

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner
Matthew Schuerger	Commissioner

In the Matters of the Applications of	PUC Docket Nos.	PL-9/PPL-15-137
Enbridge Energy, Limited Partnership, for		PL-9/CN-14-916
a Certificate of Need and Pipeline Routing	OAH Docket No.	65-2500-32764
Permit for the Line 3 Replacement Project		65-2500-33377

**MOTION TO EXTEND OR REOPEN
THE ENVIRONMENTAL IMPACT STATEMENT SCOPING PERIOD**

Friends of the Headwaters (“FOH”) and Minnesota Center for Environmental Advocacy (“MCEA”), pursuant to Minn. R. 7829.0410, hereby request that the Public Utilities Commission (“Commission”) order the Minnesota Department of Commerce to initiate a new scoping period for the environmental impact statement (“EIS”) on the Line 3 Replacement Project (“L3R”).¹ Developments occurring after the current scoping period demonstrate that the project has fundamentally changed from the one originally proposed by the applicant. Subsequent to the closing of the period for scoping comments on May 26, 2016, two events occurred: (1) on July 20, 2016 the project applicant entered into a Proposed Consent Decree with the United States, which revealed that the project applicant has made inconsistent statements about the future of

¹ Movants note that although the Certificate of Need (“CON”) and Routing Permit applications have been referred to the Office of Administrative Hearings (“OAH”), the environmental review process for these projects has not been referred to OAH. The Public Utilities Commission remains the Responsible Governmental Unit for environmental review, and retains sole jurisdiction over processes undertaken pursuant to Minn. R. 4410.0200 *et seq.* OAH does not have the authority to order the remedy requested by this motion. As such, Movants direct this motion to the attention of the Commission. Movants are aware that Minn. R. 1400.7600 states that “[n]o motions shall be made directly to or be decided by the agency subsequent to the assignment of a judge and prior to the completion and filing of the judge’s report unless the motion is certified to the agency by the judge.” Nevertheless, Movants note that this motion does not pertain to the matters referred to OAH, namely the CON and Routing Permits. This motion is directed toward the RGU’s obligations under Chapter 4410, which remain squarely under the purview of the PUC alone.

Line 3, casting doubt on the scope and nature of the project, and (2) on September 1, 2016 the project applicant petitioned to withdraw its applications for a Certificate of Need and Routing Permit for the Sandpiper Pipeline Project.

The scoping document issued by the Department of Commerce (“DOC” or the “Department”) on September 22 in this matter does not acknowledge these developments, and as a result, the citizens of this State have not been informed about, let alone been given the opportunity to comment on, the true and accurate dimensions of this project. Preparation of an EIS for the L3R Project without allowing for an expanded scoping period violates Minn. Stat. § 116D.04, subd. 2a, 6, 6a, and 7, which, among other things, require a description of the “proposed action in detail,” require a process for soliciting and responding to public input, and prohibit state agencies from taking any action that would impair the environment so long as there is a feasible and prudent alternative. In addition, a determination of adequacy on an EIS prepared on the basis of the existing scoping documents would be certainly unlawful under Minn. Stat. § 116D.04, subd. 2a and 6, because the EIS would not reflect the accurate scope of the project. To avoid such an outcome, Movants urge the Commission to order a new scoping period to address issues that have arisen subsequent to the close of the previous scoping period. The Commission’s authority to order such a remedy is established by Minn. Stat. § 116D.02, subd. 2, § 116D.03, subd. 2, § 116D.04, subd. 2a, 6, 6a, 7 and 9, as well as Minn. R. 4410.2100.

Movants acknowledge that this remedy risks lengthening an already drawn-out process. However, this motion and the remedy it seeks are the direct result of actions taken by the project Applicant itself. The Applicant has changed the project proposal, and therefore the Applicant alone is responsible for any delays resulting from its actions in these proceedings.

I. BACKGROUND

The Sandpiper and Line 3 Pipeline Proposals

The L3R Project is a proposal by Enbridge Energy, Limited Partnership² (“Enbridge” or Applicant) to construct a new pipeline from Alberta, Canada to Superior, Wisconsin.³ An

² Enbridge Energy, Limited Partnership is a subsidiary of Enbridge Energy Company, Inc. See Enbridge Inc., Annual Information Form for the Year Ended December 31, 2015, February 19, 2016, at p. 6, available at http://www.enbridge.com/investment-center/~media/Rebrand/Documents/Investor%20Relations/2016/2015_YE_ENB_AIF.PDF (“Enbridge 2015 Annual Report”).

existing Line 3 (“Original Line 3”) transports crude oil from Alberta to Superior, traversing Minnesota from Kittson County in the far Northwest of the State to St. Louis County near Duluth (see map below).

