

STATE OF MINNESOTA  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner
Betsy Wergin	Commissioner

In the Matter of the Applications of  
North Dakota Pipeline Company LLC  
for a Certificate of Need and Pipeline  
Routing Permit for the Sandpiper  
Pipeline Project

MPUC Docket Nos. PL-6668/CN-13-473  
PL-6668/PPL-13-474

OAH Docket Nos. 8-2500-31260  
8-2500-31259

**FRIENDS OF THE HEADWATERS' COMMENTS ON HOW BEST TO PROCEED IN  
LIGHT OF THE DECISION OF THE MINNESOTA COURT OF APPEALS ORDERING  
AN ENVIRONMENTAL IMPACT STATEMENT**

---

The best way to proceed in light of the September 14, 2015 Court of Appeals decision ordering an EIS for the certificate of need proceedings is to:

√<sup>1</sup> Stay all certificate of need and route permit proceedings for the Sandpiper; and

√<sup>1</sup> Stay all certificate of need and route permit proceedings for Line 3.

The stay should remain in place until the Minnesota Supreme Court has either denied the petition for review, or accepted review and entered judgment. If the Commission is concerned about delay, then the Commission could proceed with an Environmental Impact Statement for the proposed certificate of need pending the Supreme Court's ruling.

An EIS is the right course for these proceedings regardless of the outcome at the Minnesota Supreme Court. It maximizes public and agency engagement, utilizes all available

agency expertise efficiently and effectively, and allows the Commission to gather data to evaluate reasonable alternatives. It is a flexible tool that may be used to maximize efficiencies as well as public and agency engagement. Most importantly, it allows for an objective analysis of system alternatives. Under the certificate of need proceedings, it is the public's job to research and support potential alternatives. Under the CEA, it is NDPC's job. Neither of these solutions make any sense here. Instead, this unique proceeding calls for the structure of an EIS—where a responsible governmental unit is charged with gathering information, evaluating alternatives and presenting the environmental information and data upon which the decision maker can rely.

Anything less than a full, qualitative and comprehensive EIS, as FOH has advocated from the beginning of the Sandpiper proceedings, would be a retreat from the Commission's commitment to fully evaluate the system alternatives as part of the certificate of need process. Environmental review is inevitable for this pipeline, but not all forms of environmental review are equal. The previous process on certificate of need, now defunct, exposed the deficiencies of the process in the starkest possible way. While the Commission denied in its findings that only another pipeline company could propose a "more reasonable and prudent alternative" as defined by Minnesota Rule 7853.0130(B), there is no clear way in which an agency such as MPCA or a citizens' organization could support a proposal for an alternative location based on the language of the rule. An EIS allows the Commission to evaluate system alternatives using its own expertise and that of sister agencies, rather than relying on a private company that is unlikely to provide meaningful analysis of an alternative that it does not prefer. As noted, an EIS is the best

vehicle available to gather all necessary evidence to evaluate system alternatives, independent of any order from the Court of Appeals.

Once the EIS has been initiated, it can inform the certificate of need and the route permit proceedings. The Commission must preserve the bifurcation of the certificate of need and route permit proceedings if it wishes to continue to provide opportunities for meaningful public engagement. Throughout the Sandpiper proceedings, this Commission has sought to preserve and honor public engagement, consistent with its statutory mandate. FOH is confident that the Commission will remain mindful of its obligation to conduct its proceedings in a way that is both transparent and accessible to the public moving forward.

The process around Sandpiper has been extraordinary in many ways. The level of interest from MPCA and DNR, public scrutiny and concern, tribal engagement, and the introduction of system alternatives have all made the proposed Sandpiper pipeline unique. Now is not the time to streamline the process at the expense of agency and public involvement. Rather, it is a time to let the process run its course at the Supreme Court, and keep this process as fair and open as possible.

