

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

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

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

OAH Docket No. 8-2500-31260

**INITIAL POST-HEARING BRIEF

OF

FRIENDS OF THE HEADWATERS**

FEBRUARY 27, 2015

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
PROCEDURAL HISTORY	2
ARGUMENT	7
I. THE QUESTION BEFORE THE ALJ AND THE PUBLIC UTILITIES COMMISSION IS WHETHER THERE IS A NEED FOR A PIPELINE IN NDPC’S PREFERRED LOCATION.	7
II. LEGAL FRAMEWORK GOVERNING THE CERTIFICATE OF NEED DECISION.....	8
A. The Burden Is On NDPC To Prove The Need For The Pipeline.....	10
B. All Four Criteria Must Weigh In NDPC’s Favor To Obtain A Certificate Of Need.....	12
III. NDPC HAS NOT MET THE BURDEN OF PROOF SUFFICIENT FOR THE COMMISSION TO GRANT A CON FOR THE CURRENTLY PROPOSED LOCATION.	13
A. The Probable Result Of Denial Will Not Adversely Affect The Future Adequacy, Reliability, Or Efficiency Of Energy Supplied To The Applicant, The Applicant’s Customers, Or To The People Of Minnesota And Neighboring States.	14
i. NDPC has not shown that refineries need or want the oil delivered to Clearbrook or Superior.	14
ii. “Conservation Programs” weigh against granting a CON.	18
iii. All of the impacts to denial of a CON that NDPC has alleged result from its own promotional practices, and should not be given any weight.	19
iv. A System Alternative, or even no pipeline at all, will not affect the adequacy, reliability or efficiency of the shippers’ crude oil supplies.	20
B. The Record Demonstrates That There Are More Reasonable And Prudent Alternatives.....	21
i. FOH’s System Alternatives deliver oil where it is needed—to Illinois refineries.....	23

ii. The cost of the alternatives has not been properly calculated, but may well favor alternatives.....	24
iii. NDPC’s Preferred Route has the greatest negative effect on the natural environment.....	26
iv. Reliability concerns do not weigh in favor of granting a CON for a pipeline in NDPC’s Preferred Route.....	29
v. The Commission cannot grant a CON for a System Alternative.....	30
C. NDPC Has Not Proven That The Consequences To Society Of Granting A CON Are More Favorable Than The Consequences Of Denying A CON For A Pipeline In This Location.	31
i. The proposed pipeline does not serve state energy needs.	32
ii. The environmental effects of the Project require denial of the CON.....	33
iii. Granting a certificate of need for a pipeline in this location will lead to future pipeline development in an ecologically sensitive part of Minnesota.	38
iv. The socially beneficial uses, if any, of the output of the pipeline are not dependent on location.	40
D. The Design, Construction, And Operation Of The Sandpiper Pipeline Would Not Comply With Minnesota State Law.....	40
i. The System Alternatives are “feasible and prudent” under MERA and MEPA.....	42
ii. Economic considerations do not justify selecting NDPC’s Preferred Route.....	44
IV. MEPA PROHIBITS THE COMMISSION FROM MAKING A FINAL DECISION TO GRANT A CERTIFICATE OF NEED FOR THE SANDPIPER PIPELINE UNTIL IT HAS COMPLETED ENVIRONMENTAL REVIEW REQUIRED BY STATUTE AND RULE.	45
A. The Certificate Of Need Is A “Final Governmental Decision” Under MEPA.	46
B. A “Final Governmental Decision” Such As A Certificate Of Need May Not Be Made Prior To Fulfilling The Procedural And Substantive Requirements Of MEPA.....	46
C. The Environmental Review Ordered By The Commission Does Not Comply With MEPA.	47

V. THE DOC-EERA SYSTEM ALTERNATIVES REPORT DOES NOT COMPLY WITH THE COMMISSION’S OCTOBER 7 ORDER.	48
CONCLUSION.....	50

INTRODUCTION

This case is about contrasting the *private* interests of one or two companies with the *public* interest of the State of Minnesota. The Minnesota Public Utilities Commission (the “Commission”) is a state agency tasked with protecting the public interest through its oversight of the construction of facilities such as the large petroleum pipeline at issue in this case. Friends of the Headwaters (“FOH”) is a citizens group that formed to protect the public’s interest in protecting Minnesota’s ecologically sensitive regions. FOH opposes the pipeline in this case because it is proposed to be built in an environmentally destructive location that would put Minnesota’s treasured and unique state resources at risk for the limited and *purely economic* benefit of one or two companies. FOH asks the Commission to protect the public interest and require any pipeline that crosses Minnesota to be built in an environmentally appropriate location.

When the evidence in this case is viewed in a light most favorable to the public interest, it becomes immediately clear that these companies have not established that their limited economic interests outweigh the public interest of the State of Minnesota. Rather, the evidence clearly establishes that there is no need for a pipeline to cross Minnesota in this destructive corridor.

BACKGROUND

North Dakota Pipeline Company, LLC (“NDPC”) is seeking approval to construct the Minnesota portion of the proposed Sandpiper Pipeline Project (“Project”), a new 616-mile, 24- to 30-inch diameter pipeline and associated facilities to transport crude oil from Enbridge’s Beaver Lodge Station south of Tioga, North Dakota to an existing Enbridge terminal in Superior, Wisconsin. (Exhibit (“Ex.”) 3 at 1.) Approximately 302 miles of the new pipeline installation would be located in Minnesota. (*Id.*) The proposed route from Clearbrook to Superior is not an

existing right of way for pipelines. (*Id.* at 3-4.) Some of the route follows existing rail and utility right of-ways, but approximately 25 percent of the route is a “greenfield” route. (NDPC’s Comments Regarding System Alternatives, August 21, 2014, at 2.) The Project also includes a new terminal with two 150,000 barrel tanks and a new pump station near Clearbrook. (Ex. 3 at 3-4.)

The initial capacity of the pipeline will be 225,000 barrels per day (“bpd”) into Clearbrook and 375,000 bpd from Clearbrook into Superior. (Ex. 3 at 6.) However, the Project is designed to accommodate a future expansion to 406,000 bpd into Clearbrook, and 711,000 bpd from Clearbrook to Superior. (Ex. 3 at 7, Table 7853-0230-1-D.5-1.) NDPC described the purpose of its Project as follows:

The Project will transport growing supplies of North Dakota crude oil to refining centers in the Midwest and the East Coast. The Project will be operationally integrated with the NDPC System, and will be used to transport crude oil to the Enbridge Superior terminal facilities for subsequent deliver of crude oil supplies on the Enbridge Mainline System. To meet the need for safe and economical transportation capacity, the Project will provide up to 225,000 barrels per day (“bpd”) of new crude oil capacity from North Dakota. Additionally, the Project will have the ability to deliver crude oil at the new Clearbrook Terminal as redundant service for NDPC’s existing Line 81.

(Ex. 3 at 5 (footnotes omitted).)

PROCEDURAL HISTORY

NDPC¹ applied for a Certificate of Need (“CON”) and a Route Permit in November 2013. (Ex. 1.) The CON and Route Permit applications were conditionally accepted as complete in February 2014, and, at that time, the Commission invited the public to suggest “alternative

¹ The application was submitted by Enbridge Pipelines (North Dakota) LLC in November 2013 (Ex. 1 at 1), but Enbridge updated the application and changed the applicant to NDPC in January 2014 (Ex. 3). NDPC is a joint venture between Enbridge Energy Partners, L.P. and Marathon Petroleum Company. (Ex. 3 at 2.)

pipeline routes.” (Ex. 42 at 2.) The Commission then referred the cases to the Office of Administrative Hearings for a contested case and authorized the Department of Commerce Energy Environmental Review and Analysis (“DOC-EERA”) to facilitate the development of route proposals beyond those proposed by NDPC. (Ex. 42 at 10.)