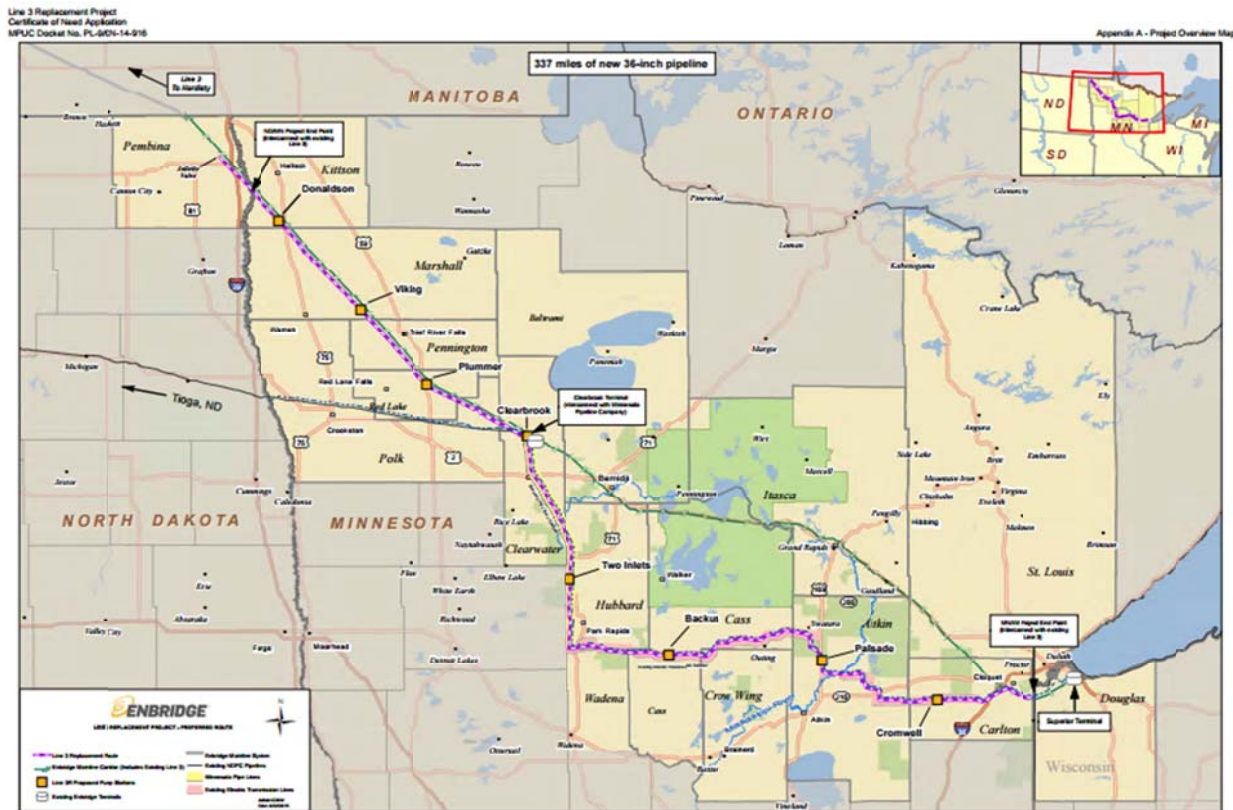


Figure 1.1-1, Project Overview Map from Enbridge CON Application, April 24, 2015, Docket No. PL-9/CN-14-916.

With a diameter of 36 inches, the new pipeline would be larger than the existing line, virtually doubling its capacity from 390,000 barrels per day (bpd) to 760,000 bpd.⁴

The new pipeline would also be built in a new corridor from Clearbrook to Superior.⁵ The Applicant has proposed to construct the pipeline in a new right of way where no pipeline currently exists following the route proposed for the Sandpiper Pipeline Project from Clearbrook

³ See INITIAL FILING – LINE 3 CERTIFICATE OF NEED APPLICATION (“CON Application”), Docket No. PL-9/CN-14-916, April 24, 2015, at 1-1.

⁴ CON Application at 1-1, 1-6.

