



Minnesota Center for
Environmental Advocacy

Using law, science, and research to protect Minnesota's environment, its natural resources, and the health of its people.

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March 9, 2016

Dan Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101

VIA ELECTRONIC SERVICE

Re: *In the Matters of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need and Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border and of the Applications of North Dakota Pipeline Company LLC for a Certificate of Need and Pipeline Routing Permit for the Sandpiper Pipeline Project.*

MPUC Docket Nos. PL-9/CN-14-916; PL-9/PPL-15-137

PL-6668/CN-13-473; PL-6668/PPL-13-474

OAH Docket Nos. 65-2500-32764

8-2500-31260; 8-2500-31259

Dear Mr. Wolf,

In connection to the above-captioned dockets please find the enclosed Motion To Order The Department Of Commerce To Renegotiate The Memorandum Of Understanding And To Establish An Expert Advisory Council Under Minn. Stat. § 116D.03, filed on behalf of Friends of the Headwaters. Also attached is an Affidavit of Service.

Sincerely,

/s/ Kathryn M. Hoffman
Kathryn M. Hoffman
Staff Attorney

KMH/em

Enclosure

cc: Service List

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FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

MPUC Docket Nos. PL-6668/CN-13-473
PL-6668/PPL-13-474
OAH Docket Nos. 8-2500-31260
8-2500-31259

In the Matters of Enbridge, Limited Partnership, for a Certificate of Need and Pipeline Routing Permit for the Line 3 Replacement Project

PUC Docket Nos. PL-9/PPL-15-137
PL-9/CN-14-916
OAH Docket No. 65-2500-32764

MOTION TO ORDER THE DEPARTMENT OF COMMERCE TO RENEGOTIATE THE MEMORANDUM OF UNDERSTANDING, AND TO ESTABLISH AN EXPERT ADVISORY COUNCIL UNDER MINN. STAT. § 116D.03

Pursuant to Minn. R. 1400.6600 and Minn. Stat. § 116D.03, subd. 2, the Friends of the Headwaters (“FOH”) hereby moves that the Commission: 1) order the Department of Commerce to Renegotiate the Memorandum of Understanding to ensure non-discretionary involvement of the assisting agencies, and 2) order the formation of an Expert Advisory Council to assist in properly scoping the Environmental Impact Statement (“EIS”) in this case and to ensure compliance with applicable state laws and regulations concerning environmental review.

INTRODUCTION

FOH is gravely concerned that the preparation of the Sandpiper EIS is proceeding contrary to well-established law and procedure. Divergence between the legal requirements of environmental review and the development of the EIS, especially at this early stage, will almost certainly result in reversal on appeal, an outcome that will only lengthen the delays with which North Dakota Pipeline Company LLC (“NDPC”) and its supporters are so concerned. The recently-filed Memorandum of Understanding (“MOU”) does not alleviate these concerns; if anything, the MOU heightens these concerns, as it provides for the *possibility* of assistance from other agencies, but it does not *require* it. Any assistance is contingent on the availability of funding and staff, neither of which are presumed to exist. To prevent any further delays, FOH

requests that the Commission order the Department to renegotiate the MOU to ensure non-discretionary involvement of DNR and PCA through specified minimum commitments of funding and staff time. FOH also requests that the Commission establish an Advisory Council under § 116D.03, subd. 2(2) to assist the Department of Commerce (“the Department”) in the scoping process and to generally advise the Department on two areas of expertise: (1) MEPA compliance and implementation and (2) the environmental impacts of pipelines to be evaluated.

Recent comments from the Department suggesting that “the discretion to set schedules for contested cases, including schedules for dates of prefiled testimony, is within the ALJ’s purview,”¹ demonstrate a poor understanding of EIS procedure. Most importantly, these comments illustrate a faulty understanding of the Responsible Governmental Unit’s (“RGU”) legal responsibilities in EIS preparation. Perhaps this is understandable, given the novel circumstances in which the Department finds itself. Preparing an EIS is a highly specialized, technical, and difficult endeavor for any agency, but especially so for an agency unfamiliar with the process. To make the matter even more difficult, this EIS concerns two massive pipelines traversing 300 miles of sensitive Minnesota landscape and affecting 14,000-15,000 acres. It also incorporates the environmental impact of the Line 3 Replacement Project, which proposes to carry diluted bitumen across Minnesota wetlands.² A recent National Academies of Science report emphasized the uniquely challenging aspects of the environmental impact of diluted bitumen spills, which highlights the need for additional expertise as part of the EIS.³ Such an EIS is much more complicated than a single-site project such as Polymet’s NorthMet proposal. Without guidance from experts well-versed in the preparation of EISs, this complexity and lack of experience greatly increases the risk that the EIS will be found inadequate upon judicial review, further delaying these proceedings.

FOH is further concerned that the Department’s role in the preparation of the EIS will be highly influenced by the privileged position of NDPC, the applicant in this case. Their reliance on NDPC for advice on EIS implementation is troubling, as recent statements from NDPC have also indicated a fundamental misunderstanding of how environmental review works under state law.

¹ Docket Nos. PL-6668/CN-13-473; PL-6668/CN-13-474, *Comments Of The Minnesota Department Of Commerce*, February 12, 2016, at page 2.

