

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

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, 474
OAH Docket No. 8-2500-31260

**CARLTON COUNTY LAND STEWARDS' RESPONSE TO MOTIONS
TO RECONSIDER THE COMMISSION'S JANUARY 11, 2016 ORDER**

I. Introduction

Carlton County Land Stewards responds to the North Dakota Pipeline Company LLC (“NDPC”) and Minnesota Department of Commerce (“DOC”) submissions in this unified document. We begin by acknowledging the efforts of Friends of the Headwaters (“FOH”) to provide a detailed, coherent, and thoughtful response to those documents. Except as described herein, having reviewed an advance draft of the FOH filing, we endorse and incorporate those comments by reference as our own. To avoid repetition, we have focused on areas where we feel amplification may be required, or where we wish to submit additional non-duplicative thoughts of our own.

- We strongly endorse the comments of FOH to the effect that attempting to narrow the scoping before scoping occurs turns the EIS process upside down. The correct procedure to get a high quality EIS completed with dispatch is (1) to retain a Consultant, (2) to require NDPC to comply with a pre scoping financial deposit sufficient to get a quality job done, (3) to engage agencies and the public in a robust and fair scoping process, (4) to issue a draft scoping order, (5) to take comments and then adopt a final scoping order. We are extremely concerned that NDPC's actions to date have both the purpose and effect of slowing down and frustrating the proper procedure, so that later they can complain about delay.

- We vehemently reject the suggestion by any of the parties that the Comparative Environmental Analysis (“CEA”) is an Environmental Impact Statement (“EIS”) substitute. To the extent that a party (the DOC) might be implying that the Public Utilities Commission (“PUC”) was granted implicit authority to use the CEA, or anything like the CAS, as an EIS is wrong. As explained in our detailed briefing in Docket 473, the Environmental Quality Board’s (“EQB”) Statement of Need and Reasonableness (“SONAR”) for the alternative review and the PUC’s own statements in the Court of Appeals in the TsR case has been that the alternative review depended upon the fidelity of the applicant in preparing an EIS equivalent scientific document with its application. We incorporate by reference our arguments in Docket 473 and our amicus brief in the Court of Appeals. The reason that the CEA is so limited, and its failure to comply with MEPA standards, derives from the fact that the CEA was never designed to meet MEPA’s requirements.
- We vehemently reject the suggestion that delay in this case is attributable to the actions of the intervenors or even the PUC and DOC. The delay in this case is directly attributable to NDPC’s decision to attempt to prepare an Environmental Assessment Supplement on the cheap and to eliminate alternatives from consideration, and then the decision to concoct a “high level review” that was not MEPA compliant. As we explained in our previous filings, the SONAR adopted by the EQB specifically warned pipeline applicants that should they fail to provide a robust high quality EAS with the application, the application would be delayed until the lack of an EAS was remedied.
- We strongly urge the PUC to require the DOC to get outside help, because it is now clear that while the DOC has the best of intentions, it is struggling to comply with MEPA. At the last hearing, the DOC protested against being “ordered” to enter into inter-agency agreements, because it expressed the willingness to do so voluntarily. We are deeply troubled if it is true that such an agreement has not yet been signed, and we think the proper course is now to order the DOC to enter into an inter-agency agreement by a certain date.
- We categorically reject the claim that the Dormant Commerce Clause has any application to these circumstances. The Court of Appeals decision ordering an EIS is res judicata on this point. If NDPC wanted to make the claim that ordering an EIS would violate the dormant commerce clause, it must have raised that claim in the appeal, and its attempt to inject that claim now is totally without merit. Moreover, PUC lacks the authority and jurisdiction to declare Minnesota law a violation of the Commerce Clause. A party that creates delay by failing to comply with Minnesota law has no standing to claim that the delay that it caused is unconstitutional.

II. Discussion

A. CEA does not Meet MEPA Standards

The Department of Commerce begins its request for clarification with the following statement:

a Comparative Environmental Analysis (CEA) has been deemed an acceptable substitute for an EIS in pipeline route proceedings

The quoted sentence cites, as authority for this claim, Rule 7852.1500, titled “Alternative Route Analysis.” That rule does not support the claim that the CEA qualifies as a “substitute for an EIS” as asserted by the DOC. That rule merely authorized the submission of the CEA as prefiled testimony. The rule states:

A comparative environmental analysis of all of the pipeline routes accepted for consideration at public hearings shall be prepared by the commission staff or by the applicant and reviewed by the commission staff. This comparative environmental analysis must be submitted as prefiled testimony as required by part 1405.1900.

Rule 7852.2700

The applicant must also submit to the commission along with the application an analysis of the potential human and environmental impacts that may be expected from pipeline right-of-way preparation and construction practices and operation and maintenance procedures. These impacts include but are not limited to the impacts for which criteria are specified in part 7852.0700 or 7852.1900.