In the public comment period that ensued,² 402 citizens and 55 organizations and businesses wrote to oppose the proposed pipeline, as did one local unit of government and one tribal entity. (DOC-EERA Comments and Recommendations, dated July 16, 2014 at 11.) Only 30 citizens and five organizations or businesses wrote to support the project. (*Id.*) Among the concerns raised, over 380 raised environmental concerns, over 350 comments expressed concern about water quality specifically, and 347 comments expressed a preference for an alternative route. (*Id.*) As part of the same public comment period, FOH submitted alternative routes for consideration. (*Id.* at 14-15.) FOH’s routes (System Alternatives designated SA-04, SA-05, SA-06 and SA-07) follow existing pipeline rights-of-way to serve Midwestern refineries. (*Id.*) The Minnesota Pollution Control Agency (“MPCA”) also filed a preliminary³ alternative to the Project, designated SA-03, and Honor The Earth filed a System Alternative as well. (*Id.* at 13-15.) DOC-EERA filed a report describing these “System Alternatives” as well as several “route alternatives” in July 2014. (*Id.*) DOC-EERA’s report describes the System Alternatives as follows:

- SA-04 would follow the existing Alliance Pipeline through North and South Dakota, Minnesota, Iowa and Illinois. It entirely avoids the concentrated areas of clear water lakes, wild rice lakes, wetlands, and vulnerable aquifers (the “Lake Country’s Environmentally Sensitive Resources”) that NDPC’s Preferred Route

² There was also a public comment period that ended on January 23, 2015. Those comments have not yet been summarized, but a small sample of public comments that specifically address the concerns of FOH is attached to this brief.

³ Upon further analysis MPCA concluded that System Alternatives proposed by other parties were environmentally superior to SA-03. (Ex. 183, Sch. 1 at 7.)

traverses, and crosses primarily agricultural land. It is approximately 1,050 miles long, and does not connect with terminals in Clearbrook or Superior.

- SA-05 also follows an existing gas pipeline, the Northern Border Natural Gas Pipeline that cuts across southwestern Minnesota, which is primarily an agricultural area. It avoids the Lake Country's Environmentally Sensitive Resources. It also does not connect with terminals in Clearbrook or Superior. SA-05 is approximately 1,100 miles long.
- SA-06 follows Minnesota Highway 9 south until it joins the Magellan Products pipeline. It follows the existing Magellan Products line south and east, where it intersects with the existing MinnCan crude oil pipeline. SA-06 could connect back to the terminal in Superior after it intersects with the existing Enbridge right-of-way, or it could proceed south to the Chicago area. It avoids the Lake Country's Environmentally Sensitive Resources.
- SA-07 would follow I-94 to an existing Magellan Product pipeline south and east to a point where it intersect with the MinnCan 24-inch crude oil pipeline and follow it to Minnesota's two refineries. At those points the pipeline can proceed northward to the Superior terminal or follow an existing Magellan Product pipeline east into Wisconsin until it intersects the existing Enbridge right-of-way at which point a pipeline could be built to carry the oil back up to Superior or down to Illinois. It avoids the Lake Country's Environmentally Sensitive Resources.
- SA-08 was proposed by Honor The Earth, and delivers oil directly to the Minnesota refineries by following the I-29 and I-94 corridors. It avoids the Lake Country's Environmentally Sensitive Resources.
- SA-03, proposed by MPCA, bypasses the Lake Country's Environmentally Sensitive Resources (and the Clearbrook Terminal), follows existing corridors south, then heads east to the I-35 corridor and back north to terminate in Superior. SA-03 is approximately 360 miles long.

(Id.)

The Commission considered DOC-EERA's report at a meeting on August 7, 2014. (Ex. 46 at 2.) At that meeting, the Commission heard comments from parties as well as from the public regarding the selection of additional route and/or System Alternatives for further consideration in these matters. (*Id.* at 3 n. 7.) The Commission accepted 53 route alternatives and

one modified system alternative (Modified SA-03)⁴ for further consideration. (*Id.* at 2.) The Commission also solicited comments on which, if any, of the eight System Alternatives identified by DOC-EERA should be considered further, as well as the legal basis for determining whether the System Alternatives should be considered in either the CON proceeding or the Route Permit proceeding. (*Id.* at 10.) FOH submitted comments analyzing Enbridge’s crude oil pipeline system in detail and refuting NDPC’s alleged need to go through Clearbrook and terminate at Superior. (Ex. 183, Sch. 4.) FOH stated that the System Alternatives were sufficient to meet the need of transporting oil from the Williston Basin to refineries in Minnesota and elsewhere. (*Id.* at 5-6.)

On September 11, 2014, the Commission met to decide whether to consider any of the System Alternatives further based on comments from the parties. (Ex. 47 at 3.) The Commission also considered two additional topics: (1) whether the route proceeding and CON proceedings should be bifurcated; and (2) what type of environmental review, if any, should be completed as part of the CON proceeding. (*Id.*) The Commission determined in a rare if not unprecedented action that: (1) the CON and Route Permit proceedings should be bifurcated and the CON proceeding should be completed before the route proceeding begins in order to avoid unnecessary confusion and resource expense, (2) the System Alternatives should be evaluated in the CON proceeding, and (3) a “high-level,” “broad-based” environmental review of the System Alternatives should be conducted. (Ex. 48 at 11-13.)

⁴The modifications connected SA-03 (proposed by MPCA) to Clearbrook and Superior, essentially transforming the system alternative into a route alternative. FOH uses the term “System Alternatives” to include the System Alternatives that the Commission ordered to be addressed in the CON proceeding: SA-03, SA-04, SA-05, SA-06, SA-07, and SA-08. FOH will refer to Modified SA-03 and NDPC’s “Preferred Route” separately.

The Commission concluded that environmental review of the System Alternatives is “appropriate,” and its decision was guided by the “general charge” of MEPA, § 116D.03. (*Id.* at 11.) The Commission stated that “it is reasonable to investigate the potential natural and socioeconomic environmental impacts, as well as the economic and technical considerations posed by System Alternatives, as part of the need decision.” (*Id.* at 11-12.) The Commission “anticipate[d] that this review should evidence, from a broad environmental perspective, the relative risks and merits of choosing a different system alternative.” (*Id.* at 12.) The “high-level” environmental review ordered by the Commission was intended to “ensure opportunity for other governmental agencies, the public and other private entities, like pipelines, to weigh in on both the need and any System Alternatives.” (Transcript Sept. 11, 2014 at 5.) Based on these recommendations, the Commission ordered DOC-EERA to prepare an environmental review document that “examines and evaluates the potential impacts of the proposed project” and the System Alternatives. (Ex. 48 at 12.)

DOC-EERA filed its Systems Alternative Report on December 18, 2014, a little more than two weeks before rebuttal testimony was due. (Ex. 80.) FOH witness Stolen, Carlton County Land Stewards witness Chapman, the Minnesota Department of Natural Resources (“MDNR”), and MPCA all critiqued the Systems Alternative Report. (*See* Exs. 184, 112, and 185, MPCA Comments dated January 23, 2015.) Although Stolen and Chapman were allowed to provide their critiques as prefiled testimony, FOH’s requests for subpoenas for MPCA and MDNR witnesses were denied.⁵ MDNR eventually agreed to voluntarily appear, but FOH was unable to question MPCA further about its analysis of the System Alternatives. Chapman,

⁵ Your Honor denied FOH’s renewed request dated January 20, 2015 at the prehearing conference on January 22, 2015. To date, FOH has not received a written order denying its renewed request.

MDNR, and MPCA weighed in on the relative merits of the System Alternatives. (Exs. 112 and 185, MPCA Comments, dated January 23, 2015.) Each one agreed that NDPC's Preferred Route presents the least preferable location for a pipeline to cross Minnesota.

