is warranted in this case. To create such a record, FOH seeks a response from MPCA employees with personal knowledge of how the comments submitted on August 21 were prepared. The rules of the Office of Administrative Hearings contemplate and allow for a witness to be subpoenaed in exactly this type of situation. *See* Minn. R. 1400.7000.

Similarly, DNR employee Nathan Kestner authored comments submitted by DNR in this proceeding. (Letter to Sara Ploetz dated August 14, 2013.) FOH understands that other DNR employees were involved in preparing this letter as well as additional DNR comments that are expected to be submitted as part of the record. But, again, if that is not the case, those persons are free to state as much in response to the subpoenas. In this letter, Mr. Kestner makes several recommendations about how to conduct an appropriate environmental analysis of the proposed pipeline locations. FOH seeks testimony from Mr. Kestner about these recommendations in light of the environmental analysis that has occurred since then, including the DOC-EERA Report filed December 18, 2014 and the applicant's report attached as schedule 1 to Mr. Eberth's rebuttal testimony.

(b) These subpoena requests also seek information about opinions from the listed witnesses that were previously formed. The rule cited by Your Honor and the footnote to the advisory committee notes relate to compelling experts to divulge intellectual property without being compensated, which is inapplicable here. These state agencies voluntarily submitted the comments that are now the subject of dispute. The court in *Kaufman* notes that there is a "difference between testifying to a previously formed or expressed opinion and forming a new one." 539 F.2d at 822. FOH is seeking additional testimony from MPCA and DNR about their previously formed or expressed opinions regarding the Sandpiper Pipeline. FOH is not asking these witnesses to perform onerous new analyses on new subject matter simply because of their general area of expertise; FOH is asking about previously formed opinions on the very question before this tribunal. FOH is also asking about these previously formed opinions in light of new material in these proceedings, work that we understand the DNR and MPCA are doing anyway as part of the public comment period currently underway.

(c) The factors Your Honor lists under 2.c.i-iv of the Twentieth Prehearing Order are factors identified by the *Kaufman* court for district courts to consider on a motion to quash to determine if some "dispensation" for the complaining witness is appropriate. *Id.* They are not, as Your Honor states, required to "demonstrate the necessity of such an order under the balancing test." Regardless, FOH states that:

(i) Because of their involvement in generating the comments and opinions previously filed in this proceeding, these witnesses are "unique experts."

(ii) It is unlikely that any "comparable" witness will willingly testify because FOH seeks information solely within the personal knowledge of these witnesses.

(iii) As noted above, the sought-after testimony is based on a previously formed or expressed opinion; and

(iv) There is no likelihood that these witnesses can be compelled to testify in similar matters because the comments on which the testimony is based are unique to this proceeding.

III. COMPLIANCE WITH PREVIOUS PREHEARING ORDERS

Lastly, FOH will attempt to respond to your Honor's request that "[a]ny renewed request shall address how FOH's proffer of the listed witnesses shall comply, if at all, with the prehearing disclosure provisions of the Seventeenth Prehearing Order and paragraphs 19 through 22 of the Second Prehearing Order." On review of the Seventeenth Prehearing Order, FOH was unable to find any disclosure provisions therein. The Seventeenth Prehearing Order sets out the schedule to which the parties are now adhering, including prefiling of all parties' surrebuttal testimony in the CON matter by Wednesday, January 21, 2015. FOH is requesting that MPCA witnesses respond to the subpoena request by prefiling surrebuttal testimony by this date. FOH did not ask the DNR witnesses to prefile their responses but will ask the DNR witnesses to do so, even though this is the first that FOH has heard of a requirement that any witness must prefile testimony in order to offer relevant fact and expert testimony at the evidentiary hearing.

Paragraphs 19 through 22 of the Second Prehearing Order are reproduced below with an indication of how FOH witnesses will comply included:

19. Pre-filed testimony and exhibits may be in any reasonable format that is understandable, logically organized, and capable of being readily cited (either by page and line number, paragraph number, or similar identifier).

FOH Response: FOH will work with counsel for MPCA and DNR to ensure that any prefiled surrebuttal testimony by these witnesses is in a reasonable format.

20. A paper copy of pre-filed testimony that is offered for admission into the record at the hearing shall be provided for use of the witnesses and others at the hearing. The offering party will identify the document as having been eFiled with the unique eFile identifying number of the document. The Administrative Law Judge will assign a hearing exhibit number to the document at the time that it is offered for admission at the hearing.

FOH Response: As the party subpoenaing these witnesses, FOH will offer these witnesses' prefiled testimony for admission into the record at the hearing. FOH will accordingly provide paper copies of such testimony at the hearing and identify the documents as having been eFiled and will have the unique eFile identifying numbers available at the hearing.

21. Corrections to any pre-filed testimony shall be identified and marked on the paper copy of the exhibit. Those changes will be eFiled as soon as practicable after the hearing. A hearing exhibit list will be prepared that identifies each exhibit in the hearing record, with its hearing

exhibit number and unique eFile identifying number. The eFiled documents constitute the official record of the proceeding, along with any supplemental record data that cannot be eFiled. Any such supplemental record data will be identified by the Administrative Law Judge as included in the official record.

> **FOH Response:** Any MPCA and DNR testimony that requires correction will be handled by FOH in accordance with this paragraph.

22. Pre-filed testimony that is not offered into the record, or stricken portions of pre-filed testimony, shall be considered withdrawn and no witness shall be cross-examined concerning the withdrawn testimony. Except for good cause shown, any new affirmative matter that is not offered in reply to another party's direct case will not be received into the record as part of rebuttal testimony and exhibits. Except for good cause shown, all revisions or corrections to any pre-filed testimony shall be in writing and served upon the Administrative Law Judge and the parties no later than three (3) days prior to the commencement of the evidentiary hearing.

> **FOH Response:** FOH intends to offer the pre-filed testimony of any subpoenaed witnesses into the record. As discussed above, the content of the witnesses testimony will be in response to the rebuttal testimony filed by Ms. Sara Ploetz, the report filed by DOC/EERA on December 18, 2014 and the SA Report attached to the rebuttal testimony of Mr. Eberth. FOH will comply with the procedures for correcting any pre-filed testimony in accordance with this paragraph.

IV. CONCLUSION

FOH finds your Honor's denial of the subpoena requests troublesome and prejudicial given the extremely short timeline in this case coupled with your Honor's denial of FOH's motion for a continuance on the basis of new counsel. FOH counsel was required to devote considerable time to renewing these subpoena requests to which no objection has been raised and that were erroneously denied. FOH respectfully requests that Your Honor issue the subpoenas now upon renewed request.

Dated: January 20, 2015

/s/ Kathryn M. Hoffman
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Attorneys for Friends of the Headwaters

OFFICE OF ADMINISTRATIVE HEARINGS P.O. Box 64620 St. Paul, Minnesota 55164-0620 (651) 361-7900 FAX (651) 539-0300	**SUBPOENA REQUEST FORM** Minn. R. 1400.7000 OAH File No.: 8-2500-31260 (MPUC 13-473) Request Date: Thursday, Jan. 15, 2015
Name of Judge: Eric L. Lipman	**Type of Subpoena** (Check one) Hearing Presence _x__ Document Production _x_ Deposition __

In the Matter of: Sandpiper Pipeline Project

Requesting Party or Attorney	**Person Being Served**
Name: Kathryn M. Hoffman on behalf of Friends of the Headwaters	Name: Randall Doneen
Address: 26. E. Exchange Street, Suite 206	Address: Minnesota Department of Natural Resources 500 Lafayette Rd
City: Saint Paul State: MN Zip: 55101 Telephone: 651-223-5969 FAX: 651-223-5967	City: Saint Paul State: MN Zip: 55155

Date and Location of Hearing (or Deposition or Return of Documents):

Date for Return of Documents (as prefiled surrebuttal testimony):
January 21, 2015 Time: 4:30 p.m.
Minnesota Department of Commerce eFiling system in Docket No. 13-473.