⁵ PROPOSED FINAL SCOPING DECISION DOCUMENT FOR LINE 3 REPLACEMENT PROJECT, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, September 21, 2016, at p. 2. Although the new route would follow other rights of way for transmission lines, there are no existing crude oil pipelines on the proposed route from Clearbrook to Superior.

to Superior.⁶ The Clearbrook-Superior segment of Line 3 is the only location along its over 1,000 mile length where construction of the new pipeline would deviate from the existing Line 3 corridor.⁷

Sandpiper was a project proposed by a joint venture between Enbridge Energy Partners, L.P. (a subsidiary of Enbridge Energy Company, Inc.) and Marathon Petroleum Company (“Marathon”) named North Dakota Pipeline Company LLC (“NDPC”).⁸ Sandpiper was designed to transport light sweet crude fracked from the tight oil formations of the Bakken in North Dakota. Crude oil production in that region has declined precipitously in recent years, and as a result NDPC recently petitioned the Commission to withdraw its permit applications for the Sandpiper Pipeline Project, citing changed market conditions.⁹

The Applicant states that the L3R Project is necessary because maintaining the safety and integrity of the existing Line 3 is costly to the Applicant, and because safety concerns have required pressure reductions on the pipeline, decreasing transportation capacity.¹⁰ Line 3 was originally constructed in the 1960s, and Enbridge states that its maintenance program “has revealed corrosion growth and other pipe material flaws that have impacted the operating capabilities of the pipeline.”¹¹ By reducing pressure on the line and conducting investigatory digs and repairs, Enbridge states that it can continue to safely operate the existing pipeline, albeit at a lower capacity.¹² “All pipelines in the Enbridge Mainline System,” the Applicant states, “undergo regular and systematic inspections and preventive maintenance activities to ensure

⁶ See Docket No. PL-6668/CN-13-473, *In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project* (Sandpiper need docket), and Docket No. PL-6668/PPL-13-474, *In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota* (Sandpiper routing docket).

⁷ CON Application at Figure 1.5-1.

⁸ PETITION TO WITHDRAW CERTIFICATE OF NEED AND PIPELINE ROUTING PERMIT APPLICATIONS, MOTION TO SUSPEND CONTESTED CASE AND CERTIFY ISSUES AND NOTICE TO TERMINATE ENVIRONMENTAL IMPACT STATEMENT PREPARATION, Docket Nos. PL-6668/CN-13-473, PPL-13-474, September 1, 2016 at p. 1 (“SPP Withdrawal Petition”). The Enbridge companies proposing both Sandpiper and L3R are corporate affiliates; both Enbridge Energy, Limited Partnership and Enbridge Energy Partners, L.P. are subsidiaries of Enbridge Energy Company, Inc. See Enbridge 2015 Annual Report at 6.

⁹ *Id.*.

¹⁰ CON Application at 1-7.

¹¹ *Id.*

¹² *Id.*

their integrity and safe operation.”¹³ Although the Applicant has stated repeatedly that the L3R Project is a safety and integrity project, its CON application states that the Planned Use and Purpose is to “restore Line 3’s historical operating capabilities.”¹⁴ This is consistent with its statements that the existing Line 3 can continue to be operated safely with investigatory digs and repairs. The L3R Project, in other words, is fundamentally a transportation capacity project, not a safety project.¹⁵

Environmental Review of the Sandpiper and Line 3 Pipeline Proposals

On September 14, 2015, the Minnesota Court of Appeals issued an opinion ruling that the Commission must complete an EIS before issuing a final decision on a certificate of need application for a crude oil pipeline.¹⁶ Following that ruling, the Commission ordered the consolidation of the certificate of need and routing dockets for the L3R Project and referred the combined dockets to OAH for contested case proceedings.¹⁷ More importantly, the Commission authorized the preparation of a “combined environmental impact statement” that “considers the cumulative impact of the Sandpiper Pipeline Project and the Line 3 Project.”¹⁸ Lastly, the order effectively stayed the consolidated contested case proceedings, requiring that the final EIS be completed prior to the filing of intervenor direct testimony.¹⁹

Under Minnesota rules on environmental review, the scope of the EIS is determined through preparation of an environmental assessment worksheet and a draft scoping decision document, followed by a notice and comment period and the issuance of a final scoping decision

¹³ *Id.*

¹⁴ *Id.* at 2-5.

¹⁵ *See, e.g., id.* at 3-16 (noting that safety measures and pressure restrictions has prevented a failure from occurring on Line 3 since 2007, but that these measures “have also resulted in the pipeline operating at a level far below its historical capability.”).

¹⁶ *See In the Matter of the Application of North Dakota Pipeline Company LLC for a Certificate of Need for the Sandpiper Pipeline Project in Minnesota; In the Matter of the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota*, 869 N.W.2d 693 (Minn. Ct. App. 2015), review denied (Minn. Dec. 15, 2015).

¹⁷ ORDER JOINING NEED AND ROUTING DOCKETS, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, February 1, 2016, at 9-10.

