

**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**

**OAH Docket No. 8-2500-31260**

**MPUC Docket No. PL-6668/CN-13-473**

**RESPONSE BRIEF  
OF  
FRIENDS OF THE HEADWATERS**

**MARCH 13, 2015**

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	3
I.    NDPC Failed To Show That The Sandpiper Pipeline Is Necessary To Adequately, Reliably, And Efficiently Deliver Energy To The Applicant, The Applicant’s Customers, Or To The People Of Minnesota.....	3
A. NDPC misconstrues Minn. R. 7853.0130(A).....	3
B. The only evidence of shipper support in the record is the Transportation Service Agreements (“TSAs”). There is no evidence in the record of support from uncommitted shippers. ....	4
C. Conservation Programs have effectively eliminated “need” for the project.....	5
II.   The Record Establishes That There Are Reasonable and Prudent Alternatives To NDPC’s Preferred Route. ....	5
A. NDPC erroneously attempts to impose an impossible burden of proof on the other parties, while ignoring the statutory language. ....	5
B. The record establishes that SA-04 and SA-05 would serve the needs of NDPC’s shippers by way of the Flanagan Terminal. ....	9
C. NDPC has not identified any harm to denying the Certificate of Need that is appropriate for consideration under Minnesota law.....	10
1. The Commission should not consider resources put into an application process when evaluating whether to grant a Certificate of Need. ....	10
2. NDPC’s timing argument carries no weight.....	10
D. The System Alternatives comparison documents prepared by Department of Commerce and NDPC are accounting exercises, not analyses, that are meaningless without expertise provided by Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, Mr. Chapman and Mr. Stolen.....	12
1. NDPC does not have the expertise or the neutrality of MPCA, MDNR, Chapman or Stolen. ....	14
2. NDPC’s own data does not support its claim that the system alternatives have a higher “density” of features. ....	17
E. NDPC concedes that the System Alternatives are similarly safe and reliable as NDPC’s Preferred Route. ....	18

III. The Consequences To Society Of Denying The Certificate Of Need Are More Favorable Than The Consequences To Society Of Granting The Certificate Of Need..... 19

A. The pipeline would only benefit out-of-state private interests. No interests in Minnesota, and no public interest in general, would benefit. .... 19

B. Any favorable consequences of construction cited by NDPC would also be available for other System Alternatives. .... 20

C. Granting a Certificate of Need for NDPC’s preferred route will likely result in negative proliferation of pipelines along the Preferred Route..... 21

D. NDPC’s promises that it will take financial responsibility for the impact of spills rings hollow. .... 22

CONCLUSION..... 24

## INTRODUCTION

North Dakota Pipeline Company's ("NDPC") Initial Brief demonstrates that it has identified only a single indirect benefit to the people of Minnesota—the potential for the proposed Sandpiper Pipeline to relieve rail congestion. But this ignores much of the evidence that has come out of these proceedings. Several of the System Alternatives offer viable routes that would provide the same safe, reliable, and efficient alternatives to rail that would also alleviate future growth of rail traffic through Minnesota. NDPC's objection to these alternative routes boils down to a single word: cost. NDPC and the co-owner of the proposed Sandpiper Pipeline, Marathon Petroleum Company ("Marathon"), object to the incremental cost per barrel of what they claim is a longer pipeline.

Yet the Commission's job here is not to ensure the most economically advantageous pipeline for the co-owners. The Certificate of Need process exists in Minnesota because the construction of energy facilities is not and should not be a foregone conclusion merely because it is in the financial interest of the project proposer and its shipper customers. Energy facilities are not analogous to other development opportunities such as factories or convention centers—permanent investments that provide long-term employment opportunities for the local community and may have some environmental risks that can be managed. In Minnesota, we recognize that energy consumption has a cost, and we should not encourage energy facilities for their own sake. This is why the legislature has provided that “no large energy facility shall be certified for construction unless the applicant can show that demand” cannot be met more cost effectively through efficient and energy conservation measures. Minn. Stat. § 216B.243, subd. 3.

In its brief, NDPC failed to show that a Certificate of Need should be granted. It failed to show that the Sandpiper Pipeline is necessary to adequately, reliably, and efficiently deliver

energy to the applicant, its customers, or the people of Minnesota because it failed to show that the supply of energy or petroleum products would be affected in any way if the Sandpiper Pipeline is not built, or is built in a different location.

It also failed to show that SA-04, a reasonable and prudent alternative put forward by Friends of the Headwaters (“FOH”), could not provide the same indirect benefits to Minnesota that it alleges its Preferred Route provides. NDPC did not address any of the evidence in the record that supports SA-04, and relied only on its own inadequate analysis to argue that its Preferred Route is environmentally preferable, while ignoring the experts who testified otherwise. NDPC remained almost completely silent regarding significant environmental concerns raised by independent parties that have demonstrably more expertise than its own staff. In addition, it is likely that FOH’s alternatives are actually shorter than NDPC’s Preferred Route when compared to the distance the oil has to travel to reach the destination preferred by shippers and the general market. Superior is only a mid-point, and, if NDPC’s Preferred Route were approved, oil would still have to be transported through the entire state of Wisconsin and part of Illinois.

Finally, NDPC failed to show that the consequences to society of granting the Certificate of Need outweigh the consequences to society of denial, because the only direct benefits identified and supported are to private out-of-state interests, while the state of Minnesota bears all the risks. And those risks are substantial, as pipeline construction itself is destructive to the landscape, and an oil spill could permanently damage Minnesota’s lakes, rivers, wetlands, aquifers, and wild rice waters while potentially costing billions to clean up.