Date and Location of Hearing:
January 27-30, 2015 Time: 9:30 a.m.
Minnesota Public Utilities Commission, Large Hearing Room

Relevancy of Testimony or Document to be Subpoenaed

The Department of Natural Resources ("DNR") has submitted comments in this matter evaluating various proposed system alternatives. Friends of the Headwaters understands that DNR intends to submit additional comments as part of the ongoing public comment period. By developing these comments and through their other professional duties, DNR employees have gained expertise and fact knowledge on the various proposed pipeline locations that will be valuable to the parties, the Administrative Law Judge, and the Public Utilities Commission in determining whether the various system alternatives meet the criteria of Minn. R. 7853.0130.

Friends of the Headwaters asks that the DNR employee respond to the attached questions and submit them as prefiled surrebuttal testimony in this matter. Friends of the Headwaters also asks that this , or other DNR employees who have similar knowledge and expertise, be available for cross examination at the evidentiary hearings in this matter from January 27, 2015 to January 30, 2015.

Friends of the Headwaters seeks answers in the form of written testimony to the following questions, to be submitted as prefiled surrebuttal testimony by January 21, 2015:

1. What is your name and employer?

2. What are your qualifications for your current position?

3. Did you assist in authoring the letter to Sara Ploetz submitted by the Minnesota Department of Natural Resources on August 14, 2014 on the proposed Sandpiper Pipeline?

4. Can you identify any other employees at the Minnesota Department of Natural Resources who also assisted with that letter?

5. Are you currently working on generating any other documents related to the Sandpiper Pipeline on behalf of the MDNR?

6. Please provide a copy of all documents described in question 5, if any.

7. Please describe your role in generating the August 14, 2014 comments on behalf of MDNR, if any.

8. Please describe your role in generating any other documents attached pursuant to question 6.

9. Please describe how your area of expertise relates to the August 21, 2014 comments, as well as any other documents attached pursuant to question 6.

10. Did you review any rebuttal testimony from the North Dakota Pipeline Company?

11. If yes, do you have any response at this time?

12. Did you review the Department of Commerce Report entitled “Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives,” published in December 2014?

13. If yes, do you have any response at this time?

OFFICE OF ADMINISTRATIVE HEARINGS P.O. Box 64620 St. Paul, Minnesota 55164-0620 (651) 361-7900 FAX (651) 539-0300	**SUBPOENA REQUEST FORM** Minn. R. 1400.7000 OAH File No.: 8-2500-31260 (MPUC 13-473) Request Date: Thursday, Jan. 15, 2015
Name of Judge: Eric L. Lipman	**Type of Subpoena** (Check one) Hearing Presence _x__ Document Production _x_ Deposition __

In the Matter of: Sandpiper Pipeline Project

Requesting Party or Attorney	**Person Being Served**
Name: Kathryn M. Hoffman on behalf of Friends of the Headwaters	Name: Nathan Kestner
Address: 26. E. Exchange Street, Suite 206	Address: Minnesota Department of Natural Resources, NW Region Headquarters 2115 Birchmont Beach Road NE
City: Saint Paul State: MN Zip: 55101 Telephone: 651-223-5969 FAX: 651-223-5967	City: Bemidji State: MN Zip: 56601

Date and Location of Hearing (or Deposition or Return of Documents):

Date for Return of Documents (as prefiled surrebuttal testimony):
January 21, 2015 Time: 4:30 p.m.
Minnesota Department of Commerce eFiling system in Docket No. 13-473.

Date and Location of Hearing:
January 27-30, 2015 Time: 9:30 a.m.
Minnesota Public Utilities Commission, Large Hearing Room

Relevancy of Testimony or Document to be Subpoenaed

The Department of Natural Resources ("DNR") has submitted comments in this matter evaluating various proposed system alternatives. Friends of the Headwaters understands that DNR intends to submit additional comments as part of the ongoing public comment period. By developing these comments and through their other professional duties, DNR employees have gained expertise and fact knowledge on the various proposed pipeline locations that will be valuable to the parties, the Administrative Law Judge, and the Public Utilities Commission in determining whether the various system alternatives meet the criteria of Minn. R. 7853.0130.

Friends of the Headwaters asks that the DNR employee respond to the attached questions and submit them as prefiled surrebuttal testimony in this matter. Friends of the Headwaters also asks that this DNR employee, or other DNR employees who have similar knowledge and expertise, be available for cross examination at the evidentiary hearings in this matter from January 27, 2015 to January 30, 2015.

Friends of the Headwaters seeks answers in the form of written testimony to the following questions, to be submitted as prefiled surrebuttal testimony by January 21, 2015:

1. What is your name and employer?

2. What are your qualifications for your current position?

3. Did you assist in authoring the letter to Sara Ploetz submitted by the Minnesota Department of Natural Resources on August 14, 2013 on the proposed Sandpiper Pipeline?

4. Can you identify any other employees at the Minnesota Department of Natural Resources who also assisted with that letter?

5. Are you currently working on generating any other documents related to the Sandpiper Pipeline on behalf of the MDNR?

6. Please provide a copy of all documents described in question 5, if any.

7. Please describe your role in generating the August 14, 2013 comments on behalf of MPCA, if any.

8. Please describe your role in generating any other documents attached pursuant to question 6.

9. Please describe how your area of expertise relates to the August 21, 2014 comments, as well as any other documents attached pursuant to question 6.

10. Did you review any rebuttal testimony from the North Dakota Pipeline Company?

11. If yes, do you have any response at this time?

12. Did you review the Department of Commerce Report entitled “Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives,” published in December 2014?

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OFFICE OF ADMINISTRATIVE HEARINGS P.O. Box 64620 St. Paul, Minnesota 55164-0620 (651) 361-7900 FAX (651) 539-0300	**SUBPOENA REQUEST FORM** Minn. R. 1400.7000 OAH File No.: 8-2500-31260 (MPUC 13-473) Request Date: Thursday, Jan. 15, 2015
Name of Judge: Eric L. Lipman	**Type of Subpoena** (Check one) Hearing Presence _x__ Document Production ___ Deposition __

In the Matter of: Sandpiper Pipeline Project

Requesting Party or Attorney	**Person Being Served**
Name: Kathryn M. Hoffman on behalf of Friends of the Headwaters	Name: Jamie Schrenzel
Address: 26. E. Exchange Street, Suite 206	Address: Minnesota Department of Natural Resources 500 Lafayette Rd
City: Saint Paul State: MN Zip: 55101 Telephone: 651-223-5969 FAX: 651-223-5967	City: Saint Paul State: MN Zip: 55155

Date and Location of Hearing (or Deposition or Return of Documents):

Date for Return of Documents (as prefiled surrebuttal testimony):
January 21, 2015 Time: 4:30 p.m.
Minnesota Department of Commerce eFiling system in Docket No. 13-473.

Date and Location of Hearing:
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Friends of the Headwaters asks that the DNR employee respond to the attached questions and submit them as prefiled surrebuttal testimony in this matter. Friends of the Headwaters also asks that this DNR employee, or other DNR employees who have similar knowledge and expertise, be available for cross examination at the evidentiary hearings in this matter from January 27, 2015 to January 30, 2015.

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1. What is your name and employer?