ARGUMENT

NDPC has failed to meet its burden to justify the need for this pipeline. At most, its evidence establishes a *private* business interest in a pipeline on behalf of itself and relatively few, perhaps just one, shipper. Nothing in the record establishes a *public* interest, or a *public* need, for a new pipeline along NDPC's Preferred Route. The State of Minnesota is asked to bear the costs in the form of loss of habitat, wetlands, forested and recreational areas, and most significantly, the risk of a major oil spill. Major oil spills can cost billions of dollars to clean up, impact a huge area, and cause permanent damage. Even if there is a need for pipeline to cross Minnesota, FOH asserts that the pipeline must be constructed in an area where the environmental risks are minimized to the greatest degree possible. As the record demonstrates, NDPC's Preferred Route poses the greatest environmental risk and therefore cannot be approved.

I. THE QUESTION BEFORE THE ALJ AND THE PUBLIC UTILITIES COMMISSION IS WHETHER THERE IS A NEED FOR A PIPELINE IN NDPC'S PREFERRED LOCATION.

The Commission must decide whether there is a need for oil transportation via the specific pipeline project, in the specific corridor proposed by NDPC. NDPC's allegations on "need" are based on the pressure to transport crude oil, specifically "Bakken oil" via pipeline out of the Bakken formation in the Williston Basin of North Dakota. Despite this general need to get oil out of the Bakken—a need that FOH does not dispute—NDPC insists that this need can only be satisfied by transporting oil via a pipeline in one particular corridor. NDPC has therefore inextricably bound the question of need to the location of the pipeline.

NDPC proffered three reasons as to why there is a “need” for its pipeline:

- Rising production in the Williston Basin has resulted in a need to move crude oil from the Basin to refineries;
- Additional pipeline capacity will allow shippers to ship via pipeline rather than other modes of transportation; and
- Connections at Clearbrook and Superior “optimize” the performance of Enbridge’s pipeline system as a whole and increases reliability of delivery to St. Paul refineries.

(Ex. 6 at 4:108-21.) Of these three proffered reasons, only the third relates to the need for a pipeline at the particular location proposed by NDPC.

NDPC has claimed that it needs a pipeline at this particular location and that no other location will serve the needs of its shipper(s). Thus, NDPC must show why the Project must be built *at the proposed location* to meet its burden of proof as required by law, and it must show why the significant disadvantages to the public interest from a route that cuts through environmentally sensitive areas of the state is outweighed by the private business interests of the very few shippers that might benefit from the Project.

II. LEGAL FRAMEWORK GOVERNING THE CERTIFICATE OF NEED DECISION.

The Commission’s decision in this matter is governed by the CON statute as well as Minnesota’s bedrock environmental statutes.

Minnesota’s CON statute plainly states that “no large energy facility may be sited or constructed in Minnesota without the issuance of a certificate of need . . . consistent with the criteria for assessment of need.” Minn. Stat. 216B.243, subd. 2. It is the applicant’s burden to justify the need for the facility. *Id.*, subd. 3. The legislature identified a number of criteria for the Commission to use when assessing need and empowered the Commission to adopt, through rule, assessment of need criteria. *Id.*, subds., 1, 3. Pursuant to that authority the Commission established the four criteria that must *all* be demonstrated by NDPC for a CON to be granted.

Minn. R. 7853.0130. If any one of these criteria is not established, the Commission must deny the CON application.

Separately, and in addition, the Minnesota Environmental Policy Act (“MEPA”) and Minnesota Environmental Rights Act (“MERA”) prohibit the construction of any project that would cause pollution, impairment or destruction of any of the state’s natural resources “so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare of the state’s paramount concern for the protection of [its natural resources]. Economic considerations alone shall not justify such conduct.” Minn. Stat. § 116D.04, subd. 6; *see also* Minn. Stat. § 116B.03 (establishing private cause of action for pollution, impairment or destruction of natural resources). The statutes define “pollution, impairment or destruction” to include “any conduct which materially adversely affects or is likely to materially adversely affect the environment.” Minn. Stat. § 116B.02, subd. 5.

The Minnesota Supreme Court has recognized that infrastructure projects, such as highways and pipelines, are subject to the constraints of MERA. In one of the first cases under the statute, the Minnesota Supreme Court rejected the route for a highway that would have damaged a wetland where there was a less destructive alternative. *Freeborn Cnty. v. Bryson*, 243 N.W.2d 316 (Minn. 1976). The court cited Aldo Leopold’s description of the land ethic in A Sand County Almanac, an ethic which “enlarges the boundaries of the community to include soils, waters, plants, and animals or collectively: the land.” “In the Environmental Rights Act,” the Court wrote, “our state legislature has given this land ethic the force of law.” *Id.* at 322.

Finally, the Commission must approach its decision in light of two strong policy preferences expressed in Minnesota law: (1) a preference for the public interest over private

interests; and (2) an overarching state policy in favor of environmental protection. For example, the Legislature has specifically instructed that it intends for Minnesota laws to be interpreted “to favor the public interest as against any private interest.” Minn. Stat. § 645.17. The legislature has expressed similar intent to protect the environment. “The legislature . . . directs that, to the fullest extent practicable the policies, rules and public laws of the state shall be interpreted and administered in accordance with the policies set forth in [the Minnesota Environmental Policy Act].” Minn. Stat. § 116D.03, subd. 1. It is the state’s objective to “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.” Minn. Stat. § 116D.02, subd. 2. In particular, it is the state’s policy to “minimize the environmental impact from energy production and use.” *Id.* State agencies are required to ensure that “environmental amenities and values . . . will be given at least equal consideration in decision making along with economic and technical considerations.” Minn. Stat. § 116D.03, subd. 2.

In sum, NDPC’s project cannot be approved unless it establishes that it has met *all* of the criteria for a CON *and* that there are no reasonable and prudent alternatives consistent with the general welfare that would cause less pollution, impairment or destruction of the environment. Importantly, NDPC’s justification for its proposal, in the face of reasonable alternatives, cannot be based on economic considerations alone.

A. The Burden Is On NDPC To Prove The Need For The Pipeline.

The Project cannot be built without a CON. Minn. Stat. § 216B.243. To obtain a CON, the legislature placed the burden of proof squarely on the applicant:

No proposed large energy facility shall be certified for construction *unless the applicant can show* that demand for electricity cannot be met more cost effectively through energy conservation and load-

management measures and unless *the applicant has otherwise justified its need*.

Minn. Stat. § 216B.243, subd. 3 (emphases added). The language of this provision could not be any clearer, as it says not once but twice that the burden lies with the applicant to demonstrate need. Additionally, Minnesota's Administrative Rules squarely place the burden of proof on the party proposing the action. "The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard." Minn. R. 1400.7300.

It is particularly important that the requirement in Minn. R. 7853.0130(B) that a reasonable and prudent alternative must be demonstrated "by a preponderance of the evidence on the record by parties or persons other than the applicant" be read in light of the authorizing statute and legislative intent. The burden to demonstrate that a reasonable and prudent alternative exists cannot mean it becomes another party's burden to offer foolproof, technical evidence that alternatives are technically and financially viable. Indeed, such proof is impossible on large energy projects such as this because the applicant holds, and keeps from public view as "trade secret," all of the information another party would need to make such a showing. That is clearly not what the legislature intended.