## ARGUMENT

### **I. NDPC Failed To Show That The Sandpiper Pipeline Is Necessary To Adequately, Reliably, And Efficiently Deliver Energy To The Applicant, The Applicant's Customers, Or To The People Of Minnesota.**

#### **A. NDPC misconstrues Minn. R. 7853.0130(A).**

NDPC's Initial Brief contains a sleight-of-hand that results in a significant misinterpretation of Minn. R. 7853.0130(A). NDPC states that its proposed pipeline "adequately, reliably, and efficiently delivers energy to the Applicant, the Applicant's Customers, and to the people of Minnesota and Neighboring States." (North Dakota Pipeline Company LLC's Initial Post-Hearing Brief (hereinafter "NDPC Initial Brief"), Section IV.A.) This misstates the rule, however, which asks whether "*the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, the applicant's customers, or to the people of Minnesota and neighboring states.*" Minn. R. 7853.0130(A) (emphasis added). The distinction is significant. NDPC makes the case that a pipeline would provide an adequate, reliable and efficient source of energy. But that is not the disputed issue. The actual question for the Commission is whether the energy supply to the applicant, its customers and the state of Minnesota and neighboring states would be adversely affected in terms of adequacy, reliability, or efficiency absent approval of the Sandpiper Pipeline.

The answer in the record is a resounding "no." There is no evidence in the record that, absent the Sandpiper Pipeline, or if the Sandpiper Pipeline is built in an alternative location, shippers, refiners, or consumers will suffer any sort of shortage or unreliable energy supply. Even Marathon, one of only two shippers willing to publicly support the Project, was only able to state that lack of the Sandpiper Pipeline could potentially result in an unreliable source of *Bakken* crude oil. (Ex. 13 at 5:134-35.) Marathon may still readily obtain other sources of light

crude oil via pipeline or rail. (Ex. 13 at 10:253-58.) In fact, Marathon's primary concern here is not that its refineries will lack crude oil, but that it maximizes "flexibility." (Transcript of Evidentiary Hearing ("T.") Vol. III, at 125:15-18.) In other words, Marathon's goal is to not be able to obtain a reliable, adequate, and efficient source of crude oil, but provide itself with an additional source of crude oil that it hopes will be cheaper. And, while that is a valid business goal for Marathon, that goal should carry little weight for the Commission. It certainly does not outweigh the drawbacks of NDPC's Preferred Route, given that Minnesotans (with the exception of some short-term construction monies and minor tax benefits) do not benefit directly from the Sandpiper Pipeline at all but nevertheless are asked to put our own recreational areas, lakes, streams, wild rice stands, and drinking water at risk.

**B. The only evidence of shipper support in the record is the Transportation Service Agreements ("TSAs"). There is no evidence in the record of support from uncommitted shippers.**

The record does not support NDPC's claims that there is additional support among shippers beyond those who signed TSAs. NDPC stated in its Initial Brief that it "queried" shippers, and in response "shippers indicated that they supported the project." (NDPC Initial Brief, p. 43.) But, notably, NDPC cannot provide a single citation to the record in support of this claim. While Mr. MacPhail gave a vague description of discussions with some shippers, he did not identify those shippers, nor did any of them either intervene in the proceedings or even write a public comment to support the project. Some uncommitted shippers, of course, did go on the record in the Federal Energy Regulatory Commission ("FERC") proceedings to express their opposition. (Ex. 21 at 7:211-14.) Thus, we are left with a substantiated record of opposition from some shippers, including one of the Minnesota refineries, weighed against unsubstantiated, self-serving claims from NDPC that it consulted with some shippers and some of them supported the Sandpiper Pipeline.

**C. Conservation Programs have effectively eliminated “need” for the project.**

NDPC concedes that conservation efforts have effectively reduced demand for petroleum products in Minnesota, and does not dispute the Department of Commerce-Division of Energy Resources’ observation that demand for petroleum in Minnesota, neighboring states, and the U.S. as a whole is down dramatically and is not expected to rebound fully for decades. (NDPC Initial Brief at 41; Ex. 50 at 13:12-14; 21:4-5) Despite this concern, NDPC nevertheless argues in its Initial Brief that conservation efforts “may reduce but will not eliminate the need for petroleum products by the people of Minnesota.” (NDPC Initial Brief at 41.) This is a *non sequitur*. There is no evidence in the record that proposed Sandpiper Pipeline has any relationship at all to Minnesota’s demand for petroleum products. The people of Minnesota do not need additional access to petroleum or petroleum products, and even if they did, the Sandpiper Pipeline would not serve that need.

**II. The Record Establishes That There Are Reasonable and Prudent Alternatives To NDPC’s Preferred Route.**

**A. NDPC erroneously attempts to impose an impossible burden of proof on the other parties, while ignoring the statutory language.**

A Certificate of Need may not be granted unless the applicant justifies the need. Minn. Stat. § 216B.243. When considering whether the applicant has proven its need, the Commission must consider the existence of reasonable and prudent alternatives. *Id.* NDPC argues in its Initial Brief that parties other than the applicant bear the burden of proof regarding the existence of reasonable and prudent alternatives. However, NDPC misconstrues its own burden as well as the Court of Appeals’ reasoning in the unpublished *City of Hutchinson* case. *See In the Matter of the Application of the City of Hutchinson for a Certificate of Need to*



*Construct a Large Natural Gas Pipeline*, No. A03-99, 2003 WL 22235803 (Minn. Ct. App. Sept. 23, 2003).