² See Docket Nos. PL-9/CN-14-916; PL-9/PPL-15-137, *Order Joining Need And Routing Dockets*, February 1, 2016, at page 10 (“The Commission authorizes a combined environmental review that considers the cumulative impact of the Sandpiper Pipeline Project and the Line 3 Project.”).

³ National Academies of Sciences, Engineering, and Medicine. 2016. *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response*. Washington, DC: The National Academies Press (“[D]iluted bitumen spills in the environment pose particular challenges when they reach water bodies. Progressive evaporative loss of the diluent leaves behind the relatively dense and viscous bitumen, which can then become submerged, perhaps first by adhering to particles, and ultimately sink to the sediments.”).

The Commission's reliance on the Department's Comments in this matter (and by implication, on the comments of NDPC) will almost certainly result in procedural delays to allow for the Court of Appeals to provide guidance on proper EIS implementation. In order to prevent such delays from occurring, FOH urges the Commission to create an Expert Advisory Council as authorized by Minn. Stat. § 116D.03, subd. 2(2), which states that each state department and agency shall "utilize a systematic, interdisciplinary approach that will insure the integrated use of the natural and social sciences and the environmental arts in planning and in decision making which may have an impact on the environment; as an aid in accomplishing this purpose there shall be established advisory councils or other forums for consultation with persons in appropriate fields of specialization so as to ensure that the latest and most authoritative findings will be considered in administrative and regulatory decision making as quickly and as amply as possible." An expert advisory council could be the difference between a legally inadequate EIS and a thorough analysis that can assist both the public and decision-makers. FOH also urges the Commission to order the renegotiation of the MOU to provide for non-discretionary assistance from DNR and MPCA.

FACTS AND PROCEDURAL BACKGROUND

After meeting in December 2015 to consider how to proceed in light of the Minnesota Court of Appeals decision in this case, the Commission on January 11, 2016 lifted the stay on the Certificate of Need docket, joined the need docket with the routing docket, and referred the matter to OAH for contested case proceedings.⁴ The order also "authorize[d] the preparation of a combined EIS that addresses issues related to the certificate of need and route permit dockets" and ordered that the final EIS "shall be issued prior to the filing of intervenor direct testimony."⁵ The Commission found that issuance of the final EIS prior to direct testimony would "best reconcile the contested case process with the MEPA process, and [] avoid delay related to use of the EIS document in that process."⁶

On February 1, 2016, multiple parties petitioned the Commission to reconsider that order, all making substantially identical arguments that that Commission should require issuance of the draft EIS prior to the direct testimony, not the final EIS. Also on February 1, 2016, the Department of Commerce filed a "request for clarification" in which it asked whether the Commission "intended the Department to include some or all of the six system alternatives

⁴ See Docket Nos. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Order Lifting Stay, Rejoining Need And Routing Dockets, And Referring For Contested Case Proceedings*, January 11, 2016, at page 6-7.

⁵ *Id.* at 7.

⁶ *Id.* at 6.

considered in its environmental review in the EIS scoping document, in addition to the Company's preferred route and SA-03-AM."⁷

In response, FOH noted first that the Department's request for clarification "demonstrates a rather extraordinary misunderstanding of the Minnesota Environmental Policy Act and EISs in general."⁸ FOH explained that MEPA does not allow the RGU to "take any steps to limit alternatives prior to scoping" the EIS.⁹ The very purpose of scoping an EIS is to identify those alternatives that are reasonable based on the scoping comments.¹⁰ To predetermine those alternatives before scoping has even taken place is a clear violation of MEPA.¹¹

As part of its discussion on the troublingly misleading comments from the Department, FOH suggested that the Commission could head off any future procedural difficulties in EIS preparation by exercising its authority to form expert advisory councils under § 116D.03.¹² NDPC has misconstrued this suggestion, arguing that it is an untimely request for reconsideration of the Commission's January 11, 2016 Order.¹³ To the contrary, FOH was not requesting any changes or modifications to the Commission's January 11, 2016 Order. FOH believes that order was both justified and clearly lawful, and has not asked for it to be modified in any way. However, FOH does have continuing concerns about how that order is being implemented by the Department. FOH is concerned that the preparation of the Sandpiper EIS is proceeding contrary to well-established law and procedure. FOH also believes that the Commission has clear ongoing authority under MEPA to establish advisory councils, and to clarify its position, FOH is submitting the present motion to establish such a council.

On March 3, 2016, the Department of Commerce filed its Memorandum of Understanding ("MOU") with MPCA and DNR regarding the preparation of the EIS for the proposed Sandpiper and Line 3 pipelines. The MOU fails to commit any minimum level of staffing, resources or expertise from MPCA or DNR. It also includes several caveats that could easily prevent any cooperation whatsoever between the agencies.

⁷ Docket Nos. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Request For Clarification*, February 1, 2016, at page 3.

⁸ See Docket Nos. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Response To Minnesota Department Of Commerce's Request For Clarification And Other Parties' Motions For Reconsideration*, February 11, 2016, at page 1. FOH also responded to the many petitions for reconsideration, noting that the Commission was well within its statutory discretion to control the timing of the EIS issuance, as it did in this case.

⁹ *Id.*

¹⁰ *Id.* (citing Minn. R. 4410.2100, subp. 1).

¹¹ *Id.*

¹² *Id.* at 7.

¹³ See Docket Nos. PL-6668/CN-13-473, PL-6668/PPL-13-474, *North Dakota Pipeline Company LLC's Response To Friends Of The Headwaters, Carlton County Land Stewards, And Honor The Earth's Requests For Reconsideration*, February 22, 2016, at page 2-3.