The CON statute states that "the commission shall evaluate . . . possible alternatives." Minn. Stat. § 216B.243, subd. 3. It says nothing about placing the burden to introduce or prove such alternatives on other parties. As noted, the statute itself clearly states that the burden of proof remains with the applicant at all times. Minn. Stat. § 216B.243, subd. 3. A rule "adopted in pursuit of legislative goals cannot subvert the primary purpose behind the legislation." *Weber v. City of Inver Grove Heights*, 461 N.W.2d 918, 922 (Minn. 1990). "[W]hile administrative agencies may adopt regulations to implement or make specific the language of a statute, they

cannot adopt a conflicting rule.” *Green v. Whirlpool*, 389 N.W.2d 504, 506 (Minn. 1989). Thus, to the extent that Minnesota Rule 7853.0130 appears to shift the burden of proof for need to the other parties that are not proposing a pipeline, it is inconsistent with Minn. Stat. § 216B.243. The statutory intent must prevail.

B. All Four Criteria Must Weigh In NDPC’s Favor To Obtain A Certificate Of Need.

Minnesota Rule 7853.0130 outlines the criteria for determining whether a CON may be granted and requires that all four criteria weigh in the applicant’s favor. It states:

A [CON] shall be granted to the applicant if it is determined that:

- A. the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant’s customers, or to the people of Minnesota and neighboring states . . .
- B. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant . . .
- C. the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate . . .

and...

- D. it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rule and regulations of other state and federal agencies and local governments.

Minn. R. 7853.0130 (emphasis added). In other words, the CON shall be granted if all four criteria weigh in favor of the applicant. Any other reading would omit the “and” after subdivision C, and thus misconstrue the plain language of rule. *See Chisholm v. Davis*, 292 N.W. 268, 270 (Minn. 1940) (construing the use of the word “and” to mean that both statutory conditions connected by the term “and” must be present in order for the exclusion to apply). As the language of the rule plainly demonstrates, Minnesota Rule 7853.0130 is not a list of factors to be weighed or balanced, but a list of criteria that must be met.

As a result, if the Commission finds that *any* of the four criteria, including the existence of a reasonable and prudent alternative, weigh against the Project, it must deny a CON for a pipeline that would run from Clearbrook to Superior. In so doing, the Commission is not denying the need for a pipeline, at some point, to cross Minnesota carrying Bakken oil. NDPC is free to propose a more appropriate location for a pipeline, such as those locations suggested by FOH in this case.

III. NDPC HAS NOT MET THE BURDEN OF PROOF SUFFICIENT FOR THE COMMISSION TO GRANT A CON FOR THE CURRENTLY PROPOSED LOCATION.

NDPC cannot establish any of the four criteria it must prove to obtain a CON. There is no credible, objective evidence that suggests denying the CON for a pipeline in NDPC's Preferred Route will adversely affect the adequacy or reliability of the crude oil supply in Minnesota or neighboring states.⁶ Minn. R. 7853.0130(A). The record shows that SA-04 and SA-05, and possibly other System Alternatives, are more reasonable and prudent than NDPC's Preferred Route because they are located in environmentally appropriate corridors. Minn. R. 7853.0130(B). In addition, the consequences of granting a CON, primarily because of the potential for catastrophic environmental effects in a sensitive area, are not more favorable than the consequences of denying the CON. Minn. R. 7853.0130(C). And lastly, because constructing a pipeline in NDPC's Preferred Route when feasible and prudent alternatives exist will violate both MEPA and MERA, NDPC cannot demonstrate that the Project will comply with state laws. Minn. R. 7853.0130(D).

⁶ At the close of the evidentiary hearing, Your Honor asked parties to consider the meaning of "neighboring states" and to determine if this phrase had been interpreted by the Commission in past proceedings. FOH's research did not reveal any such interpretations and FOH therefore concludes that the phrase should be given its plain meaning.

A. The Probable Result Of Denial Will Not Adversely Affect The Future Adequacy, Reliability, Or Efficiency Of Energy Supplied To The Applicant, The Applicant's Customers, Or To The People Of Minnesota And Neighboring States.

NDPC has failed to prove that “the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant’s customers, or to the people of Minnesota and neighboring states.” Minn. R. 7853.0130(A).

i. NDPC has not shown that refineries need or want the oil delivered to Clearbrook or Superior.

NDPC has failed to show that there is adequate demand for this pipeline. By rule, the Commission must consider “the accuracy of the applicant’s forecast of demand for the type of energy that would be supplied by the proposed facility.” Minn. R. 7853.0130(A)(1). In the context of a CON for a pipeline, this means NDPC must show that its customers want this pipeline—both in Clearbrook and Superior.

The only potential beneficiaries of the Clearbrook delivery point on NDPC’s Preferred Route would be the two refineries in Minnesota—St. Paul Park Refining Co. (“SPPRC”) and Flint Hills. (Ex. 20 at 10:283-84.) These refineries do not appear to be shippers,⁷ and have not expressed support for the Project. Moreover, the shipping capacity between Clearbrook and these refineries will not increase, nullifying any potential benefit to these refineries. (Ex. 9 at 5:158-60.) Although these refineries are already served by Line 81 to Clearbrook, NDPC stated that the Minnesota refineries would benefit from construction of the Sandpiper Pipeline because it would provide the benefit of redundancy. (Ex. 7 at 10:287-92.) NDPC also claims that Project, if it

⁷ FOH does not have access to the Transportation Service Agreements (“TSAs”) that form the entire basis of NDPC’s case that the pipeline must be built along NDPC’s Preferred Route. Those documents are being held within a separate docket that can only be viewed by state agencies, per NDPC’s request. If FOH had access to the TSAs, it would be able to argue with certainty whether any shipper had committed to delivery at Clearbrook, and if so, whether that shipper is one of the Minnesota refineries, or might serve the refineries in Minnesota.

connects at Clearbrook, will provide the benefit of avoiding apportionment on the NDPC Pipeline System. (*Id.* at 3:80-86.)

But there is no evidence that the Minnesota refineries want the proffered benefit of redundancy or decreased apportionment from the Project as NDPC claims. Indeed, the two refineries have not been supportive of the pipeline at all, and in the case of SPPRC, have outright opposed it. In the FERC proceedings related to the tariff rates for the proposed Project, SPPRC opposed the pipeline stating that the Project upstream from Clearbrook is neither “necessary [n]or desirable to meet the transportation needs of SPPRC.” (Ex.183, Sch. 4 at 42.) It also stated that SPPRC “has not suffered from chronic prorationing on the NDP system,” and “has seen no operational evidence that the system is subject to persistent excess demand.” (*Id.*) Moreover, SPPRC stated that the proposed Sandpiper Pipeline would have “no value” to it, but would only require it to pay a higher transportation cost than it pays now. (*Id.*) The effect of the pipeline, would be simply to “harm, not benefit, the business of SPPRC and its customers” due to increased costs. (*Id.* at 43.)

Similarly, Flint Hills Resources, the other Minnesota refinery, intervened in the Sandpiper docket at the FERC to express its concerns. While it did not oppose the project outright, it expressed concern about whether uncommitted shippers would bear financial responsibility for underutilization of the pipeline if NDPC’s predictions about shipper demand prove overly optimistic. (*Id.* at 159.) It also sought to ensure that the rights of non-committed shippers to challenge future rate changes were preserved if NDPC is forced to allocate costs associated with underutilization of the pipeline. (*Id.* at 159-60.)

The Department of Commerce (“DOC”) also agreed that Minnesota does not benefit from the Clearbrook connection, and that Minnesota refineries would not benefit from the proposed

pipeline. (Ex. 50 at 24:1-19; Ex. 54 at 30:13-17.) DOC's witness, Mr. Heinen, confirmed, based on his own independent analysis, that the pipeline is likely to increase the cost of crude oil to Minnesota refineries. (Ex. 50 at 25-26.) Mr. Heinen also responded to the benefit of redundancy to Minnesota refineries alleged by NDPC. He stated that while redundancy is potentially a benefit, it is not clear whether Minnesota refiners would benefit from redundancy in this case. (*Id.* at 27-28.)