¹⁸ *Id.*

¹⁹ *Id.* at 9.

document.²⁰ Those documents were issued in these dockets on April 11, 2016, thereby beginning the scoping process on Sandpiper and the L3R Projects.²¹ During that scoping period, roughly 1,300 public comments were received²², offering criticisms, suggestions, and comments on the Department's draft scoping documents. Twelve public meetings were held from April 25, 2016 to May 11, 2016, during which the Department presented on the twin pipeline proposals and the public offered comments on the draft scoping documents.²³ Those public meetings addressed environmental review of a total of *four* pipeline permits: the certificate of need and routing permit for Sandpiper, and the certificate of need and routing permit for L3R.²⁴

Many of those public comments, and all of the public meetings, were addressed to *both* pipeline proposals. Because the two pipelines were proposed to share a new right of way between Clearbrook and Superior, many citizen commenters did not address their comments solely to one project or the other; rather, members of the public have long understood that these two pipeline projects are inextricably linked, and offered comments addressed to the prospect of *two* pipelines being constructed in a new right of way. Indeed, the Schedule of Public Meetings states that "Each project [Sandpiper and L3R] will have its own scope and EIS, however, public meetings *will address both projects.*"²⁵ Many of the comments were only to Sandpiper, or to both pipelines based on what commenters knew about Sandpiper, as it was by far the most prominent project. Sandpiper had been proposed before L3R, and much of the public's attention was focused on that project.

After that scoping period was completed, however, two events occurred that fundamentally altered the proposals that form the basis of the current scoping documents, thereby undermining public participation in the scoping process. First, Enbridge announced on

²⁰ Minn. R. 4410.2100.

²¹ NOTICE OF AVAILABILITY OF SCOPING EAW AND DRAFT SCOPE FOR SANDPIPER PIPELINE AND LINE 3 REPLACEMENT PROJECTS AND SCHEDULE FOR EIS SCOPING MEETINGS, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, April 11, 2016.

²² COMMENTS AND RECOMMENDATIONS OF MINNESOTA DEPARTMENT OF COMMERCE ENERGY ENVIRONMENTAL REVIEW AND ANALYSIS, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, September 22, 2016, at p. 7 (although the document is dated September 21, 2016, it was not filed in the docket until September 22, 2016).

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ *Id.* at 3 (emphasis added).

September 1, 2016 that it was withdrawing its permit applications for the Sandpiper Pipeline.²⁶ What was once understood by the public as a proposal to build two pipelines was now a proposal to build one. More importantly, the primary impetus for L3R's deviation from its existing route was to follow the route of Sandpiper.²⁷ That impetus has now been rendered obsolete, and yet Enbridge's permit application to build a new pipeline in the new corridor remains unchanged.

Secondly, on July 20, 2016, Enbridge Energy, Limited Partnership and Enbridge Energy Partners, L.P. entered into a Proposed Consent Decree with the United States, to resolve outstanding disputes that arose from the 2010 Kalamazoo oil spill in Michigan.²⁸ The settlement was the result of nearly two years of negotiations between Enbridge and the U.S. Department of Justice.²⁹ The Proposed Consent Decree contains a number of provisions that fundamentally change the essential attributes of the L3R Project and operation of the existing Original Line 3:

1. The Consent Decree requires Enbridge to replace Line 3 from Neche, North Dakota to Superior, Wisconsin.³⁰
2. If the Original Line 3 is not removed from service by December 31, 2017, Enbridge is required to implement a comprehensive battery of safety measures to ensure continuing integrity of the line, including in-line inspections, biocide treatments to limit corrosive microbiological growth, and extensive excavation and repair digs.³¹ According to the Department of Justice, the "agreement puts in

²⁶ See SPP Withdrawal Petition.

²⁷ See Environmental Assessment Worksheet for the Line 3 Replacement Project ("L3R EAW"), Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, April 11, 2016, at p. 23 ("For much of the route east of Clearbrook, L3R would be installed approximately 25 to 40 feet away from the SPP [Sandpiper] pipeline.").

²⁸ PROPOSED CONSENT DECREE ("Proposed Consent Decree"), Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, July 20, 2016, at 1-2.

²⁹ David Hasemyer, *Enbridge's Kalamazoo Spill Saga Ends in \$177 Million Settlement*, Inside Climate News, July 20, 2016, available at <https://insideclimatenews.org/news/20072016/enbridge-saga-end-department-justice-fine-epa-kalamazoo-river-michigan-dilbit-spill>; *Enbridge Reaches \$176M Agreement for 2010 Michigan Oil Spill*, Chicago Tribune, July 20, 2016, available at <http://www.chicagotribune.com/news/nationworld/midwest/ct-enbridge-oil-spill-20160720-story.html>.

³⁰ Proposed Consent Decree at 25.