## **I. FACTUAL BACKGROUND**

On August 25, 2014, the Commission accepted the eight “system alternatives” for further evidentiary development. The Commission’s decision was in part a response to the overwhelming public participation at the time:

Public opposition to the proposed route and the route alternatives in this proceeding has to date been high, with a significant majority of those offering comments in the docket urging the Commission to include system alternatives for

further consideration in this matter in lieu of the routes proposed by the Company, in an effort to reduce environmental and public health risks.<sup>1</sup>

The Commission also reasonably relied upon the advice of MPCA, which stated that “limiting the alternatives to route options alone at this state would unnecessarily narrow the scope of project options to reduce the environmental and public health risks.”<sup>2</sup>

The Commission’s decision to accept the system alternatives for further discussion led directly to its decision on October 7, 2014 bifurcating the certificate of need and route permit proceedings. The Commission determined that bifurcation was supported both by the logic of the questions presented – it is premature to determine a route for a pipeline when the “need” has not yet been determined – and the resources of the parties involved. NDPC raised the issue of delay at that time, but the Commission decided that this was an unusual docket that justified a different approach. It stated that “concerns about confusion and delay” should not prevail over the factors that made joint proceedings infeasible; namely the fact that consideration of route alternatives “relies, of necessity, solely on the context of the need decision and the identified purpose of the project,” and the confusion and burden on the public that resulted from keeping the proceedings together.<sup>3</sup>

---

1 Order Accepting Alternative Route and System Alternatives for Evidentiary Development, Requiring Notice, and Setting Procedures, August 25, 2015, Docket Nos. PL-6668/PPL13-474; PL6668/CN-13-474, at 10.

2 *Id.*

3 Order Separating Certificate of Need and Route Permit Proceedings and Requiring Environmental Review of System Alternatives, October 7, 2014, Docket Nos. PL-6668/PPL13-474; PL6668/CN-13-474, at 6.

In the same Order, the Commission also declined to order an EIS for the certificate of need, instead asking the Department of Commerce Energy Environmental Review and Analysis (DOC-EERA) staff to prepare an environmental report that was not subject to public comment on the scoping or a draft, and did not comply with the Minnesota Environmental Policy Act (MEPA).<sup>4</sup> FOH appealed this determination under MEPA, Minn. Stat. § 116D.04, subd. 10, on January 1, 2015. On September 14, 2015, in a 3-0 decision, the Court of Appeals reversed the Commission's determination and held that because "the decision to grant a certificate of need for a large oil pipeline constitutes a major governmental action that has the potential to cause significant environmental effects, we conclude that MEPA requires an environmental impact statement to be completed before a final decision is made to grant or deny a certificate of need."<sup>5</sup> Specifically, the court resolved this "simple question of statutory interpretation" by holding that because the parties agreed that a pipeline is a "major governmental action" that requires an EIS under MEPA, the state is forbidden from granting a permit or certificate to the project until an EIS has been completed.<sup>6</sup> The court emphasized the importance of having an EIS completed as early in the process as possible in order to inform later decisions because, as the US Supreme Court has held, it "ensures that the important [environmental] effects will not be overlooked or

---

<sup>4</sup> *Id.* at 12.

<sup>5</sup> *In re N. Dakota Pipeline Co. LLC*, 869 N.W.2d 693, 699 (Minn. Ct. App. 2015).

<sup>6</sup> *Id.* at \*8-9.

underestimated only to be discovered after resources have been committed or the die otherwise cast.”<sup>7</sup> That consideration is especially important for a certificate of need for a large oil pipeline:

In this case, the completion of an EIS at the certificate of need stage satisfies the imperative identified above by ensuring decision-makers are fully informed regarding the environmental consequences of the pipeline, before determining whether there is a need for it. Moreover, completion of an EIS at the initial certificate of need stage seems particularly critical here because once a need is determined, the focus will inevitably turn to where the pipeline should go, as opposed to whether it should be built at all.<sup>8</sup>

