

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

**In the Matter of the Application of
North Dakota Pipeline Company LLC
for a Certificate of Need for the
Sandpiper Pipeline Project**

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

OAH Docket No. 8-2500-31260

**INITIAL POST-HEARING BRIEF
OF
CARLTON COUNTY LAND STEWARDS**

FEBRUARY 27, 2015

Table of Contents

I.	Introduction.....	1
II.	Carlton County Land Stewards.....	4
III.	Procedural History	7
	A. The Application	7
	B. Environmental Assessment Supplement Project Description.....	8
	C. NDPC Files Incomplete USACE Application and Refuses to Complete the Application	12
	D. PUC Orders Consideration of System Alternatives.....	14
	E. The “High Level” CEA.....	16
IV.	The Overwhelming Weight of Evidence from Minnesota Regulatory Agencies with Jurisdiction over Natural Resources Establishes that the Applicant Has Failed to Meet the Criteria Necessary for Issuance of a Certificate of Need	18
	A. Minnesota Department of Natural Resources.....	18
	B. Minnesota Pollution Control Administration.....	21
	C. Analysis from the US Army Corps of Engineers/EPA is Absent Because NDPC Refused to Proceed with the Section 404 Permitting.....	22
	D. Mille Lacs Band of Ojibwe.....	25
	E. Fond du Lac Band of Lake Superior Chippewa.....	27
	F. Dr. Chapman	29
	G. Specific Identified Defects in the Environmental Reviews	31
V.	The Alternative Environmental Review Authorized by the EQB Contemplates a Submission of full environmental analysis with the Application Commensurate with an Environmental Impact Statement— The Environmental Assessment Supplement Fails to Meet that Standard	38
VI.	NDPC Selected Pipeline Routes for Analysis in the Environmental Assessment Supplement by Improperly Selecting Only the Shortest Pipeline Length	52

A.	Market data shows that there is plenty of demand to support the additional costs required by a longer pipeline and hence the Environmental Supplement Assessment improperly eliminated longer pipeline alternatives	53
B.	Applicant’s Elimination of Routes Based on the Erroneous Premise that Even Small Price or Cost Increases is Contrary to the Evidence.....	56
VII.	A Certificate of Need Must be Denied, because No Chapter 116D Environmental Impact Statement Has Been Completed, and because the Criteria of the CON Rule Have Not Been Met	58

I. Introduction

The evidentiary hearing received official statements of position on whether NDPC has established that the proposed route should be granted a certificate of need from four governmental entities with jurisdiction over natural resources, the MPCA, the DNR, and two tribal sovereigns. The MPCA and DNR both have vast experience in conducting environmental reviews, and both have statewide jurisdictional responsibility for management of our environmental resources, including lands and waters. The MPCA and DNR have major permitting responsibility for permits that must be granted before a pipeline could be constructed. All four have conducted extensive reviews of the relevant information, and all four have concluded that the environmental reviews are inadequate and all four have urged that superior system alternatives exist. In addition, the only qualified environmental expert to testify, Dr. Chapman, concluded that the environmental review is inadequate, and gave deep and thoughtful professional support for that opinion. The contrary opinion was offered by an employee of NDPC who has never before conducted an environmental review, and whose education consists of a Bachelor's degree in environmental studies.

The PUC cannot ignore these conclusions: the record simply will not sustain a conclusion that the MPCA, DNR's position is incorrect. The record shows that NDPC formed a joint venture with Marathon Petroleum, the Midwest's largest petroleum refinery, and that they decided to develop the route with the least cost that did not cross an Indian reservation. They concluded that any route that exceeded the length of that route would not be studied. They filed

an Environmental Assessment Supplement¹ (Environmental Information Report) that totaled up the kinds of resources but did not weigh in any way the different resources that were being counted, because “that would be an extremely difficult, if not impossible task to achieve.” Ploetz Tr.41, lines 17-22); (pg. 108, lines 4-7). This approach is unlawful and completely contrary to the purpose of an environmental review, which requires evaluation of the environmental impacts: the great reform embodied in both NEPA and MEPA is that major decisions impacting the environment will be made after a public science-based consideration of impacts on the environment.

Both the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency have consistently supplied official statements in these proceedings to the effect that NDPC has not established the elements necessary for grant of a Certificate of Need because the environmental review was improperly conducted, and because there are alternatives which take petroleum from Bakken to Patoka and other refineries via routes that inflict a lesser impact on the environment and with lesser risk of catastrophic damage to the environment in the event of a spill. Agency submission show that:

- (a) the environmental review conducted by NDPC and submitted with its application in the form of a Environmental Assessment Supplement is inadequate;

¹ In its Brief to the Court of Appeals, the PUC explained the significance of the document filed with the application, as follows, Instead of the Commission preparing an EIS or EAW, the approved rules specifically provide that the applicant is **to submit essentially the same information as is found in an EIS**. See Minn. R. 7852.2700. This document filed by the applicant is commonly known as an Environmental Assessment Supplement ("EAS"). The rules then provide for public review and comment, and at least one hearing conducted by an administrative law judge. PUC Brief, *infra*, page 10.

Minn. R. 7852.1300-1700.

- (b) NDPC Selected Pipeline Routes for Analysis in the Environmental Assessment Supplement by Improperly Selecting Only the Shortest Pipeline Length;
- (c) there are numerous particularized insufficiencies in the environmental analysis that prevents adequate review of the key issues in the CON and Routing Proceedings;
- (d) there are feasible routing/system alternatives which are environmentally superior thus prohibiting the grant of a certificate of need;
- (e) NDPC improperly omitted Line-3 from the Environmental Assessment Supplement; and
- (f) NDPC intentionally terminated the federal environmental review by refusing to move forward with its Section 404 permit thus depriving this docket of the benefit of the Federal NEPA review and creating the prospect that there will be three separate reviews of route and system alternatives, and three separate adjudications, when federal and state law both require coordination and consolidation.

One of the critical problems with this record is that NDPC and DOC-EERA have been proceeding on the assumption that an environmental impact review can be value free, can simply list resources, and that by eliminating any scientific conclusions about the degree or importance of impacts, by disclaiming the use of ecological science to render judgments, the environmental review is somehow more objective.

Ms. Ploetz (and for that matter, the CEA) tells us, for example, that both artificial drainage ditches and shallow lakes are bodies of water and that the environmental impact review does its job by pointing out that if a pipeline has a catastrophic spill event that the environmental impact will be the same. Both will get polluted, and so by telling us what features the pipeline crosses, and leaving it to the rest of us to draw our own conclusions from that information, the environmental review is objective and complete. But that contention abdicates the responsibility of an environmental review to tell us that shallow lakes are especially vulnerable to pollution and that they are the subject of a great body of ecological study, entitled to special treatment under

the Minnesota regulatory regimen. NDPC and DOC-EERA have taken the impact out of the Environmental Impact Statement and thus have eviscerated its fundamental purpose.

II. Carlton County Land Stewards

The Carlton County Land Stewards (CCLS) is a grassroots group of families, farmers, landowners and individuals who opposed the creation of a new pipeline right of way through the sustainable agriculture district in Carlton County, but who also strongly favor application of sound environmental principals through a robust environmental review to the location of the future pipeline. CCLS was formed by families directly impacted by the original Southerly route as submitted initially by Applicant². CON Petition to Intervene Par 1. CCLS has several interests in these proceedings. It sought to protect important sustainable and organic farming regions which directly impact members operations. That particularized interest has been protected by the rerouting of the proposed pipeline outside of the organic and sustainable farming region as it exists today, and for that, CCLS is appreciative. At the same time, as a result of its commitment to broad principles of sustainability, the organization resolved that it would not be driven solely by “not in my back yard” principles, but would rather advocate that the PUC and other State agencies use environmental review techniques that would locate any necessary pipeline in that portion of Minnesota least vulnerable to environmental harm from construction of the pipeline and least vulnerable to catastrophic irreparable damage in the event of an accidental spill. It is this second interest that a pipeline, if necessary, be located so as to inflict the least damage, that CCLS believes has not been served.

² Testimony of Steve Schulstrom, Public Hearing Duluth January 6, 2015, p 183.

CCLS initially strongly supported consideration of co-location of the proposed line in the existing Northerly corridor. It reasoned that co-location would minimize the disturbance of previously undisturbed lands and waters. That seemed also consistent with the PEER principles that strongly disfavors development of new corridors³. CCLS submitted comments questioning the completeness of the Environmental Assessment Supplement in the docket and strongly expressing our concern that the EAS, while listing resources, did not apply scientific principles to determine the least impact, as Chapter 116D requires⁴. CCLS began to recognize that the Environmental Assessment Supplement wasn't an environmental review at all, but rather an inventory of resources, a counting of the number of those resources in the vicinity of the proposed pipeline.⁵ The organization became convinced that Environmental Assessment Supplement failed to comply with Chapter 116D, because it merely functioned as a list of resources, rather than a scientific comparison of impacts⁶.

³ People for Environmental Enlightenment & Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978)

⁴ Document No 20144-98540-03.

⁵ A project of this scale and complexity requires a more comprehensive environmental review than was previously performed by the Department of Commerce. The Sandpiper pipeline and the Line 3 proposals combine to form the largest hazardous liquid materials storage and transportation complex in Minnesota history. As such, the Minnesota Environmental Protection Act mandates a more thorough and rigorous Environmental Impact Statement due to the effects of the proposed facility upon the natural and socioeconomic environments. Until such analysis is done, the Certificate of Need should not be granted. See Tim and Mary Anderson, written comments, docket # 20151-106524-01

⁶ As Dr. Chapman indicates: federal and state agencies evaluate the priority of an effect by its intensity, extent, and duration. Intensity refers to the severity of the direct and indirect impacts on the natural resource. Is a habitat completely destroyed by the effect, or only slightly damaged, for example. Is a groundwater aquifer rendered undrinkable, or only slightly contaminated at levels below a drinking water standard? Extent refers most often to a geographic scope. Lastly, duration indicates the reversibility of an effect: it is permanent or temporary, and if temporary, can recovery be accelerated by restoration and remediation?

CCLS retained Dr. Chapman because it believed that applicant was deviating materially from the robust environmental review intended by Chapter 116D. The organization hoped to provide the ALJ and the Commission with actual scientific evidence on how a quality environmental review should work. CCLS did not instruct Dr. Chapman to select any particular route, but as Dr. Chapman's testimony indicates⁷, he was asked to use his training and experience constructively to make recommendations that would assist the Commission in evaluating the environmental review. It is CCLS fervent hope ALJ and PUC will benefit from submissions offered for this purpose, and that the end-result will be a Minnesota pipeline system that inflicts the least environmental harm, and only if the pipeline is actually necessary.⁸

The CCLS position on routes and system alternatives, then, is not based upon naked self-interest. The organization has not yet taken a position on which route is the best, or which system alternative is the best. The organization's position, rather, is that the best alternative must come from a full development of a record, and that development cannot be adequate unless there is a full and robust compliance with the letter and the spirit of applicable law and policy, including Chapter 116D, the CON, routing and other permitting statutes and rules, and the key

⁷ See Dr. Chapman Surrebuttal Testimony paragraph 7.

⁸ A thorough and robust environmental review will reveal the negative impacts this pipeline proposal will have on Minnesota's environment. Loss of forest biomass exacerbates climate change by decreasing the amount of carbon that can be sequestered. Wetland impacts will reduce their ability to store carbon and mercury another serious environmental problem. Wild rice waters will be harmed and so will indigenous people's cultures and livelihoods. Pipeline rights of way will increase forest fragmentation, which seriously harms many types of living things including songbird populations like the golden winged warbler a species of concern, and the Northern long eared bat a candidate for listing as an endangered species. See Tim and Mary Anderson, written comments, docket # 20151-106524-01.

state regulatory requirements that protect public waters and natural resources such as Minnesota's Water Policy, Chapters 103A-103G, Chapter 83A-102.

III. Procedural History

A. The Application

On November 8, 2013, NDPC simultaneously filed applications for a new Sandpiper Route which would carry Bakken 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. Its notice plan had contemplated that the applicant would offer two route alternatives, one corresponding to the currently existing Sandpiper Route running through Clearbrook to Superior (Northerly route) and a second, striking out in a southerly direction, then turning east crossing Aitkin County into Carlton County and then heading northeast to Superior.