ARGUMENT

I. THE MOU FILED BY THE DEPARTMENT FAILS TO FULFILL THE COMMISSION'S PREVIOUS ORDER.

The MOU fails to obligate either the DNR or the MPCA to even a minimum level of non-discretionary participation in the EIS, and therefore should be renegotiated. The Commission, in its previous order, authorized the Department to “enter into an agreement with the Department of Natural Resources and the Pollution Control Agency to ensure that the EIS fulfills the requirements of MEPA.”¹⁴ In the discussion that led to this order, Commissioners expressed concern about the anemic participation of these agencies during the Certificate of Need proceedings. During the Certificate of Need proceedings, those agencies were only able to participate to the extent that minimal staff was available to comment, unsolicited and uncompensated, during the public comment periods for the project. The expectation was that a formal agreement between the Department and MPCA and DNR would remedy that deficiency by *dedicating* staff time to EIS assistance. It would give the Department a way to leverage DNR and MPCA resources.

Unfortunately, the MOU filed by the Department last week fails to leverage any resources from MPCA and DNR. Rather, it provides multiple caveats that may result in little or no cooperation at all between the agencies, despite the fact that the Department is embarking on a major EIS with limited experience. Rather than make MPCA and DNR co-lead agencies, therefore obligating them to provide meaningful assistance, the MOU is clear that the Department is the sole lead agency on the EIS.¹⁵ The agreement contains laudable language that the assisting agencies will “ensure that each EIS fulfills applicable MEPA requirements,” but without any specific commitment of resources, this language is largely aspirational.¹⁶ Agency assistance is predicated on the assisting agencies using their “best efforts to provide the staffing resources necessary to accomplish the purpose of this MOU.”¹⁷ Even these “best efforts” are subject to availability, however, as the MOU establishes that “[a]ll obligations of the Lead Agency and Assisting Agencies under this MOU are contingent upon the appropriation, allotment, or the availability of funding sources for the work undertaken by the Agencies to accomplish the MOU’s purpose and allocation of responsibilities.”¹⁸ This all-encompassing caveat destroys the very purpose of the document itself, which is to ensure that the Department

¹⁴ See Docket Nos. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Order Lifting Stay, Rejoining Need And Routing Dockets, And Referring For Contested Case Proceedings*, January 11, 2016, at page 6-7.

¹⁵ See Docket No. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Memorandum Of Understanding Between The Minnesota Department Of Commerce And The Minnesota Department Of Natural Resources And The Minnesota Pollution Control Agency*, March 3, 2016, at page 1.

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ *Id.*

has the assistance necessary to produce an adequate EIS. If that assistance and EIS oversight is in fact nominal or even hypothetical because of agency resource limitations, the MOU is rendered virtually meaningless.

It need not be so. An effective MOU could be crafted by the inclusion of a few key provisions that turn potential assistance and oversight into actual assistance and oversight. At a minimum, such an MOU could designate DNR and/or MPCA as RGU and co-lead agencies; or, in the alternative, it could require participation by those agencies in certain areas where they have expertise. The document could also specify areas where DNR and MPCA will provide insight and resources specific to each agencies' areas of expertise, including experience with MEPA implementation. Rather than expressing a desire for the assisting agencies to help with EIS preparation, the MOU could *commit* each agency to a minimum level of resources, staff, or expertise. Importantly, since the MOU appears to imply that the availability of funding and staff time could be at a premium, Minnesota's environmental review regulations specify that the costs of scoping an EIS are "part of the reasonable costs of preparing, reviewing, and distributing the EIS and are to be assessed to the project proposer by the RGU."¹⁹ These scoping costs include staff time, including direct salary and fringe benefit costs, the cost of consultants hired by the RGU, and other direct and indirect costs of the RGU incurred during the scoping process.²⁰ The MOU could implement this provision by specifying that MPCA and DNR are to be compensated for their contributions through the EIS costs that are assessed to the project proposer. Utilizing this provision could ensure that adequate agency resources are ready and available to provide crucial oversight and assistance to the Department. FOH therefore urges the Commission to direct the Department to renegotiate the MOU to include non-discretionary assistance from MPCA and DNR.

II. THE COMMISSION IS AUTHORIZED BY § 116D.03 TO CREATE AN EXPERT ADVISORY COUNCIL THAT WOULD PROVIDE CRUCIAL OVERSIGHT AND ASSISTANCE WITH THE SCIENTIFIC, TECHNICAL AND PROCEDURAL ASPECTS OF EIS SCOPING

MEPA authorizes RGUs such as the Commission to engage in a wide range of measures to ensure thorough and adequate environmental review, including establishing an expert panel. Sections 116D.02-.03 provide a set of statutory guidelines framing the RGU's responsibilities that are coherent and mutually reinforcing. They are also sweeping in language, and worth quoting in full, as it is easy to forget the scope of this state's clearly expressed policy:

The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technological advances

¹⁹ Minn. R. 4410.6200, subp. 3 (2015).