NDPC has also failed to prove that there is sufficient demand for a pipeline to Superior. Few shippers have shown interest in the Project, and fewer still have been willing to publicly support it. (Ex. 183, Sch. 4 at 182-83.) The only shipper of record who has admitted publicly to shipping oil on the proposed Sandpiper pipeline to be delivered in Superior is Marathon,⁸ (T. Vol. III at 77:13-18), who is also a 27% owner of the Project. (*Id.* at 183; T. Vol. III at 71:20-24.)

Based on the record here, FOH believes that Marathon is accountable for almost all of the committed shipper volume on the proposed pipeline. NDPC has stated that 155,000 bpd of the 375,000 bpd capacity has been reserved by committed shippers. (Ex. 6 at 5:132-33.) Mr. Palmer, a senior vice president at Marathon, stated in his testimony that Marathon "recognized a need for the project" and made a commitment to ship at a volume that is "sufficient for the Project to proceed." (Ex. 13 at 5:126-28.) Mr. Palmer stated at the hearings that its commitment is at least 25 percent of the total 375,000 bpd, which would be 93,750. (T. Vol. III at 40:12-41:1.) Mr. Palmer was more hesitant about whether its commitment exceeded 50 percent, which is 187,500,

⁸ The only other shipper who has come forward publicly in these proceedings is Enerplus Resources Corporation ("Enerplus"). Enerplus submitted comments in support of the project as part of the public comment period without revealing its volume commitment or preferred delivery location. However, the comments specifically addressed the importance of the Clearbrook connection to Enerplus, so it is reasonable to assume that Clearbrook is its preferred delivery point on the route. (Enerplus Comments, dated January 7, 2015.)

and exceeds the total volume of all committed shippers on the proposed pipeline. (*Id.*) The Commission must review the TSAs to determine the actual commitments related to the Project.

Marathon, NDPC's largest, and possibly only, shipper, who prefers delivery at Superior, will ship the oil either to, or through, Illinois. (T. Vol. III at 77:13-18.) The Superior refinery is very small, and does not need any crude oil beyond the 2.3 million bpd that Enbridge already ships into Superior. (T. Vol. II at 45:15-18.) Mr. Palmer stated that Marathon is upgrading its refinery in Robinson, Illinois to increase its capacity to refine light crude in expectation of the Project, and the expansion is expected to coincide with the construction of the Project. (Ex. 13 at 7:179-84.) Marathon is also investing in a Kentucky facility to increase the capacity of light, sweet crude that the facility can process. (*Id.* at 7:186-92.) The crude oil from the Project would travel via pipeline to these facilities. (T. Vol. III at 45:13-21.) This all demonstrates that Superior is not the final destination for this oil.

Despite what appears to be an obvious lack of demand for oil through Clearbrook to Superior, the FERC proceedings provide some insight into why Marathon and NDPC insist that they "need" a pipeline in this specific location. Three shippers filed a protest to the proposed Sandpiper Pipeline, arguing that the proposed rate structure "is inherently discriminatory and appears to be designed to confer economic benefits on an affiliated shipper, Marathon, at the expense of uncommitted shippers." (Ex. 183, Sch. 4 at 11.) As the protesting shippers clarified, they are not opposed to NDPC building a pipeline; they are only opposed to NDPC doing so at the expense of other shippers who do not need or want the pipeline:

It is in fact apparent that the major motivating factor of the Sandpiper project was an effort to assure Marathon Petroleum Company, an equity owner of the pipeline and the "anchor" committed shipper, that Sandpiper will enable it to deliver crude oil to its Illinois and Ohio refineries.

(*Id.* at 41.) This is why, the shippers point out, the entire contract is dependent upon the Southern Access Extension, which is designed to enable Marathon to supply crude oil to its Illinois and Ohio refineries. (*Id.*) In other words, Marathon wishes to ship crude oil on its own system from Superior to Illinois, and to leverage funds from uncommitted shippers while doing so. There is no evidence in the record that any other shippers have similar needs.

If Marathon, an investor in the project, is the *only* shipper demanding oil in Superior, or one of only a very few, that is a significant factor in the Commission's consideration. The question before the Commission is about whether there is a need to deliver oil through Clearbrook to Superior across some very sensitive and ecologically valuable areas. If the delivery to Superior has more to do with Marathon's business strategy than the needs of crude oil refineries as a whole (only one of which is actually located in Superior) then that fact needs to be weighed against the risks of a large new oil pipeline in an ecologically sensitive and remote area of Minnesota.

Ultimately, on the question of whether NDPC has accurately demonstrated the demand for this Project, the best source of information is the refineries themselves, who spoke loud and clear at the FERC proceedings. NDPC has overstated the demand for this pipeline, and the record does not show that the probable result of denial would affect the reliability of delivery of crude oil to refineries in the Midwest.

ii. "Conservation Programs" weigh against granting a CON.

NDPC cannot demonstrate that denial of the CON would adversely affect the adequacy of the crude oil supply if programs to conserve petroleum consumption and limit greenhouse gas emissions are considered. Minn. R. 7853.0130(A)(2). For example, increased fuel economy and

decreased vehicle miles traveled have resulted in flat or declining demand for crude oil nationally. (Ex. 50 at 13:11-15:17.)

iii. All of the impacts to denial of a CON that NDPC has alleged result from its own promotional practices, and should not be given any weight.

In this case, *all* of the alleged adverse effects of denying a CON for a pipeline in NDPC's Preferred Route are due to NDPC's promotional practices and should therefore be disregarded. Minn. R. 7853.0130(A)(3).

Prior to seeking state approval of its proposed pipeline location, NDPC took several calculated business risks. These are circumstances of the company's own making, and should not be taken into account when weighing whether to grant a CON for NDPC's Preferred Route. For example, NDPC obtained approval to increase its rates from FERC associated with the proposed Sandpiper Pipeline, and also signed contracts with two or more shippers to ship oil on a pipeline for which it did not have any state approval. (T. Vol. II at 70:1-8, 69:3-6.) In addition, NDPC's two shippers of record, Marathon and Enerplus, also made calculated business decisions by upgrading refineries in the Illinois area to accommodate oil shipped on an as-yet-hypothetical Sandpiper Pipeline, and signing railroad contracts expected to terminate at the time that the Sandpiper Pipeline could come on line. (T. Vol. III at 48: 8-18; Enerplus Comments, January 7, 2015.)

NDPC took several steps to drum up support for its project prior to submitting any applications for state approval. First, NDPC entered into its agreement with Marathon for Marathon to become an investor and "anchor shipper" in November 2013. (Ex. 13 at 4.) NDPC announced this relationship just prior to commencing the "open season" to solicit other shippers, giving the appearance of stability and support to the project. (T. Vol. III at 37:1-8.)

These companies cannot foist the risks of their own business decisions upon this administrative body or the State of Minnesota, or use the fact that they took those risks to obligate the Commission to do as the companies ask. It is axiomatic that a company must bear its own risks, and the Commission should not consider the impacts to the applicant and its shippers where those risks were self-created. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (halting construction of a power plant despite \$800 million investment because the company began construction before an Army Corps of Engineers permit had been granted); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (ordering injunction despite evidence of financial loss due to existing contractual obligations because the harm was largely self-inflicted caused by “entering into contractual obligations that anticipated a pro forma result”).

As a matter of law and public policy, the Commission discourages companies from using promotional practices to encourage use of their services. Minn. Stat. § 216B.243, subd. 3(4); Minn. R. 7853.0130(A)(3). While NDPC may not be encouraging use of refined petroleum projects, it is promoting a pipeline project across Minnesota that would be unnecessary, particularly at this location, absent its promotional activities.

iv. A System Alternative, or even no pipeline at all, will not affect the adequacy, reliability or efficiency of the shippers’ crude oil supplies.