However when the application was submitted, the northerly route was eliminated. An environmental assessment supplement (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, applicant concluded and continued:

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, and 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.

B. Environmental Assessment Supplement Project Description

NDPC’s Environmental Assessment Supplement--- titled an Environmental Information Report, but here referred to by its alternative name (EAS) submitted with both applications was predicated on the belief that it could satisfy its obligations to evaluate environmental impact by enumerating the types of resources through which the proposed pipeline would travel. In the TSR brief to the Court of Appeals, the PUC explained that the purpose of this EAS is to supply the docket with the same information as would be provided by an Environmental Impact

Statement:

Instead of the Commission preparing an EIS or EAW, the approved rules specifically provide that the applicant is to submit essentially the same information as is found in an EIS. See Minn. R. 7852.2700. This document filed by the applicant is commonly known as an Environmental Assessment Supplement ("EAS"). The rules then provide for public review and comment, and at least one hearing conducted by an administrative law judge. Minn. R. 7852.1300-1700.

In Part IV of this brief, we describe the legal framework surrounding the alternative environmental analysis. We show, there, that the alternative environmental analysis was designed to make it possible for a petroleum pipeline applicant to submit simultaneous Certificate of Need and Routing Applications by presenting a professionally prepared EIS. (The adequacy of this document is legally critical, because the Environmental Quality Board granted an alternative review waiver based upon the assumption that the Environmental Assessment Supplement would be equivalent in scope to an Environmental Impact Statement.) The environmental analysis submitted by NDPC was prepared under the direction of Sarah Ploetz. Ms. Ploetz has a bachelor's degree with a major in "environmental studies." Her prior experience consists in providing information requested by permitting authorities, but she has no prior experience in working on an Environmental Impact Statement. Ploetz Tr.66, lines 17-19. Ms. Ploetz was operating under several constraints. First, as discussed below, the NDPC joint venture, which includes Marathon, had determined that their business plan could not justify or support a route that was even modestly longer than the preferred route, because of the additional cost arising from that additional pipe and the filler, the cost of which they customarily allocated to shippers, for some reason. Second, they determined that they would prepare an environmental document that listed and counted environmental resources, but would not make what Ploetz described as "value judgments" by actually by determining which resources were more significant, or by quantifying the nature of the potential impacts.

NDPC's engineering people created GIS shapefiles necessary for identifying the route for design, acquisition and regulator purposes. These GIS shapefiles and their proper use by environmental professionals are described in Dr. Chapman's Rebuttal and Surrebuttal testimony. The route files can be combined using Google or ArcGis software to determine the nature of

soils, geology, geographic, water and numerous other resources. Under NDPC's direction, Ploetz's team decided to use GIS strictly to perform a counting operations, to show, for example, how many water resources, forests, aquifers, towns, cities and counties, intersect with the GIS shapefile describing the proposed route. NDPC told Ploetz to reject any "value judgments" that would determine which aspects of the environment deserved high priority protection, or to describe the nature of environmental impacts that might be involved by placement of the lines in or near these resources. The Environmental Assessment Supplement presented for public review, then, merely counted feature quantitatively and made no qualitative judgments regarding environmental impacts. Ploetz Tr. pg. 22. This failure to actually assess environmental impacts in the environmental assessment supplement filed with both CON and Routing Dockets, has drawn strong objection from MPCA, DNR and Dr. Chapman, because it is completely contrary to the way in which environmental impacts are assessed.

Ms. Ploetz's explained that NDPC's production of an EAS was envisioned as a "straightforward comparison" of the resources, by which NDPC means simply using the quantity of numbers or data to compare alternative systems. (Ploetz pg. 37, lines 20-24)⁹. NDPC did not weigh in any way the different resources that were being counted, because "that would be an extremely difficult, if not impossible task to achieve. Ploetz Tr. 41, lines 17-22); (pg. 108, lines 4-7). Although the EAS is actually submitted in both dockets. Tables reported density of resources only¹⁰. There was no attempt to quantify or compare potential routes based upon how

⁹ A: I mean simply using the quantity of numbers or data that's indicated in the table.

Q: Yes, correct. (pag.37, lines 20-24)

¹⁰ Each line item that you see on the table would be essentially a different factor that was looked at. So the -- where the density comes into play is the -- when you look at the total numbers,

they were impacted by a spill¹¹, nor was there any consideration of the potential increased risk of spill connected to the Line 3 replacement¹².

The limitations imposed by NDPC basically eliminated any judgment as to whether a particular resource or ecosystem was deserving of special consideration or protection. Since NDPC did weight cost and route length, the only indicators that were given weight by NDPC in determining route viability were cost and length. By deciding that environmental impacts should all be counted equally, because all resources are supposedly equal and equally impacted, NDPC violated Minnesota's Environmental Policy Act. By way of example, Ploetz explained that when the Environmental Analysis reviewed water bodies, the environmental review would not differentiate between a shallow lake¹³, and an artificial drainage ditch.¹⁴ The entire

sheer quantity of what was identified within each factor that was looked at, that informs the overall density of the human and environmental features contained, within the two-mile-wide study area. (Pg.123-lines 19-25, pg.124)

¹¹ Q: Okay. Are you involved in projecting or placing values on areas that would be impacted by a spill?

A: As I've testified to earlier, we haven't placed a value on one resource being more important than another. (pg.62, 15-19).

¹² Tr. 106, lines 17-23.

¹³ One of Minnesota's environmental challenges is to protect its numerous shallow lakes. The concern has spawned a major shallow lake program described at <http://www.dnr.state.mn.us/wildlife/shallowlakes/index.html>. The suggestion by NDPC's chief environmental employee that there is no special consideration for shallow lakes suggests a shocking state of ecological and environmental illiteracy. This is another example of the point that we later make, that environmental reviews need to be conducted of teams of scientists each applying their respective discipline so that the review integrates the acquired ecological knowledge specific to Minnesota's natural resources. Indeed, Ploetz admitted the only distinction made in its environmental review was between a water body or a fast-moving water body. Therefore, in their analysis overlap between the two could occur and an inaccurate counting of features is thus possible. (tr. 119, lines 5-9)

¹⁴ Q :And so my question was it more ecologically healthy, is one more ecologically healthy than the other, do you think, if you were to look at – to identify a healthy ecosystem?

environmental assessment document was predicated on merely quantifying the number of types of resources¹⁵.

C. NDPC Files Incomplete USACE Application and Refuses to Complete the Application

In February of 2014, NDPC filed an incomplete Section 404 Clean Water Act Permit application with the US Army Corps of Engineers (USACE). The USACE notified NDPC that the application was incomplete, but NDPC refused to go forward with the application.

Commencing this application would have triggered a federal environmental review under NEPA and would have triggered government to government information exchanges between USACE and Minnesota agencies, as well as consultations with Indian tribes on the impact of the proposal on native resources, as well as impacts on treaty rights. In August of 2014, NDPC's Ploetz filed inaccurate testimony claiming that this application had been completed, and that a permit decision was scheduled.

In September of 2014, less than a month after NDPC filed Ploetz's direct testimony claiming that NDPC had submitted an application for a federal Section 404 permit, the United States Army Corps of Engineers posted a document on the internet publicly announcing that Enbridge-NDP had refused to submit a complete application for Section 404 permit, and that as a result the federal environmental review contemplated by the National Environmental Policy Act could not go forward. We provided a copy of this posting to this docket in October of 2014,

A: Again, I don't feel like I can answer that, because it would depend on the quality of the shallow lake that would be contained within that. There – there are a variety of potential impairments that could be placed on water bodies. You know, the use – human activity use of water bodies can affect that. It's difficult to answer. It's a complex distinction. (pg.118, lines 1-11)

¹⁵ Tr. 128, lines 24-25; pg.129, lines 1-4)

because at the time, NDPC was telling the Commission that bifurcating the process was slowing down the process. We argued that “Enbridge-NDP is acting in the State of Minnesota as if time is of the essence, but it is slow-walking its application process through the federal system.” We wrote:

The USACE announcement made it clear that the USACE had assembled a regulatory team to conduct the required analysis, but that they could not conduct their review, because Enbridge-NDP would not complete its application. Under both state and federal law, these reviews are designed to proceed simultaneously, and one of the major benefits of this collaborative process is that information compiled by each agency will be available to the other. See Minn. Rules section 4410.3900, 40 CFR Part 1501.¹⁶

Perhaps NDPC rationalized that it would be better not to let the USACE look at their application because the USACE would demand under NEPA that a real Environmental Impact Statement would be prepared examining all system alternatives. Perhaps it felt that it could convince the PUC to accept an environmental review that merely listed resources, instead of examining and weighting scientifically the gravity of impacts on those resources. Perhaps it believed that the PUC would ignore environmental regulations requiring that an environmental review encompass

¹⁶ In its January 5, 2015 rebuttal testimony, NDPC once again claimed that it had an active Section 404 permit application and reaffirmed the application date for the Federal 404 permit and environmental review as January 11, 2014. The testimony specifically affirmed that the purpose of the testimony was to update the status of these applications, to make them current. The chart attached affirmed that dates in bold represented actual dates as opposed to estimates. But on cross examination, Ms. Ploetz admitted that actually NDPC had withdrawn its application, and essentially that NDPC had intentionally discontinued the federal environmental review process. We don’t recite this history to attack the credibility of the witness or to embarrass the witness. We assume that when the witness affirmed in August 2014 and again in January 2015 that an application was submitted she believed it to be true. Our problem is that Minnesota’s two regulatory agencies with environmental jurisdiction have attacked the completeness of the environmental review and urged consideration of system alternatives, and the two federal agencies with that jurisdiction have intentionally been removed from the field.

all related activities, but recognized that the USACE would not tolerate conducting an environmental review limited to Sandpiper, when a second pipeline was being proposed for the same route. But whatever the reason, NDPC chose to postpone the federal environmental review, thereby depriving the State of Minnesota of the scientific and regulatory information that would have been compiled in the federal review process, and chose also not to reveal that in its testimony here.

D. PUC Orders Consideration of System Alternatives

As this case advanced in consolidated form, Minnesota agencies became increasingly concerned that NDPC had failed to comply with even minimal standards governing environmental analysis and consequently had confined the route and system alternatives in a way that was inconsistent with the obligation to protect Minnesota's natural resources. In August of 2014, two Minnesota agencies with jurisdiction over Minnesota's public waters and environmental issues warned that Minnesota is facing an unprecedented challenge respecting its petroleum pipeline network that has been called a "pipeline tsunami" of 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 2014¹⁷. In its letter of August 2014, MPCA¹⁸ wrote:

¹⁷ 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. NYTimes April 21, 2014.

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.

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

That concern resulted in a decision by the Public Utilities Commission to require an environmental review of alternative routes that did not start and end at the end points selected by the applicant¹⁹.

¹⁸ 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.

¹⁹ 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.

E. The “High Level” CEA

The so-called high level of review has no regulatory framework to guide its scope. Nothing in the PUC order suggested that it would be acceptable for the MnDOC to conduct a listing of environmental resources, instead of a scientific analysis of the environmental impacts. It is difficult to criticize MnDOC for choosing that path, because as Dr. Chapman points out, it is virtually impossible to attempt to complete a true environmental review of the environmental impacts, and then to provide scientific judgment rating the alternatives in the time allotted. As discussed below, the alternative review envisioned by the Environmental Quality Board expected that the applicant would conduct that level of review and file it with their application.

MnDOC States in the abstract of the Comparison of Environmental Effects of Reasonable Alternatives that the document created is intended to provide analysis of six system alternatives for the Sandpiper Project and to provide valuable information to the Commission to be weighed along with other information in making a need decision;

“For the Sandpiper Project, the Commission concluded that an environmental analysis of six system alternatives, which were identified in the Route Permit docket, and six alternatives to the proposed project identified by NDPC in its CN application would provide it with valuable information to be weighed along with other information while making its need decision. This document is intended to provide that analysis. (Pg.1, CEA)”

In the analysis of each system alternative, the CEA counted the number of features within in a preliminary category as defined with the 12 identified resource areas that public datasets were available for;

“Datasets were identified in 12 resource areas:
Geology/Soils/Groundwater, Ecoregions, Land cover, Water Resources, Special species and critical habitat, Public resource and recreational lands, Cities and population, Community features,

Cultural resources, Contaminated areas, Air emissions, High-consequence areas.(pg.47, CEA)” See table 6-1 on pg. 249.