²⁰ *Id.*, subp. 1.

and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, *to use all practicable means and measures, including* financial and *technical assistance*, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.²¹

In order to carry out these grand goals, the statute continues, “it is the continuing responsibility of the state government *to use all practicable means*, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources,” so that the state may (among other goals) “discourage ecologically unsound aspects of population, economic and technological growth, and develop and implement a policy such that growth occurs only in an environmentally acceptable manner.”²²

Although the primary means of implementing these lofty goals is through the assurance that important governmental actions are informed by considerations of environmental impacts through environmental review such as EISs, they are not the only means. Section 116D.03 imposes a host of duties on state departments and agencies that are designed to further implement the notion that state actions should be guided not only by principles of economic and technological efficiency, but by concern for the protection of natural resources and habitats. The law thus directs that:

All departments and agencies of the state government *shall*:

.....

(2) utilize a systematic, interdisciplinary approach that will insure the integrated use of the natural and social sciences and the environmental arts in planning and in decision making which may have an impact on the environment; as an aid in accomplishing this purpose *there shall be established advisory councils* or other forums for consultation with persons in appropriate fields of specialization so as to ensure that the latest and most authoritative findings will be considered in administrative and regulatory decision making as quickly and as amply as possible.²³

Both the federal and state environmental review laws are designed not only to inform decisionmakers but to involve the public and affected persons in the decisionmaking process itself. A core requirement of both MEPA and NEPA is that significant governmental action cannot be taken until environmental impact documents are disseminated to the public and

²¹ Minn. Stat. § 116D.02, subd. 1 (2015) (emphasis added).

²² *Id.*, subd. 2 (emphasis added).

²³ Minn. Stat. § 116D.03, subd. 2(2) (2015) (emphasis added).

individuals have had the opportunity to comment on scoping and drafts of those documents.²⁴ State environmental review regulations are quite specific on this point, stating that the process “is designed to . . . provide the public with systematic access to decision makers, which will help to maintain public awareness of environmental concerns and encourage accountability in public and private decision making.”

The requirement to establish expert advisory councils to assist in environmental review, in other words, is not some mere formality or forgotten technicality; it is both a mandatory directive (such councils “shall be established”²⁵) and a core function of the law. It is one of the few ways in which MEPA differs from NEPA, its federal corollary and the source of much of MEPA’s language. NEPA states that all federal agencies shall “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.”²⁶ MEPA goes one step further: all state departments and agencies shall “utilize a systematic, interdisciplinary approach that will insure the integrated use of the natural and social sciences and the environmental arts in planning and in decision making which may have an impact on the environment; as an aid in accomplishing this purpose there shall be established advisory councils or other forums for consultation with persons in appropriate fields of specialization so as to ensure that the latest and most authoritative findings will be considered in administrative and regulatory decision making as quickly and as amply as possible.”²⁷

MEPA adopts the NEPA language almost verbatim, but adds the second clause requiring the establishment of advisory councils to aid state agencies in their environmental review. This requirement, so distinctive and clear, cannot be ignored. Indeed, NEPA’s § 102 (quoted above) to which § 116D.03 adds the additional advisory council requirement, has been held to be a rigid, enforceable duty:

Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance. We conclude then, that Section 102 of NEPA mandates a particular sort of careful and informed decisionmaking process and creates judicially enforceable duties.²⁸

As it is drawn so closely to its federal counterpart, MEPA must be interpreted similarly. The statutory mandate to establish expert advisory councils was tailor-made for the very sorts of circumstances seen in this matter: an inexperienced agency charged with a technical, difficult,

²⁴ See Minn. R. 4410.0300, subp. 3, 4 (2015); 40 C.F.R. § 1506.6 (2015);

²⁵ Minn. Stat. § 116D.03, subd. 2(2) (2015).

²⁶ 42 U.S.C. § 4332(A) (2015).

²⁷ Minn. Stat. § 116D.03, subd. 2(2) (2015).

²⁸ *Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

and overwhelming task, exhibiting signs of its unfamiliarity with crucially important MEPA procedures, and relying on the legally incorrect assertions of the project proposer, who has also betrayed its unfamiliarity with those same MEPA procedures. Fortunately, MEPA allows for guidance in these circumstances, and the Commission should avail itself of that guidance by establishing an expert advisory council.

This council could be composed of experts familiar with the EIS process as well as experts that are well-versed in the particular scientific and technical challenges associated with a pipeline project of this scope. Perhaps most importantly, however, state law is quite clear that such a council must be *neutral* and *transparent*.²⁹ A baseline requirement of such a council, therefore, is that it must not include ‘experts’ that are employees of, affiliates of, or contractors with NDPC. As the project proposer, NDPC will have ample opportunities to let their interests and preferred assumptions be known. But the central nature of environmental review is that it is not simply a post-hoc rationale for justifying predetermined decisions.³⁰ It is designed to provide objective and authoritative information that would otherwise not be accounted for in the decision. Any expert advisory council formed to consult and advise on the EIS process must therefore be independent, neutral and transparent. Including employees or affiliates of NDPC would violate this general principle, and would violate § 116D.03, subd. 2(3), which requires all state departments and agencies to 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.” As the project proposer staking significant capital investments and future profits on the outcome of this EIS, NDPC has an explicitly economic interest in the content of the eventual document. Their presence on an expert advisory council would by necessity result in ‘advice’ that was neither independent nor neutral, contrary to state policy on environmental review.³¹

II. THE DEPARTMENT’S RECENT COMMENTS DEMONSTRATE AN UNFAMILIARITY WITH EIS PROCEDURES THAT WILL SIGNIFICANTLY INCREASE THE RISK OF AN INADEQUATE EIS, THUS FURTHER DELAYING THESE PROCEEDINGS

As FOH noted in its February 11, 2016 Response, the Department has become accustomed to the Comparative Environmental Assessment process authorized under Minnesota

²⁹ Minn. Stat. § 116D.03, subd. 2(3) (all state departments and agencies shall “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”); Minn. R. 4410.0300, subp. 4 (objective of environmental review is to provide *usable* information, to help maintain public awareness of environmental concerns, and encourage accountability in public decision making); Minn. R. 4410.0300, subp 3 (“Environmental documents shall not be used to justify a decision”).