The Court reversed the grant of a certificate of need and remanded to the Commission “to complete an EIS before a final decision is made to grant or deny a certificate of need.”<sup>9</sup>

On October 14, 2015, both NDPC and the Commission petitioned to the Minnesota Supreme Court for review of the decision of the Court of Appeals. If the Supreme Court declines review, the judgment of the Court of Appeals will be entered as final.<sup>10</sup> If the Supreme Court accepts review, judgment will not be entered until after the Supreme Court hears and decides the matter.<sup>11</sup>

## **II. THE COMMISSION SHOULD STAY PROCEEDINGS FOR SANDPIPER AND LINE 3.**

---

<sup>7</sup> *Id.* at \*9-10, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>8</sup> *Id.* at \*11.

<sup>9</sup> *Id.*

<sup>10</sup> Minn. R. App. Proc. 136.02.

<sup>11</sup> *Id.*

**A. The best option is to stay all proceedings until the matter is resolved at the Minnesota Supreme Court.**

Staying all proceedings until the matter is resolved by the Minnesota Supreme Court is the only option that does not risk wasting significant resources. If the Commission decides to move forward with the route permit proceedings alone, it risks engaging significant time and resources of its own, as well as the public's, to evaluate the details of a route for a pipeline for which there may be no need, or which may ultimately be located in a different corridor entirely. If the Commission decides to rejoin the proceedings, and the Minnesota Supreme Court declines the case or upholds the Court of Appeals, then the Commission risks further delay and litigation by acting to circumvent the Court's order that it conduct an EIS.

The same is true of Line 3 proceedings. Line 3 is proposed for the same corridor as Sandpiper, and the Sandpiper does not go forward, or goes forward in a different corridor, Enbridge Energy LP will need to change its Line 3 proposal accordingly. Both proceedings, in other words, hinge on the Sandpiper certificate of need.

Moreover, the Commission may not legally move forward with the route permit proceeding for Sandpiper given that the certificate of need has been stayed and remains in significant doubt. Granting a certificate of need is a prerequisite to granting a route permit. Minn. Stat. §216B.243. In its October 7, 2014 Order, the Commission recognized the “clear statutory dictate” of Minnesota Statute § 216B.243, subd. 2, which requires a decision on the certificate of need for a large energy facility such as a pipeline prior to making a decision on the route permit. The Commission would clearly violate this statute if it moved ahead with the route permit proceedings for a project for which no certificate of need has been granted.

**B. The Commission has no basis to reverse its bifurcation decision, which promoted public access and transparency.**

The Commission found just cause for its decision to (1) bifurcate the proceedings and (2) hold the certificate of need proceedings first, and all of the underpinning reasons are as true today as they were on October 7, 2014. Among the reasons stated were:

- √<sup>1</sup> The “clear statutory dictate” of Minn. Stat. § 216B.243, subd. 2, requiring a decision on the certificate of need for a large energy facility prior to making a decision on the route permit;
- √<sup>1</sup> The increasing complexity of the issues raised, resulting in confusion to the public;
- √<sup>1</sup> The introduction of eight unanticipated system alternatives, six of which the Commission recommended for consideration in the certificate of need docket;
- √<sup>1</sup> The burden that discovery, experts and preparing testimony to consider system alternatives and route alternatives simultaneously would impose on the public and parties;
- √<sup>1</sup> The limited resources of the public to participate in certificate of need and route permit proceedings simultaneously.
- √<sup>1</sup> The discussion and evaluation of route alternatives “relies solely on a finding of need,” and addressing need first will bring additional clarity to both dockets.



In its October 7, 2014 Order, the Commission recognized NDPC’s concerns about “confusion and delay,” but the Commission “disagree[d] that these concerns should prevail.”<sup>12</sup> Based on the above reasons, the Commission separated the two proceedings and postponed any further action on the route permit proceeding until a decision has been made by the Commission on the certificate of need.