Pages 16-18 of our February 27, 2015 filing describes the manifest insufficiencies of the CEA. It was not merely that the CEA was not conducted at a “high-level.” Rather, the problem with the CEA was that it was not equivalent to an EIS, and by its own terms specifically disclaimed any intent to prepare the equivalent information of an EIS.

The reason that the CEA was fatally flawed is that the CEA was not designed to be an EIS equivalent. There is no provision for a CEA in the Certificate of Need Rule; no guidelines for its preparation. The EQB did not have authority to create an alternative EIS for the Certificate of Need (“CN”) in the first place. This reference to the CEA by the DOC, then, is

deeply troubling. The Court of Appeals did not remand this case to conduct a CEA. It remanded to conduct an EIS. Despite the expressions of good intentions and great good will expressed by the DOC representatives at the last Commission hearing, it appears DOC employees desire to preserve past agency action, no matter how inadequately it addresses their court ordered responsibilities. They declare through their submissions: “Never mind the Court of Appeals; let’s just keep on doing what we’ve been doing!”

We thought it was crystal clear, based on discussions at the last hearing, that the scoping for the EIS would be supported by qualified scientists, ecologists, and others capable of conducting a first class EIS. We understood that, by now, Requests for Proposals would have been issued and a team of EIS consultants with broad strengths and capability would have been retained. Based upon the dialog that occurred at the hearing, the claim that the CEA is an EIS is shockingly wrong and completely lacks citation to authority. The CEA is a document designed to summarize the material submitted by the applicant and parties, after an EIS equivalent document has been completed. It is not funded to be an EIS and it is not conceived as an EIS.

B. Decisions to Violate MEPA Caused the Delay in this Case

If a defendant is tried by a jury of 3, or if the instructions to the jury neglect to require a conviction upon evidence beyond reasonable doubt, the fact that a second trial occurs, cannot be attributable to “delaying tactics” by the defendant. Delay caused by failure to follow the law is delay required by our system’s due process guarantees. As stated above, the delay in this case was caused by NDPC’s decision to file an application without a SONAR required Environmental Assessment Supplement (“EAS”) that explored alternatives. On November 8, 2013, NDPC simultaneously filed applications for a new Sandpiper Route to carry petroleum from the Bakken oil fields to Midwestern refineries at Patoka, Chicago and other refineries in the eastern Midwest, as well as refineries served by the Enbridge Lakehead system. NDPC’s notice plan contemplated

that the applicant would offer two route alternatives, one corresponding to the currently existing Sandpiper Route running through Clearbrook to Superior (Northerly route); a second, striking out in a southerly direction, before turning east, crossing Aitkin County into Carlton County, then heading northeast to Superior.

However, when the application was submitted, the Northerly route was eliminated. An EAS was filed with the applications. The EAS considered and rejected system alternatives rail (Section 2.2.3) and truck (Section 2.2.2). Applicant rejected the proposed Plains All American Pipeline L.P. reversal, which would have carried Bakken oil via Canada and then via third party carriers to Cushing, Oklahoma, because the project had not met its scheduled construction date. (Section 2.2.1, page 2-3). It considered Koch Pipeline Company, L.P.'s possible Dakota Express Pipeline from western North Dakota through Minnesota to Hartford and Patoka, Illinois with a connection that would possibly serve Gulf Coast refineries. These system alternatives would not satisfy the demand, and Applicant concluded and stated:

Any other pipeline system would require entirely new right-of-way as well as new pump station sites, power supplies, valve sites, and potential access roads that would likely be equal to or greater in impact than the proposed Project. P. 2-3.

With this single sentence, Applicant summarily rejected any possible alternative route, simply concluding that wherever the pipeline might be located, it could be assumed that the environmental impact would be “equal to or greater in impact than the proposed Project.”

Although not articulated in the Application itself, we learned subsequently that NDPC and its part-owner Marathon had decided that other pipeline alternatives would be longer, that longer pipelines would be more costly and that NDPC, and Marathon would not accept even a 70 mile increase in pipeline length, because they wanted to hold down the shipping price for Marathon and shippers who would utilize the remaining Sandpiper capacity.

In August of 2014, two Minnesota agencies with jurisdiction over Minnesota’s public waters and environmental issues warned that Minnesota is facing a “pipeline tsunami,” an unprecedented challenge respecting its petroleum pipeline network of numerous applications for new routes and expansion to routes. This tsunami has been triggered by technological advances in extracting oil from shale rock, which drove a 39 percent jump in U.S. production from 2011 to 2014¹. In its letter of August 2014, MPCA² wrote:

Given the high potential of additional pipelines and replacement or upgrading of existing pipelines in the near future, and within the same corridors, ***it is critical that the current effort consider multiple alternatives, including both route and system alternatives.*** For the reasons outlined below, limiting the alternatives to route options alone at this stage would unnecessarily narrow the scope of project options to reduce environmental and public health risks. August 6, 2014 Letter to Commission. (Emphasis added).