³⁰ Minn. R. 4410.0300, subp. 3 (2015).

³¹ Minn. R. 4410.0300, subp. 4;

Rules Chapter 7852. They have never conducted an EIS on a pipeline before. Indeed, no agency in Minnesota ever has, to FOH's knowledge.³² Such a novel situation cries out for additional consultation and advice. The novelty of these circumstances alone would typically justify the creation of an experienced council to offer advice, but it is especially necessary here, where the Commission has numerous indications that the Department's understanding of the EIS process is, at best, incomplete.

The Department's recently-filed Memorandum of Understanding ("MOU") with MPCA and DNR will not remedy this problem. Although MPCA and DNR have considerably more expertise with EISs, they have not conducted a pipeline EIS, and would still benefit from expertise specific to pipelines such as Mr. Stolen, and an expert on diluted bitumen. Nor, of course, can they offer the expertise on treaty rights and tribal resources that White Earth and Mille Lacs would bring. Additionally, the MOU is limited and provides no assurance of meaningful cooperation between agencies. MPCA and DNR are not co-lead agencies, and thus have no legal obligation to ensure a quality EIS. There is no discussion in the MOU of how or whether MPCA and DNR will provide staff. The MOU provides for a separate agreement, which has not been filed, to provide for "specific staffing needs." It also states that "All obligations of the Lead Agency and Assisting Agencies under this MOU are contingent upon the appropriation, allotment, or the availability of funding sources..."³³ Thus, any real involvement of MPCA and DNR is both entirely discretionary by the Department, and contingent on other factors, including the availability of funding and staff. Put simply, there is nothing in this agreement that ensures quality involvement by MPCA and DNR.

The Department will make a series of other internal decisions going forward that are not subject to public scrutiny yet are extremely significant, especially for an agency that has not previously conducted a full EIS on a pipeline. An advisory committee as proposed by FOH would not have a "veto" over any of these decisions, but would provide Commerce the opportunity to obtain input before making an important decision. Such an advisory council

³² FOH notes, however, that there was state agency involvement in an EIS for the Alberta Clipper pipeline, for which the U.S. Department of State was the lead agency. The Department of State notes that they consulted with other federal agencies in preparing the EIS for the Alberta Clipper project, and that "state agencies also were consulted to ensure that their needs for analyses in relation to their respective state permitting processes would be reflected in the EIS." U.S. Dep't of State, Bureau of Energy Resources, *Final Environmental Impact Statement Executive Summary*, available at <http://www.state.gov/e/enr/applicant/applicants/202453.htm>. (last visited March 1, 2016). Such consultation, clearly, is a far cry from the substantive and procedural duties encompassed by the bearing the sole responsibility for preparing an adequate EIS, particularly where the entire burden falls on the state agency.

³³ See Docket No. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Memorandum Of Understanding Between The Minnesota Department Of Commerce And The Minnesota Department Of Natural Resources And The Minnesota Pollution Control Agency*, March 3, 2016, at page 2.

would increase transparency and produce better, more informed decisions, as envisioned by the drafters of MEPA.

Recently the Commission received Comments from the Department that indicate a fundamental misunderstanding of environmental review in general, and MEPA requirements in particular. The DOC suggested that “the discretion to set schedules for contested cases, including schedules for dates of prefiled testimony, is within the ALJ’s purview.”³⁴ As these comments were submitted in response to the Commission’s Order that the final EIS be issued prior to direct testimony in the contested case proceedings, they appear to indicate the Department’s view that OAH has the discretion to determine when in the contested case proceedings the final EIS must be issued. To the extent that these schedules include dates by which the EIS must be issued, this statement is legally incorrect, and therefore grossly misleading to the Commission. Allowing OAH to determine at what point the final EIS be issued would be an abdication of the Commission’s (and the Department’s, as the Commission’s delegate) responsibilities as the RGU in this matter, thereby clearly violating MEPA.³⁵

The Commission is the RGU in this matter. It is the RGU’s responsibility to ensure that the EIS is prepared in accordance with state law,³⁶ and any abdication of that responsibility is a violation of law:

NEPA establishes environmental protection as an integral part of the [RGU’s] basic mandate. The primary responsibility for fulfilling that mandate lies with the [RGU]. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff’s evaluation and recommendation.³⁷

As part of this obligation, the *RGU* determines at what stage the EIS is to be prepared, not OAH. Because MEPA is fundamentally a procedural law, the timing of the EIS preparation

³⁴ Docket Nos. PL-6668/CN-13-473; PL-6668/CN-13-474, *Comments Of The Minnesota Department Of Commerce*, February 12, 2016, at page 2.

³⁵ See *Calvert Cliffs*, 449 F.2d at 1119 (the only agency in a position to ensure decisions are informed by environmental considerations is the RGU; abdication of that key role is a violation of law); *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974) (environmental review requirements are directed only to the RGU; delegation of those responsibilities is an unlawful abdication).