As discussed in FOH's Initial Brief, the Minnesota Legislature has stated, in no uncertain terms, that the burden of proof for need lies with the project proposer. (FOH Initial Post-Hearing Brief at 11.) This is the traditional approach to the burden of proof in an administrative proceeding. Minn. R. 1400.7300 ("The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence[.]"). Yet the rule governing alternatives appears to shift that burden of proof to other parties. Minn. R. 7853.0130(B).

In resolving this apparent conflict, two principles govern. First, legislative intent governs. The Minnesota Supreme Court has held that 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). The Minnesota Legislature did not intend for the Certificate of Need for a large energy facility to be an easy, *pro forma* process. It intended the burden of proof to be a significant undertaking for the project proposer because it recognized that large energy facilities have a major impact on Minnesota's environment, natural resources, and health of its people. Given that environmental concerns are paramount (Minn. Stat. § 116D.04, subd. 6), the legislature expressed a preference for "energy conservation and load-management measures" over new facilities. Minn. Stat. § 216B.243, subd. 3. Thus, the primary purpose behind the legislation is that the project proposer must be responsible for proving all aspects of "need."

Second, when evaluating whether a party has met its burden, the Commission and the Administrative Law Judge should consider the parties and the particular situation. Even if it were acceptable for an agency to shift the burden of proof to parties other than the applicant in subversion of the legislative intent, it cannot be that the legislature intended for citizens'

organizations to assemble a technical proposal for an alternative pipeline route, complete with evidence of support from shippers, as NDPC seems to suggest when it says that FOH did not provide “a centerline, specific pipe size, costs, evidence of proposed shipper support, or detailed environmental analysis.” (NDPC Initial Brief at 69.) NDPC even suggests, absurdly, that because the citizens’ groups are not willing to build the pipelines themselves, the System Alternatives are not viable: “None of the proposers of the System Alternatives has provided evidence of support from crude oil shippers or a willingness to construct a System Alternative.” (NDPC Initial Brief at 66.) Obviously, because FOH is a grassroots citizens’ group and not a pipeline company, FOH is not able to spend millions on engineering and environmental studies and detailed routing, nor is FOH able to directly solicit shipper support, since FOH has no intention of ever building a crude oil pipeline. Thus, the evidentiary burden, to the extent that FOH bears it at all, must be reasonable based on the particular facts and circumstances of the proceeding.

*City of Hutchinson*, cited by NDPC in its Initial Brief, supports this understanding. In that case, the court of appeals held that a pipeline company failed to show that a utility should be forced to purchase natural gas from it rather than built a new pipeline, even though the pipeline company had no additional capacity to serve the utility’s needs. The utility that supplied natural gas to Hutchinson, Minnesota had been receiving natural gas via a pipeline owned by Northern Natural Gas Company. 2003 WL 22234703 at \*1. But Northern was not able to supply adequate natural gas to serve the city’s needs in the summer, and the utility’s contract with Northern was scheduled to expire. *Id.* Rather than negotiate a new contract with Northern, the utility proposed to build its own pipeline. *Id.* at \*2. Upon appeal from granting the Certificate of Need, Northern argued that the utility bore the burden of proof to show that a contract with Northern, rather than a new pipeline, was a reasonable and prudent alternative. *Id.* at \*7. The court of appeals was

dismissive, stating that it was not reasonable to force the applicant to “prove the negative” and show that there are no reasonable and prudent alternatives. *Id.*

In *City of Hutchinson*, it made sense to hold Northern to a higher standard because it was a pipeline company proposing to provide the alternative through its own existing pipeline network. There was no other party in a better position to prove or disprove Northern’s ability to provide natural gas, and it was not reasonable to demand that the utility disprove Northern’s ability when Northern was present in the proceedings and prepared to submit the information on its own behalf.

In the present case, in contrast, the System Alternatives have not been presented by existing pipeline companies who wish to build a different pipeline or utilize an existing network, and can present specific and technical information about their own pipelines. Rather, the alternatives have been brought forth by citizens’ groups and a state agency that perceived that the NDPC’s Preferred Route is not right for Minnesota, and other routes made more sense for the State and Minnesota’s natural resources. These other routes deliver the crude oil where, according to the record, it is needed (Superior in the case of SA-03, and the Flanagan Terminal in Illinois, in the case of SA-04 and SA-05). (DOC-EERA Comments and Recommendations, dated July 16, 2014 at 13-15; Ex. 183, Sch. 4, 22.)

Thus, in this case, although NDPC did not bring forth the System Alternatives, NDPC and its shippers remain the best source of information about the commercial validity of the alternatives because a citizens’ organization (or a state agency, for that matter) cannot prove that a System Alternative is technically feasible or financially supportable. Rather, NDPC must bear the burden of showing that its Preferred Route is “needed” to serve the public interest as outlined

in Minnesota Statute § 216B.243 and Minnesota Rule 7853.0130 and that none of the more reasonable System Alternatives can meet that need. NDPC has not met its burden.