2. What are your qualifications for your current position?

3. Did you assist in authoring the letter to Sara Ploetz submitted by the Minnesota Department of Natural Resources on August 14, 2014 on the proposed Sandpiper Pipeline?

4. Can you identify any other employees at the Minnesota Department of Natural Resources who also assisted with that letter?

5. Are you currently working on generating any other documents related to the Sandpiper Pipeline on behalf of the MDNR?

6. Please provide a copy of all documents described in question 5, if any.

7. Please describe your role in generating the August 14, 2014 comments on behalf of MDNR, if any.

8. Please describe your role in generating any other documents attached pursuant to question 6.

9. Please describe how your area of expertise relates to the August 21, 2014 comments, as well as any other documents attached pursuant to question 6.

10. Did you review any rebuttal testimony from the North Dakota Pipeline Company?

11. If yes, do you have any response at this time?

12. Did you review the Department of Commerce Report entitled “Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives,” published in December 2014?

13. If yes, do you have any response at this time?

OFFICE OF ADMINISTRATIVE HEARINGS P.O. Box 64620 St. Paul, Minnesota 55164-0620 (651) 361-7900 FAX: (651) 539-0300	**SUBPOENA REQUEST FORM** Minn. R. 1400.7000 OAH File No.: 8-2500-31260 (MPUC 13-473) Request Date: Thursday, Jan. 15, 2015
Name of Judge: Eric L. Lipman	**Type of Subpoena** (Check one) Hearing Presence _x__ Document Production _x__ Deposition __

In the Matter of: Sandpiper Pipeline Project

Requesting Party or Attorney	**Person Being Served**
Name: Kathryn M. Hoffman on behalf of Friends of the Headwaters	Name: Stephen Lee
Address: 26. E. Exchange Street, Suite 206	Address: Minnesota Pollution Control Agency 520 Lafayette Ave N
City: Saint Paul State: MN Zip: 55101 Telephone: 651-223-5969 FAX: 651-223-5967	City: Saint Paul State: MN Zip: 55155

Date and Location of Hearing (or Deposition or Return of Documents):

Date for Return of Documents (as prefiled surrebuttal testimony):
January 21, 2015 Time: 4:30 p.m.
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January 27-30, 2015 Time: 9:30 a.m.
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Relevancy of Testimony or Document to be Subpoenaed

The Minnesota Pollution Control Agency ("MPCA") has submitted comments in this matter evaluating various proposed system alternatives. Its employees have gained expertise on the various pipeline locations that will be valuable to the parties, the Administrative Law Judge, and the Public Utilities Commission in determining whether the various system alternatives meet the criteria of Minn. R. 7853.0130. NDPC has responded to MPCA comments as part of its rebuttal testimony.

Friends of the Headwaters asks that the MPCA employee answer the attached questions in writing, and provide any comments from MPCA related to the Sandpiper Pipeline as prefiled surrebuttal testimony in this proceeding. Friends of the Headwaters also requests that Mr. Lee, or other MPCA employees who assist in answering the attached questions, be available for cross examination at the evidentiary hearings in this matter from January 27, 2015 to January 30, 2015.

Friends of the Headwaters seeks answers in the form of written testimony to the following questions, to be submitted as prefiled surrebuttal testimony by January 21, 2015:

1. What is your name and employer?

2. What are your qualifications for your current position?

3. Did you assist in authoring comments submitted by the Minnesota Pollution Control Agency on August 21, 2014 on the proposed Sandpiper Pipeline?

4. Can you identify any other employees at the Minnesota Pollution Control Agency who also assisted with those comments?

5. Are you currently working on generating any other documents related to the Sandpiper Pipeline on behalf of the MPCA?

6. Please provide a copy of all documents described in question 5, if any.

7. Please describe your role in generating the August 21, 2014 comments on behalf of MPCA, if any.

8. Please describe your role in generating any other documents attached pursuant to question 6.

9. Please describe how your area of expertise relates to the August 21, 2014 comments, as well as any other documents attached pursuant to question 6.

10. Are you familiar with the chemical qualities of Bakken oil?

11. If yes, what are those qualities?

12. What challenges, if any, do those qualities pose for a potential spill?

13. Have you ever done any modeling or other work on the potential impacts of a spill from the proposed Sandpiper Pipeline?

14. If yes, please include any documents associated with that work.

15. Did you review any rebuttal testimony from the North Dakota Pipeline Company?

16. If yes, do you have any response at this time?

OFFICE OF ADMINISTRATIVE HEARINGS P.O. Box 64620 St. Paul, Minnesota 55164-0620 (651) 361-7900 FAX (651) 539-0300	**SUBPOENA REQUEST FORM** Minn. R. 1400.7000 OAH File No.: 8-2500-31260 (MPUC 13-473) Request Date: Thursday, Jan. 15, 2015
Name of Judge: Eric L. Lipman	**Type of Subpoena** (Check one) Hearing Presence _x__ Document Production _x__ Deposition __

In the Matter of: Sandpiper Pipeline Project

Requesting Party or Attorney	**Person Being Served**
Name: Kathryn M. Hoffman on behalf of Friends of the Headwaters	Name: Scott Lucas
Address: 26. E. Exchange Street, Suite 206	Address: Minnesota Pollution Control Agency 7678 College Road, Suite 105
City: Saint Paul State: MN Zip: 55101 Telephone: 651-223-5969 FAX: 651-223-5967	City: Baxter State: MN Zip: 56425

Date and Location of Hearing (or Deposition or Return of Documents):

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Friends of the Headwaters asks that the MPCA employee answer the attached questions in writing, and provide any comments from MPCA related to the Sandpiper Pipeline as prefiled surrebuttal testimony in this proceeding. Friends of the Headwaters also requests that Mr. Lucas, or other MPCA employees who assist in answering the attached questions, be available for cross examination at the evidentiary hearings in this matter from January 27, 2015 to January 30, 2015.

The Department of Natural Resources ("DNR") has submitted comments in this matter evaluating various proposed system alternatives. Friends of the Headwaters understands that DNR intends to submit additional comments as part of the ongoing public comment period. By developing these comments and through their other professional duties, DNR employees have gained expertise and fact knowledge on the various proposed pipeline locations that will be valuable to the parties, the Administrative Law Judge, and the Public Utilities Commission in determining whether the various system alternatives meet the criteria of Minn. R. 7853.0130.

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1. What is your name and employer?

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3. Did you assist in authoring the letter to Sara Ploetz submitted by the Minnesota Department of Natural Resources on August 14, 2014 on the proposed Sandpiper Pipeline?

4. Can you identify any other employees at the Minnesota Department of Natural Resources who also assisted with that letter?

5. Are you currently working on generating any other documents related to the Sandpiper Pipeline on behalf of the MDNR?

6. Please provide a copy of all documents described in question 5, if any.

7. Please describe your role in generating the August 14, 2014 comments on behalf of MDNR, if any.

8. Please describe your role in generating any other documents attached pursuant to question 6.

9. Please describe how your area of expertise relates to the August 21, 2014 comments, as well as any other documents attached pursuant to question 6.

10. Did you review any rebuttal testimony from the North Dakota Pipeline Company?

11. If yes, do you have any response at this time?

12. Did you review the Department of Commerce Report entitled “Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives,” published in December 2014?