The CEA describes differences between system alternatives by counting the above referenced features crossed by each alternative route. No qualitative information regarding the alternative systems or analysis of the individual resources particular to that region and the potential to impact of that resource is discussed within the document. No scientific opinion, hydrological, ecological or otherwise was obtained or offered. To distinguish among alternatives, the CEA offers the features in percent-based format of each feature within an alternative. The CEA essentially mirrors the approach taken by Environmental Assessment Supplement. The CEA states that there are few differences among the alternatives and few differences among the potential impacts to some resource category; The CEA merely asserts that system alternatives would have “similar impacts to some resource categories,” but it offers no support for this view, and evidently, it simply means that if a pipeline crosses through a forest, by definition, that is similar to crossing through wetlands, or through a prairie. (Pg. 249, CEA)

In each resource category, the CEA focuses on making tables depicting the different amounts of that resource in each system alternative; making the comparison factor based on quantity and not quality of individual features or specific potential impacts to resources. For example, in relating water resources crossed by each alternative the CEA states;

“Water resources vary considerably by type and extent across system alternatives. Stream crossings range from 1,157 in SA-05 to 615 in SA-Applicant, while the numbers of named lakes crossed range from 159 in SA-07 to 20 in SA-04. Generally, stream crossings are greater in the southern system alternatives while waterbody crossings tend to be higher in the northern system alternatives. (pg.250, CEA).” (See table 6-2A and table 6-2B for examples, both on pg. 250).

There is no statement or section in the CEA document that address the different potential impacts to specific resources in determining value of a resource or adverse effects on one type of resource from another. MnDOC's simple counting of features and its failure to address actual environmental concerns as related to each alternative drew strong criticism from both of the State agencies that have experience in preparing real environmental impact statements. But the fault here is not with MnDOC: the problem is that the Environmental Assessment Supplement was submitted based on the premise that the only factor that really counts and can be weighed pipeline length and pipeline cost.

IV. The Overwhelming Weight of Evidence from Minnesota Regulatory Agencies with Jurisdiction over Natural Resources Establishes that the Applicant Has Failed to Meet the Criteria Necessary for Issuance of a Certificate of Need

We begin with a summary of the position statements of the two major Minnesota regulatory authorities charged with responsibility for protection of Minnesota's environment. We then note that these proceedings have been deprived of the benefit of the Federal NEPA review by NDPC's intentional refusal to proceed with a Section 404 Clean Water Act application and argue that this has harmed the completeness of the environmental review required by law. We then show that Dr. Chapman's testimony strongly supports the conclusions of DNR and MPCA and conclude this section with an itemization of specific deficiencies in the environmental review as described in the testimony.

A. Minnesota Department of Natural Resources

The Minnesota Department of Natural Resources has broad jurisdiction over Minnesota's public waters (including rivers, streams, lakes and wetlands) Minnesota Chapter 103G, game and fish, Chapter 97-102, and broad powers over conservation, state lands, forestry and lands and minerals. The Department of Natural Resources issues pipeline permits for crossings over

public waters and thus has important regulatory authority over pipelines that cross public waters and public lands. All utility crossings (transmission and distribution) of wild, scenic or recreational rivers, or of state lands within their land use districts which are under the control of the commissioner, require a permit from the commissioner pursuant to Minnesota Statutes, section 84.415 or 103G.245 under Minn. Rules 6105.0170. The position of the Department of Natural Resources on matters within its jurisdiction are thus entitled to great weight and cannot be lightly disregarded here. The DNR has vastly more experience and vastly more regulatory responsibility in the critical areas of environmental protection than the Public Utility Commission. Moreover, the Department of Natural Resources has substantial experience among state agencies in the conduct of environmental reviews and maintains a permanent unit with the Department for the Conduct of Environmental Reviews.

Minn. Rules 6135.1000 provides that “It is essential to regulate utility crossings of public lands and waters in order to provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings.” Rule 6135.1000 subordinates utility crossing permitting regulations to any law, rule or regulation which is stricter in its protection of the environment. Other related environmental laws and rules and regulations include but are not limited to those associated with: A. federal and state wild, scenic and recreational rivers; B. the Minnesota Environmental Protection Act. See Rule 6135.1600. This rule makes it crystal clear that MEPA, all of it, must be applied to any action that would have the effect of siting a pipeline across public waters. Even if the PUC’s rules, or the EQB’s rules, were intended to trump MEPA (and we think they were not) EQB was not granted the jurisdiction to override MEPA in connection with DNR’s regulatory jurisdiction over public waters.

The Department of Natural Resources letter of January 23, 2015 could not be more clear: The environmental review document submitted by NDPC and the comparative environmental analysis are simply inadequate to support the grant of a Certificate of Need.

“In general, due to the limited scope requested for this document, the broad geographic area, and challenges related to the type of data and analysis used, DNR was not able to use this document alone to identify the least environmentally impacting System Alternatives. Examples will be provided below of the type of information that would further inform the Certificate of Need decision for context when considering the most reasonable and prudent System Alternative.”

Despite the manifest deficiencies presented, the DNR “conducted a focused review of SA-03 and SA-Applicant, in an effort to supplement the incomplete environmental review supplied so far.”

The DNR found:

When only comparing the two routes found reasonable by DNR, SA-03 and SA-Applicant, SA-03 appears to impact less natural resources than SA-Applicant. SA-Applicant features that would incur impacts greater than those identified for SA-03 are: forest and wetland acreage, river and stream segment crossings, and crossings of public lands. Cultivated lands and occurrences of already-impaired waters are greater along SA-03, indicating the developed state of lands along this route.

The DNR letter of January 23, 2015 also supports the conclusion that there are superior alternatives, alternatives which it was NDPC’s duty to investigate and analyze in the Environmental Assessment Supplement filed with the application, which are superior to the applicant’s preferred route. The letter states:

Within Minnesota , more southern routes (south of I-94 corridor) have less concentration of natural resources (regardless of length) within the 2-mile corridor. Therefore, there is a greater opportunity for avoidance of resources with the more southern System Alternatives. ... From a natural resource perspective, the more southern routes appear to be feasible and prudent System Alternatives that merit consideration.

B. Minnesota Pollution Control Administration

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. The Commission has extensive experience in the preparation of environmental reviews under its statutory authority. Minn. Stat. § 116.02. It has broad and extensive jurisdiction in the protection of Minnesota’s waters, and has regulatory authority over pollution in cooperation with the federal Environmental Protection Agency and the United States Army Corps of Engineers under the Clean Water Act. Like the DNR, MPCA has vast experience in environmental protection, a coordinated responsibility with the federal government in water protection, and substantially more expertise in the crafting of science based environmental reviews.

In its letter of August 2014, MPCA 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.

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

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

In its letter submitted for the record on January 2013, 2015, MPCA stated that the Applicant's proposed route was inferior to other routes analyzed:

SA-Applicant presents significantly greater risks of potential environmental impacts and encroaches on higher quality natural resources than SA- 03 and several other system alternatives. Minn. Rule 7853.0130.8(3). The effects of SA- Applicant on the natural environment support a determination in favor of other alternatives. Minn. Rule 7853.0130.C(2) and C(3).

The letter continued:

During these proceedings, the MPCA has commented extensively on the environmental concerns regarding the route proposed by Applicant in comparison to alternative routes and system alternatives. MPCA's prior comments can be found in Document Nos. 20146- 100780-01,20148-102458-02 and 20148-102458-04, each incorporated by reference. These prior comments have addressed such specific items as access to potential release sites in surface waters, potential to impact ground water, wild rice, the state's highest- quality surface water systems, wildlife habitat, low income populations, watersheds currently being assessed for restoration and protection strategies, fisheries, economies, and numerous other parameters.

In these comments, the MPCA concluded that with respect to protection of the highest- quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the system alternatives, including SA-03. (emphasis added)

C. Analysis from the US Army Corps of Engineers/EPA is Absent Because NDPC Refused to Proceed with the Section 404 Permitting

In this section, we should be exploring the results of USACE's NEPA review, because both Minnesota and Federal law express a preference for collaboration and information sharing in the respective state and federal reviews, but we cannot do so, because NDPC terminated its federal permit requests. The Clean Water Act, 33 USC Section 1344 (Act section 404) provides

a permitting process for major actions that impact public waters and wetlands. Major actions like the current action require not only a permit but trigger a National Environmental Policy Act (NEPA) environmental review. A federal section 404 permit is listed on submissions by NDPC as one of the necessary permits required. On page 8 of her August 8, 2014 Direct Testimony, NDPC's Senior Environmental Analyst, Ploetz, represented (incorrectly) that NDPC had submitted an application for a Section 404 Permit on February of 2014 and that a decision was expected in August of 2015. If that testimony had been accurate, it would have meant that the USACE would have already launched a NEPA required environmental review parallel to the requirements of MEPA, which is the Minnesota version of NEPA.

Under both state and federal regulations for MEPA and NEPA, submitting a completed application would have triggered a federal public environmental review. Part of that federal review, would have triggered information exchanges between the USACE, the EPA, and Minnesota's regulatory agencies, the MPCA, DNR, PUC and DOC-EERA. The State of Minnesota environmental review here would have been supplemented by the information compiled by the expertise of federal agencies, and citizens concerned about the route would then have had the opportunity to explore through the federal process the alternatives disclosed through a federal review. The two processes, NEPA and MEPA are both designed to work together. See 40 CFR § 1503.1 (After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall: (2) Request the comments of: (i) Appropriate State and local agencies); 40 CFR 1501.7 (a) As part of the scoping process, the lead agency shall:

- (1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons

(including those who might not be in accord with the action on environmental grounds).

One of the critical features of NEPA is to allow public officials, including state public officials, to obtain information that will help them take a position on the proposed project. 40 CFR § 1500.1 (NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments and public scrutiny are essential to implementing NEPA.)

The NEPA process –which should have been commenced long ago -- is “intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” But if the NEPA process is intentionally interrupted, then the effect of that is to deny to state regulators, local government, and citizens, the information that would otherwise have been produced in a federal review. MEPA and its implementing regulations similarly call for coordination with any federal environmental review, so that the information compiled by federal agencies can be exchanged with state agencies compiling information, each within their areas of expertise²⁰. Because NDPC has intentionally cancelled the environmental review that otherwise would have taken place, we believe that we are entitled to an inference that the USACE/EPA would have supported the Minnesota regulatory agencies concerns.

²⁰ See for example, the collaboration involved in the PolyMet EIS.
http://files.dnr.state.mn.us/input/environmentalreview/polymet/sdeis/004_executive_summary.pdf, page ES-7.

D. Mille Lacs Band of Ojibwe

Under the provisions of Minnesota Executive Order 13-10²¹,

All Executive Branch agencies of the State of Minnesota shall recognize the unique legal relationship between the State of Minnesota and the Minnesota Tribal Nations, respect the fundamental principles that establish and maintain this relationship, and accord Tribal Governments the same respect accorded to other governments.

The Mille Lacs Band's position represents then the position of a sovereign with regulatory jurisdiction entitled to deference under both State and Federal law. The Mille Lacs Band's reservation consists of three districts composed of several distinct communities that have existed in East Central Minnesota for hundreds of years²². In addition to its successful business enterprises, and its growing investments in public education from pre-school through College, the Mille Lacs Band of Ojibwe has sovereign responsibilities for the environment. The Mille Lacs Band's Department of Natural Resources, under the leadership of its commissioner, works in collaboration with the Minnesota DNR to manage the fish populations and the overall health of the lake. The Band also participates as a member of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), which serves as an intra-tribal regulatory and enforcement agency for natural resources in the Treaty of 1837 Ceded Territory, which includes the East Central Minnesota region and Mille Lacs Lake. The Mille Lacs Band DNR also issues hunting and fishing licenses and permits to Band members and non-Band members that hunt and fish on

²¹ This order represents a continuation of the Executive Orders issued under the Pawlenty administration. See EO-03-05, for example.