³¹ *Id.* at 26-27.

place advanced leak detection and monitoring requirements to make sure a disaster like [Kalamazoo] doesn't happen again."³²

3. The Consent Decree allows Enbridge to re-use the Original Line 3 even after completion of the L3R Project, provided that Enbridge gives 60 days notice of their "intention to operate Original US Line 3, or any segment thereof, for the purpose of transporting oil, gas, diluent, or any hazardous substance after the date Original US Line 3 was taken out of service."³³ The Consent Decree discusses the re-use of Original Line 3 extensively, with provisions outlining safety measures that must be taken prior to re-using the decommissioned line and provisions clarifying that the re-use of the previously decommissioned line would be considered a new pipeline under the agreement.³⁴

The permit applications filed with this Commission, which form the foundation of the scoping process for the project's EIS, state unequivocally that "[t]he existing Line 3 pipeline will be **permanently deactivated** in-place after the Replacement Program has received all regulatory approval, and the 36 inch replacement pipeline is constructed, tested, and placed into service."³⁵ This representation is also unequivocal in the EAW for the L3R Project, on which the public submitted over 1,300 comments. The EAW notes, "once L3R is placed into service, Enbridge plans to permanently remove the existing Line 3 pipeline from service."³⁶ The Final Scoping Documents issued September 22, 2016 also maintain this representation, stating that "once construction of the Line 3 Replacement Project is complete and in service, the existing Line 3 will be permanently deactivated and remain in place."³⁷

³² U.S. Department of Justice, *United States, Enbridge Reach \$177 Million Settlement After 2010 Oil Spills in Michigan and Illinois*, July 20, 2016, available at <https://www.justice.gov/opa/pr/united-states-enbridge-reach-177-million-settlement-after-2010-oil-spills-michigan-and>.

³³ Proposed Consent Decree at 27.

³⁴ *Id.* at 27-28.

³⁵ CON Application at 1-1 (emphasis added); *see also* ROUTE PERMIT APPLICATION FOR LINE 3 REPLACEMENT PROJECT, Docket No. PL-9/PPL-15-137, April 24, 2015, at 21 ("Once the replacement pipeline becomes operational, the existing Line 3 will be permanently deactivated").

³⁶ L3R EAW at 27.

³⁷ Comments and Recommendations of Minnesota Department of Commerce Energy Environmental Review and Analysis, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, September 22, 2016, at p. 5.

II. DUE TO MATERIAL DEVELOPMENTS IN THIS MATTER, THE PROJECTS HAVE FUNDAMENTALLY CHANGED FROM THE PROJECTS INITIALLY PROPOSED, REQUIRING A NEW SCOPING PERIOD UNDER STATE LAW

A. The Proposed Consent Decree Reveals that the Project Proposer Intends to Reuse the Original Line 3 to Transport Petroleum Products Even After the Construction of the New “Replacement” Pipeline, Contrary to the Project’s Application to the Commission

Enbridge’s representations to the state of Minnesota in its L3R applications, and the contents of the consent decree cannot be reconciled. Despite unequivocally telling state agencies and the citizens of this state that they intend to permanently deactivate the existing Line 3 once the new “Replacement” pipeline is built, it now appears that Enbridge may in fact plan to reserve the right to re-use the existing line even after it has been taken out of service and the new line built. It is no accident that the re-use provisions are in the Consent Decree. It is a settlement of \$177 million negotiated over two years, as a result of one of the nation’s most devastating inland oil spills. There is no reasonable inference from this fact, other than that Enbridge requested that the language be included because it intends to keep the existing line available for future use. It seems highly unlikely that the Department of Justice would include such language on their own accord. The document permanently enjoins Enbridge from using its deactivated Line 6B, but takes no such steps in relation to Line 3.³⁸

The very purpose of the Minnesota Environmental Policy Act is to provide accurate information to agencies and citizens, so that a proposed project may be evaluated for potentially significant environmental effects.³⁹ The Act is a decision-making tool, designed to “force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions.”⁴⁰ The Act’s central function, then, is to operate as “an information gathering and analytical process.”⁴¹ It is impossible for a state agency to satisfy its obligations under the Act if the information about the scope and magnitude of the project being proposed is not accurate. One cannot assess the environmental impacts of a project if one is unaware of the project’s essential

³⁸ Proposed Consent Decree at 25.

³⁹ Minn. R. 4410.2000, subp. 1.

⁴⁰ *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977).

⁴¹ *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 644 N.W.2d 457, 468 (Minn. 2002).

attributes. One cannot gather and analyze information that has been obscured. The revelation contained in the Consent Decree penetrates to the very heart of the Act, and simply pressing on with environmental review would only calcify this lack of information.