13. If yes, do you have any response at this time?

OFFICE OF ADMINISTRATIVE HEARINGS P.O. Box 64620 St. Paul, Minnesota 55164-0620 (651) 361-7900 FAX (651) 539-0300	**SUBPOENA REQUEST FORM** Minn. R. 1400.7000 OAH File No.: 8-2500-31260 (MPUC 13-473) Request Date: Thursday, Jan. 15, 2015
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In the Matter of: Sandpiper Pipeline Project

Requesting Party or Attorney	**Person Being Served**
Name: Kathryn M. Hoffman on behalf of Friends of the Headwaters	Name: Bill Sierks
Address: 26. E. Exchange Street, Suite 206	Address: Minnesota Pollution Control Agency 520 Lafayette Rd N
City: Saint Paul State: MN Zip: 55101 Telephone: 651-223-5969 FAX: 651-223-5967	City: Saint Paul State: MN Zip: 55155

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Friends of the Headwaters asks that the MPCA employee answer the attached questions in writing, and provide any comments from MPCA related to the Sandpiper Pipeline as prefiled surrebuttal testimony in this proceeding. Friends of the Headwaters also requests that Mr. Sierks, or other MPCA employees who assist in answering the attached questions, be available for cross examination at the evidentiary hearings in this matter from January 27, 2015 to January 30, 2015.

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1. What is your name and employer?

2. What are your qualifications for your current position?

3. Did you assist in authoring comments submitted by the Minnesota Pollution Control Agency on August 21, 2014 on the proposed Sandpiper Pipeline?

4. Can you identify any other employees at the Minnesota Pollution Control Agency who also assisted with those comments?

5. Are you currently working on generating any other documents related to the Sandpiper Pipeline on behalf of the MPCA?

6. Please provide a copy of the MPCA's August 21, 2014 comments, as well as documents described in question 5, if any.

7. Please describe your role in generating the August 21, 2014 comments on behalf of MPCA.

8. Please describe your role in generating any other documents attached pursuant to question 6.

9. Please describe how your area of expertise relates to the August 21, 2014 comments, as well as any other documents attached pursuant to question 6.

10. Did you review the rebuttal testimony of Ms. Sara Ploetz submitted by the North Dakota Pipeline Company?

11. Do you have any response to her discussion of MPCA's August 21, 2014 comments?

12. Did you review any other rebuttal testimony from the North Dakota Pipeline Company?

13. Do you have any response at this time to other rebuttal testimony from the North Dakota Pipeline Company?

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

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

AFFIDAVIT OF SERVICE

MPUC Docket Nos. PL-6668/CN-13-473
OAH Docket Nos. 8-2500-31260

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Leah Murphy, being duly sworn, says that on the 20th day of January, 2015 she served via U.S. mail and e-dockets the following:

- Response to Denial of Subpoenas filed on behalf of the Friends of the Headwaters

on the following persons, in this action, by filing through e-dockets or mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at St. Paul, Minnesota, directed to said persons at the last known mailing address of said persons:

Attached Service List.

Leah Murphy

Subscribed and sworn to before me
this 20th day of January, 2015

Karen E Moss
Karen Moss

KAREN E. MOSS
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2016

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade	
Julia	Anderson	Julia.Anderson@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota St St. Paul, MN 551012134	Electronic Service	Yes	Service List - CC
David	Barnett	daveb@uanet.org	United Association of Journeymen & Apprentices	1300 Derek Street Haskell, OK 74436	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Frank	Bibeau	frankbibeau@gmail.com	Honor the Earth	51124 County Road 118 Deer River, Minnesoa 56636	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Ellen	Boardman	eboardman@odonoghuelaw.com	O'Donoghue & O'Donoghue LLP	4748 Wisconsin Ave NW Washington, DC 20016	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Christina	Brusven	cbrusven@fredlaw.com	Fredrikson Byron	200 S 6th St Ste 4000 Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Leigh	Currie	lcurrie@mncenter.org	Minnesota Center for Environmental Advocacy	26 E. Exchange St., Suite 206 St. Paul, Minnesota 55101	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
John E.	Drawz	jdrawz@fredlaw.com	Fredrikson & Byron, P.A.	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Peter	Erlinder	proferlinder@gmail.com	International Humanitarian Law Institute	325 Cedar St. Suite 308 St. Paul, MN 55101	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 500 Saint Paul, MN 551012198	Electronic Service	Yes	OFF_SL_13-473_Official Service List - CC
John R.	Gasele	jgasele@fryberger.com	Fryberger Buchanan Smith & Frederick PA	700 Lonsdale Building 302 West Superior Street Duluth, MN 55802	Electronic Service	No	OFF_SL_13-473_Official Service List - CC

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade S	
Benjamin	Gerber	bgerber@mnchamber.com	Minnesota Chamber of Commerce	400 Robert Street North Suite 1500 St. Paul, Minnesota 55101	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Andrew	Gibbons	andrew.gibbons@stinsonleonard.com	Stinson Leonard Street	150 S Fifth St Ste 2300 Minneapolis, MN 54002	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Jon	Godfread	Jon@ndchamber.com	Greater North Dakota Chamber	2000 Schafer Street Bismarck, ND 58501	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Burl W.	Haar	burl.haar@state.mn.us	Public Utilities Commission	Suite 350 121 7th Place East St. Paul, MN 551012147	Electronic Service	Yes	OFF_SL_13-473_Official Service List - CC
Helene	Herauf	Laney@ndchamber.com	Greater North Dakota Chamber	PO Box 2639 Bismarck, ND 58502	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Kathryn	Hoffman	khoffman@mncenter.org	Minnesota Center for Environmental Advocacy	26 E. Exchange St Ste 206 St. Paul, MN 55101	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Linda	Jensen	linda.s.jensen@ag.state.mn.us	Office of the Attorney General-DOC	1800 BRM Tower 445 Minnesota Street St. Paul, MN 551012134	Electronic Service	Yes	OFF_SL_13-473_Official Service List - CC
Eric	Lipman	eric.lipman@state.mn.us	Office of Administrative Hearings	PO Box 64620 St. Paul, MN 551640620	Electronic Service	Yes	OFF_SL_13-473_Official Service List - CC
Peter	Madsen	peter.madsen@ag.state.mn.us	Office of the Attorney General-DOC	Bremer Tower, Suite 1800 445 Minnesota Street St. Paul, Minnesota 55101	Electronic Service	Yes	OFF_SL_13-473_Official Service List - CC
Brian	Meloy	brian.meloy@stinsonleonard.com	Stinson,Leonard, Street LLP	150 S 5th St Ste 2300 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-473_Official Service List - CC

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade S	
Joseph	Plumer	joep@whiteearth.com	White Earth Band of Ojibwe	P.O. Box 418 White Earth, Minnesota 56591	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Kevin	Pranis	kpranis@liunagroc.com	Laborers' District Council of MN and ND	81 E Little Canada Road St. Paul, Minnesota 55117	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Neil	Roesler	nroesler@vogellaw.com	Vogel Law Firm	218 NP Avenue PO Box 1389 Fargo, ND 58107	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	Ste 122 9100 W Bloomington Frwy Bloomington, MN 55431	Electronic Service	Yes	OFF_SL_13-473_Official Service List - CC
Eileen	Shore	eileenshore@outlook.com	Eileen Shore	3137 42nd Ave So Minneapolis, MN 55406	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Mollie	Smith	msmith@fredlaw.com	Fredrikson Byron PA	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Richard	Smith	grizrs615@gmail.com	Friends of the Headwaters	P.O. Box 583 Park Rapids, MN 56470	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Byron E.	Starns	byron.starns@leonard.com	Leonard Street and Deinard	150 South 5th Street Suite 2300 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Randy V.	Thompson	rthompson@nmtlaw.com	Nolan, Thompson & Leighton	5001 American Blvd W Ste 595 Bloomington, MN 55437	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
Gerald	Von Korff	jvonkorff@rinkenoonan.com	Rinke Noonan	PO Box 1497 St. Cloud, MN 56302	Electronic Service	No	OFF_SL_13-473_Official Service List - CC

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Kevin	Walli	kwalli@fryberger.com	Fryberger, Buchanan, Smith & Frederick	380 St. Peter St Ste 710 St. Paul, MN 55102	Electronic Service	No	OFF_SL_13-473_Official Service List - CC
James	Watts	james.watts@enbridge.com	Enbridge Pipelines (North Dakota) LLC	26 E Superior St Ste 309 Duluth, MN 55802	Electronic Service	No	OFF_SL_13-473_Official Service List - CC

TELEPHONIC PREHEARING - JANUARY 22, 2015 - 13-473

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

OF THE STATE OF MINNESOTA

FOR THE MINNESOTA PUBLIC UTILITIES Commission

In the Matter of the Application of North Dakota Pipeline Company, LLC for a Certificate of Need for the Sandpiper Pipeline Project.