²² District 1 includes the main reservation area on the west side of Mille Lacs Lake. District 2 includes communities near Isle on the south side of Mille Lacs as well as communities in East Lake, Sandy Lake and Minnewawa near McGregor. District 3 includes the Lake Lena community near the St. Croix River east of Hinckley.

tribal lands, and enforces related regulations on the reservation. Through its collaboration with the Garrison-Kathio Sewer Management District, the Band has formed ML Wastewater which protects Lake Mille Lacs from pollutants generated by the resort and recreational businesses from Kathio to Garrison.

The Band's Department of Natural Resources writes:

The Mille Lacs Band requests that the Public Utilities Commission deny the North Dakota Pipeline Company's (NDPC) application for a certificate of need for the Sandpiper pipeline. The pipeline route proposed by NDPC would have greater negative impacts to wild rice, water and other natural resources utilized by the Band than several of the system alternatives proposed by the Minnesota Pollution Control Agency (MPCA) and citizen groups. Letter of January 20, 2014. Doc No. 20151-106385-01.

The letter continues:

The proposed route for the Sandpiper pipeline project borders our Minisinaakwaang (East Lake) Community and threatens the Big Sandy Lake and Rice Lake watersheds, in which the Band's members and their ancestors have gathered wild rice and harvested other natural resources for generations. Neither the Comparative Environmental Analysis (Doc. # 201412-105544, Dec. 18, 2014) prepared for the proposed route and the six system alternatives identified by the MPCA nor the revised Environmental Information Report submitted by the North Dakota Pipeline Company (Doc. # 20141-96101-02) discuss the impacts that pipeline construction and operation could have on wild rice waters or other natural resources of critical importance to the Band.¹ It appears that the Minnesota Department of Natural Resources (DNR) and the MPCA have GIS data for mapping wild rice waters,² thus it is not clear why this data was not included in the Comparative Environmental Analysis..... The Band is opposed to the proposed route for the Sandpiper pipeline because of its potential adverse impacts on the Big Sandy Lake and Rice Lake watersheds. The Band asserts that system alternatives SA-03 and SA-04 are more reasonable and prudent alternatives because those alternatives avoid these watersheds, which are of vital cultural, historical and environmental importance to the Band, and present route options with lesser impacts to critical wetlands and watersheds.

We note that in her testimony, Ms. Ploetz contended that wild rice was discussed in an appendix of the Environmental Assessment Supplement. But, the treatment in the supplement represents another example of NDPC's approach to the environmental review: the entire discussion of Wild Rice consists of a table that counts the number of waters which have been identified as supporting wild rice. The table tells us that there are more wild rice supporting lakes on SA-Applicant than on the alternatives, but there is no information, not any, regarding the meaning of that data. See Table EAS page b-5. The EAS is not an environmental impact review, it is a description of the geographic resources.

E. Fond du Lac Band of Lake Superior Chippewa

The Fond du Lac Reservation, established by the LaPointe Treaty of 1854, is one of six Reservations inhabited by members of the Minnesota Chippewa Tribe. The Chippewa Nation is the second largest ethnic group of Indians in the United States. Archaeologists maintain that ancestors of the present day Chippewa have resided in the Great Lakes area since at least 800 A.D.²³. The Fond du Lac Resource Management Division has responsibilities for management, conservation and sustainability of the natural resources of the Fond du Lac Band in order to protect the environment on the Fond du Lac Reservation and within its treaty areas. The Fond du Lac Natural Resources Program is responsible for the wild rice management and restoration activities of the Band. The Band confirms in its letter dated September 29, 2014, the concerns

²³ The LaPointe Treaty of September 24, 1854 (10 Stat. 1109) was the last principal treaty between the several bands of Chippewa inhabiting Northern Minnesota, Northern Wisconsin, and the Western Upper Peninsula of Michigan. In this treaty, the various bands of Lake Superior and Mississippi Chippewa ceded approximately 25% of the land areas of the present states of Minnesota and Wisconsin plus the balance of the Upper Peninsula of Michigan to the United States. The LaPointe Treaty established the Fond du Lac Reservation at 100,000 acres.

repeatedly raised by representatives of White Earth and Honor the Earth that NDPC failed to engage in the kind of due diligence called for when generating an environmental impact statement, and complains of a lack of consultation²⁴. The Band contends as well that recently installed pipelines have resulted in major hydrological changes impacting wild rice resources:

Changes in hydrology affect wetland type, and indirectly affect wetland functions, including wildlife habitat, fisheries habitat, groundwater recharge, surface water retention, nutrient transformation, sediment retention, conservation of biodiversity, etc. The Alberta Clipper and Southern Lights projects have already impacted the Fond du Lac wetlands along the Enbridge pipeline corridor. A Geographical Information Systems (GIS) analysis reveals up to forty (40) newly developed intermittent streams since the pipelines were installed. The National Wetland Inventory (NWI) documents a wetland type change from one side of the pipeline corridor to the other, clearly showing hydrology impacts from pipeline installations.

The role of the Department of Commerce in Public Utility Commission proceedings is to advocate for relevant public interest, the band writes:

In this case, the Department sought no tribal input, leaving a significant section of the public ignored. The Department has an obligation to consult with tribes under Minnesota Governor's Executive Order # 13-10²⁵. The Department has not met its obligations. Enbridge failed to follow through with negotiations with the Leech Lake and Fond du Lac Bands about the pipeline route and no agreement has been reached with the Bands. Although the Fond du Lac Band has concerns about all of Enbridge's proposed routes, the Band is particularly concerned that Enbridge's preferred route was chosen for the sole purpose of going around Indian reservations. As a result, Enbridge's proposed route fails to provide monetary compensation or legal protection to the Band, while exposing the Band to the same threats as if the route were to go directly through the reservation. Further safety

²⁴ Document No. 20149-103433-01

²⁵ <https://mn.gov/governor/images/EO-13-10.pdf>

considerations must be discussed given the increased volatility of Bakken crude oil.

F. Dr. Chapman

Dr. Chapman's testimony explains that the comparative environmental analysis, both EAS and CEA, are not true environmental reviews. In this regard, Dr. Chapman's critique supports the critique offered by MPCA and DNR. We have been given information on how many of certain listed categories of geographic features are found in the vicinity of the proposed pipelines, there has been no effort to use science and regulatory experience to describe the impacts on resources and to weigh those impacts. Both of these documents are value neutral, Dr. Chapman explains, but that neutrality is what renders them useless as environmental impact reviews:

The many GIS analysis results presented in the main HDR report and Appendix B do not reflect the level of severity, extent, and duration of the effects of pipelines. Moreover, any one GIS result or various combinations of GIS results can be used to argue for or against a system alternative. While the HDR report states that the purpose of the report was exactly that, most readers do not have the technical understanding to identify which factors should be given greater weight, and even experts are stymied by the challenge of summarizing the total absolute effect of the system alternatives.

Counting the number of water bodies, as the DNR and MPCA point out, for example, does not assess environmental impacts, it simply lists the number of water bodies. Different water bodies are different in value, have different susceptibilities to pollution, and are entitled to different levels of protection. The entire Clean Water Act protection regimen is based on this principle. See Minnesota Rules Chapter 7050. Waters are protected based upon their use classifications, Rule 7050.0140, their current state of water quality, biological and physical

conditions, and compliance with standards Rule 7050.0150 and other indicators of ecological importance.

The Department of Commerce inventoried geographic features and left lay people to make scientific conclusions they are not qualified to make.

The PolyMet Environmental Impact Statement, when completed, will be entitled to deference, because it was generated by a team of specialists. The agencies that perform these reviews develop procedures designed to make accountable scientific judgments. We may think, those of us who are not qualified, that we can make these inferences, but that in an environmental impact statement, conclusions are made by scientist: hydrologists, biogeochemists, ecologists, and environmental engineers. The reason that an environmental impact statement, properly prepared, is given deference by the Courts, is that it is a product of experience, regulatory experience, scientific experience all driven by the public interest, rather than a business motivation. Dr. Chapman explains

In other projects we have worked on with multiple indicators of effects, we identify the significance of an effect and weight it relative to other effects using scientifically-defensible criteria. Criteria are developed from the scientific literature, employing our professional judgment and that of others. The significance is based on the intensity, extent, and duration of the effect, as discussed above. Data are fitted to a 0-1 scale (normalization) in order to make all effect indicators equal. Lastly, the effect indicator is multiplied by the weight of the significance of the effect. Care must be taken to balance the indicators to both accounts for the variety of effects while not double-counting indicators. The most important effects must be included, with other effects included as needed to account for as many effects as feasible. For example, should the loss of the economic value of timberland, cropland, and minerals be included, and if so, given a low weight? Essentially, the weighting represents a summary of scientific knowledge about the effects of pipelines.

An environmental review cannot simply record that a project is near water bodies: it needs to apply scientific judgment combined with regulatory criteria, to make a determination of which alternative has the greatest negative impacts.

A weighting would identify routes with the greatest and least total effect as determined by careful consideration of the scientific information. It would identify routes that are best at avoiding natural resource effects. The weighting would also reveal the driving environmental effects behind a route's weighted result, and provide data for a discussion of, to use a simple example, the trade-offs in avoiding groundwater contamination on one route versus loss of rare species habitat on another. It may lead to combining different route segments in order to balance the trade-offs in effects.

G. Specific Identified Defects in the Environmental Reviews

In the prior subsections, we have described in a general way the objections lodged by key witnesses or agencies, but we think it is important to list some of the specific objections to the quality of the environmental reviews described by the witnesses.

Treatment of Impacts to Undisturbed Lands. The environmental review's treatment of impacts to undisturbed lands versus previously disturbed lands is inadequate²⁶ and fails adequately to:

- A. Include impacts of fragmentation to forests due to the construction of corridors
- B. Include sites containing area sensitive avian species
- C. Describe the impact of invasive species introduced
- D. Acknowledge construction through undisturbed areas results in habitat loss, conversion, degradation, fragmentation
- E. Recognize ag land has impacted soils already

²⁶ JS 1, pages 3-4 (Reference to JS is to January 23, 2015 DNR letter signed by Jaime Schrenzel on behalf of DNR.

F. Recognize that BMPs are not practical for undisturbed areas

Incomplete Topographic Comparisons. The Environmental review failed to provide completed topographic relief comparisons.²⁷

Failure to Consider the Value of Water Resources Crossed. The environmental review fails to consider the value of water resources being crossed and provide alternative routes or systems to avoid these areas.²⁸

Tamarack State Mineral Lease. The environmental review fails to consider the Tamarack state mineral lease in route determination and fails to identify safety concerns on the possibility of having both future crude oil pipeline and mining operations on the same state-owned land.

Consideration of Co-Location. The environmental review fails to consider drawbacks to co-location.²⁹ This concern is compounded by the failure to include consideration of the proposed connected action under way in the Line-3 Docket and represents a flagrant violation of the requirement that connected actions should not be segmented.

Risk Assessment. The environmental review fails to include a risk assessment of potential damages as a result of an oil leak.³⁰

Consideration of Impact of Corridor Width. The environmental review fails to use varying widths of corridor for assessment.³¹

²⁷ JS 1, page 4 paragraph 1

²⁸ JS 1, page 5

²⁹ JS 1, page 6, paragraph 4

³⁰ JS 1, page 6

³¹ JS 1, page 7

Inadequate Treatment of Threatened and Endangered Species. The environmental review fails to adequately address Minnesota State listed threatened and endangered species and Minnesota sites of biodiversity significance.³²

Failure to Address Undisturbed Soil Preservation. The environmental review fails to adequately address standard measures of preserving undisturbed soil and related impact to undisturbed areas.³³

Failure Adequately to Utilize Hydraulic Conductivity Ratings. The environmental review fails to adequately conduct hydraulic conductivity ratings at appropriate standard pipeline depths.³⁴

In this regard, we make special reference to the conflict in testimony between Barr Engineering's Mr. Wuolo, retained by Enbridge, and Bob Merritt, who testified on March 12, 2014. Mr. Merritt is a Minnesota Licensed Professional Geologist with 32 years of experience as Minnesota Department of Natural Resources Area Hydrologist. He holds a M.S. in Hydrology. Mr. Merritt testified that his concerns about the vulnerability of groundwater in the area traversed by the proposed pipeline led to a detailed hydrological study of the Straight River region. (U.S. Geological Survey Water-Resources Investigations Report 94-4009). Mr. Merritt submitted a copy of the study for the record.