**B. The record establishes that SA-04 and SA-05 would serve the needs of NDPC's shippers by way of the Flanagan Terminal.**

The record establishes that a pipeline that serves the Illinois area may well serve shippers *better* than NDPC's Preferred Route. In its Initial Brief, NDPC noted that the Energy Transfer Partners' Bakken Pipeline could not serve as an alternative because the entire capacity of the pipeline has already been contractually committed to shippers. (NDPC Initial Brief at 65.) The Bakken Pipeline is an approximately 1,100-mile proposed crude oil pipeline that would run from the Bakken formation to Patoka, Illinois. (NDPC Initial Brief at 64.) It declared an open season in June of 2014, and immediately received binding commitments for the entire initial capacity of 320,000 bpd, and then held a second open season, possibly with the expectation that it could expand the initial capacity. (NDPC Initial Brief at 65.)

While FOH does not disagree with NDPC that the Bakken Pipeline itself cannot serve as a reasonable and prudent alternative because it has no additional capacity, one cannot help but contrast the Bakken Pipeline's open season, which resulted in 100% commitment of the capacity by potential shippers, with the open season for the proposed Sandpiper Pipeline, which only achieved a commitment for 40% of its capacity (the lion's share of which was from a co-owner of the pipeline). The experience of the Bakken Pipeline very strongly suggests that the shipper support for a pipeline that connects directly to the Illinois area would be much more robust than shipper support for NDPC's Preferred Route for the Sandpiper Pipeline.

In its Initial Brief, NDPC claimed that FOH did not make a pipeline proposal with sufficient detail and did not know where the termination point would be. (NDPC Initial Brief at 69.) The record does not support this claim. SA-04 follows an existing pipeline route that

terminates at the Flanagan Terminal. (Ex. 183, Sch. 4, at 22.) As Mr. Smith pointed out in his testimony, the Flanagan Terminal does not connect to Patoka, Illinois currently, but Enbridge is in the process of building a pipeline that will connect Flanagan and Patoka—the Southern Access Extension. (*Id.* at 254.) Once that is built, SA-04 will provide the same interconnectivity to the Enbridge system as NDPC’s Preferred Route. Mr. Palmer testified on behalf of Marathon that NDPC’s Preferred Route was attractive to Marathon because Superior, Wisconsin is connected to Patoka, Illinois. (T. Vol. III, at 27:18-22.) The record thus demonstrates that the System Alternatives will better meet the needs of shippers than will NDPC’s Preferred Route.

**C. NDPC has not identified any harm to denying the Certificate of Need that is appropriate for consideration under Minnesota law.**

**1. The Commission should not consider resources put into an application process when evaluating whether to grant a Certificate of Need.**

NDPC’s main objection to the System Alternatives in its Initial Brief is that it has already begun “commercial arrangements, rate design, FERC approval, environmental review and engineering,” and there are “significant commercial and regulatory challenges” involved with proposing a pipeline. (NDPC Initial Brief at 66-67.) But to argue that because a company has put work and resources into an application process it should be granted a Certificate of Need makes a mockery of the entire regulatory process. Obtaining state or federal approval of any large project takes work and resources. That does not mean that the outcome is a foregone conclusion, or that the applicant is entitled to a particular result.

**2. NDPC’s timing argument carries no weight.**

NDPC argues that it would take between three to five years to complete an application process for a System Alternative. However, this argument carries no weight for two reasons. First, NDPC has not taken steps to advance the approval process. For example, NDPC has not

filed a complete application for a permit under Section 404 of the Clean Water Act. The Sandpiper Project will undergo at least an Environmental Assessment (the federal equivalent of an Environmental Assessment Worksheet), and quite possibly an Environmental Impact Statement (“EIS”) under federal law. (Carlton County Land Stewards Initial Brief at 9.) A federal EIS is a substantial undertaking that will likely take at least a year. Yet NDPC has not even initiated this process by completing its 404-permit application. Its claims that further delay caused by appropriate environmental review of the System Alternatives would cause it harm are not consistent with its own actions.

Second, the dramatic decline in oil prices has substantially lessened need for the Sandpiper Pipeline since NDPC first submitted its application. (Expert Commentary on Enbridge’s Sandpiper Pipeline across Northern Minnesota, submitted as public comment from Cyrus Bina, Ph.D, dated Jan. 19, 2015.<sup>1</sup>) While FOH does not doubt NDPC’s claims that oil prices are volatile and will rise again at some point, the reality is that, in the short term, prices will stay low, causing a glut in the supply of crude oil. (Public Comments dated Jan. 23, 2015, attachment 1<sup>2</sup> at 4, “This Week In Petroleum,” Jan. 14, 2015, U.S. Energy Information Administration.)

Minnesotans should not be forced into an “up-or-down” vote on the Sandpiper Pipeline simply because the company has failed to adequately consider alternative locations for its pipeline that are better for the state, its citizens, and its environment. NDPC could have done a more thorough investigation of alternative routes as part of its application. It also could have agreed to coordinate state and federal environmental review, since federal environmental review is mandatory under the Section 404 permitting process administered by the Army Corps of

---

<sup>1</sup> E-docket Document No. 20151-106520-01.

<sup>2</sup> E-docket Document No. 20151-106576-01.

Engineers. Such federal-state coordination is not uncommon for projects as large and significant as the Sandpiper Project, and is an essential component for reducing the regulatory burden on applicants and reducing review times.<sup>3</sup> Also, an alternatives analysis is required by the federal Clean Water Act as part of the 404 permitting process. NDPC chose not to do these things.