³⁶ See Minn. Stat. § 116D.04, subd. 2a; subd. 2a(g); subd. 2a(h) (2015); Minn. R. 4410.0400, subp. 2 (“RGU’s shall be responsible for verifying the accuracy of environmental documents and complying with environmental review processes in a timely manner.”).

³⁷ See *Calvert Cliffs*, 449 F.2d at 1119.

is an essential determination under the law.³⁸ As federal courts have noted, it is an “important fact of administrative life” that “as time goes on, it will become ever more difficult to undo an improper decision.”³⁹ MEPA codifies this concern by requiring that certain decisions be informed by a proper consideration of the environmental effects of that decision, and that such consideration take place early enough to influence the decision making process. The primary purpose of MEPA is therefore to identify and study the environmental impacts of a particular decision *before* that decision is made. The Act’s lodestar, in other words, is *informed choice*:

The Minnesota Environmental Policy Act recognizes that the restoration and maintenance of environmental quality is critically important to our welfare. The act also recognizes that human activity has a profound and often adverse impact on the environment. A first step in achieving a more harmonious relationship between human activity and the environment is understanding the impact which a proposed project will have on the environment. The purpose of parts 4410.0200 to 4410.6500 is to aid in providing that understanding through the preparation and public review of environmental documents. Environmental documents shall contain information that addresses the significant environmental issues of a proposed action. This information shall be available to governmental units and citizens *early in the decision making process*.

.....

Environmental documents shall be used as guides in issuing, amending, and denying permits and carrying out other responsibilities of governmental units to avoid or minimize adverse environmental effects and to restore and enhance environmental quality.⁴⁰

Subpart 4 of that Rule states that the process is designed to “provide *usable* information to the project proposer, governmental decision makers and the public concerning the primary environmental effects of a proposed project.”⁴¹ If the central purpose of the law is to inform a particular decision, the timing of that information’s delivery will determine whether that information is usable or even relevant, which is why the Rules direct the information to be generated and delivered as early as possible.⁴²

³⁸ See *Calvert Cliffs*, 449 F.2d at 1113 (“However, [NEPA] also contains very important ‘procedural’ provisions – provisions which are designed to see that all federal agencies do in fact exercise the substantive discretion given them. These provisions are not highly flexible. Indeed, they establish a strict standard of compliance.”).

³⁹ *Sierra Club v. Marsh*, 872 F.2d 497, 503 (1st Cir. 1989).

⁴⁰ Minn. R. 4410.0300, subp. 3 (emphasis added).

⁴¹ *Id.*, subp. 4 (emphasis added).

⁴² See, e.g., *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (“The procedures required by NEPA . . . are designed to secure the accomplishment of the vital purpose of NEPA. That result

On judicial review, the central question for the court is whether the agency took a “‘hard look’ at the salient issues,”⁴³ and in answering this question the *timing* of the EISs issuance is a critical detail. In the present matter it was in fact the *timing* of the EIS issuance that was reversed on appeal, when the Court determined that this Commission could not issue a Certificate of Need without conducting an EIS first.⁴⁴ It is therefore a critical role for the RGU to determine when the EIS is to be issued, and abdicating that role to OAH would violate MEPA. Just as the deferral of the EIS was found unlawful in this matter, it would have been similarly unlawful if the RGU had simply allowed OAH to decide whether the EIS would be issued early or deferred until later, which is what the Department is suggesting in its comments to the Commission.

But the RGU’s responsibilities extend beyond merely determining when the EIS shall be issued. Its responsibilities are to oversee the entire process of environmental review as it relates to the decision being considered, to ensure that the decision incorporates a proper consideration of environmental effects. The statute is clear that it is the RGU’s responsibility to ensure coordination between environmental review and permitting.⁴⁵ This responsibility is a core function of the RGU, not a mere formality. The coordination between environmental review and permitting is the heart of MEPA, and the RGU must ensure that this coordination renders the environmental review useful, timely, and relevant to properly inform the permitting decision. For the OAH to undertake a crucial role in this regard, by determining when in the contested case proceedings the final EIS should be issued, would be a direct violation of the RGU’s coordination responsibilities.

If there is a conflict between OAH’s procedural rules and an agency order made pursuant to state law, including MEPA, the agency order takes precedence. This is made clear by the state law itself. In cases requiring multiple permits, for instance, the agency may consolidate the hearing process, “notwithstanding any law or rule to the contrary.”⁴⁶ That statute also directs the agency to “establish appropriate procedures for the consolidated hearing process.”⁴⁷ When it comes to complying with state environmental review laws, the agency cannot delegate crucial procedural milestone scheduling to a non-RGU agency like OAH.

Fortunately, the Commission did not delegate that crucial role in this instance. Rather, it determined that contested case proceedings must begin after the issuance of the final EIS, “[t]o

can be achieved only if the prescribed procedures are faithfully followed; grudging, pro forma compliance will not do.”).

⁴³ See, e.g., *Friends of Twin Lakes v. Roseville*, 764 N.W.2d 378, 381 (Minn. Ct. App. 2009).

⁴⁴ *In re North Dakota Pipeline Co., LLC*, 869 N.W.2d 693, 698 (Minn. Ct. App. 2015) (“In this case, the completion of an EIS at the certificate of need stage satisfies the imperative identified above by ensuring decision-makers are fully informed regarding the environmental consequences of the pipeline, before determining whether there is a need for it.”).