The study, Stream-Aquifer Interactions in the Straight River Area, Becker and Hubbard Counties, Minnesota, studied a representative portion of the investigation area is underlain by an

³² Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

³³ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

³⁴ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

extensive surficial aquifer consisting of glacial outwash. Stark Study, page 3. The study explains:

This aquifer is part of a large surficial aquifer system, called the Pinelands Sands (Helgesen, 1977), which underlies 770 square miles of Becker, Cass, Hubbard, and Wadena Counties. Confined drift aquifers also underlie most of the investigation area. (Stark Study, page 3).

According to the Stark study, the aquifer system in this region values of vertical hydraulic conductivity, which are higher than those reported for other parts of the glaciated northern United States. (Stark Study page 32) The study further indicates that residence-time data obtained in the study are “significant because they indicate that waters in both the surficial and in the uppermost confined-drift aquifers are susceptible to contamination from local recharge.” (Stark Study at page 48) Further, the study indicates that this region is on the Straight River which contains water that is underlain by highly transmissive surficial and confined-drift aquifers.

The Stark study contradicts Mr. Wuolo, a hydrologist for Barr engineering, Mr. Wuolo did not assist in the preparation of Environmental Assessment Supplement. Mr. Wuolo suggested that he believed that acquifers in the Becker, Cass, Hubbard County region were not very transmissive, but that testimony is completely contradicted by The Stark study and the testimony of the former DNR area hydrologist for this region. The study and Mr. Merritt’s presentation appear more reliable in this regard. However, this dispute reinforces the recommendation of the DNR that a properly constructed Environmental Assessment Supplement should have contained a scientific assessment of the actual water resources impacted.

This is the kind of dispute that is not resolved in an environmental review by a lay administrative law judge. Environmental reviews are conducted by agencies with expertise, or if

they lack expertise, by a team of professional experts, under the direction of the agency, who engage in applying science, technical skills and regulatory accountability, to resolve controverted issues. Under MEPA and NEPA, controversies of this nature are resolved by an agency with expertise combined with regulatory accountability. The danger of trying these issues to a lay judge, even a highly skilled, fair adjudicator, is that administrative law affords credibility to the decision because it is made by a team of experts applying agency expertise. And, as we explain later, that is the great flaw in trying to center an environmental review on a listing of geographic features headed by a person with a bachelor's degree in environmental studies.

We continue now with our list of identified flaws in the Environmental Reviews.

Lack of water sensitivity and flow-path analysis. The Environmental Assessment supplement fails to provide comparison of potential environmental effects among the system alternatives, including failing to complete a water sensitivity analysis and flow path analysis³⁵ Instead, the assessment documents merely list the number of resources in the region, which does not provide adequate data to determine which potential routes pose the greatest risk to resources.

Failure to Assess Value and Impact on Public Lands. The environmental review fails to distinguish between all public lands and inadequately address the functionality and service provided by said lands to the public.³⁶ The environmental review fails to clearly define definition of impaired water across different regions crossed in the suggested route; therefore it fails to adequately account for existing water quality conditions.³⁷

Failure recognize biological quality rankings. The environmental review fails to account for the biological quality ranking of specific communities; hydrological continuity, species diversity, disease, regeneration, and presence of invasive species.³⁸

Public Land Crossings. The environmental review fails to quantify the acres of public land crossed, therefore the varying sizes of parcels is not accounted for and the impact assessment cannot be evaluated appropriately.³⁹

³⁵ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 8

³⁶ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 8

³⁷ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 10; see also (William Sierks 1/23/15 Letter -WS_MPCA-1) page 7, paragraph 3

³⁸ Exhibit 185, page 10

Spire Valley AMA. The environmental review fails to adequately provide information regarding the Spire Valley AMA therefore impact assessment does not include all potential impacts and ramifications:⁴⁰

- A. Fails to conduct geotechnical borings, which must be done in order to adequately assess the depth to aquifer located in the Spire Valley AMA and assess the potential of puncturing the artesian aquifer
- B. Clarification of pipeline construction must be made regarding placement above or below ground
- C. Fails to include potential impacts to the hatchery, the trout stream and aquifer at the Spring Brook crossing

Spill risk and cost Analysis. The environmental review fails to include cost analysis based on evaluation of a system's ability to reduce the risk of a costly spill to a sensitive environment area.⁴¹

Failure to Recognize Consequences of Traversing Glacial Moraines. The environmental review failed to recognize that significant data gathering must be performed in the SA-Application route that transverses glacial moraines prior to understanding the movement of oil discharge in the area and understand the difficulty to accurately assess the potential for groundwater contamination based solely on GIS layers.⁴²

Neglect of Wild Rice Resources. The environmental review Failed to include an impact assessment for the native wild rice of Minnesota.⁴³

These specific shortcomings result from the way in which the Environmental Assessment Supplement was produced. When an environmental review is produced by an organization like the Department of Natural Resources, the team in charge has at their command experts throughout the agency infrastructure who have decades of experience and an agency history in regulating the various topics described above. When they lack expertise in the organization, they

³⁹ Exhibit 185, page 10

⁴⁰ (JS-3) (Jamie Schrenzel 5/30/14 Letter) page 2, paragraphs 1-2

⁴¹ (WS_MPCA-1) page 3, paragraph 2-3

⁴² (WS_MPCA-1) page 10, paragraph 1

⁴³ (WS_MPCA-1) page 10, paragraph 3

can connect to other state and federal agencies with this have this expertise or may utilize where necessary qualified experts with demonstrated track records with the agency. Enbridge's Environmental Assessment Supplement was headed by NDPC's regulatory permitting representative who has a BA in environmental studies. That degree does not prepare a person to recognize the list of above concerns: environmental impact statements that are produced by agencies marshal the resources of experts in their field with actual field experience in regulating the areas involved.

The Environmental Assessment Supplement was prepared by a joint venture with a refinery partner – Marathon -- who insisted that even the smallest price increases would be inconsistent with the refineries price objectives. In contrast, quality Environmental reviews are typically performed by an independent agency itself, or under the control of an independent agency. The purpose of the environmental review was to provide an independent judgment by the responsible agency. As our Supreme Court has explained:

A number of federal courts have also held that it is an abdication of agency responsibility under NEPA for its EIS to rely solely on information prepared by a project's proponent. *City of Des Plaines v. Metropolitan Sanitary Dist. of Chicago*, 552 F.2d 736 (7 Cir. 1977); *Greene County Planning Bd. v. Federal Power Comm.*, 455 F.2d 412, 420 (2 Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Comm.*, 146 U.S.App.D.C. 33, 43, 449 F.2d 1109, 1119 (1971). The purpose of all environmental legislation, at both the state and the federal levels, is to force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions. The agency's role in the preparation of an EIS is not to serve as an arbiter between two opposing parties, as a judge is expected to do in the adversary process. Instead, it is expected to be a source of independent expertise whose scientific investigation can uncover the data necessary to make an informed environmental decision.

This theme our Supreme Court continued, was stressed in *Greene County Planning Bd. v. Federal Power Comm.*, (455 F.2d 420):

When “The Federal Power Commission has abdicated a significant part of its responsibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire. **The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant’s statement will be based upon self-serving assumptions.**”⁴⁴

The individual flaws, arising as they do in a variety of scientific and technical areas, are the direct result of conducting the environmental assessment supplement as if it were a cataloguing of resources, rather than an effort to use science to determine impacts on resources.

V. The Alternative Environmental Review Authorized by the EQB Contemplates a Submission of full environmental analysis with the Application Commensurate with an Environmental Impact Statement—The Environmental Assessment Supplement Fails to Meet that Standard

In early January, FOH filed a petition for writ of certiorari challenging the PUC’s decision to call for a “high level” environmental review of system alternatives⁴⁵. We understand that FOH asserts that the EQB lacked jurisdiction (and did not intend) to create an alternative review for the Certificate of Need proceedings, and that consequently, it is a violation of Chapter

⁴⁴ In the *No Power Line* case, the Supreme Court held that the fact that the agency’s Environmental Impact Statement was in many respects similar to the Power Company’s submission did not make approval arbitrary and capricious or unlawful. It is critical, to recognize that when the PUC approves an EIS it is not performing the same function as the Supreme Court. The PUC has an obligation to assure that the environmental review meets the policies and objectives of Chapter 116D. It should not accept an environmental review simply because it is not so egregiously bad as to cross the line into being unlawful.

⁴⁵ CCLS did not seek review of that order, because we believe that the issues presented by that order were not ripe for review, because that the order was interlocutory in nature, and because it concluded that the issues could not be decided in the absence of a full record.

116D to issue a Certificate of Need until a full environmental review meeting Chapter 116D standards have been met. It is our view that this issue – whether the review procedure adopted by the PUC comports with Chapter 116D --should be resolved only upon a full record. One of the key issues presented to the Administrative Law Judge in pipeline proceedings is whether the environmental review has been prepared substantively and procedurally in compliance with applicable law. In cases like LSR, for example, parties have not sought to develop a record on this issue, and it is our sense that the PUC and the DOC have failed to give this issue the policy review to which it is entitled. One of CCLS’s primary reasons for advocating in this case, is to call attention to the difference between what NDPC and DOC have characterized as environmental reviews, and what the law requires.

The outcome of FOH’s contention (which we support) is going to result in one of two legal outcomes. One of two contentions must necessarily be true, in this context:

- (A) That a Certificate of Need is a major environmental action resulting in a permit and therefore a full EIS is required because the EQB did not acquire jurisdiction in the routing statute to impact other permits.
- (B) That a Certificate of Need is a major environmental action, and the environmental review for the CON is governed by the alternative review provisions of the Routing Rule (as the PUC contended) and consequently the EAS filed with the CON and Routing applications must meet the standards applicable to an Environmental Impact Statement.

The latter position, (B), is the position taken by the Minnesota Attorney General in the LSR case. See Brief of Public Utilities Commission, *Minnesota Center for Environmental Advocacy*⁴⁶ v *Minnesota Public Utilities Commission*, Court of Appeals No. A10-812. Pages 9ff.

⁴⁶ Review of that case was impacted by the fact that the Minnesota Center had not participated as a party in the contested case.

For purpose of this brief, we assume that alternative B is governing these proceedings, subject to later judicial review of that contention. (We note in passing, that there is simply no provision in the EQB’s authorization of an alternative review for a “high level” of review that substitutes for the review required by the routing rule. Whatever the high level is, it cannot satisfy the need for an EIS, because it was not provided for as an EIS substitute by the EQB.) It is very clear that, if the PUC’s LSr contention is correct, i.e. that the alternative review supplies the environmental impact statement equivalent for a Certificate of Need, then it is the Environmental Assessment Supplement filed by NDPC that must meet the standards under the Routing Rule. The text of the rule, and the history of the EQB’s adoption of that rule, would require that an adequate Chapter 116D compliant document with an environmental analysis, must be filed with the CON and Routing applications, so that the document can be used to inform the parties, agencies, ALJ and PUC in making the CON decision. A review of the history of the alternative review makes that quite clear.

The history leading to the alternative review begins in 1974, when the legislature passed Chapter 116H, which created the Minnesota Energy Agency and designated petroleum pipelines as a large energy facility⁴⁷. 1974 c 307 s 3; 1976 c 333 s 3. Minn. Stat. Sec. 116H.03 subdiv. 5.

⁴⁷ Originally, legislation for high energy facilities called for development of energy corridors for high voltage lines, reflecting the concern that carriers would seek to locate their transmission facilities in inconvenient corridors. Again, the primary focus of the policy debate was upon high voltage power transmission lines, because they were visibly and more obviously impacting an important constituency – Minnesota agriculture. However, the corridor process was eventually abandoned and left to the need and siting process. Thus, *In re Wilmarth Line of C U Project*, 299 N.W.2d 731, 733-34 (Minn. 1980), a high voltage transmission case, explained: “The statute contemplates that certificate of need hearings are of a general nature and deal with broad determinations of public energy needs, the available resources for satisfying those needs, and the desirability of or necessity for additional generating or transmission systems. Minn. Stat. § 116H.13, subd. 3 (Supp. 1979); see 6 MCAR s 2.0611(C). These proceedings may or may not

Criteria for assessment of need were to be promulgated by rule by 1976⁴⁸. Minn. Stat. 116H.13. In 1989, the Environmental Quality Board approved an alternative process for environmental review of pipeline projects like Sandpiper. EQB Rule Part 4415. The alternative review provisions were promulgated pursuant to Environmental Quality Board Rules 4410.3600⁴⁹. The

be site specific, but the determination of need is not dependent on or related to specific sites. Site specific determinations are relegated to route proceedings since corridor-type proceedings have been statutorily abandoned. See Minn. Stat. § 116C.57 (1978).”