Three to five years is a short time for established, profitable corporations such as Enbridge and Marathon. It is also a very short time compared with the estimated 40- to 50-year lifespan of a pipeline, if Minnesotans are forced to live with the consequences of a rushed, poorly made decision.

**D. The System Alternatives comparison documents prepared by Department of Commerce and NDPC are accounting exercises, not analyses, that are meaningless without expertise provided by Minnesota Department of Natural Resources, the Minnesota Pollution Control Agency, Mr. Chapman and Mr. Stolen.**

NDPC contends that two “significant” environmental reviews were completed, citing the reports completed by DOC-EERA and the applicant itself, NDPC. (NDPC Initial Brief at 25.) However, referring to these reports as “environmental reviews” is misleading. The term “environmental review” is a term of art referring to a report completed pursuant to the Minnesota Environmental Policy Act. It requires robust analysis of environmental impacts, and it must be an “analytical rather than encyclopedic” document. Minn. Stat. § 116D.04, subd. 2a. It must include, among other things, a discussion of the following topics:

- A. type, extent, and reversibility of environmental effects;
- B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions

---

<sup>3</sup> See, e.g., *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1028 (D. Minn. 2010) (reviewing EIS conducted jointly between state and federal agencies for Enbridge’s Alberta Clipper pipeline).

to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;

- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority . . . and
- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. R. 4410.1700. In addition, environmental review must address the: “economic, employment, and sociological effects that cannot be avoided should the action be implemented.”

Minn. Stat. § 116D.04, subd. 2a.

In contrast to these required components of environmental review, DOC-EERA’s report and NDPC’s “Comparison of Environmental Effects of Reasonable Alternatives” are textbook examples of “encyclopedic” rather than analytical reports. Neither report analyzed environmental effects of pipelines at all, let alone by “type, extent,” or “reversibility.” Cumulative potential impacts are completely ignored, including the potential for additional pipeline expansion or other pipelines, such as NDPC’s Line 3 already proposed to be installed on the exact same corridor as the Sandpiper Pipeline. Construction of Line 3, coupled with the built-in ability for the Sandpiper to expand its capacity to 711,000 bpd, brings the total volume of oil that will be flowing through this corridor to well over 1,000,000 bpd. In contrast, the total capacity of the controversial Keystone pipeline is 830,000 bpd. (Public Comments dated Jan. 23, 2015 at 12,<sup>4</sup> “Is Keystone Still Viable Amid Low Oil Prices,” Jan. 14, 2015.)

---

<sup>4</sup> E-Docket Document No. 20151-106575-01.



DOC-EERA also ignores economic, employment and sociological effects; to the extent that NDPC addresses them, it is *only* to analyze the potential advantages of the proposed project. (Ex. 16, Sch. 1.) It failed to commission a study that would analyze the potential negative effects that could not be avoided should the pipeline be built. (T. Vol. IV at 59:15-60:6; 73:22-74:6.)

And therein lies the irredeemable deficiency of the reports prepared by NDPC and DOC-EERA, which NDPC has incorrectly labeled “environmental reviews.” They bring no environmental expertise to bear whatsoever. They are simply data, an accounting exercise that can be used or manipulated to support any argument. NDPC does exactly that, attempting to argue that because its own GIS analysis shows higher numbers of some poorly defined categories of natural resources in some of the system alternative routes, therefore those routes are inferior.<sup>5</sup> But neither DOC-EERA’s nor NDPC’s report even attempts to quantify all of the resources from origin to final destination. None of the water bodies in Wisconsin, for example, was quantified in either report.

FOH urges the Administrative Law Judge and the Commission to rely instead on the experts who have weighed in on the System Alternatives, all of whom agree that NDPC’s route is the least environmentally preferable route offered in the Certificate of Need proceedings.

**1. NDPC does not have the expertise or the neutrality of MPCA, MDNR, Chapman or Stolen.**

Mr. Stolen, an expert in both pipelines and environmental review, provided extensive criticism of the DOC-EERA report in his testimony. For instance, the DOC-EERA failed to

---

<sup>5</sup> NDPC also claimed that its analysis went a “step further” than DOC-EERA’s when it analyzed the features crossed by the Centerline of the Preferred Route. (NDPC Initial Brief at 77.) NDPC did not complete a similar analysis for the System Alternatives. However, the significance of this additional “step” remains a mystery, as NDPC’s witness, Ms. Ploetz, disclaimed that there was any distinction between features within the two-mile radius and those crossed by the centerline. (T. Vol. V at 98:18-99:5.) Thus, the Administrative Law Judge and Commission should disregard any statements related to the features crossed by the centerline.

analyze the following significant issues which should be part of a meaningful environmental review:

- How many acres of topsoil would be lost by mixing with substrate or the impacts of loss of productivity from soil compaction in cropland, forest areas, etc., if compaction alleviation from deep ripping if it is not performed. (Ex. 184 at 8:1-29; 15:18-17:2; Ex. 180 at 73:15-24.)
- Oil spill amounts, even though they have the data, or the effects of oil spills/ruptures on various types of landscapes such as farmland, populated areas nearby, etc. (Ex. 180 at 32:15-17.)
- Block valve placement effectiveness in reducing impacts to rivers; and they ignored the Oak Ridge National Laboratory risk assessment recommendations to do additional analysis of potential impacts to high consequence areas. (Ex. 23 at 5:147-9:245 and T. Vol. IV at 124:12-138 (discussing valve placement generally without discussing effectiveness); Ex. 180 at 27:17-36.)
- Whether the federal regulations were sufficient to protect adjacent resources. (Ex. 180 at 24:5-7; 26:30-33; Ex. 184 at 11:12-24; 18:13-19.)
- Criteria as to avoidance of populated areas—in other words, how close or how far away is acceptable.