MPCA’s concerns, as reflected in its official comments include the following:

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

¹ The United States has been the jewel of global petroleum in recent years, increasing its oil production by more than 50 percent since 2008, and most energy analysts say they believe the good fortunes are sustainable for at least another decade. Natural gas production has been so plentiful that the price of the commodity has plunged, giving consumers and manufacturing industries a financial break, while gas import terminals are being turned around to export. The country has already replaced almost all imports of high-quality African oil with the booming production of the Texas and North Dakota shale oil fields. NY Times April 21, 2014.

² The Minnesota Pollution Control Agency was established “To meet the variety and complexity of problems relating to water, air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state...” Minn. Stat. § 116.01.

methods and time frames; wastewater issues; and water quality, watershed and wetland issues.

That concern resulted in a decision by the PUC to require an environmental review of alternative routes that did not start and end at the end points selected by the applicant³. When the PUC ordered a “high level” review, CCLS warned that failure to involve the public in scoping would result in an inadequate review. We repeatedly sought to engage PUC and the DOC in a dialog about how to prevent the catastrophe that ultimately occurred. We warned that if the DOC continued to attempt to concoct a high level review without transparent public involvement that there was a danger that it would result, and that is exactly what happened. DOC should not be allowed to repeat this error by once again attempting artificially to narrow the review. PUC should by now have learned that cutting corners and concocting an EIS inside the DOC leads inevitably to further delay.

III. Scoping Suggestions

With respect, we urge the PUC to immediately commence the EIS process by insisting that the DOC get competent help from an environmental consultant with a reputation for impartiality and professional excellence in the field. Narrowing the scope now is a terrible idea. MEPA differs from NEPA in one very significant respect. NEPA can readily widen the scope as the science dictates. Under MEPA widening the scope, even when sound science dictates,

³ In launching that review, the PUC recognized that a comparison of alternatives might not contain all of the components of a review that would take place when a specific route is being located. But the order issued by the PUC contained no specific guidance on the scope or contents of such a review. The plan adopted was outside the scope of any regulation or other guidance. Neither PUC nor DOC provided for scoping input, nor did they announce publicly the intended scope. The document that was generated has been referred to as a CEA – Comparative Environmental Analysis, but because of its extra-regulatory character, it is not. It is an attempt, by DOC-EERA to interpret the PUC’s intentions. CCLS’s attempts to gain information on the intended scope of the review were rebuffed.

involves legal and administrative complexities. If the scope is unduly narrowed, PUC runs the risk that the only remedy will be to deny the CON. Scoping should be based on environmental science.

Scoping should start out with a broad sweep to examine all possible alternatives. An environmental review can eliminate alternatives, based on science, through a screening process. But the screening process, it is worth repeating, should start broadly, develop screening criteria, and screen out alternatives through a winnowing process that is transparent and subject to review. As applied here, it would be an abdication of responsibility to screen out all alternatives that avoid the headwaters, or all alternatives that don't have endpoints pre-selected by NDPC to fulfill their business purposes. Most of the petroleum crossing Minnesota is coming from sources far west of Minnesota and most of it is being delivered to destinations far to the east and south of Minnesota. NDPC has argued that safety and cost factors strongly militate for moving that petroleum the shortest possible distance. It would be totally inconsistent with these policy objectives, and totally inconsistent with MEPA, to fail to take an inventory of possible routes that move petroleum outside of the headwaters, especially if those routes are as short as or shorter than the routes NDPC proposes. Including such options will then lay before the Commission a genuine policy choice, one that is denied to the Commission if such routes are eliminated from all consideration, because NDPC chose to limit its "open season" to a route that served Marathon and NDPC's business objectives.

A. Assure Competence and Impartiality on the part of the Vendor(s):

We understand that DOC intends to seek an EIS vendor with a demonstrated record of competence in pipeline work. That may well require the vendor to use consulting specialists,

where the vendor's own areas of competence need to be rounded out. In Keystone XL, the vendor selection was dogged by contentions that selected vendors conducted incomplete work, or that their choices were driven by potential conflicts of interest. For this reason, in addition to selecting your vendor with attention to potential conflicts, you might consider establishing an *independent expert panel review* that scrutinizes the work product before it becomes final. For example, the USACE subjects engineering and environmental work to an independent panel composed of experts pledged to provide honest and unbiased opinions of the completeness of the product. By way of another example, it is common where an appraisal will be critical to the outcome of a major dispute, to obtain a "review appraisal," which is an independent second opinion of the appraisal, utilized to serve as a check on the product, before the appraisal becomes final. In addition, MPCA, DNR, and other agency experts should be tasked periodically to review the approach being taken by the vendors, well before they are locked in stone.