⁴⁸ Subdivision 9 of section 116.13 provided: Other state agencies authorized to issue permits for siting, construction or operation of large energy facilities shall present their position regarding need and participate in the public hearing process prior to the issuance or denial of a certificate of need. Issuance or denial of certificates of need shall be the sole and exclusive prerogative of the director and said determinations and certificates shall be binding upon other state departments and agencies, regional, county and local governments and special purpose government districts except as provided in sections 116C.01 to 116C.08 and 116D.04, subdivision 9.

⁴⁹ Subpart 1. Implementation. Governmental units may request EQB approval of an alternative form of environmental review for categories of projects which undergo environmental review under other governmental processes. The governmental processes must address substantially the same issues as the EAW and EIS process and use procedures similar in effect to those of the EAW and EIS process. The EQB shall approve the governmental process as an alternative form of environmental review if the governmental unit demonstrates the process meets the following conditions: A. the process identifies the potential environmental impacts of each proposed project; B. the aspects of the process that are intended to substitute for an EIS process address substantially the same issues as an EIS and uses procedures similar to those used in preparing an EIS but in a more timely or more efficient manner; C. alternatives to the proposed project are considered in light of their potential environmental impacts in those aspects of the process that are intended to substitute for an EIS process; D. measures to mitigate the potential environmental impacts are identified and discussed; E. a description of the proposed project and analysis of potential impacts, alternatives (in those aspects of the process intended to substitute for an EIS), and mitigating measures are provided to other affected or interested governmental units and the general public; F. the governmental unit shall provide notice of the availability of environmental documents to the general public in at least the area affected by the project (a copy of environmental documents on projects reviewed under an alternative review procedure shall be submitted to the EQB; the EQB shall be responsible for publishing notice of the availability of the documents in the EQB Monitor) G. other governmental units and the public are provided with a reasonable opportunity to request environmental review and to review and comment on the information concerning the project (the process must provide for RGU response to timely substantive comments relating to issues discussed in environmental documents relating to the

State's position has been that the alternative review represented a tradeoff designed to fast track certain pipeline proceedings in a way that would meet the full requirements of Chapter 116D, but would accomplish the environmental review more rapidly and efficiently. *The essence of this tradeoff, as articulated by the PUC's counsel, has been that in return for filing an environmental assessment supplement equivalent to an environmental impact statement with the CON and Routing Applications, the applicant would be granted an opportunity to receive a CON and Route Permit on an accelerated basis.*

The tradeoff described by PUC in the LSr brief cannot comply with the letter or spirit of Chapter 116D unless the applicant prepares a professionally prepared, high quality environmental assessment supplement, one that is equivalent to an environmental impact statement in scope and which has anticipated the concerns of the key stakeholder agencies and governmental entities. In this section, we provide the legal basis for the following propositions:

1. That the EQB granted the alternative review assuming that a professionally prepared Environmental Assessment Supplement equivalent to an EIS would be prepared at the time that CON and Routing applications were submitted
2. That the alternative review was not designed to permit CON and Routing decisions to be decided on a mere listing of geographic features. Allowing Con and Routing to be decided without a review that uses science and engineering principles that makes judgments about which route is environmentally superior is inimical to the fundamental ideas behind Chapter 116D.
3. Unless a professionally prepared EAS equivalent in quality to an EIS is submitted with the application, the supplanting of the procedural guarantees in Chapter 116D and implementing regulations cannot be justified, and would not be lawful.

project); and H. the process must routinely develop the information required in items A to E and provide the notification and review opportunities in items F and G for each project that would be subject to environmental review.

4. The Environmental Assessment Supplement does not meet the minimum standards required under the alternative review, and conducting a last-minute CEA cannot cure that defect.

In its Brief to the Court of Appeals in the LsR case the state asserted that the alternative review as applied to the Certificate of Need is functionally equivalent to the environmental review process created by Chapter 116D and its implementing EQB regulations. While we support FOH's position that EQB lacked the jurisdiction to exempt the Certificate of Need from traditional review (and for that matter the permitting jurisdiction of MPCA and DNR), in order for the State's position to be true, the alternative review would have to be implemented in full compliance with Chapter 116D, and that has not been the case here.

There cannot be any doubt that Chapter 116D requires that an Environmental Impact Statement must be prepared before any governmental action, and that a Certificate of Need is a government action. Section 116D.04, Subd. 2a, titled: "*When prepared*" states:

Where there is potential for significant environmental effects resulting from ***any major governmental action***, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, *analyzes its significant environmental impacts*, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated..... ***To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action.*** (emphasis added).

Governmental action is not limited to a "project." "Governmental action" means activities, *including projects* wholly or partially conducted, permitted, assisted, financed, regulated or approved by units of government including the federal government." Minn. Stat. §116D.04 subd. 1a(2). The statute requires that "The responsible governmental unit shall, to the

extent practicable, avoid duplication and ensure coordination between state and federal environmental review and between environmental review and environmental permitting.

Whenever practical, information needed by a governmental unit for making final decisions on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement. Minn. Stat § 116D.04 subd. 2a.

The State's position in the Court of Appeals review of the LsR proceedings was that the above quoted provision is complied with by the alternative review in the Routing Rule, because the Environmental Assessment Supplement filed simultaneously with the routing and CON applications meets that requirement by "analyzing its significant environmental impacts." But what NDPC filed with its CON and Routing applications simply does not meet anything approaching the description of the environmental review that must be filed with the application.

The EQB's SONAR⁵⁰ dated September 1988 makes it clear that the alternative review must:

Comply with "the direction provided by Minn. stat., section 116D.03, subd. 1, which states that "the legislature authorizes and directs that, to the fullest extent practicable the policies, regulations and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 1160.06", which is the State Environmental Policy Act. Statement of Need and Reasonableness (SONAR), EQB Rule Part 4415.

The Sonar continues:

"The environmental review criteria found in the Routing Rule, (Criteria F through J) are taken from the content requirements for environmental impact statements found in the rules of the environmental review program (4410). Inclusion of these criteria, when taken with portions of the application contents part of these

⁵⁰ In the Matter of the Proposed Permanent Rules Relating to Pipeline Routing, Minnesota Environmental Quality Board, Statement of Need and Reasonableness, pp 1-2, September 30, 1988.

rules, provides for a level of environmental review consistent with the conditions qualifying for alternative review under the board's environmental review program. This obviates the need for a separate EIS for pipeline routing applications. ***It will be the applicant's responsibility to provide a discussion of these criteria in its application, pursuant to part 4415.0145 (application procedures).***

The routing rule attempts to implement this concept of in several locations. Now renumbered Rule 7852.0200 Subd. 3 emphasizes the function of the routing rule to assess environmental *impacts*⁵¹, not a general description of the environment. If, for example, a wastewater treatment plant serves a lake, it's not enough to say, merely, this project sends effluent into a lake. An assessment of environmental impacts must explain what impacts the effluent will cause in the lake⁵². In this regard, the testimony of NDPC's environmental team leader completely misunderstands what an environmental impact statement is. She incorrectly believes that the alternative environmental review simply requires a listing of resources, but that is completely false. Rule 7852.0800, regarding application procedure states that

“A person submitting an application for a pipeline routing permit must comply with the application procedures of part 7852.2000

⁵¹ Minnesota Statutes, section 216G.02, recognizes that pipeline location and restoration of the affected area after construction is important to citizens and their welfare and that the presence or location of a pipeline may have a significant impact on humans and the environment. To properly assess and determine the location of a pipeline, it is necessary to understand the impact that a proposed pipeline project will have on the environment. Pipeline route designation procedures, proper pipeline right-of-way preparation, construction practices, and restoration of the affected area will lessen or mitigate the impacts of the proposed pipeline project on humans and the environment. The purpose of this chapter is to aid in the selection of a pipeline route and to aid in the understanding of its impacts and how those impacts may be reduced or mitigated through the preparation and review of information contained in pipeline routing permit applications and environmental review documents.

⁵² See for example, Dead Lake Association, Inc., v MPCA, A04-483 (Minn. App. 2005) (environmental review which failed to describe chemical interactions in a shallow lake was inadequate and MPCA acceptance of the review was arbitrary and capricious.

and submit an application that contains the information required in parts 7852.2100 to 7852.3100.”

If NDPC is correct in asserting that the alternative review governs the CON as well as Routing, then the waiver can only be valid if the EIR or EAS submitted with the applications simultaneously contains an analysis that is equivalent to an Environmental Impact Statement. A mere listing of nearby resources does not meet that standard, and the assumption upon which the EQB waiver was granted was that an EIS equivalent document will be submitted with the application, not generated on the fly during the proceedings. There is no waiver extended a proceeding which would create an EIS equivalent document a month before the evidentiary hearing, and in any event, we have no such EIS equivalent even attempted, let alone created, in this docket.

The SONAR tells us that it is *the applicant's job* to conduct a comprehensive review of potential alternative routes and to report the results in EIS-substitute in the application pursuant to Rule 4415.0170 Evidence of Consideration of Alternative Routes:

The information required in part 4415.0170 is to be included in an application for a pipeline routing permit for a project which will be reviewed in the full nine month process, but not for the partial exemption process. The exclusion of this rule requirement from the partial exemption process can be cross-referenced to part 4415.0035, subpart 1 and to Minn. Stat., section 116I.015, subp. 3(b) (7). **Route alternatives must be considered before the board can determine that the final route decision causes the least environmental impact. *The criteria to be considered by the board (part 4415.0100) in selecting a route with the least impact must be applied to each route which can reasonable be utilized.*** (Emphasis Added).

Contrary to DOC-EERA's interpretation, nothing limits the applicant to routes that begin and end at the applicant's preferred endpoints. The applicant is obligated to “Fully consider reasonable route alternatives, in the initial application. If it fails to do that, the entire process is

undermined, because the waiver of the procedural protections in the traditional environmental review depends upon an EIS equivalent review at the time of the application.

The SONAR continues:

It is to the applicant's advantage to fully consider reasonable route alternatives and to describe its analysis and conclusions in the application for a preferred route. The route selection process is designed to encourage thorough evaluation of all reasonable route alternatives. ***Reasonable route alternatives which are known to the applicant but not included in the application will surface during the process and possibly require additional costs and time to analyze.*** An applicant's credibility is enhanced if full disclosure is reflected at the time of application.

It was never envisioned that a petroleum refiner could control the environmental review by instructing an employee to limit the review to pipelines that would not increase pipeline costs or increase delivery prices.

Again, the drafters of the environmental alternative review contemplated that the applicant would be submitting a competent EIS with their applications for both CON and Routing permit. Without that compliant EIS document, the alternative review could not satisfy MEPA. Under this paradigm, one of the central functions of the hearings that follow the application is to determine whether the document submitted with the application is fully MEPA compliant. To achieve that objective, the applicant should have consulted with the MPCA, PUC, Indian tribes, local government to identify problems and deal with them comprehensively.

Under this paradigm, the Comparative Environmental Analysis, is not designed to “fix” an inadequate environmental impact statement filed by the applicant. A CEA analyzes the information provided by an adequate environmental review, which is submitted with the routing and CON applications. The CEA here was dropped in our laps on December 23, 2014 without any input into the scoping. It doesn't provide, because it could not provide, given the time

allotted, the kind of scientific impact analysis that Chapter 116 intends. Under the EQB waiver, the CEA is designed to compare those routes, using the environmental information submitted by the applicant with the application⁵³.