MPUC DOCKET NO. PL-6668/CN-13-473

OAH DOCKET NO. 8-2500-31260

Minnesota Public Utilities Commission
St. Paul, Minnesota

Met, pursuant to Notice, at 10:30 in the morning on January 22, 2015.

BEFORE: Judge Eric Lipman

REPORTER: Janet Shaddix Elling, RPR

APPEARANCES:

CHRISTINA K. BRUSVEN, Attorney at Law, Fredrikson & Byron, P.A., 200 Sixth Street South, Suite 4000, Minneapolis, Minnesota 55402, appeared for and on behalf of the Applicant.

BRIAN MELOY, Attorney at Law, Stinson, Leonard, Street, 150 South Fifth Street, Suite 2300, Minneapolis, Minnesota 55402, appeared for and on behalf of Kennecott Exploration Company.

GERALD VON KORFF, Attorney at Law, Rinke Noonan, 1015 West St. Germain Street, St. Cloud, Minnesota 56303, appeared for and on behalf of the Carlton County Land Stewards.

FRANK BIBEAU, Attorney at Law, 51124 County Road 118, Deer River, Minnesota 56636, appeared for and on behalf of Honor the Earth.

JOSEPH PLUMER and JESSICA MILLER, Attorneys at Law, P.O. Box 238, White Earth, Minnesota 56591, appeared for and on behalf of White Earth Band of Ojibwe.

LEIGH CURRIE, Attorney at Law, Minnesota Center for Environmental Advocacy, 26 East Exchange Street, Suite 206, St. Paul, Minnesota 55101, and EILEEN SHORE, P.O. Box 583, Park Rapids, Minnesota 56470, appeared for and on

behalf of Friends of the Headwaters.

BENJAMIN GERBER, Attorney at Law, 400 Robert Street North, Suite 1500, St. Paul, Minnesota 55101, appeared for and on behalf of the Minnesota Chamber of Commerce.

KEVIN PRANIS, 81 East Little Canada Road, St. Paul, Minnesota 55117, appeared for and on behalf of Laborers' District Council of Minnesota and North Dakota.

ELLEN BOARDMAN, Attorney at Law, O'Donoghue & O'Donoghue, LLP, 4748 Wisconsin Avenue Northwest, Washington, D.C. 20016, appeared for and on behalf of United Association.

HELENE HERAUF, P.O. Box 2639, Bismarck, North Dakota 58502, appeared for and on behalf of the Greater North Dakota Chamber.

JULIA ANDERSON, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, Minnesota 55101-2134, appeared for and on behalf of the DOC DER.

LINDA S. JENSEN, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, Minneota 55101-2134, appeared for and on behalf of the DOC EERA.

PUC STAFF: Scott Ek and Tracy Smetana

WHEREUPON, the following proceedings were duly had and entered of record, to wit:

JUDGE LIPMAN: My name is Eric Lipman, I'm an administrative law judge with the Minnesota Office of Administrative Hearings.

We're here in a prehearing status and scheduling conference In the Matter of the Application of North Dakota Pipeline Company, LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota. It's otherwise known as OAH docket 8-2500-31260.

We've had a series of colloquies by way of a meet-me telephone conference call for roughly an hour off the record about a variety of scheduling issues in advance of the evidentiary hearing to commence on Tuesday, the 27th of January, in the large hearing room of the Public Utilities Commission's offices in St. Paul.

And we did want to have an on-the-record colloquy not only to describe the agreements and understandings that have been reached informally off the record, but also to preserve our record with respect to the testimony of certain nonparty agency witnesses that may well be called by the Friends of the Headwaters at the upcoming evidentiary hearing.

Let me first review some of the items that have been agreed upon.

Earlier in the week I circulated a draft set of potential exhibit ranges and preassigned numbers for easy and convenient labeling by the parties so that they know, they would have a range certain of how to label their documents. In addition to -- with respect to numbering. In addition to remembering to place the individual eDocket number on the face of that document.

Notwithstanding the fact that Kennecott is not going to be offering its own exhibits, to save and to avoid any confusion by any party, notwithstanding the fact that exhibit numbers 100 through 109 will still be reserved, we're going to maintain the original draft with the earlier assigned numbers to each of those parties in the order of intervention.

The Applicant starting with 1 through 49, proceeding in various slots of various sizes through the other parties in order of intervention, and reserving numbers 240 to 299 to the court reporter for the narrow range of exhibits, which subject to a very narrow exception might be introduced at the evidentiary hearing.

Okay. Also, it was agreed that as parties complete their review of surrebuttal testimony and considering the travel needs of their own witnesses, that following this call, and particularly tomorrow, Friday, January 23, and if need be over the weekend and on Monday, January 26th, that there will be a series of exchanges between parties, both telephonically and by electronic mail as to any stipulations that might be arrived at, such as either as a date certain for the appearance of certain witnesses to sponsor their testimony or, in the alternative, a waiver by the other parties of cross-examination of that witness entirely, and a stipulation that their earlier prefiled testimony could be received without the physical sponsorship of that witness at the evidentiary hearing of their earlier prefiled testimony.

Also, as part of those colloquies and conversations, the parties will do their level best, if they do have cross-examination of particular witnesses, to be able to describe to others the nature and extent, giving their best learned guesstimates of the time in cross that they might have, only so that as a global enterprise all of the

parties can make rough learned, educated guesses as to when particular witnesses later in time might be called upon to testify. And, also, whether we are likely to make it and close the evidentiary hearing record within the four days that have been allotted in the original prehearing order for the evidentiary hearing. As a safety measure, we have a reservation for February 2 and February 3, the Monday and Tuesday respectively that follow the earlier scheduled close of the evidentiary hearing on January 30th just in case. I'm mindful that folks may well have other commitments on February 2 and 3, that includes this tribunal, I would have to be engaged in scheduling, and so that's a result to be avoided if at all possible, but this case is a priority to the tribunal and to the state generally and so it may well come to that.

Anything on any of those topics that any of the lawyers -- and since I didn't do the role, you'll have to identify yourself, and any counsel who want to be heard on any of those topics? Any additions, corrections, things we should know? Please.

MS. BOARDMAN: Your Honor, this is Ellen Boardman representing the UA.

Just because of the travel of witnesses leaving from out of town on Monday, could I request that we set a deadline for the stipulation, perhaps 4:00 tomorrow, your time? Just so that everybody will know going into the weekend and Monday in particular what the travel schedule will be for witnesses who may be waived. And I'm thinking of my witness in particular.

JUDGE LIPMAN: Okay. Any concerns with that?

MR. VON KORFF: UA means Mr. Barnett?

MS. BOARDMAN: Yes, sir.