Moreover, both MPCA and MDNR are highly experienced at environmental review. Both agencies regularly conduct environmental review for projects large and small under MEPA. MPCA would issue environmentally significant permits for any pipeline project, including stormwater, wastewater, and spill and emergency response. MDNR similarly has jurisdiction over management of public and recreational lands, water withdrawal impacts, and wetland impacts from the pipeline. These agencies are also designated in the Federal Fish and Wildlife Coordination Act, which requires federal agencies to consult with state agencies regarding impacts to fish and wildlife species. (Ex. 184 at 3:1-6.) Both agencies have considerable expertise in these areas, and their opinions should carry great weight.

NDPC will likely argue that these agencies have a narrow focus based on their jurisdictional assignments. This is incorrect. Both agencies, having conducted hundreds of

environmental reviews, are well-equipped to evaluate the entire breadth of environmental impacts of a project. (*See* Ex. 185 and MPCA Comments dated Jan. 23, 2015.) Their expertise and opinions can and do extend well beyond their areas of regulatory jurisdiction. Moreover, while the agencies' specific areas of regulatory jurisdiction allows them to apply conditions or deny permits, their advisory recommendations are very frequently used by other agencies that do have overall project jurisdiction or major permitting responsibility such as the Army Corps of Engineers. (Ex. 184 at 2:15-4:15.) These recommendations are based on scientific data and analysis and carry far greater weight than any done by NDPC for two reasons. First, the Minnesota Pollution Control Agency ("MPCA") and the Minnesota Department of Natural Resources ("MDNR") are more experienced in evaluating environmental impacts. Ms. Ploetz, the Enbridge Employee responsible for managing consultants working for NDPC on the environmental aspects of the project, has only a bachelor's degree in environmental studies, and was unable to articulate any distinction between an artificial ditch and a shallow lake in her testimony. (T. Vol. V at 113:19-116:13; 118:1-11.)

Second, and more importantly, MPCA and MDNR are public agencies tasked with representing the public interest. They are *neutral* in relation to the Sandpiper Pipeline. In contrast, NDPC has a strong financial interest in the advancement of this project, and thus has an incentive to make the environmental data appear as favorable as possible. Accordingly, it is no surprise that NDPC's environmental team are the only ones on record claiming that NDPC's preferred route is environmentally preferable. All other experts—MPCA, MDNR, Mr. Stolen and Mr. Chapman—all agree that from an environmental perspective, NDPC's "Preferred Route" is, in fact, least preferred.

**2. NDPC’s own data does not support its claim that the system alternatives have a higher “density” of features.**

Throughout Ms. Ploetz’s testimony as well as NDPC’s Initial Brief, NDPC makes the claim that “all of the System Alternative Study Areas contain a higher density of multiple human and/or environmental features than is present within the Preferred Route Study Area.” (NDPC Initial Brief at 78; *see also* T. Vol. V at 96:20-22.) However, this contention is not supported by the record. To support this claim, Ms. Ploetz referred to some tables attached to Mr. Eberth’s Rebuttal Testimony in Schedule 2. However, these tables do not analyze density of natural features within the various “study areas.” Instead, they demonstrate *number* of natural features.<sup>6</sup> But density, as Ms. Ploetz agreed in her testimony (and simply as a matter of common sense), is not only dependent upon numbers. (T. Vol. V at 124.) It is dependent upon total area. And every single one of the System Alternatives is longer than the preferred route, as pointed out by NDPC when making cost comparisons between the routes. (NDPC Initial Brief at 72, Table 2). But NDPC never analyzes feature per acre, or mile, or introduces an area component at all. (T. Vol. V at 123:14-17.) It simply lists a higher number of features for longer routes. But that alone does not and cannot demonstrate “density.”

NDPC’s data also ignore origin and destination points of the various System Alternatives. The System Alternatives proposed by FOH, specifically SA-04 and SA-05, terminate at the final destination for this oil: Illinois. NDPC cannot make any claims about “density” without considering the length of the entire route—origin to destination. NDPC’s apples-to-oranges comparison has little-to-no value in aiding the Commission in choosing among System Alternatives.

---

<sup>6</sup> The reports also “double count” features that could fall into more than one category, so it is difficult to understand what the “quantification” of these resources actually accomplishes. (T. Vol. V at 123-24.)

“Density” of features is the primary claim that NDPC makes to distinguish its Preferred Route from the System Alternatives, yet it is unsupported by the record. Thus, not even NDPC’s analysis supports NDPC’s Preferred Route as an environmentally preferable alternative.