Not a single one of these reasons has changed. Public opposition remains high – in fact public interest may be even higher now as additional parties have sought participation in both the Sandpiper and Line 3 dockets. The System alternatives have yet to be given serious consideration using the resources of MPCA and MDNR. The potential for confusion remains high if the Commission considers route alternatives and system alternatives simultaneously—in fact the potential for confusion is higher now given Enbridge's desire to place Line 3 within feet of Sandpiper, and bevy of comments raising complex questions submitted on the Line 3 proceeding. The citizen organizations and the public remain strapped for resources and time and lack the capacity to be involved in multiple proceedings simultaneously, especially since many citizens are involved on a strictly volunteer basis. The route alternatives, most of which lie within NDPC’s proposed corridor, only make sense for further consideration if a certificate of need for NDPC’s proposed corridor is granted.

**C. Ordering an EIS furthers the public interest, is a good use of time and resources and results in little or no delay for NDPC.**

An EIS resolves one of the major challenges of these proceedings so far – how to best leverage the expertise of sister agencies. An EIS is by far the best vehicle in state and federal law

---

<sup>12</sup> Oct. 7 Order at 6.

for bringing agency expertise to bear. The Pollution Control Agency and the Department of Natural Resources have significant expertise on pipeline impacts, spill remediation and natural resource protection. The only way to fully engage those agencies is to conduct an EIS.

**1. NDPC’s proposed project is improved, not harmed, by an EIS.**

Projects regularly undergo EISs in Minnesota, and the vast majority of those projects are permitted. Moreover, the results of an EIS improve the projects by providing meaningful analysis of reasonable alternatives and concrete mitigation strategies for decreasing potential environmental and socioeconomic impacts.

When it passed the Minnesota Environmental Policy Act, our state legislature recognized the profound impact that humans can have on the environment. It ordered all state agencies to “use all practicable means and measures...to create and maintain conditions under which humans beings and nature can exist in productive harmony,” with a focus on present and future generations.<sup>13</sup> The legislature understood that making sound environmental decisions means gathering information, and it ordered agencies to cooperate on environmental planning, utilize a “systematic, interdisciplinary approach” in order to ensure that “the latest and most authoritative findings” are considered in administrative and regulatory decision making, and to “study, develop and describe appropriate alternatives” to any proposed course of action.<sup>14</sup>

In other words, MEPA was designed to promote the use of science, information gathering from the public, and expertise from all agencies in regulatory decision-making. The EIS as a

---

<sup>13</sup> Minn. Stat. 116D.02.

<sup>14</sup> Minn. Stat. 116D.03.

vehicle for studying a proposal and gathering public input persists after 40 years at both the state and federal level because, put simply, it works.

NDPC will no doubt complain about delay, but there is no reason why an EIS has to cause delay in these proceedings. An EIS could occur simultaneously with certificate of need proceedings. As long as a draft EIS is available as part of the public comment period and hearings, and a final is available before the ALJ recommendation, an EIS that moves forward along with need proceedings will not run afoul of MEPA. An EIS could even incorporate elements of the route permit analysis, resulting in efficiencies for NDPC.

NDPC is proposing a crude oil superhighway across our state that will ultimately transport more oil than the controversial Keystone XL.<sup>15</sup> The state of Minnesota will live with this decision for 50 years or more. Taken together, these projects cost more than \$3 billion and will affect on the order of 10,000 acres during construction. In other words, these are enormous projects with long-term implications. An extra 6 months or a year, if that's what it takes, to do a thorough study of potential corridors that includes all foreseeable pipeline proposals, including Line 3, will be well worth it, if the result is a project that makes sense for the state of Minnesota, and not just for Enbridge and Marathon. Doing it right this time may actually reduce opposition in the future, when other pipelines are proposed. Until quite recently, oil pipelines were not a matter of major public concern. That time has passed. If this process is done correctly now, with both public and private interests given their full due, there may be less public opposition in the future.