⁴⁵ Minn. Stat. § 116D.04, subd. 2a(g) (2015).

⁴⁶ Minn. Stat. § 116D.04, subd. 2a(g) (2015).

⁴⁷ *Id.*

best reconcile the contested case process with the MEPA process, and to avoid delay related to use of the EIS document in that process.”⁴⁸ As described in FOH’s February 11, 2016 Response to Minnesota Department of Commerce’s Request for Clarification and Other Parties’ Motions for Reconsideration, the Commission has the legal authority and discretion to take this action, as part of their obligation to ensure that the eventual decision is properly informed.

But the Commission’s suggestion that this scheduling decision is within the purview of the OAH is an alarmingly incorrect statement coming from the RGU’s delegate. Combined with its previous conduct in this case, they presage a very high risk of producing an EIS that is either poorly substantiated, overly restrictive in scope, or otherwise affected by procedural error. Their recent statements are merely the latest instance of a series of events demonstrating an inexperience and unfamiliarity with fundamental principles of environmental review. As but one example, FOH understands that the Department is currently renegotiating an earlier contract with Cardno, rather than put out a new Request for Proposal from other consultants. These negotiations are taking place without oversight or assistance, and these decisions can have irreversible consequences.

EIS preparation is a difficult and technical process, but because MEPA is a fundamentally procedural law, it is critical that the proper procedures and timing are followed. The Department’s inexperience with this process should not be allowed to jeopardize the integrity of both the process and the eventual document, but the Commission can help protect the process by creating an expert advisory council to assist the Department.

III. THE COMMISSION’S RELIANCE ON NPDC WOULD CLEARLY VIOLATE MEPA REQUIREMENTS

FOH is concerned that the Department of Commerce may be allowing NDPC to prepare the scoping EAW, which is unlawful under MEPA. As the Responsible Governmental Unit for this EIS, the Commission is responsible for the content of both the scoping EAW and the EIS.⁴⁹ The Commission may not delegate the responsibility for preparation of these key documents to NDPC.

The reasoning for this requirement should be self-evident. NDPC has a strong interest in a narrow EIS that rejects consideration of any serious alternatives and minimizes potential environmental impacts. Under no circumstances should such a conflicted entity be preparing a

⁴⁸ See Docket Nos. PL-6668/CN-13-473, PL-6668/PPL-13-474, *Order Lifting Stay, Rejoining Need And Routing Dockets, And Referring For Contested Case Proceedings*, January 11, 2016, at page 6.

⁴⁹ Minn. R. 4410.1400 (“The EAW shall be prepared by the RGU or its agents... The RGU shall be responsible for the completeness and accuracy of all information.”); Minn. Stat. § 116D.04, subd. 2a (“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.”) (emphasis added).

document that is intended to educate the public and inform decision-makers by describing “the proposed action in detail, analyz[ing] its significant environmental impacts, discuss[ing] appropriate alternatives to the proposed action and their impacts, and explor[ing] methods by which adverse environmental impacts of an action could be mitigated.”⁵⁰

Moreover, NDPC is already trying to mislead the Commission in violation of MEPA in its comments. In its February 11, 2016 Response to the Petitions for Reconsideration, NDPC acknowledges that making scoping decisions before the scoping process has been completed would be inconsistent with state law. However, it then argues that, should the Commission consider the Department’s Request for Clarification, it should inform the Department that “six system alternatives were considered for inclusion within the EIS but rejected (and therefore not proposed for inclusion within the EIS) because they do not meet the identified purpose and need for the Project.”⁵¹ This statement is a clear violation of state environmental review laws, and illustrates elementary misconceptions of how to scope an EIS under state regulations.

Under MEPA, the purpose of the scoping process is to focus the EIS on the relevant issues by:

Identify[ing] only those potentially significant issues relevant to the proposed project, define the form, level of detail, content, *alternatives*, time table for preparation, and preparers of the EIS, and to determine the permits for which information will be developed concurrently with the EIS.⁵²

After scoping is complete, the RGU will make a “scoping decision” that contains, among other things, the alternatives that will be addressed in the EIS.⁵³ Thus, it is appropriate for DOC to turn to the Commission for a scoping decision on alternatives, but it is premature to do so prior to scoping.

Eliminating alternatives prior to scoping is illegal under MEPA. This Commission’s decision to grant a certificate of need to the Sandpiper Pipeline was overturned by the Court of Appeals because, under MEPA, the State may not grant a permit to a project prior to completion of an EIS.⁵⁴ But the reason for this prohibition is that agencies may not pre-determine significant

⁵⁰ Minn. Stat. § 116D.04, subd. 2a.

⁵¹ Docket Nos. PL-6668/CN-13-473; PL-6668/CN-13-474, *North Dakota Pipeline Company LLC’s Response To Petitions For Reconsideration*, February 11, 2016, at page 3.

⁵² Minn. R. 4410.2100, subp. 1 (emphasis added).

⁵³ *Id.* at subp. 6.

⁵⁴ Minn. Stat. § 116D.04, subd. 2b; *In re North Dakota Pipeline Co., LLC*, 869 N.W.2d 693, 698 (Minn. Ct. App. 2015)(“Therefore, based on the plain language of subdivision 2b, the MPUC’s issuance of a certificate of need constitutes a final governmental decision that is prohibited until the required environmental review is completed.”).

decisions about the project prior to the EIS process.⁵⁵ The EIS process is designed to thoroughly vet a proposed project; it is not designed to affirm a decision that was already made. Courts have regularly overturned efforts by agencies to control and limit the outcome of an EIS in this way.