NDPC has not proven that current facilities cannot meet demand. Minn. R. 7853.0130(A)(4). Although FOH does not oppose a pipeline in an environmentally appropriate location, the fact remains that the record does not demonstrate that any shortage or other disruptions in the supply of crude oil to the shippers would actually occur, absent the Project. No shipper has gone on record saying that if the pipeline is not built, it will not be able to obtain

crude oil. The reality is that there is a network of pipelines across the U.S. that service existing refineries with light crude oil from other sources, some of them domestic.

In fact, Marathon has stated only that the proposed Sandpiper pipeline could provide a more reliable and efficient source of *Bakken* crude, not light crude in general. (Ex. 13 at 5:134-35.) Marathon can supplement the supply of crude to its refineries with light crude from other sources, including domestic, Canadian, and non-Canadian foreign sources. (Ex. 13 at 10:253-58.) There is no evidence in the record that other sources of crude will not serve equally well for Marathon's needs for its Illinois refineries during the time required to assure that a pipeline is located correctly.

In short, not building the pipeline, or building in an alternate location, will not affect the "future adequacy, reliability, or efficiency of energy supplied" to any shippers, refineries or consumers. Minn. R. 7853.0130(A).

B. The Record Demonstrates That There Are More Reasonable And Prudent Alternatives.

The record demonstrates that there are more reasonable and prudent alternatives NDPC's Preferred Route. In particular, SA-04 and SA-05 have both been shown to be reasonable and prudent alternatives in the record. Each of these routes has been shown to be environmentally preferable for both Minnesota and Wisconsin, potentially commercially viable, and a more direct route to the markets NDPC claims it needs to serve.

To determine if the record contains a more reasonable and prudent alternative, Commission must consider:

- (1) the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;
- (2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;

- (3) the effect of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and
- (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives.

Minn. R. 7853.0130(B). Whether or not a system alternative is more “reasonable and prudent” is a determination that must be made based on the public interest, not NDPC’s private business interests. NDPC’s primary argument is that the alternatives are not “reasonable and prudent” because they do not conform to its shipping contracts, the executed TSAs. (Ex. 17 at 15:427-29.) However, that is not a valid consideration under the rule—the factors listed under the rule address the public interest.

In light of the burden of proof, it would be error for the ALJ or the Commission to apply a wooden interpretation to the rule in considering whether “a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties other than the applicant.” The appropriate approach is to consider, first, whether more evidence than not (i.e., a preponderance of the evidence) shows that the System Alternatives are better aligned with the public interest (i.e., more reasonable and prudent) than the NDPC’s Preferred Route. If they are, then it remains the applicant’s burden to show why such reasonable and prudent alternatives are not feasible or viable.

Here, the record clearly demonstrates that there are reasonable and prudent System Alternatives. Moreover, NDPC has failed to proffer sufficient evidence demonstrating that these several System Alternatives are not feasible or viable. Because the ultimate burden rests with the project proponent and because the record evidence establishes preferable alternative routes that have not been shown by NDPC to be infeasible or non-viable, the requested CON cannot be granted.

i. FOH's System Alternatives deliver oil where it is needed—to Illinois refineries.

The record contains no evidence that the size, type, or timing of NDPC's Preferred Route necessitates its selection over one of the System Alternatives. *See* Minn. R. 7853(B)(1). Rather, the System Alternatives offer more appropriate locations for pipelines than NDPC's Preferred Route. The record demonstrates that much, if not all, of the oil to be shipped via the Project is destined for Illinois. (T. Vol. III at 48:19-24.) NDPC has attempted to short-circuit the alternatives discussion by claiming that its "need" is limited to delivery of crude oil at Clearbrook and Superior. But this ignores the ultimate destination of the crude oil. SA-04 and SA-05 actually serve the refineries'—and ultimately the consumers'—needs more effectively than SA-Applicant.

NDPC witness Earnest stated that the crude oil shipped via the Project would be refined in the Midwest. (Ex. 14 at 6:104-07.) When asked to clarify which refineries he meant, he stated that it would include up to 15 refineries, only one of which is located in Superior. (T. Vol. I at 123:2-17; *see also* Ex. 3, Table 7853.0240-C.1 at 6.) SA-04 and SA-05 are more appropriate alternatives to meet the need to ship oil to these refineries—all of which are located in Illinois or states to the east. (*Id.*)

In its comments, MPCA also stated that the record supports the potential need for a pipeline that directly serves the Chicago area. (MPCA Comments, dated January 23, 2015 at 5.) MPCA strongly questioned whether alternatives through Clearbrook and Superior are the only alternatives that served the applicant's needs, noting that "Chicago appears to be a common destination for most if not all of the oil that is proposed to be moved through Minnesota," and that the record generally supports that need likely "can be achieved by several of the System Alternatives." (*Id.*) The System Alternatives that go where the oil is needed—and ultimately

destined—are more reasonable and prudent when considering the appropriateness of getting the oil where it needs to go: Midwest refineries.

ii. The cost of the alternatives has not been properly calculated, but may well favor alternatives.

NDPC has not demonstrated that the “cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives” necessitates the Project to be located in NDPC’s Preferred Route. Minn. R. 7853.0130(B)(2). However, Minnesota’s environmental statutes make plain that this consideration in the CON rule, alone, cannot justify the selection of NDPC’s Preferred Route. Environmental considerations must be paramount when comparing alternatives, and economics alone cannot justify the selection of an alternative. Minn. Stat. § 116D.04, subd. 6.

To the extent that NDPC attempts to make a cost comparison, the focus of NDPC’s study is inappropriately narrow. (*See* Ex. 17, Sch. 1.) The focus of the cost impacts, according to Minnesota Rules, is not only on the applicant and the shipper; it is also on the consumer. A true cost comparison between the routes has not been completed. A true cost comparison between the routes would compare the cost of shipping oil on the proposed pipeline route or alternative pipeline route, and then to its final destination—a refinery. It would then determine how, if at all, those different routes would impact the shipper and consumer.

NDPC alleges that it compared the costs of the various routes based on mileage, and found that the other System Alternatives were more expensive because they are longer. (Ex. 6, Sch. 1.) For instance, NDPC claimed that the additional cost of materials to build SA-03 is \$210 million for additional pipe and a pumping station. (*Id.* at 32.) But this is only a small part of the equation under Subdivision B(2)—the cost of the facility. It does not compare the cost of the System Alternatives to the consumers. NDPC did not ask its economic expert to consider any of

the indirect economic costs of the Project (T. Vol. IV at 59:15-60:6; 73:22-74:6.) There is no consideration of the potential remediation costs or other costs in the event of a spill. (*Id.*) The citizens of the State of Minnesota are asked to bear the environmental costs of the pipeline; the costs for a longer pipeline that avoids its most sensitive natural areas should be understood before the state can agree to take on the risks of the applicant's Preferred Route.

NDPC's allegation that the cost to its shippers will increase based on increased mileage, (Ex.6, Sch. 1), is also flawed. There are no shippers who are shipping only the length of this pipeline. Clearbrook is only a transfer point to the Minnesota refineries, and Superior is only a transfer point to other Midwest refineries in Illinois, Ohio, Michigan and Kentucky. Thus, shippers will also need to ship oil from their transfer point to the final destination, and will incur additional costs when they do so. NDPC's study does not take these costs into account.

Indeed, once those costs are taken into account, it may well be that the proposed System Alternatives are *less* expensive because they deliver the crude oil to a location that is far closer to its final destination. For instance, SA-04 and SA-05 deliver the oil to the Flanagan terminal in Illinois, (T. Vol. VII at 53:4-15), which may soon be connected to the Patoka area by way of the Southern Access Extension pipeline, (T. Vol. III at 50:3-16). It may be that refineries in the Midwest prefer a more direct pipeline rather than having to ship oil east on the Sandpiper, then south from Superior. A full and accurate cost comparison would take this into account.