But the Act is designed not merely to aid agencies in decisionmaking; it is also expressly intended to inform the *public* of significant projects and to allow them the opportunity to comment on decisions made on their behalf.⁴² As the U.S. Supreme Court has stated, an EIS “also serves a larger informational role. It gives the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process . . . and, perhaps more significantly, provides a springboard for public comment.”⁴³

The Applicant’s inconsistent representations make a mockery of the public’s right to have input on matters of environmental importance. The citizens of this state have been repeatedly told that, upon completion of the L3R Project, the existing Line 3 will be permanently deactivated. That is the central premise upon which thousands of comments were submitted, during 12 public meetings and over the course of the 45-day comment period. That premise appears to be no longer accurate, and the state cannot rectify the situation by simply informing the public that the project has changed without giving citizens the right to comment on the project. Anything less than a new or reopened scoping comment period would be a clear violation of MEPA.

The integrity of the public process in these proceedings clearly requires that the Department solicit accurate information from the Applicant regarding its true intent with Line 3, and that the scoping process be started anew or reopened to allow the public the right to comment on this newly expanded pipeline project.

B. The Interconnectedness of the Sandpiper and L3R Projects Resulted in a Confusing and Convolutd Scoping Process that Neglected Development of System Alternatives for L3R

Public Confusion During a Difficult to Navigate Scoping Process

⁴² Minn. Stat. § 116D.04, subd. 2a.

⁴³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989).

The scoping processes for Sandpiper and Line 3 have followed an already confusing and meandering path. The Sandpiper project was proposed in 2013. In 2014, that project underwent a scoping process under the now-inapplicable CEA rules that included 7 scoping meetings.⁴⁴ After the L3R Project was proposed in 2014, 15 scoping meetings were held under the CEA rules in August 2015.⁴⁵ After the Court of Appeals ruled that the Commission may not grant a certificate of need on a crude oil pipeline without conducting a full EIS, however, that scoping process began again, this time with a focus on preparing an EIS.

By order of the Commission, the EIS process on the two pipeline projects was combined, and the certificate of need and routing dockets were also joined for each project.⁴⁶ As a result, the scoping process for preparation of the EIS in these matters involved public comment on four permits (the CON and routing permits for both Sandpiper and L3R) in one single, consolidated comment period.

Due largely to this complexity, confusion among members of the public reigned during the scoping process. Many citizens were unaware that there were two pipeline proposals, and those that were aware of both projects were confused about the relationship between the two. Many others were unaware of the distinction between a certificate of need and routing permit, and what that meant about what they were being asked to comment on. This confusion extended to members of the public that were generally supportive of the pipeline projects. At a prehearing conference in the spring of 2016, parties discussed the merits of separate or joint SPP/L3R public scoping meetings, and counsel for the Laborers District Council of Minnesota and North Dakota stated that the constituents of his client were greatly confused as well, and expressed concern that the public scoping meetings would not clear any of that confusion.

Now, however, circumstances have changed considerably. The Project Applicant has withdrawn its permits applications for Sandpiper. This development offers an opportunity for a scoping process that is much more clear and focused than the sprawling hodgepodge of public meetings and comments to date. No longer must the public contend with two proposals and four

⁴⁴ SCOPING SUMMARY REPORT FOR LINE 3 REPLACEMENT AND SANDPIPER PIPELINE PROJECTS, Docket Nos. PPL-15-137/CN-14-916, PPL-13-474/CN-13-473, September 21, 2016, at E-1.

⁴⁵ *Id.*

⁴⁶ ORDER JOINING NEED AND ROUTING DOCKETS, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, February 1, 2016, at 9-10.

permit applications. No longer must it comment on two projects that were different, but which confusingly shared essential characteristics, such as a new right of way through sensitive lands. The project proposal now is much more clear than the one considered by the public six months ago; there is one pipeline proposal and one Applicant-preferred route. This newfound clarity would allow for public comment and participation that would be much more focused and informative than the process over the spring and summer of 2016.

However, confusion was not the only result of combining all four permit applications into a single comment period. The second result was that much of the public's involvement in scoping was singularly focused on Sandpiper, not L3R. Sandpiper was proposed first and underwent a scoping process in 2014, under the then-applicable CEA rules. Because the public was already involved in participating in scoping environmental review on Sandpiper, the public's attention remained overwhelmingly centered on Sandpiper, even after L3R was combined into the scoping process. Now that Sandpiper is no more, it now appears that public participation on the combined scoping process was therefore centered on a project that is now dead, or at least indefinitely postponed.