The application requirements demand that the applicant submit a complete environmental analysis of the preferred route. Rule 7852.2600.⁵⁴ The document must not merely provide description of the environment of the route as Ms. Ploetz contended. *Id.* Subpart 3. It must also provide an analysis of the impact of the route. Rule 7852.2700⁵⁵. ***The essence of the letters from MPCA and the DNR (as well as Dr. Chapman's testimony) is that the faux environmental review document submitted by Enbridge fails to meet that requirement and asking DOC-EERA to try to fix that problem at in a few months' time is simply not authorized by the EQB.*** An adequate document should have been available at the time the CON application was submitted, and the remedy for not preparing that document is to deny the CON because the

⁵³ 7852.1500 ALTERNATIVE ROUTE ANALYSIS 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

⁵⁴ Subpart 1. Preferred route location. The applicant must identify the preferred route for the proposed pipeline and associated facilities, on any of the following documents which must be submitted with the application: A. United States Geological Survey topographical maps to the scale of 1:24,000, if available; B. Minnesota Department of Transportation county highway maps; or C. aerial photos or other appropriate maps of equal or greater detail in items A and B. The maps or photos may be reduced for inclusion in the application. One full-sized set shall be provided to the commission. Subp. 2. Other route locations. All other route alternatives considered by the applicant must be identified on a separate map or aerial photos or set of maps and photos or identified in correspondence or other documents evidencing consideration of the route by the applicant. Subp. 3. Description of environment. The applicant must provide a description of the existing environment along the preferred route

⁵⁵ 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.

environmental review document is not MEPA compliant. The drafters of the alternative review provisions thus contemplated that the application would likewise include a robust consideration of route alternatives and a comparative environmental review of those alternatives⁵⁶. Rule 7852.3100.

Our position is four square consistent with what the PUC told the Court of Appeals in defending the LSR process. There, the State represented to the Court of Appeals that the Environmental Assessment Supplement submitted by the applicant meets the tests for an alternative Environmental Impact Statement because it is subject to a probing review during the administrative proceedings⁵⁷:

The environmental information filed by Enbridge [is] subject to extensive review, comment and analysis by the public and other interested governmental agencies. As part of this process, the ALJ conduct[s] ...public hearings and an evidentiary hearing, as well as an opportunity to comment on the evidence already in the record.

The purpose of that probing review is to determine whether the alternative Environmental Impact Statement submitted with the applications meets the criteria of the regulations. If an EAS can be passed through the PUC simply because in pipelines “anything goes,” that would make a

⁵⁶ 7852.3100 EVIDENCE OF CONSIDERATION OF ALTERNATIVE ROUTES.

If the applicant is applying for a pipeline routing permit under parts 7852.0800 to 7852.1900, the applicant shall provide a summary discussion of the environmental impact of pipeline construction along the alternative routes consistent with the requirements of parts 7852.2600 to 7852.2700 and the rationale for rejection of the routing alternatives.

⁵⁷ The document submitted by the applicant is by custom referred to as an Environmental Assessment Supplement. If that document is deemed sufficient, and if it is subjected to appropriate review in the routing procedure, the State contends, “projects reviewed under that alternative review procedure shall be exempt from environmental review under parts 4410.1100 to 4410.1700, and 4410.2100 to 4410.3000. The mechanism to assure compliance, according to the State, is described in the State’s Brief. The Sonar notes that “the EQB retains its authority under part 4410.2800 to determine the adequacy of the environmental documents that substitute for the EIS in the approved process.”

mockery of the alternative review. NDPC chose to ignore the warning signals that were coming from the major regulatory agencies of Minnesota. It decided to roll the dice, believing that regulators would pass anything, even an EIS authored by a person with a BS in environmental studies that merely counts the number of lakes, forests, and other resources despite repeated warnings that more is required.

In the LSr case, MCEA (which had not intervened as a party to the trial) argued that it was dangerous to allow a pipeline company to take responsibility for authoring the alternative Environmental Impact Statement, and they were right. They warned that environmental reviews are a governmental function, and that a pipeline company might author an EAS that failed appropriately to actually analyze the environmental impacts. Now here, we don't even have a pipeline carrier acting alone: we have a petroleum refinery in a business partnership which creates an economic motivation to drive down costs to the specific partner-refinery, thus creating a potential competitive advantage.

The PUC's brief in the LSr case responded to MCEA's concerns by representing to the Court of Appeals that the hearing process because the contested case hearing and the PUC Commissioners would not approve a project with an inadequate Environmental Assessment Supplement. If the PUC departs from that representation and approves the environmental inventory presented by NDPC here, it will amount to a bait and switch: when the alternative review is being defended, the Court is told that parties can successfully challenge an inadequate EAS/EIS, but when a non-compliant EAS is submitted, the parties would be told that "anything goes."

In the LSR docket, 7-360, the Certificate of Need and Routing Permit proceeded simultaneously. Enbridge filed an Environmental Assessment Supplement on April of 2007, a

Comparative Environmental Analysis for the Route Alternatives filed on October 10, 2007 and a contested case hearing was held on January 22, 2008. According to the State's brief in the LsR docket, the EAS was utilized as the base environmental document for both consolidated dockets and the ALJ's recommended findings issued on March 4, 2008⁵⁸. The key point that we want to make here is that the rationale for allowing the alternative environmental review to substitute for the EIS process is that the environmental impact statement substitute is supplied with the application when filed in the CON and Routing document. When the environmental review document submitted with the application is inadequate, the entire rationale for the alternative review falls apart. That explains why the CON rule can contain environmental criteria: application of the environmental criteria depends upon a Chapter 116D compliant document: the alternative review contemplates that the CON and routing process will be accelerated, but the tradeoff is that the applicant must submit a compliant EIS with the application. Without that compliant document, the entire process falls apart. The compliance determination is an essential part of the review process, which depends upon public comment, public testimony and evidence submitted to the ALJ.

⁵⁸ In the LsR docket, there was no intervenor participating in the evidentiary hearing who challenged the substance of the EAS with evidence. We have not reviewed the content of the EAS supplied in that docket and certainly don't suggest that it was, or was not, EIS compliant. The Court of Appeals reviews the record based upon the issues preserved by the parties in the proceedings, and reviews those issues affording deference to the decision of the PUC. The issue here is not what the PUC can get away with on review, based on the reluctance of a reviewing court to substitute its judgment. The issue here, rather, is what that judgment should be in the first instance.

VI. NDPC Selected Pipeline Routes for Analysis in the Environmental Assessment Supplement by Improperly Selecting Only the Shortest Pipeline Length

In this section, we show that Enbridge and its petroleum refinery partner, Marathon decided to rule out system and route alternatives based upon the false premise that the market could not withstand even small price increases in petroleum delivery cost. We argue that this premise was infected by the fact that one of the NDPC partners is not a petroleum carrier, but rather the Midwest's largest refinery of petroleum products, and that the Environmental Assessment Supplement was thus directed away from system and route alternatives by business motivations instead of the public considerations that are required by Chapter 116D and by NDPC's use of eminent domain to acquire pipeline easements. In summary, we contend:

1. The EAS reported alternatives constrained by Marathon-Enbridge's mutual business commitment to keep prices low and eliminate consideration of alternatives which might even modestly increase Marathon's delivery price.
2. That the designers have operated based upon a grossly erroneous calculations of cost which vastly inflates the alleged cost of additional mileage
3. That the designers of this project were significantly influenced by the business interests of a particular non-carrier owner, Marathon, which understandably wanted to maximize its competitive advantage over competing refineries and retail competitors. A significant part of this case is based upon Marathon-NDPC partners asserting that the routing decision should be driven by their own internal and secret business arrangements designed to maximize this competitive advantage, as opposed to the economics of the petroleum market at large.
4. That the designers of the pipeline predicated the route location upon the position that Marathon and the partner shippers are not willing to pay even 38 cents a barrel extra for a superior location. As we show, the \$0.38 calculation is flagrantly wrong⁵⁹. Nonetheless, the market data provided by the testimony shows that there is plenty of demand for pipeline services at prices far about the additional 38 cents per barrel that Marathon-NDPC used as a ceiling on additional cost.

⁵⁹ See Glanzer cross examination beginning at 32.

The use of individual private shipper contracts to set the cost parameters for a common carrier's route choice would represent an unconstitutional use of the eminent domain power to satisfy private economic advantage. It would be inconsistent with the very concept of common carrier in Minnesota and elsewhere, that a shipper could turn itself into a carrier and then contend that regulation of that common carrier/shipper, must be driven by the private secret contracts between the carrier wearing its carrier hat and the carrier wearing its shipper that. It would also contradict the provisions of section 116D.04 which prohibit the environmental review from selection comparison alternatives based solely upon economic considerations.

A. Market data shows that there is plenty of demand to support the additional costs required by a longer pipeline and hence the Environmental Supplement Assessment improperly eliminated longer pipeline alternatives

The evidence overwhelmingly negates Marathon's and NDPC's assumption that longer pipelines could be excluded from the Environmental Assessment Supplement because the market would not support even small price increases. In NDPC's application contains the following admission contradicting the assumptions that drove the environmental assessment supplement:

Table 8 illustrates, if a Bakken crude oil shipper is seeking to access markets to the east, either in the Midwest or Mid-Continent, the Sandpiper route is unequivocally the lowest cost route. At Patoka, the Sandpiper route offers a total transportation cost that is \$2.62 per barrel less than the alternative, and the Sandpiper advantage to Chicago is \$4.26 per barrel. 20148-102134-03 Earnest CN Direct Testimony, Schedule 2, Page 38.

The claim that an extra 70 miles would sink the pipeline economically is completely rebutted by the recognition that Sandpiper would have a significant price advantage over the competition. Petroleum is carried 1000 miles on the Alberta Clipper from Hardesty to Superior. Southern lights carries petroleum products from 1588 miles from Chicago to Edmonton.

Enbridge's Mainline, also known as the Lakehead system is 1900 miles long. The idea that 70 miles would be significant in this context is absurd.

NDPC's decision to eliminate alternatives from the comparison in the Environmental Assessment Supplement is thus inexplicable, unless it derives from a decision to reject any alternatives that might cost Marathon the refinery operation more. Applicant's shipper partner Marathon evidently prevailed by removing from considerations any route even 70 miles longer. Its claim that the extra 70 miles would cost shippers an extra \$26 million would result in an additional cost of \$.38 per barrel (Palmer Direct) is economically baseless as is its claim that the extra 38 cents per barrel would drive away shippers.

There are numerous flaws in the Palmer calculation. It wrongly pretends that the extra 70 miles of petroleum described as "filler" as if it were sitting stagnant in the pipeline. In fact, once the pipeline is operational, that 70 miles of petroleum moves to the other end of the pipeline where it is refined by Marathon or others. Petroleum is worth substantially more, as much as \$15 per barrel more, at the end of the pipeline when it is delivered to a Marathon refinery than it was at the wellhead in Bakken. By treating the "filler" as if it is immobile, Marathon ignores the fact that the petroleum is actually moving from one end of the pipeline to the other, and that petroleum is made more valuable by moving it from wellhead to refinery head. At a \$15 per barrel price-spread between well-head and refinery, the 348,000 barrels of oil that Marathon says is a burden actually gains five plus million dollars in value by making the trip from Bakken to the Marathon refinery. Perhaps Marathon or its shippers have accepted the filler fiction for purposes of their internal accounting: but the reality is that a pipeline adds value to all of the petroleum, including the fictional 70 miles which NDPC and Marathon treat as immobile.

But even if one accepts Marathon's erroneous hypothesis that it must invest \$26 million into the pipeline as a one-time filler expense without compensating reward, still, Marathon's contention that this translates into a 38 cent per barrel cost to shippers is flagrantly incorrect. Mr. Palmer assumed a price of \$75/barrel for purpose of his argument. Assuming that Sandpiper carries 225,000 barrels per day, let us deduct 15 days a year for maintenance, obviously a conservative assumption. In that case, Sandpiper would deliver 2.4 billion barrels of petroleum in 30 years of operation.

If one spreads Mr. Palmer's one-time cost for 348,000 barrels over 30 years, to apportion the cost of the so-called filler to the pipeline operations, one needs to divide 348,000 barrels, the filler, by 2.4 billion barrels, the petroleum transported by the filler. At \$75 per barrel, assumed by Mr. Palmer, that translates to about a penny of cost added on to each barrel carried not the 38 cents projected by Marathon. By capping the universe of acceptable pipelines in this way, the Environmental Assessment Supplement was predicated upon a false assumption – that longer pipelines were economically infeasible.

But even the penny per barrel calculation still overstates the apportioned cost, *because at the end of the thirty years of operation, Marathon still has the 348,000 left in the pipeline line,* but now that filler petroleum could be sold at 2050 market prices. If the price of petroleum rises from its current \$45 per barrel at the rate of inflation, the pipeline company will have recovered every last dollar of expenditure with interest, and potentially it could make a handsome profit on the filler.