A full and accurate cost comparison would also take into account the cost of future expansions between Superior and the Illinois refineries required to carry additional oil. Mr. Palmer stated that Marathon preferred the Superior shipping destination because Marathon thought that there was potential for future expansion of a pipeline that moves the oil from Superior to Patoka, Illinois. (T. Vol. III at 77:13-18.)

If the actual costs of the Project were considered and then compared to the System Alternatives, it would be clear that the System Alternatives are more reasonable and prudent alternatives to the Project.

iii. NDPC's Preferred Route has the greatest negative effect on the natural environment.

The Project's effects on the natural environment compared to the System Alternatives demonstrate that the System Alternatives are more reasonable and prudent. Minn. R. 7853.0130(B)(3). When comparing the effects on the natural environment among these alternatives, there are several important considerations:

- The landscape surface features and land uses that result in oil releases that rapidly spread away from the leak or rupture site and that thus can cause exponential increases in consequences. These include hilly terrain, moving water, locations with difficult access, situations where leaks occur under the ice, and locations containing natural resources that can be affected by oil releases. (Ex. 180 at 31:8-12.)
- The locations where the consequences of oil releases are lower or more likely to be mitigated. These include landscapes and land uses that tend to have little topographic relief, that have slower or more widespread water channels, that have numerous roads and open country for rapid containment, and that are set back from human populations and natural resources that are more difficult to mitigate. (*Id.* at 35:25-36:9.)
- The time frame for such risks as the project life. This is on the order of 40 or 50 years. (*Id.* at 41:34.)
- The underground landscape features that result in small leaks (sometimes referred to as "pinhole" leaks) that can go undetected by pipeline pressure monitoring, especially for longer period of time. Such features include locations with rapid groundwater flow away from the leak location, and areas of deep underground burial, such as under lakes or rivers where the pipeline can be 20-40 or more feet under the river or lake. (Ex. 184 at 10:13-11:11.)
- The locations where there are closely adjacent facilities also transporting oil products that are susceptible to damage from a pipeline rupture and accompanying ignition. (Ex. 180 at 18:32-36; 27:29-30.)

With the above considerations, and others, in mind, *every* independent expert who compared the System Alternatives concluded that NDPC's Preferred Route was the most

environmentally damaging of all of the System Alternatives. Both MPCA and MDNR concluded that NDPC's Preferred Route posed the greatest environmental risk compared with all of the System Alternatives. MDNR concluded that "[w]ithin Minnesota, more southern routes (south of I-94 corridor) have less concentration of natural resources (regardless of length) within the 2-mile corridor. . . . From a natural resource perspective, the more southern routes appear to be feasible and prudent System Alternatives that merit consideration." (Ex. 185 at 2.) Similarly, MPCA concluded "that with respect to protection of the highest-quality natural resources in the state, the SA-Applicant route presents significantly greater risks of potential impacts to environment and natural resources than several of the System Alternatives." (MPCA Comments, dated January 23, 2015 at 4.) Indeed, "the Applicant's proposed route encroaches on higher quality resources, superior wildlife habitat, more vulnerable ground water, and more resources unique to the State of Minnesota than do many of the proposed System Alternatives." (*Id.*)

In addition, CCLS witness Chapman conducted a GIS study of the various System Alternatives and analyzed the actual impacts of pipelines on those features based on his expertise as an ecologist. (Ex. 110.) Based on his study and analysis, he concluded that NDPC's Preferred Route posed the greatest environmental risk. (Ex. 112 at 9.)

The weighting analysis of important oil pipeline effects showed that the Preferred Alternative has the potential for the greatest effects both in Minnesota and also the multi-state area. . . . In Minnesota, this was because the Preferred Alternative has the greatest potential effect on: (1) rare habitats, (2) forest fragmentation and degradation, (3) alteration and spread of product in wetlands with little surface water, and (4) encroachment on public and conservation lands.

(*Id.*)

These experts also noted that the potential impacts of spills in NDPC's preferred location will be more significant when compared to the System Alternatives sponsored by FOH. (Ex. 185;

MPCA Comments, dated January 23, 2015.) FOH witness Stolen documented in detail how certain landscapes, such as the Lake Country Environmentally Sensitive Resources, may be more sensitive to oil spills, harder to clean up, or more difficult to access than other landscapes. (*See, e.g.,* ex. 184 at 11.) MPCA stated that:

An Alternative that avoids or impacts fewer sensitive ecosystems and water bodies than SA-Applicant will have a smaller likelihood of incurring significant response costs. As documented by the U.S. Environmental Agency (“USEPA”), **it costs considerably more to restore or rehabilitate water quality than to protect it.** The areas of the state traversed by the SA-Applicant have waters and watersheds that are currently subject to protection in the state’s “Watershed Restoration and Protection Strategy” program, financed through the Clean Water Fund and aided by significant volunteer participation of Minnesota citizens. **By keeping these waters as clean as possible before they become impaired, extensive costs of restoring waters to state standards can be avoided. Location of oil pipelines in these areas place their pristine waters at risk, and also place potentially millions of dollars in state and federal funds allocated for protection of these areas at risk.**

(MPCA Comments, dated January 23, 2015, footnotes omitted, emphases added.) “[L]ong-term impacts from a spill can be much more damaging in areas containing features such as environmentally sensitive areas and those with limited access.” (*Id.* at 7.)

NDPC’s Preferred Route presents many problems, including more pristine areas near natural water bodies. “A primary rule of thumb when planning for response to an oil leak is that a release in soil is better than a release in water, and a release in stagnant water is better than a release in flowing water.” (*Id.* at 13.) MPCA noted that when evaluating spill response costs, certain factors make one corridor preferable to another, including: “fewer crossings of flowing water, fewer adjacent water bodies; quality of those waters; presence of especially sensitive areas or habitats or species or uses; better access to downstream oiled areas; tighter soils; and closer and more equipped and prepared responders.” (*Id.* at 3.) MPCA concluded that “[f]rom the

perspective of minimizing risk of major environmental incidents due to inability to access potential leak sites in Minnesota, **the proposed Sandpiper route fares more poorly than any of the proposed System Alternatives.**” (*Id.* at 14 (emphasis added).)

Ultimately, MPCA concluded that the consequences of building a pipeline in NDPC’s preferred location were worse for all factors analyzed, including high quality surface waters, the potential for release at or near a water crossing, potential damage during construction and testing, threats to groundwater and potential drinking water supplies, and threats to wild rice and native forests. MPCA concluded that FOH’s System Alternatives were superior to others—including SA-03. The relative environmental effects of NDPC’s Preferred Route and the System Alternatives demonstrate that there is evidence of a more reasonable and prudent alternative in the record and NDPC’s CON application for its Preferred Route must therefore be denied.

iv. Reliability concerns do not weigh in favor of granting a CON for a pipeline in NDPC’s Preferred Route.

NDPC has not presented any evidence that there is demand for a pipeline to go through Clearbrook to Superior or that current facilities cannot adequately meet that demand. (*See* Part III.A *supra*.) As such, any delay caused by forcing NDPC to apply for a CON for a System Alternative in an environmentally appropriate location will not cause any reliability concerns. *See* Minn. R. 7853.0130(B)(4) (requiring the Commission to compare the expected reliability of the proposed facility with reasonable alternatives). Moreover, the change in oil prices has, at a minimum, bought the Commission the time needed to evaluate this Project fully and determine the right location for the State of Minnesota—even if that means a delay while NDPC evaluates one or more System Alternatives more fully.

v. The Commission cannot grant a CON for a System Alternative.