MR. VON KORFF: I'd stipulate to a deadline for Mr. Barnett for sure. I'm not ready -- I'm going to do the best I can, but with regard to North Dakota Pipeline, I'm not ready to -- I can't say that I'll be ready by the end of Friday.

JUDGE LIPMAN: Well, let me ask this: I will -- and any concern about putting a deadline as to Mr. Barnett -- is it Dr. Reddy or Mr. Reddy, Ms. Currie?

MS. CURRIE: It's Dr. Reddy, Your Honor.

JUDGE LIPMAN: Dr. Reddy and Ms. Herauf, since they've already requested time certain arrangements, can we --

MR. PRANIS: Can we throw Mr. Duncombe in as well?

JUDGE LIPMAN: Okay, Duncombe.

MR. GERBER: I'm wondering if it's a possibility to stipulate for the parties that didn't submit rebuttal, including Mr. Younggren and Mr. Blazer, you know, I understand, it sounds like, you know, maybe the stipulation, there's concern about North Dakota, you know, Pipeline Company, but I'm wondering if we could do that for the parties just in general that aren't submitting surrebuttal.

MR. VON KORFF: Well, all of the ones that he -- go ahead.

JUDGE LIPMAN: Well, did Mr. -- or Dr. Reddy submit surrebuttal?

MS. CURRIE: He did, Your Honor.

JUDGE LIPMAN: So that rule wouldn't apply to him. I'm just thinking about folks who are traveling from out of state to get to this.

MS. CURRIE: Your Honor, this is Leigh Currie -- sorry to interrupt -- for Friends of the Headwaters.

We would be willing to meet a 4:00 p.m. deadline tomorrow to stipulate to any of the nonapplicant witnesses as to whether we have cross

or not.

JUDGE LIPMAN: Okay.

MR. VON KORFF: And Carlton County Land Stewards is in the same position.

MR. BIBEAU: Honor the Earth, also, Your Honor.

JUDGE LIPMAN: Okay. So nonapplicants.

MR. PLUMER: Right. Same with White Earth, too.

JUDGE LIPMAN: Okay. Any party participants on the call who does not want to stipulate to a 4:00 p.m. deadline as to nonapplicant witnesses?

Great. We have a stipulation. Wonderful. Very helpful.

Okay. So with that, Ms. Currie, what should we know about, I guess, the surrebuttal of DNR and MPCA officials?

MS. CURRIE: Thank you, Your Honor. Leigh Currie again for Friends of the Headwaters.

As you are aware, we submitted a written request to Your Honor last week for six subpoenas for agency witnesses. Three from the Department of Natural Resources and three from the Pollution Control Agency. Your Honor denied these requests

without prejudice and invited a renewed request, which we made on Tuesday, January 20th of this week, with the understanding that surrebuttal testimony would be due Wednesday, January 21st of this week. And also an understanding that in order to call these witnesses that prefiled testimony was recommended.

As a result of these subpoenas, which we didn't receive a response to our renewed request by the surrebuttal deadline yesterday, we coordinated with the agencies to have them prefile surrebuttal testimony even in the absence of a subpoena, which they were willing to do. However, we would like to call these witnesses not as supporters of Friends of the Headwaters or the party, but rather as independent witnesses testifying on behalf of state agencies.

And so with that in mind we are requesting that they are subpoenaed witnesses rather than witnesses on behalf of Friends of the Headwaters. Or in the alternative, that at least Friends of the Headwaters is given the opportunity to treat those witnesses as hostile witnesses or nonparty witnesses.

JUDGE LIPMAN: Well, okay. So let me

just inquire. We'll take the example of Ms. Schrenzel, but I assume that a similar rule applies to other witnesses.

Is Ms. Schrenzel on the agency clock, your understanding, if she is called at the evidentiary hearing? Is she getting paid or is she taking time off? Is she testifying as learned Jamie Schrenzel or is she testifying as a DNR employee?

MS. CURRIE: It's my understanding, Your Honor, that she would be testifying as a DNR employee.

JUDGE LIPMAN: Okay. And if she's willing to do so willingly and presumably has the permission of her supervisors, why do you need a subpoena?

MS. CURRIE: Well, again, Your Honor, these agency witnesses were not intending to prefile testimony, nor were they intending to testify at the hearing on behalf of Friends of the Headwaters. And that is why we requested a subpoena for these witnesses in order to ask them to prefile testimony, require them to prefile testimony, and have them appear at the hearing next week so that we were able to cross-examine them on certain aspects of the comments that they voluntarily submitted earlier in

the Commission proceeding in this docket. And so that is why we believe that subpoenas were necessary.

MR. VON KORFF: Your Honor?

JUDGE LIPMAN: Please, Mr. Von Korff.

MR. VON KORFF: The position of the agencies with respect to environmental review, both its adequacy and any differences that they might have, seems tremendously relevant. It certainly was, you know, in the power line case that I was involved in. It wasn't done by subpoena, they filed comments, and I think they are -- I think both agencies are intending to file comments by the 23rd deadline, but in my experience they then are available through some mechanism to get on the witness stand and be cross-examined with regard to the agency position.

And I don't know what the right mechanism is, a subpoena seems one mechanism, but it feels like in order to have a complete record, since the agencies are expressing their position, that no party should have to take that position on cross-examination.

MS. CURRIE: And, Your Honor, just to be clear -- this is Leigh Currie again -- if we can

agree on the record that these witnesses will testify at the hearing and are subject to cross-examination by all of the parties, then we don't see a need for the subpoenas at this point.

MS. BRUSVEN: Your Honor, Christy Brusven.

JUDGE LIPMAN: Please.

MS. BRUSVEN: A question maybe for Ms. Currie. Absent a subpoena, will the state agencies voluntarily come, or based on your prior statement, must they be compelled to show up at the evidentiary hearing?

MS. CURRIE: I can't speak for them at this point. We have not asked them if they would voluntarily appear at the hearing next week. But I can certainly connect with the agency attorneys and ask if that is a possibility.

MR. VON KORFF: Maybe the PUC staff has a memory on past practice, but my memory is that, whether it was an administrative law judge or one of the parties, when MnDOT, DNR, MPCA, when they had views, those views were expressed in writing sometimes out of the ordinary order of things, but they made themselves available to explain to the administrative law judge and to answer questions.

JUDGE LIPMAN: Well, I think that there are -- there are two sets of issues here. One is, Ms. Currie, I think you should see about whether they are willing, the listed six are willing to come and testify willingly, whether they have permission. I think we need to be clear about whether they speak for the agency or not or whether they're, you know, taking their own time, either flex time or their own vacation time for the good of the order to volunteer their views. And, you know, that would be helpful. I don't think it's necessarily problematic that they're not under the employ of the Friends of the Headwaters.

More significantly as an issue is I think whether there's going to be an effort to take in the yet-to-be-filed comments tomorrow, which were not part of surrebuttal prefiled, and have a detailed inquiry about things which were beyond the couple of pages that were filed in surrebuttal. Is that your view? Are you going to query Ms. Schrenzel, by way of example, on her yet-to-be-filed comments as we sit here today on the 22nd?

MS. CURRIE: Your Honor, the primary purpose of having these witnesses appear was to question them on the comments that they have already

submitted in this record. The comments of the Minnesota Pollution Control Agency that were submitted on August 21st, 2014, and the comments of the Department of Natural Resources that were submitted in August of 2013 (sic).

We included in our subpoena request whether they were preparing additional comments, and they indicated that they were, and it would be our intent on the stand to ask them questions about those comments as appropriate. Obviously, we have not seen those comments either. However, the primary intent is to question them about comments that are already in this record.

JUDGE LIPMAN: Well, I think that there is -- I have some concerns about that only because of unfair surprise. Which is no one knows what those comments are today. And it's obviously well beyond the prefiling deadline if it happens tomorrow.