**E. NDPC concedes that the System Alternatives are similarly safe and reliable as NDPC’s Preferred Route.**

When considering System Alternatives, any claims by NDPC that it can mitigate risks from pipelines through safety measures may be disregarded because all measures designed to increase their safety would be implemented similarly, regardless of the pipeline’s location. (T. Vol. I at 65:12-66:2.) NDPC spent a considerable amount of its Direct Testimony detailing safety measures that Enbridge would implement. (*See, e.g.*, Ex. 6 at 7:227-10:314; Ex. 12 at 4:119-5:155.) No amount of safety measures can eliminate the risk, of course, and pipelines still pose considerable risks. (MPCA Comments dated Jan. 23, 2015 at 4; Ex. 185 at 6; Ex. 180 at 22:25-23:20.) But to the extent that Enbridge’s best practices can mitigate those risks, those mitigation measures would be equally—or perhaps even more—effective for all System Alternatives. (T. Vol. I at 65:12-66:2.) For example, NDPC’s Preferred Route is hillier and has rapid lateral groundwater flow, and “[g]iven the very large flows in the Enbridge pipelines, [any] leaks could be large before being detected, and could travel significant distances from the pipeline in hilly terrain and in areas with rapid lateral groundwater flow.” (Ex. 180 at 31:10-12.) Right-of-way and construction requirements can also lead to greater environmental impacts in these types of environments. (*Id.* at 34:1-9.)

NDPC’s explanation of its commitment to reducing the likelihood of oil releases misses the main point: there has been no independent review of the risks and damages of oil releases and differences among the System Alternatives. As Mr. Stolen points out in his surrebuttal testimony, FOH does not question NDPC’s “sincerely held commitment to following good

engineering practices and the federal pipeline regulations.” (Ex. 184 at 10:23-24.) The key point is the lack of independent analysis of NDPC’s practices. But, more importantly, even without this independent analysis, the record establishes a high degree of concern about the potentially catastrophic consequences from an oil spill along NDPC’s Preferred Route even if, as NDPC claims, the as-yet-unexamined risk of such a spill is low.

**III. The Consequences To Society Of Denying The Certificate Of Need Are More Favorable Than The Consequences To Society Of Granting The Certificate Of Need.**

**A. The pipeline would only benefit out-of-state private interests. No interests in Minnesota, and no public interest in general, would benefit.**

No one in the State of Minnesota, not even the refineries, would benefit directly from the proposed Sandpiper Pipeline. NDPC is only able to identify a single, indirect benefit to the residents of Minnesota, and is the potential to alleviate some future rail traffic for crude oil transportation. However, NDPC ignores the fact that the System Alternatives would be equally, if not more, effective at alleviating potential increases in rail traffic due to crude oil shipping demand.<sup>7</sup>

NDPC attempts to argue in its Initial Brief that it offers the advantages of “financially stable refineries” and benefits to consumers. The record does not support either of these claims. NDPC states that refineries need access to crude oil, and the proposed Sandpiper Pipeline will provide that. (NDPC Initial Brief at 95-96.) However, there is no evidence in the record that any

---

<sup>7</sup> FOH recognizes that the text of 7853.0130(C) calls for the Commission and Administrative Law Judge to compare granting the Certificate of Need versus denying the Certificate of Need. However, as FOH pointed out in its Initial Brief, denying the Certificate of Need is not necessarily the same as denying the need for a pipeline in general. If NDPC is correct about the overwhelming demand to ship oil out of the Bakken via pipeline, the market should support a pipeline at a more suitable location than the one proposed. Thus, given the viable System Alternatives, FOH does not assume that denial of this Certificate of Need will result in no pipeline from the Bakken across Minnesota.

refineries *lack* a reliable source of crude oil now, or that the proposed Sandpiper Pipeline would remedy that problem. NDPC also states that consumers throughout the Midwest rely on products produced from crude oil. (NDPC Initial Brief at 96.) But again there is no evidence in the record that any consumers in the Midwest are suffering from lack of access to products using crude oil, or that the distribution system is currently failing any consumers. And there is certainly no evidence that the proposed Sandpiper Pipeline would remedy any alleged harm to any consumers.

**B. Any favorable consequences of construction cited by NDPC would also be available for other System Alternatives.**

While pipelines do provide some limited local benefits, those benefits would be realized regardless of the location of the pipeline. NDPC alleges that the construction of the proposed Sandpiper Pipeline would provide “much needed, good-paying jobs” for construction. (NDPC Initial Brief at 92.) Those “much needed” jobs would be short-lived, as they are only during construction, while the risks of the pipeline would persist for at least 40 years. Moreover, at no time did NDPC attempt to determine whether the pipeline would harm the economy of the surrounding area, for instance by decreasing recreational activity and tourism. But, in any event, to the extent that the pipeline does provide economic benefits, the System Alternatives would provide similar benefits. (T. Vol. I at 64:24-65:8.)

NDPC also implies that it is FOH’s responsibility to show that existing pipelines are harming Minnesota’s water quality and other resources. (NDPC Initial Brief at 91.) However, FOH does not bear the burden to prove any such fact. NDPC bears the burden of proof in this docket. Regardless, the record is clear that existing pipelines have harmed Minnesota. There have been 49 spills in Minnesota since 2002 on Enbridge lines alone. (Public Comments dated

Jan. 23, 2015 at 7,<sup>8</sup> “Oil boom, pipeline safety put Enbridge on the spot,” MPR News, Nov. 20, 2014.) In 2002, one such spill resulted in 250,000 gallons of oil being released near Cohasset. (*Id.*) The largest recent spill, however, was “a 1.7 million gallon crude oil spill from Lakehead (now called Enbridge pipeline number 3) in Grand Rapids in March of 1991.” (MPCA Comments dated Jan. 23, 2015 at App. A, p. 20.) Clearly existing pipelines have harmed Minnesota’s resources. The question is how many more resources must be put at risk for the benefit of private business interests.