**2. An EIS is superior to a CEA in these circumstances.**

---

<sup>15</sup> Need cite.

An EIS is a superior tool for the certificate of need because it is designed to evaluate large-scale alternatives such as the proposed system alternatives. Courts have long recognized the alternatives section as the “heart of the EIS.”<sup>16</sup> MEPA requires that an EIS be an “analytical rather than encyclopedic document” that “analyzes [a project’s] significant environmental impacts” and discusses the project and “appropriate alternatives to the proposed action and their impacts.”<sup>17</sup> The Environmental Quality Board promulgated regulations describing the types of alternatives that must be considered, including “alternative sites.”<sup>18</sup> The EIS must include the “[e]nvironmental, economic, employment and sociological impacts” of the project and each major alternative.<sup>19</sup>

An EIS could address the following deficiencies in the current proceedings:

(1) *Burden of Proof for Alternatives.* The Commissioners have expressed significant concerns over whether a party who is not a pipeline company can effectively propose a “reasonable and prudent alternative” as defined by Minnesota Rule 7853.0130(B). Of course, FOH shares this concern. In an EIS, the Responsible Governmental Unit (RGU) would both define and investigate the impacts of potential alternatives, alleviating the public of that burden.

---

<sup>16</sup> Cite.

<sup>17</sup> Minn. Stat. § 11D.04.

<sup>18</sup> Minn. R. 4410.2300, subp. A(7).

<sup>19</sup> *Id.*.

(2) *Need for the Project.* The Commissioners have expressed concern over whether they may require investigation of alternatives that do not meet the “need” as defined by the applicant. NDPC claims that its “need” is to deliver oil to Clearbrook, Minnesota and Superior, Wisconsin. But under an EIS, the agency, not the applicant, defines the “purpose and need” for the project. If the Commission determined that the “purpose and need” for the project is not, as the applicant wants, to deliver oil to Clearbrook and Superior, but instead to deliver oil out of the Bakken to refineries in the Midwest, the range of alternatives could look very different. The Commission is not constrained by the company’s purpose and need; it can define the “purpose and need” of the project by its own terms, regardless of the company’s wishes or even its own jurisdiction.

(3) *Resources for Conducting Investigation into System Alternatives.* At the hearing on June 5, 2015, Commissioner Lange expressed concerns about the resources that might be required to investigate SA-03 as part of the route permit proceedings.<sup>20</sup> When an EIS is completed, the RGU assesses the costs of preparing, reviewing and distributing the EIS to the applicant.<sup>21</sup>

(4) *Lack of Support from other Agencies.* During their testimony on June 3, 2015, both the DNR and the PCA have pointed out the limitations of their involvement in the need

---

<sup>20</sup> June 5, Transcript of Commission Deliberations at 134:13-135:3.

<sup>21</sup> Minn. R. 5510.6000 *et seq.*

hearings. An EIS would allow a formal contract with the agencies and bring the full resources and expertise of the DNR and the PCA to bear.<sup>22</sup>

(5) *Lack of Evidence in the Record on Environmental Impacts of System Alternatives.*

The Commission and the ALJ have expressed concern about the lack of analysis in the record comparing the various system alternatives. In recognizing this deficiency, the Commission has ordered that the environmental review at the route permit proceedings include “quantitative as well as qualitative” analysis.<sup>23</sup> However, that does not remedy the deficiency at the need stage. Only an EIS can do that.

Additionally, if the sole form for environmental review for the Sandpiper Pipeline remains the Comparative Environmental Analysis, then the problems evident in the certificate of need proceeding will persist because NDPC will remain the primary source of environmental data. Even if the agencies attempt to force consideration of system alternatives into the CEA process, which is a questionable fit to begin with, the CEA rules state that the *applicant* is primarily responsible for providing data on potential human and environmental impacts from the “pipeline right-of-way.”<sup>24</sup> The challenge in the certificate of need hearings was that Minnesota Rule 7853.0130 could be read to require citizens or agencies to effectively propose an alternative

---

<sup>22</sup> Minn. R. 4410.2200 (allowing RGUs to request the assistance of other governmental units in help with completing the EIS).