Go ahead. Who would like to be heard?

MR. VON KORFF: I would, Your Honor. Because my experience in the -- in the high voltage case was that MnDOT might wander in and say we've discovered that there's an airport near this route, and the administrative law judge would listen to

that testimony, almost defer to it. And we had Jamie Schrenzel come in with the Department letter that was very helpful I think to the administrative law judge, and she may have discovered a bird that they thought was important. And if the comments are coming in on the 23rd and if they represent the official position of the agency, I think it's somewhat unfair to the Applicant or to the parties that that can be received as an official position but it can't be cross-examined.

JUDGE LIPMAN: Well, but they have status as a public commentator in that other process. You know, it's not, you know, being offered as, you know, as an exhibit and fodder for the evidentiary hearing.

MR. VON KORFF: Maybe we should take this up when we see what comes in.

JUDGE LIPMAN: Well, no. And I'm sure certain, Mr. Von Korff, that that question will recur, almost in a Rawlsian, R-A-W-L-S-I-A-N, sense, being beyond the veil of ignorance, I'm not -- I'm more concerned with the principle involved here of protecting against unfair surprise, without regard, because I have absolutely no idea what the comment will be tomorrow, assuming a timely filing by the

close of the parallel public comment period.

You know, I feel better about making a comment because I don't know the substance, you know, pro or con, of what those remarks will be. I'm concerned about the regular order of folks having notice, fair notice of what's going to be testified in accordance with the second prehearing order and the regular order on filing of direct, rebuttal, and surrebuttal testimony. That's my policy concern, you know, about what is going to be testified.

If we're just going to be limited to the items that have already been prefiled on surrebuttal, I don't think we have an issue.

Other people who would like to be heard on this topic?

MS. BRUSVEN: Your Honor, there were also a couple of questions in Ms. Currie's questions to the agencies, asking the Department's employees to comment on Ms. Ploetz's rebuttal testimony. Is that something that Friends of the Headwaters had anticipated including in the scope of their questioning in cross-examination of these witnesses?

MS. CURRIE: Yes, Ms. Brusven, that would be something we would include in our questioning.

And that goes back to these August 21st comments that have been in front of all the parties for months. So I don't see an unfair surprise issue with questioning these agency witnesses about comments and studies that have been in front of all the parties for many months.

With respect to the comments that are going to be filed as far as we know tomorrow, I also don't see an unfair surprise issue in that all of the parties are on equal footing, as is Your Honor, in terms of these comments. And that if the agency witnesses have relevant admissible evidence to offer, and the rules of the Office of Administrative Hearings allow for witnesses to be subpoenaed to offer relevant admissible testimony at a hearing, we frankly can't see why we're not being allowed to subpoena these witnesses to testify.

JUDGE LIPMAN: And the answer to that question is, while you describe the rule quite well, the familiar accepted ordinary practice, and one that's been the practice in this case for -- since the second prehearing order, was that there would be a series of prefiled testimony as to the topics that witnesses would be called upon to testify, and that in the main, except for a short ten-minute summary

of that -- and adoption of that prefiled testimony by the live witness, that the evidentiary hearing would be involved only of cross-examination.

And MCEA is familiar with that regular order of proceeding, and so the idea that you could, in Perry Mason fashion, subpoena the late-breaking witness is not the regular order at the Public Utilities Commission. Because of the complex nature of the subject matter and in particular in a case like this, where we have a dozen different intervening parties, that the transparency and early disclosure of what people are going to testify to and the topics that they're going to testify to is an important public purpose and the way that things are usually done. I'm not coloring outside the lines by providing for prefiled testimony in a public utilities case. It's the way things are done.

MS. CURRIE: With that understanding, Your Honor, that is why Friends of the Headwaters asked for these witnesses to prefile surrebuttal testimony yesterday, which they did.

JUDGE LIPMAN: Right. For which I'm thrilled. I'm just wondering whether, if their -- if their testimony is going to be limited to the

items that they -- or at least the topics that are described in their surrebuttal testimony, or if they're going to be talking about things which are not described in that surrebuttal testimony and, again, the nature and extent of their January 23 comments tomorrow, if there are comments tomorrow. Those I think are not fairly described in the surrebuttal testimony, the surrebuttal testimony is we're working on it, we'll send you a copy if and when we file. That doesn't lead to anyone's understanding of what may well yet come and I'm concerned that there will be unfair surprise if you want to talk about what's on page 4 of their January 23 comments and the topics and the analysis that's done in that, that will have been after surrebuttal testimony and a surprise to anyone, particularly if they're getting on a plane this weekend to come to an evidentiary hearing.

What say you on that, Ms. Currie?

MS. CURRIE: Thank you, Your Honor.

My understanding is that if these witnesses are allowed to testify at the evidentiary hearing, if our line of questioning or any parties' line of questioning gets to the point where another party feels it's necessary to object due to, say,

unfair surprise or the relevance of the line of questioning, they are free to do so and then Your Honor may rule on such an objection.

I have not at this point heard any party object to either these witnesses being called or the proposed line of questioning. And I can't predict at this point exactly which questions I would like to ask, having not seen the January 23rd comments, as none of the parties have.

MR. VON KORFF: Your Honor, I just mentioned that the record has been left open to the 23rd for comments, presumably the people -- I mean, what comes in as comments is either going to be considered or it's not going to be considered. If it's not going to be considered then we have the wrong deadline. If it's going to be considered, then it's inconceivable, if it's material to the outcome of the case, that somebody shouldn't be able to address it with cross-examination.

MR. BIBEAU: Your Honor?

JUDGE LIPMAN: Yes.

MR. BIBEAU: This is Frank from Honor the Earth. We believe having these agency witnesses are very important. We've hoped for more participation from these other agencies on a similar level and

haven't seen it that way. We've seen other submissions I think going back to around July 23rd that I believe also provide a lot of bases for testimony for those agencies, and we believe that having these agency witnesses, whether they're testifying, you know, in their particular area or not, we would like to see them be in the process because it adds credibility to the process. And we believe that having them there understood as an agency witness is a lot more important so that we don't have any confusion about why something was or wasn't said. We need to be able to rely on that ourselves as well.

Thank you.

JUDGE LIPMAN: No, and I appreciate the comment. And I think my reply to that and, again, I don't mean to pick on Ms. Schrenzel in particular, but I think that her as an example is emblematic of the others, and I'm looking at her prefiled testimony, and as to any issues that she describes with Ms. Ploetz of the Enbridge affiliate to North Dakota Pipeline, she was asked in paragraph 10. Do you have any rebuttal testimony to North Dakota Pipeline Company? No, I have not reviewed that testimony. Do you have any response at this time?

No. See my earlier response that I haven't reviewed the testimony.

What I am concerned about, and I don't know if it will happen, but I am genuinely concerned, is notwithstanding that prefiled testimony where Ms. Schrenzel either in her own personal capacity or on behalf of the Department of Natural Resources doesn't render a view about the quality of Ms. Ploetz's views or not will, after January 23, and a public comment letter is submitted and has gone through whatever vetting process is over at the DNR, is submitted by 4:30 p.m. tomorrow, that that will spring like the phoenix in the evidentiary hearing and be a request from one or another parties about we want to have vigorous cross-examination and detailed cross-examination on those topics, notwithstanding the fact that the prefiled testimony doesn't express any view about that.

Is that a genuine concern?

MS. BRUSVEN: Your Honor, thank you. Christy Brusven.