**C. Granting a Certificate of Need for NDPC’s preferred route will likely result in negative proliferation of pipelines along the Preferred Route.**

NDPC does not dispute in its brief that granting a Certificate of Need would induce future pipeline development along the same route. However, NDPC does claim, without citation or support, that it believes that discussion of such future development belongs in the Route Permit docket. (NDPC Initial Brief at 96.)

As FOH established in its Initial Brief, discussion of future expansions of the Sandpiper, as well as Line 3 belong squarely in the Certificate of Need docket, both under the Certificate of Need Rule (Minn. R. 7853.0130(C)(3)) and MEPA, which governs these proceedings. (FOH Initial Brief at 39.) The record is devoid of information about future development along this corridor. What are the impacts of construction from an expansion of the Sandpiper? What are the impacts of adding Line 3, which carries a different kind of oil, along this corridor? The Commission would be unable to come to any conclusions regarding future development along this corridor based on this record.

In addition, the record reflects that building the Sandpiper Pipeline to terminate at Superior, Wisconsin would induce future development along a downstream corridor from

---

<sup>8</sup> E-Docket Document No. 20151-106575-01.



Superior to Patoka, Illinois. (T. Vol. II at 99:25-100:1-5.) But the record does not demonstrate the impacts of this future development. It is likely that such development would require additional pump stations, resulting in greenhouse gas emissions (*see, e.g.*, NDPC Initial Brief at 72-73, Table 2) as well as other impacts from construction. There is simply nothing in the record documenting the potential impacts of sending the oil through Wisconsin to Patoka, Illinois including the many protected water resources in Wisconsin.

**D. NDPC's promise that it will take financial responsibility for the impact of spills rings hollow.**

The consequences to society of granting a Certificate of Need include the risks borne by Minnesotans of an oil spill or other incident. Enbridge, a joint owner of NDPC, recently incurred a more-than-one-billion-dollar incident in Michigan. (T. Vol. I at 53-54.) NDPC stated in its brief that Enbridge and NDPC will provide resources for an initial response. (NDPC Initial Brief at 104-05.) But NDPC's assurances were merely lip-service, with no legally binding obligations to back them up.

To ensure that the State is protected from cleanup costs, NDPC needs to provide the organizational documents that will set out the priority of payments in the event there is a spill. The NDPC documents must provide that net profits (defined in a way acceptable to the State) will first be used to pay all of the hard and soft costs of a cleanup, and to pay damages to the communities, businesses and property owners. The NDPC documents must also commit to placing its net profit into a reserve for the time period it takes to complete cleanup and until *all* of the damages have been paid. No net profit should be distributed to any partner or investor until cleanup is complete. The NDPC documents must provide that all of these special provisions cannot be amended, modified, or changed in any way without the written consent of the State. The State needs the ability to evaluate and approve the extent of NDPC's insurance coverage in

terms of amount, deductible, what is covered, and what defenses exist under the policy to avoid payment. The State needs a contractual obligation from NDPC that it will maintain the required coverage and provide evidence to the State that it will not make changes to the required coverage without the State's approval. Moreover, because the sample rider produced by NDPC is a reimbursement policy, the State still needs a contractual commitment from NDPC that it will pay for the cleanup and all damages in the event of a spill, even if it has to borrow the funds in order that it will be able to do the cleanup and pay the damages and obtain reimbursement of such payments under the policy.

MDNR, in its comments, recommended that NDPC provide financial assurance for the pipeline. (Ex. 185 at 3.) Financial assurance is a sort of "damage deposit" required for certain types of mining to ensure that the state has funds for reclamation and closure activities if the mining operations cease and the mining company does not have adequate funds available. Minn. R. 6132.1200, subp. 1. While FOH agrees with this recommendation generally, the mining financial assurance rules do not require that the bond cover catastrophic incident. *Id.* An oil spill or accidental release is the largest financial and environmental risk posed by a pipeline. Any financial assurance package that does not cover a spill of the magnitude that occurred in Michigan in 2010 leaves the state financially vulnerable.

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. 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.

## CONCLUSION

NDPC has failed to adequately justify a need for the Sandpiper Pipeline to be located in its Preferred Route. It must establish all four criteria in Minnesota Rule 7853.0130, and it has not established any of them. Denying a Certificate of Need for a pipeline in NDPC's Preferred Route will, at most, frustrate the return on the calculated business risks that NDPC and Marathon took. NDPC has offered speculative assertions of financial harm to one or two private businesses as its justification for this venture. In contrast, the record clearly demonstrates that building a pipeline in NDPC's Preferred Route will unnecessarily put Minnesota's ecologically sensitive and culturally significant resources at risk. Allowing this type of imbalance was not the intention of the legislature when it required companies to justify the need for large energy facilities to be built. The law is designed to protect the public interest and, in this case, that requires denying a Certificate of Need for NDPC's Preferred Route.

Dated: March 13, 2015

/s/ Leigh K. Currie

Leigh K. Currie

Kathryn M. Hoffman

Minnesota Center for Environmental Advocacy

26 East Exchange Street, Suite 206

St. Paul, MN 55101

Phone: (651) 223-5969

Fax: (651) 223-5967

lcurrie@mncenter.org

khoffman@mncenter.org

*Attorneys for Friends of the Headwaters*