<sup>23</sup> Commission Order Authorizing Recommencement of Route Permit Proceeding and Providing Direction for the Scope of the Comparative Environmental Analysis, August 3, 2015, at 5.

<sup>24</sup> Minn. R. 7852.2700.

pipeline; the challenge with the CEA is that the applicant is responsible for providing sufficient data to analyze system alternatives that it does not support.

The opportunity is before the Commission now. Conduct an EIS. Determine for yourself what the purpose and need of this project is. Empower MPCA and DNR to gather the data necessary to analyze system alternatives. Take advantage of the well-established and time-honored tradition of environmental review for large projects.

### **3. The Commission may use an EIS to create efficiencies.**

An EIS does not need to make these proceedings more complicated or prolonged than they already are. Here are some options available to simplify the process:

- √<sup>25</sup> Conduct an EIS at the certificate of need phase, and tier the CEA at the route permit stage off of it, so as to avoid any duplicative processes. The notion of “tiering” environmental review at various decision points for a proposed project is recognized both under MEPA<sup>25</sup> and rules governing approval of transmission lines.<sup>26</sup>

---

<sup>25</sup> “An RGU may use a series of tiered EISs to fulfill environmental review requirements for an action where decisions on which alternative to select must be made in stages, progressing from the general to the specific.... The level of detail in earlier tiers need not be as greater as that in later tiers, provided that it is sufficient to reasonably inform decision makers of the significant environmental, economic, employment and sociological impacts of the choices made in that tier.” Minn. R. 4410.4000. The procedure for a tiered EIS is the same as for a regular EIS. A later tiered EIS may incorporate material from an earlier tier by reference. *Id.*

<sup>26</sup> The EQB has approved a form of alternative environmental review for transmission lines that includes an environmental report submitted at the certificate of need stage. Minn. R. 7849.2000; Minn. R. 7849.1200. However, the rules require an EIS for the routing permit. Minn. R. 7850.2500. While no such alternative environmental review has been approved for the certificate of need stage for pipelines, the transmission line rule recognizes the general proposition that different forms of environmental review may need to occur for a certificate of need than for a route permit.

√<sup>1</sup> Do a single EIS for both certificate of need and route permit. A CEA would no longer be necessary.

In addition, as mentioned above, an EIS could occur contemporaneously with certificate of need proceedings as long as certain benchmarks for public participation and informing the decision-makers are met.

In other words, EISs may be designed to streamline the process rather than delay. It is not the death-knell for a project, but rather an opportunity to engage the public and agencies and ensure that the Commission is fully informed and the public interest is represented.

### **CONCLUSION**

The Commission puts itself at risk by taking steps to circumvent the ruling of the Court of Appeals before it is known whether it will be upheld. The Commission also puts itself at risk by taking steps that short-circuit the ability of the public and other agencies to stay engaged, or that risk eliminating system alternatives before a thorough, legal analysis has taken place. The best course of action is to stay the route permit proceedings for Sandpiper, and all proceedings for Line 3 until the matter at the Minnesota Supreme Court is settled.

The ordinary way of approving pipelines does not allow for adequate agency and public input into location, and does not allow for adequate consideration of alternative locations. The Commission has already recognized that the public engagement and interest of the MPCA and DNR in this matter are not ordinary, either. It is not good enough to try to fix the process for the next pipeline. The Commission has the opportunity and authority to change it now. NDPC is asking to approve a crude oil superhighway that will be used for decades to come. An EIS is a tool that can fully evaluate this proposal in a way that is both reasonable and court-sanctioned.