This use of a refinery's internal accounting to cap the cost of pipeline construction is one of the grave dangers of granting the applicant pipeline company control over the drafting of the environmental impact statement – here the environmental assessment supplement. That danger

is compounded when the carrier-applicant has a conflicting fiduciary duty to serve a petroleum refiner which is the dominant refiner in the region. It leads to the inference that NDPC joint venture Marathon has a business motive to drive down its own petroleum delivery costs. We wouldn't let a refinery control the design of rail cars on the theory that the refinery doesn't want the cost of rail shipment to rise.

Marathon is not a common carrier; it is the Midwest's largest and dominant refinery. It has an interest in controlling that market which is significantly different from that of a common carrier. If it is an owner of Sandpiper, reducing the delivery price of petroleum gives it a competitive advantage over other refineries. Yet, the State of Minnesota is being asked to grant a Marathon owned joint venture eminent domain powers, and we are allowing a Marathon owned joint venture to decide which routes should be considered in the Environmental Assessment Supplement. This potential distortion of the public interest is one of the reasons why it is unacceptable to grant the power of eminent domain to a petroleum refinery operation-- the Midwest's largest petroleum refinery operation-- and then allow that refinery to select comparison routes based upon the length of the pipeline. Doing so, and then allowing the refiner to have a commanding position in the design of the environmental impact statement substitute is fraught with danger and significant public policy and constitutional implications.

B. Applicant's Elimination of Routes Based on the Erroneous Premise that Even Small Price or Cost Increases is Contrary to the Evidence

In the last section, we demonstrated that NDPC/Marathon's selection of routes for study in the Environmental Assessment Supplement was improperly limited by incorrect calculation of the cost associated with a longer route. But route selection was also improperly limited by an improper assumption that Sandpiper could not afford even a small price increase to pay for a

longer more environmentally sound route. NDPC repeatedly argued that the law of supply and demand would drive shippers away because price increases necessarily reduce demand.

Contrary to Applicants' assertion, the general law of supply and demand taken from microeconomics-201 simply does not support the application of that principle to the circumstances here. The basic principle of supply and demand to which applicant's counsel referred in her cross examination of DOC's Heinen assumes complete free competition, a dynamic unrestrained supply and demand. But current market conditions are nothing like that assumption. In fact, there has been a huge explosion of demand for rail service, even though the price of rail is about \$5 per barrel higher than the current market price for pipeline service.

The market is telling us that there is a growing demand for transmission services at prices far above the price proposed by NDPC for its line. Thus the actual demand curve for petroleum transmission is clearing right now at \$5 per barrel greater than the pipeline transmission cost.

If NDPC's new pipeline were to increase the proposed transmission price by \$2 or more to accommodate environmentally preferable locations, shippers would still save money in comparison to rail. The claim that pipeline service demand in this market is ultra-sensitive to increase in price per barrel is preposterous⁶⁰.

We don't criticize Marathon the shipper for trying to convince the State of Minnesota to keep Marathon's delivery prices down, because that is what a corporation driven by profits

⁶⁰ We supported FOH's motion to review the trade-secret protected TSA's, but as we said at the time, our view is that the TSA's are largely irrelevant to the issues that are faced here. The TSA's are private agreements, arrangements among potential customers who are looking for an opportunity to take advantage of what the applicant acknowledges is likely the lowest price alternative in the marketplace at a time when the market is telling us that the demand for even the highest price alternative transportation is exploding beyond all bounds.

would necessarily attempt to do, but it is unacceptable to for the State of Minnesota to allow the author of an Environmental Assessment Supplement to put delivery price above everything else, including the environment. As stated above, building the lowest possible cost pipeline, under ownership by Marathon, will strengthen Marathon's competitive lock on the Midwest market, by establishing it as part-owner of the cheapest possible transmission alternative. But the evidence overwhelmingly shows that there is no economic justification for doing that.

Marathon's position that the partnership cannot withstand even a small increase in cost to accommodate environmental objectives infects the integrity of the environmental review. That environmental review was conducted on behalf of a partnership which had wrongly determined that lengthening the pipeline route was unacceptable, because it increased the price per barrel beyond what Marathon was willing to support. This is why both federal and state courts look with great suspicion on an environmental impact statement which is authored by the project proposer.

VII. A Certificate of Need Must be Denied, because No Chapter 116D Environmental Impact Statement Has Been Completed, and because the Criteria of the CON Rule Have Not Been Met

CCLS has tried to stay true to its articulated Mission to press for a full environmental review. Whether one concludes that the alternative environmental review applies, or whether one agrees that a Certificate of Need requires a traditional Environmental Impact Statement, the environmental review conducted here does not provide a sufficient basis to issue a CON and the CON must therefore be denied.

The evidence shows that there are more reasonable and prudent alternatives. All agency witnesses expressed a preference for one or more of the other alternatives. Even constrained by an incomplete environmental review, MPCA and DNR were able to show that the other

alternative routes reduced environmental impacts. All of the alternative routes meet the requirement that they deliver petroleum to NDPC's customers in Patoka, Chicago and other Midwestern refineries. Regrettably, NDPC has placed the economic review in a straightjacket by eliminating all alternative routes because they are a bit longer than the preferred route. Our proposed findings of fact are due with our next submission, but they will step by step show NDPC has not met its burden to prove that all CON criteria have been met.

At this point, we want to emphasize by way of conclusion, that attempting to analyze these factors is premature, because the CON factors must be analyzed with a complete Chapter 116D compliant environmental review. Requiring a quality compliant environmental review will not prejudice the applicant. It has withdrawn its USACE Section 404 application, and once that application is filed, the USACE will launch a NEPA review. Until a section 404 permit is granted, the project cannot progress in any event. Requiring an adequate environmental review will allow the USACE, DOC, MPCA and DNR to complete this process in the way that the law intends: by marshalling agency resources to supervise an independent options review that is driven by the public interest rather than Marathon's business interests.

It is the applicant's burden to demonstrate that there is not a more prudent and reasonable way than the proposed project to meet reasonable objectives, in this case, to deliver petroleum to Midwestern Refineries. This is The Commission's own description of the Certificate of Need process contains the following explanation of how a Certificate of Need process works:

For larger energy projects, an applicant must receive a Certificate of Need (CON) in conjunction with a routing or siting permit. Through the CON proceedings the applicant must demonstrate using a number of factors prescribed in the rules that the proposed facility is in the best interest of the state's citizens. The applicant must also demonstrate there is not a more

prudent and reasonable way than the proposed project to provide the stated goals.

This is an accurate statement of the law in Minnesota regarding projects that have the potential for material impact upon the environment.

During a colloquy with the Commissioners the topic of the burden of proof was raised, and we told the Commission that this issue must be addressed more thoughtfully than a short oral argument allows. Our answer is in tiers, but at each tier, we contend that the applicant has failed in all respects, however one allocates the burden, to establish the right to a Certificate of Need.

- First, it is quite clear that under the CON Statute, the applicant, not the public, nor interveners bears the burden of proof to demonstrate that the criteria for a certificate of need have been met. See Minn. Stat. 216B.243, subd. 2
- Second, a decision on any permit or other governmental authority cannot be made, unless it is first show that a valid environmental impact statement has been submitted, subjected to scrutiny, and accepted by the responsible governmental authority. That showing has not been made, indeed, there is no substantial evidence in the record that an adequate environmental impact statement or its EQB authorized substitute, has been submitted.

This principle derives from our Environmental Policy Act—which is modelled after the National Environmental Policy Act (NEPA). MEPA is designed (a) to prevent environmental damage⁶¹ and to ensure that agency decisionmakers take environmental factors into account⁶².

In the Minnesota Environmental Rights Act, Section 116B.01 the legislature has declared:

⁶¹ The Senate Report explains that NEPA is a declaration “that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: That will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth....The basic principle of the policy is that we must strive in all that we do, to achieve a standard of excellence in man’s relationships to his physical surroundings. S Rep No 296, 91st Cong p 102, 115 Cong. Rec. 40416 (1969).

⁶² “By focusing the agency’s attention on the environmental consequences of a proposed project, [the environmental policy act] ensures that important effects will not be overlooked or

The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof. The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. Accordingly, it is in the public interest to provide an adequate civil remedy to protect air, water, land and other natural resources located within the state from pollution, impairment, or destruction. Minn. Stat. Ann. § 116B.01 (West).

Although Minnesota’s Environmental Policy Act (MEPA) is modelled after the National policy act NEPA. 25 Minn. Prac., Real Estate Law § 9:3 (2013 ed.), our act differs in that it impose substantive protections for the environment by barring governmental approvals of projects that are not shown to be the “least impact solution.” Both environmental Policy Acts are “action forcing” statutes⁶³—in other words, they are designed to govern and drive the ultimate decision to grant or deny requested authority. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). But action cannot be forced, when the environmental review is inadequate, as it is here, and that requirement, of an adequate environmental review supercedes other specific laws. As Minnesota’s Supreme Court has stated:

Throughout the statutes are policy statements recognizing that often there are conflicts between preserving the environment and promoting the economy. Minn.St. 116D.03, subd. 2(c), states that

underestimated only to be discovered after resources have been committed or the die otherwise cast. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

⁶³ The term “action forcing” was introduced during the Senate’s consideration of NEPA, see Kleppe v. Sierra Club, 427 U.S. 390, 409, n. 18, 96 S.Ct. 2718, 2730 n. 18, 49 L.Ed.2d 576 (1976), and refers to the notion that preparation of an EIS ensures that the environmental goals set out in NEPA are “infused into the ongoing programs and actions of the Federal Government,” 115 Cong.Rec. 40416 (1969) (remarks of Sen. Jackson).

all departments and agencies shall“(i)identify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical considerations.” In that vein, Minn.St. 116D.04, subd. 6, prohibits the issuance of a permit for natural resources management and development if it is likely to have an adverse impact on the environment “so long as there is a feasible and prudent alternative.” The section concludes by stating, “Economic considerations alone shall not justify such conduct.” This policy is echoed elsewhere in the statutes, Minn.St. 116B.04 and 116B.09, subd. 2. Reserve Min. Co. v. Herbst, 256 N.W.2d 808, 827-28 (Minn. 1977)

Under both state and federal laws, if there is potential for significant environmental impacts, the Responsible Governmental Unit (RGU) prepares an environmental review document that analyzes the impacts of the proposed project and describe alternatives that may reduce, mitigate or avoid those impacts. There is no precedent in the entire sweep of environmental law, that an agency or party that believes that a project imposes an unacceptable or avoidable impact, must itself submit an application for project approval for the alternative project. Nothing in Minnesota’s Environmental Policy Act nor in the Minnesota Environmental Rights Act justifies the conclusion that those who contend that there exists a feasible lesser impact solution must carry that heavy burden—and it is a complete misreading of the routing rule to suggest that it does so. On the contrary, MERA and MEPA taken together establish that the proponent of a project has a heavy burden to reject a lesser impact solution. Once project opponents have demonstrated that a project inflicts major environmental damage, the burden shifts to the project proponent to demonstrate that there exists no feasible lesser impact alternative. State by Archabal v. Cnty. of Hennepin, 495 N.W.2d 416, 423 (Minn. 1993) (We believe that these cases, taken together, establish an extremely high standard for defendants to meet in establishing an affirmative defense). See People for Environmental Enlightenment &

Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858 (Minn. 1978). (Destruction of seven or eight homes was considered insufficient to overcome the law's preference against proliferation of high voltage transmission lines and the destruction of natural resources.); State, by Powderly v. Erickson, 285 N.W.2d 84, 89 (Minn. 1979).

When an Applicant submits a faulty environmental impact statement, the remedy is to demand a revised environmental impact statement. It is not permissible to force other parties to present evidence to fix the defects in the environmental impact statement (or its alternative substitute). If a developer proposes to put an industrial plant with effluent that has mercury content next to Lake Superior, but the developer fails to explore the impact of the mercury on Lake Superior, the developer can't defend the permit by saying: "nobody proved that there is a mercury damage to Lake Superior, so we win." The Dead Lake MPCA permitting case cited above, is an excellent example of that principle. An invalid environmental review stops permitting in its tracks, because nobody has the burden of proof on any environmental issue, until a complete examination of the environmental impacts has been submitted and accepted.

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Respectfully Submitted,

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