I think from -- I think it is a genuine concern, although I will say that on behalf of the Applicant we too see some value, if the state

agencies are going to be expressing an official position or provide comments and evaluation of the proposal, that there is some value in those agency representatives being available for questioning.

We share the process concerns that you've raised regarding whether or not they are there voluntarily, whether or not we're sure they will be at the hearing, and, you know, what capacity they'll be there in. Our expectation would be that they would be there speaking on behalf of the agency, not in a personal capacity. But then there are certainly the very valid concerns you've raised about the record and the fact that no one has seen those comments and we won't until tomorrow. And so certainly understanding the scope of the questions that would be acceptable at the evidentiary hearing would be very important as part of this decision.

JUDGE LIPMAN: Well, I'll tell you what. I'll invite parties as part of their date certain other negotiations to talk about, you know, any kind of stipulation or if the scope is going to go beyond the things that are described in surrebuttal testimony. If there isn't going to be an objection, you won't have a problem from me. But, again, I don't want anyone claiming unfair surprise or that

they couldn't prepare for cross because of somebody -- or for me to enforce with respect to any witness, my intention as to claims of unfair surprise, regardless of from whom they are offered, is to compare them against prefiled testimony. If it's fairly within the ambit of what was raised and discussed in prefiled testimony, then I think it's a proper area for cross. If it's not fairly within the bounds of what was earlier filed, I'm going to strike it.

So, but if there's general agreement amongst the parties, no, we don't mind, this is helpful to the process, then have at it. I'm open for a stipulation to build the record in any which way that the parties see fit. But I do want to have a fair and regular order.

So if there isn't a stipulation, I guess I'm giving a preview of how I'm going to regard it, I'm going to compare what was earlier filed to the lines of inquiry that have been made.

Any other thing for the good of our order on that point?

Okay. Hearing none, all of you have my very grateful thanks. I encourage you to keep close to your e-mail and telephone and keep in close touch

with each other.

MS. BRUSVEN: Your Honor?

JUDGE LIPMAN: Yes, Ms. Brusven.

MS. BRUSVEN: Not on the issue of MPCA, but another matter as to the record.

In surrebuttal there were a number of information requests made of the Applicant by the Department, Division of Energy Resources. I would find it helpful for clarification, if the Applicant is in a position to provide that additional information at the evidentiary hearing, is it acceptable to provide that in the form of sur-surrebuttal to address those concerns, particularly in light of the conversation we just had on items not contained in the rebuttal?

JUDGE LIPMAN: Well, I'm not familiar with this issue. Can you give a brief description of who, what, why, and where?

MS. BRUSVEN: Sure. In the testimony of Mr. Adam Heinen from the Department --

JUDGE LIPMAN: Okay.

MS. BRUSVEN: He makes a series of one, two, three, four, five, it's about six requests asking for additional information and clarification in the record on certain insurance issues, timing

for access to remote shutoff valves, clarifying certain costs, or whether certain facilities were included in cost estimates and the like found on various pages of his surrebuttal testimony.

We are looking as to whether or not we can respond fully to all of those additional requests prior to next week's hearing, but in all likelihood they would be available as the witness was on the stand, if you will. And I'm looking for feedback from you, Your Honor, and the parties, as to whether or not sur-surrebuttal is the appropriate venue to address those issues.

JUDGE LIPMAN: Well, does it make sense to start -- or to meet at 9:00 in the large hearing room for a half an hour about these kinds of issues before the start of the evidentiary hearing at 9:30?

MR. PLUMER: That would work for us.

UNIDENTIFIED: Excuse me, Your Honor, but I think the parties are going to try to work these issues out ahead of time. I think everybody is going to, you know, work in good faith.

JUDGE LIPMAN: Right. And that would be my hope. And whether we should have sort of a status report of where we are on planning of witness orders, time certain agreements, and how and when

the Applicant could make responses to Mr. Heinen's additional requests and whether there's concerns about unfair surprise there.

MR. VON KORFF: I would hope that Heinen's people and NDPC's people could come to an agreement and make a proposal to the rest of us, rather than -- that's the way I look at it. If they can come to an agreement as to how it could be done, then let us know, rather than everybody trying to get -- mess with it.

MS. ANDERSON: Your Honor, Julia Anderson for DOC-DER.

The Department does not oppose the company's suggestion. The Department's also available at 9:00 a.m., but I would like to just affirm that DOC-DER does not oppose Ms. Brusven's suggestion.

JUDGE LIPMAN: Okay. So we'll have a 9:30 start. I will certainly be there by 9:00 if one or another party needs to send up a flare that we need to have a colloquy.

Does that sound a fair way to resolve it, with the invitation that the Applicant and the Department of Commerce will begin preliminary talks on this with a reporting of this to the others as

part of the regular colloquies?

MR. PLUMER: Sounds fair.

JUDGE LIPMAN: Okay. Sounds like we have an agreement.

Any other items for the good of our order?

MS. CURRIE: Yes, Your Honor. Leigh Currie here again.

Just for the record, could you clarify your decision on our subpoena request? If you are denying our request, but witnesses will still be appearing?

JUDGE LIPMAN: No, no, no. I'm glad to receive witnesses either in their personal capacity or on behalf of the Department in sponsorship of their prefiled testimony. I'm not persuaded that on the topics that they have submitted prefiled testimony are either material to the specific criteria for the certificate of need, or that they are unique experts on those topics. And so I don't think that the factors for compelling an expert witness that is of a nonparty and one that was not subject to an earlier arrangement from another party to provide expert testimony but not sponsored, another exception, because neither of those factors

are present I'm loath to ask the Chief Administrative Law Judge to issue a subpoena for those agency witnesses, even though I'm glad to have you list them on the people that you would like to call. And I'm even open to the idea of you treating them as adverse witnesses because they filed surrebuttal, prefiled surrebuttal testimony, and to be examined on the topics, if need be, on that surrebuttal testimony. I think a subpoena is a very different thing.

The ordinary form of our subpoena says You are hereby commanded to lay aside all your business and excuses and to appear before Administrative Law Judge Eric Lipman of the Office of Administrative Hearings of the State of Minnesota.

I think that that is a very serious issue, and only in a unique set of circumstances where either they are a fact witness about a factual matter material to resolution of the dispute would we issue a subpoena, and only in the case of genuinely unique expert witnesses where there's a compelling reason because of the interest of justice, that no other witness could possibly testify or reasonably testify as to those topics,

neither of which showing I think has been made by Friends of the Headwaters that a subpoena is appropriate.

But since they were able to file prefiled testimony by the deadline, I'm delighted to have those witnesses come and offer testimony and support and answer questions from the other parties based upon the items that were in their earlier testimony.

So, with that, the renewed request for subpoenas is denied.

MS. CURRIE: Thank you for the clarification.

JUDGE LIPMAN: Other things for the good of our order today?

MR. MELOY: Your Honor, this is Brian Meloy for Kennecott.

To the extent helpful, I just thought I'd reiterate on the record that Kennecott is not planning to participate in the evidentiary hearing.

JUDGE LIPMAN: Thank you, Mr. Meloy.

MR. MELOY: Thank you, Your Honor.

JUDGE LIPMAN: Hearing no other request for further business, all of the counsel have my very grateful thanks for the hour and forty minutes we've spent together. I urge you to keep in close

touch with each other and we are adjourned.

UNIDENTIFIEDS: Thank you, Your Honor.

(Prehearing concluded at 12:40 p.m.)

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

REPORTER'S CERTIFICATE

I, Janet Shaddix Elling, do hereby certify that the above and foregoing transcript, consisting of the preceding 33 pages is a correct transcript of my stenographic notes, and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated January 26, 2014.

JANET SHADDIX ELLING
Registered Professional Reporter

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