The Focus on Sandpiper in the Combined Environmental Review Process Resulted in System Alternatives that Ignored the L3R Proposal

The effects of this focus on Sandpiper are seen in the development of alternatives to be addressed in the EIS for the L3R Project. The development of alternatives began with the 2014 scoping process for Sandpiper. Even though environmental review for L3R was rolled into the Sandpiper process, however, no alternatives to L3R were ever developed. All system alternatives are alternatives to Sandpiper, not L3R. As a result, the system alternatives proposed for study in the EIS do not reflect the current proposal; they are a vestige of a defunct proposal that were merely 'ported over' for use in reviewing L3R.

At the time of scoping in these dockets, the public understood the proposal at hand as the construction of two pipelines in one route. The determination of whether to construct those pipelines in a new right-of-way east of Clearbrook was premised on the existence of two pipelines, not one. If a new scoping and comment period is opened, it may well be the case that the public may offer entirely different alternatives as a result of the fact that the current proposal

is to create a new right of way for only *one* pipeline, a pipeline that has a different origin and may well serve different final markets.

The Department readily concedes that the development of alternatives was restricted to Sandpiper:

All of the system alternatives were initially identified during scoping for the Sandpiper Project in 2014. During the Line 3 Replacement Project scoping process in 2015, all of these Sandpiper Project system alternatives were also proposed for the Line 3 Replacement Project. All of these system alternatives were included in the Draft Scoping Decision Document for the Line 3 Replacement Project with the assumption that Line 3 could be collocated with the Sandpiper Project pipeline east of Clearbrook. On September 1, 2016, the North Dakota Pipeline Company requested the withdrawal of its route and CN applications. **Because the system alternatives were initially developed as alternatives to the Sandpiper Project**, they all (1) start in North Dakota for the purposes of carrying Bakken crude and (2) assume construction of a new terminal and associated facilities. **None of the proposed Sandpiper Project system alternatives originally envisioned a connection to Line 3** or the existing Clearbrook Terminal.⁴⁷

At the public scoping meeting in Hinckley, DOC Environmental Review Manager Jamie MacAlister captured the problem most succinctly when she stated that “Currently . . . all of the systems alternatives that were proposed during the Sandpiper Pipeline proceedings are included here for evaluation . . . And then, as well, all of the route alternatives that were proposed during the Sandpiper route permit proceedings. Now, Line 3 is somewhat unusual in that regard because that process *never really got underway, it’s been folded into this process* that we’re into.”⁴⁸

The restriction of L3R alternatives to those that were developed for a completely different and now-defunct project has been perpetuated in the final scoping documents for L3R. The Department’s Final Scoping Documents note that “[m]any of the alternatives submitted [during public scoping meetings] for Line 3 are the same as those submitted for Sandpiper since the projects were to be co-located east of Clearbrook.”⁴⁹ The Alternatives Screening Report states plainly that “[a]ll of the system alternatives were initially identified during scoping for the

⁴⁷ Alternatives Screening Report for Line 3 Replacement Project, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, September 21, 2016, at 3.2.1 (emphasis added).

⁴⁸ Transcript of Scoping and Informational Meeting, Hinckley, April 24, 2016, at 23-24, available at http://mn.gov/commerce/energyfacilities/documents/34079/042516_Hinkley_OralTranscript.pdf (emphasis added).

⁴⁹ Final Department Scoping Comments at 10.

Sandpiper Project in 2014,”⁵⁰ and “[n]o new alternatives were developed for Line 3 (or Sandpiper) from comments during the 2016 scoping.”

All of the proposed system alternatives “start in North Dakota for the purposes of carrying Bakken crude.”⁵¹ Even though the public comments were clearly directed toward Sandpiper, the Department’s Final Scoping Document carried those publicly submitted alternative proposals “into the Draft Scoping Decision Document for the Line 3 EIS,” even though they clearly had nothing to do with transporting tar sands oil from Canada to Wisconsin.⁵²

Because all of the alternatives developed during the scoping process were focused on Sandpiper, that entire scoping process has now been rendered obsolete and irrelevant, necessitating a new or reopened scoping period. MEPA requires both notice to the public and an opportunity to comment on the proposed scoping, and both of those rights have been obviated in this instance. The significant changes exacted by the demise of Sandpiper have altered the very subject on which the public is entitled to notice and comment, and that right requires a new or reopened scoping period. Enbridge was aware for years of all the circumstances it cites to justify the need to replace Line 3, and yet it chose to propose Sandpiper first. That decision captured the public’s attention, and the recent withdrawal of the Sandpiper application is a fatal blow to the integrity of the scoping process.