As noted in FOH's Response to Minnesota Department of Commerce's Request for Clarification and Other Parties' Motions for Reconsideration, federal courts have held that agencies that take steps to limit the range of potential alternatives prior to completion of environmental review violate NEPA.⁵⁶

Similarly, if the Commission instructs the Department to eliminate certain alternatives from consideration prior to the scoping process, it will violate MEPA and fail to take a "hard look" at the environmental consequences of this pipeline. The prohibition against action by the state prior to the EIS is not limited merely to granting a permit, but to *any* action that would limit the range of alternatives considered in the EIS too early in the process, thereby "seriously impeding the degree to which their planning and decisions could reflect environmental values."⁵⁷ The EIS stage is deliberative – as the Court of Appeals noted, it is intended to study the project and the alternatives early in the process, such that "important environmental effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."⁵⁸ To refuse to study system alternatives at this stage is no different than granting a certificate of need prior to an EIS – it commits the State to a particular project and location before the environmental effects have been fully understood.

NDPC's comments in this regard are unusual and alarming not only because they would constitute reversible error if followed by the Commission, but also because NDPC's reasoning is based on the Commission's Order Granting Certificate of Need that was *invalidated* for failure to comply with environmental review laws.⁵⁹ It is frankly absurd to suggest that the Commission may restrict the alternatives prior to scoping, in violation of MEPA, because the Commission had already rejected those alternatives in an Order that was made illegally in this very case. The Court of Appeals found that the Commission could not grant a certificate of need specifically because it was considered prior to completion of an EIS. NDPC is now suggesting to the

⁵⁵ *In Re NDPC*, 869 N.W.2d at 698-99 ("In this case, the completion of an EIS at the certificate of need stage satisfies the imperative identified above by ensuring decision-makers are fully informed regarding the environmental consequences of the pipeline, before determining whether there is a need for it.").

⁵⁶ Docket Nos. PL-6668/CN-13-473; PL-6668/CN-13-474, *FOH's Response To Minnesota Department Of Commerce's Request For Clarification And Other Parties Motions For Reconsideration*, February 11, 2016, at page 3-4.

⁵⁷ *Metcalf*, 214 F.3d at 1143-44 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718-19 (9th Cir. 1988)).

⁵⁸ *In Re NDPC*, 869 N.W.2d at 698.

⁵⁹ See Docket Nos. PL-6668/CN-13-473; PL-6668/CN-13-474, *North Dakota Pipeline Company Llc's Response To Petitions For Reconsideration*, at page 3.

Commission that it may disregard the Court of Appeals opinion and re-adopt that invalidated decision, and in so doing, illegally restrict the alternatives prior to scoping. This is, to say the least, faulty reasoning, and the fact that it is coming from the project proposer and a party of obvious significance and influence in these proceedings makes the need for oversight quite clear.

If the Commission were to rely on NDPC's preparation of an EAW, or its statements in this matter, its actions would likely be reversed on appeal for a second time. The primary parties in this matter – the RGU's delegate and the project proposer – have amply demonstrated an unfamiliarity with, and dangerously erroneous understanding of, the legal requirements for EIS preparation. Rather than risk further delays, the Commission should exercise its authority to create an advisory council that can correct any such errors before they are propagated into an inadequate EIS document.

CONCLUSION

EIS preparation is a complex task, substantively as well as procedurally. To FOH's knowledge, this is the first instance in which a Minnesota agency has conducted an EIS on a pipeline without federal support. It is a difficult task even for an experienced agency, but for an inexperienced agency like the Department, assistance and oversight are critical, especially where it may be relying on the project proposer to the detriment of the EIS. FOH therefore urges the Commission to utilize all resources available to it and the Department, including a revised MOU providing for non-discretionary assistance from DNR and PCA, and the advisory councils of § 116D.03.

Dated: March 9, 2016

Respectfully submitted,

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/s/ Kevin P. Lee

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

In the Matters of Enbridge, Limited Partnership, for
a Certificate of Need and Pipeline Routing Permit
for the Line 3 Replacement Project

MPUC Docket Nos. PL-9/PPL-15-137
PL-9/CN-14-916
OAH Docket No. 65-2500-32764

AFFIDAVIT OF SERVICE

In the Matters of the Application of North Dakota
Pipeline Company LLC for a Certificate of Need for
the Sandpiper Pipeline Project in Minnesota

MPUC Docket Nos. PL-6668/CN-13-473
PL-6668/PPL-13-474
OAH Docket Nos. 8-2500-31260
8-2500-31259

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Erin Mittag, being duly sworn, says that on the 9th day of March, 2016, she served via e-dockets the following:

- Motion To Order The Department Of Commerce To Renegotiate The Memorandum Of Understanding And To Establish An Expert Advisory Council Under Minn. Stat. § 116D.03, filed on behalf of Friends of the Headwaters

on the following persons, in this action, by filing through e-dockets or mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at St. Paul, Minnesota, directed to said persons at the last known mailing address of said persons:

Attached Service List.



Erin Mittag

Subscribed and sworn to before me
this 9th day of March, 2016



Karen Moss



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