B. Utilize GIS in conjunction with a policy framework to assist agencies and parties to examine the consequences of various policies.

You may recall that in its testimony in the CON proceedings, CCLS referred to a GIS based system of comparing proposed routes utilizing a policy framework which assigns numeric values to different locational attributes (i.e., forest blocks, underground hydrology, sloping versus level terrain, soil conditions, surface water and wetland conditions, etc.). We provided a scholarly publication that described how even pipeline companies themselves have used this technology to rank pipelines by environmental impact and other factors. We said that if this technology were utilized, and made accessible to qualified persons serving the agencies and parties, they could provide the record with meaningful science and data based information on the implications of the various choices.

Instead, the CEA simply reported ecological features in a broad and general way and urged parties to use that data, somehow to advocate for one route or another. However, we have noticed that in the Dakota Access Iowa proceedings, the applicant used a variation of the very method that we advocated to identify initial pipeline locations. In that proceeding, Dakota Access told the Iowa PUC that using this procedure, assigning weights to various features, they were able to improve the environmental locations of their proposed lines. For example, Dakota Access assigned a negative weight to lines if they departed from existing pipeline routes thereby rating proposals in part based upon whether they broke into new territory or followed old territory. We urge DOC and PUC to consider adopting this approach, but to make it accessible to agencies and parties as a transparent tool to rate alternatives. In making this suggestion we are not endorsing the particular factors or weights used in Dakota Access, but rather suggest that it represents an approach that could make it easier for agencies and parties to provide meaningful advocacy. If you are interested in how this process might work, we would be interested in providing professional journal support and maintaining a dialog on how this approach would modernize the environmental review.

C. Do not Prejudice Proceedings with Administrative Conclusions Arrived without the Benefit of an Environmental Impact Statement.

We think it is clear from the Court of Appeals decision and the PUC's subsequent order that the Administrative Law Judge's recommended findings and the PUC's findings are no longer binding. However, some parties have feared that the PUC might somehow attempt to reinstate them summarily. An EIS is an "action forcing" document. The only way that the new EIS can genuinely meet this action forcing requirement is if findings are fashioned afresh—de novo, once the new EIS is issued. The PUC has allowed the existing evidentiary record to be considered as appropriate, but it has not suggested, nor could it, that the vacated findings carry

any ongoing weight. Those findings were issued without the availability of a compliant EIS, and any attempt to utilize them would unlawfully eviscerate the EIS requirement.

D. Obtain advice from an independent pipeline economist to examine alternatives from a perspective of the basic need, which is to deliver petroleum from western locations to Patoka, Cushing, and beyond.

MEPA requires a genuine examination of alternatives, not one confined by artificial constraints imposed by the applicant. We think that it is clear that the primary purpose of the proposed pipelines is to carry petroleum from western fields in North Dakota or Canada to Patoka and Cushing. By demanding that this need be met by routing through Clearbrook to Superior, NDPC has artificially stacked the deck in ways that evade the central question, *what is the safest, most efficient, least impactful way of carrying petroleum to its ultimate destination.* Because NDPC is seeking to use the public's power of eminent domain, NDPC's parochial business preferences should not be allowed to determine the outcome. Whether you consider routing outside of Minnesota the "no Build" option, or whether you consider it a no damage system alternative, the fact remains that since this case originated, the Iowa PUC has fast tracked a route for western oil that is outside the headwaters, will be a pre-existing route, and which appears actually to be a shorter, hence less costly and damaging route according to NDPC's own criteria.

The original open season actually failed to produce sufficient interest in the Minnesota line. NDPC obtained interest only by granting Marathon a share of ownership in the proposed line. That bolsters our belief that the market did not endorse even the economic need for this particular line. The State should take a hard look, aided by pipeline expertise, at whether the predominant need could be better served by routing petroleum across Minnesota in a different location, or by following the Dakota Access route, outside of Minnesota altogether. Pipefitters

may scream bloody murder at the possibility that Iowa pipefitters would get this work, but the CON and Routing rule is not designed to shift pipefitting jobs into Minnesota.

In our scoping comments, we intend to identify routes for study and advocate that the EIS remain open to routes that are significantly different from those proposed by NDPC. That way, policy makers will have the ability to consider alternatives with meaningful information, instead of being handcuffed by the choices NDPC made for business reasons. Following the Dakota Access route, for example, would reduce the risk to Minnesota resources to zero yet would carry petroleum destined to Patoka and Cushing at least, if not more, efficiently and safely.

Dated: February 11, 2016

Respectfully Submitted,

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