With the Sandpiper proposal removed from the process, the confusion among members of the public is likely to dissipate. There is currently only one crude oil pipeline proposal in Minnesota, and one Applicant-preferred route under consideration. The public must be allowed to comment on the proposal that is *currently on the table* before the scoping process is completed. A scoping process based on input from a different, now-defunct pipeline proposal and a profoundly disoriented public cannot be sufficient under state law.

C. The Proposed Consent Decree Materially Alters the No-Action Alternative

The proposed consent decree alters the no-action alternative because it requires additional, improved safety measures on the pipeline as long as it continues to operate. If the

⁵⁰ Alternatives Screening Report for Line 3 Replacement Project, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, September 21, 2016, at 3.2.1.

⁵¹ Final Department Scoping Comments at 17.

⁵² Final Department Scoping Comments at 17.

existing Line 3 pipeline has not been taken out of service by December 31, 2017, the Proposed Consent Decree obligates Enbridge to undertake a series of safety measures designed to prevent the kind of catastrophic oil spill that occurred in Michigan in 2010. Those measures include:

1. Enbridge must conduct annual in-line inspections of all portions of the Original Line 3 that remain in operation, using tools designed to detect crack features, corrosion features, and geometric features;
2. Enbridge must identify, excavate and repair all features detected in the in-line inspections; and
3. Enbridge must clean and treat with biocide all portions of the line that remain in operation, to prevent corrosive microbial growth.⁵³

Although the documents submitted by Enbridge in these dockets do not divulge the frequency with which it conducts in-line inspections, it is reasonable to assume that the consent decree imposes a more robust safety regimen than would otherwise be routinely used. Indeed, according to Enbridge, these safety measures are “enhanced,” implying that they are more than the company would normally use.⁵⁴ The safety measures “codify and build on continuous improvements that have been implemented since 2010 including *enhancements* to the comprehensive in-line inspection-based spill prevention program . . . *improved* leak detection requirements; installation of new valves to control product loss in the event of an incident, continued *enhancement* of control room operations, and *enhanced* spill response capabilities.”⁵⁵

This more robust safety program for the operation of the existing Line 3 is a significant change to the ‘no-action alternative’ evaluated in the EIS. Prior to the Consent Decree, the no-action alternative would have meant to continue to operate Line 3 with Enbridge’s “standard” program of integrity management, described in Section 3 of its CON application. After the Consent Decree goes into effect, however, the no-action alternative will mean operation of the existing Line 3 with a much improved safety program specifically designed to prevent the very sorts of catastrophic spills that occurred in Michigan in 2010.

⁵³ Proposed Consent Decree at 26-27.

⁵⁴ Enbridge Press Release, *Enbridge Energy Partners L.P. Settles with the U.S. Department of Justice and U.S. Environmental Protection Agency on Marshall and Romeoville Incidents*, July 20, 2016, available at <http://www.enbridge.com/media-center/news/details?id=2072418&lang=en&year=2016>.

⁵⁵ *Id.* (emphasis added).

The public, however, was not made aware of this significant change until after the scoping comment period closed on May 26, 2016. But this change is highly relevant to public opinion on the project. A commenter that supported the project out of fears of an oil spill may now be persuaded that the improved safety program is sufficient to sway their opinion against the pipeline. Other commenters may wish to weigh in on the effectiveness of these additional proposed safety measures. The decision faced by state regulators and the public is different from the decision posed six months ago. Six months ago the decision was whether to replace an aging, risky pipeline with a new line in a new corridor. Now the decision is whether to replace an aging but intensively monitored pipeline with a new line in a new corridor. The landscape has changed, but the public comment period never offered the chance to react to that changed landscape, and that failure jeopardizes the integrity of the environmental review process. As described above, environmental review is about two things: gathering and analyzing accurate information, and using that information to make informed, well-reasoned decisions. A scoping process that is based on obsolete, irrelevant information fails those twin objectives, and therefore violates the Minnesota Environmental Policy Act.

III. RULE 7829.0410 NOTIFICATION

Pursuant to Minn. R. 7829.0410, parties to this matter are advised that any opposition to this motion must be filed and served on the persons listed on the official service list within 14 days of service of the motion filing.

IV. CONCLUSION

The Department, the Commission, and all Minnesotans are entitled to an accurate description of a proposed project, particularly with regard to a project expressly designed to transport hazardous substances through the state for the next 50 years. FOH and MCEA respectfully request that the Commission order the Department to open a new scoping comment period or to reopen the period closed on May 26, 2016. This new scoping period will give the public the opportunity to learn about and comment on the L3R Project's newly expanded scope, and it will give the Department time to solicit the required information from the Applicant.

Dated: September 26, 2016

Respectfully submitted,

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