The System Alternatives are more reasonable and prudent than NDPC's Preferred Route, and NDPC has not presented any evidence that the System Alternatives are not feasible. NDPC admitted that it did not attempt to gauge potential shipper interest in a pipeline in an alternate location. (T. Vol. II at 66:18-25.) Marathon, the anchor shipper for the Project, admitted that it wants the pipeline to ship oil from the Bakken formation in North Dakota to Illinois—which is exactly the route of SA-04. (T. Vol. III at 48:19-49:1.) If there were actually a need, or demand, to ship oil out of the Bakken to various refineries in the Midwest, any of the proposed System Alternatives would accomplish this. What the System Alternatives do not accomplish is allowing these new pipelines to be considered “expansions” thereby allowing Enbridge and Marathon to foist the cost of building the project onto captive non-committed shippers. (T. Vol. II at 70:20-71:1-6.) But this is just another economic consideration for NDPC that cannot be the basis to approve a pipeline through the worst possible location from an environmental perspective. MERA and MEPA explicitly prohibit this.

But even though the System Alternatives are clearly more reasonable and prudent than the Preferred Route, the Commission cannot grant a CON for a System Alternative. The Commission bifurcated the CON and Route Permit Proceedings in order to address the System Alternatives at the CON stage. “The discussion and evaluation of appropriate route alternatives relies solely on a finding of need; thus a discussion on the need for the project prior to a route decision will bring additional clarity to the proceedings in both dockets.” (Ex. 48 at 8.) The Commission specifically directed that the System Alternatives be considered in the CON process because Minnesota Statute § 216B.243 governing need specifically addresses alternatives, as does Minnesota Rule 7853.0130(B). (*Id.* at 9.)

Although FOH has never opposed the prospect of a pipeline in an environmentally appropriate location, the Commission does not have the authority to grant a CON for a location for which NDPC has not applied. If there are more reasonable and prudent alternatives to the Project, the CON must be denied; NDPC could then apply for a CON for pipeline in an environmentally appropriate location.

C. NDPC Has Not Proven That The Consequences To Society Of Granting A CON Are More Favorable Than The Consequences Of Denying A CON For A Pipeline In This Location.

NDPC has failed to demonstrate that “the consequences to society of granting the [CON] are more favorable than the consequences of denying the certificate,” which is its evidentiary burden. Minn. R. 7853.0130(C). Indeed, the evidence clearly shows that the societal consequences of denying the CON far outweigh the societal consequences of approval. Minnesota, its environment, and its citizens have everything to lose from a project of this nature located in the state’s most sensitive, ecologically rich region, and very little to gain. Minnesotans have no need for this oil.

The applicable rule directs the Commission to consider four factors when deciding whether the applicant has established that the societal consequences of CON approval outweigh the societal consequences of denial:

- (1) the relationship of the proposed facility, or a suitable modification of it, to overall state energy needs;
- (2) the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility;
- (3) the effects of the proposed facility, or a suitable modification of it, in inducing future development; and
- (4) socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its uses to protect or enhance environmental quality[.]

Id. These factors focus on the *societal* consequences of granting a CON for a pipeline in this location—not the interests of one pipeline company or one anchor shipper.

i. The proposed pipeline does not serve state energy needs.

The record demonstrates that the Project does not serve the energy needs of the State of Minnesota. *See* Minn. R. 7853.0130(C)(1) (requiring consideration of the relationship of the Project to overall state energy needs). The Project will not result in increased oil deliveries to Minnesota refineries. (Ex. 50 at 88:21-23.) NDPC alleges that the refineries will nevertheless benefit from the “redundancy” of multiple pipelines into Clearbrook, but the record does not demonstrate that the refineries want that so-called benefit. SPPRC argued to the FERC that the Project was unnecessary because it had “received timely service from NDPC, [it] ha[d] not been subject to apportionment, and construction of the Project would increase production costs.” (*Id.* at 24:14-16.) NDPC is unable to quantify any of the alleged redundancy benefits that Minnesota refineries will enjoy. (T. Vol. III at 92:1-8.) Vague unsupported claims are not evidence on which a decision maker should rely, especially when, as here, the record actually supports that the pipeline will have a negative effect Minnesota users: NDPC admits that the Project will increase the costs paid by current users of Line 81—namely Minnesota refineries.⁹ (Ex. 50 at 26:7-9.) NDPC acknowledges that the Project will increase costs to its existing shippers—by approximately \$0.40 per barrel. (*Id.* at 25:18-19.) In other words, not only would the Project not benefit Minnesota refineries and shippers; it will harm them.

Moreover, the record does not demonstrate any positive consequences to the end consumer in Minnesota or across the U.S. as a result of the Project. The Energy Information

⁹ The shippers commenting in the FERC proceeding also stated that “the very structure of the Sandpiper Project is designed to permit Marathon to use capacity for which uncommitted shippers will be paying.” (Ex. 183, Sch. 4 at 183.) This includes Minnesota refineries.

Agency's 2014 Annual Energy Outlook "predicts flat to declining petroleum consumption in the United States between now and 2040." (*Id.* at 13:13-14.) In Minnesota, consumption of petroleum products decreased approximately 14% from 2005 to 2012. (*Id.* at 19:13-15.)

In contrast, denying the CON so that a pipeline could be built in one of the alternative locations avoids the harm to Minnesota refineries and would provide the limited benefits associated with a new outlet for Bakken oil. A pipeline that does not go through Clearbrook would not increase shipping costs to shippers using Line 81 because the pipeline would not be considered an "expansion" according to the FERC. (T. Vol. II at 70:25-71:6.) NDPC would therefore not be able to raise the prices charged to captive uncommitted shippers currently shipping on Line 81. (T. Vol. II at 70:20-24.)

When considering the relationship of the Sandpiper Pipeline to overall state energy needs, the consequences of granting the CON are not at all favorable—Minnesota refineries do not want or need the Pipeline but will nevertheless be charged higher shipping costs because of it. In contrast, denying the CON so that the pipeline can be built in a more suitable location will be favorable to state energy needs. A pipeline in an appropriate location will save Minnesota refineries from increased costs for a pipeline they do not support, may provide a cushion against potentially increasing rail traffic, and will bring the limited job and tax benefits so aggressively promoted by NDPC in its publicity campaigns throughout the state.

ii. The environmental effects of the Project require denial of the CON.

Consideration of the environmental effects of a pipeline in NDPC's Preferred Route weighs against approval. Minn. R. 7853.0130(C)(2). The State of Minnesota is asked to bear the costs of these projects in the form of loss of habitat, wetlands, forested and recreational areas, and most significantly, the risk of a major oil spill. Major oil spills can cost billions of dollars to

clean up, and can impact a huge area, can cause long-term damage, and, depending on location, cannot be fully or even significantly mitigated in certain areas.

There are established techniques of conducting risk assessments that are used with many types of technologies, including pipelines. A fundamental principle of such assessments is that if the consequences of failure are very high, even very rare events must be closely examined as to both likelihood and to consequences. (Ex. 180 at 9:34-10:2.) There is no question that a crude oil pipeline presents a risk to the environment or that the risk of a spill is particularly significant.

According to MPCA:

Environmental risks are posed by all aspects of pipeline construction and operation, including post-spill recovery and restoration activities. The primary and most significant risks are associated with the long-term effects upon environmental and natural features that will be permanently altered, eliminated, or otherwise impacted by the presence of a pipeline, as well as the potential impacts of the release of crude oil as the result of a spill event during the potential 40 years or more that the pipeline will be operational. Those risks include environmental damages such as loss of wildlife, contamination of drinking water, destruction of fisheries, loss of habitat, and alteration of ecological systems.

(MPCA Comments, dated January 23, 2015 at 4.)

For instance, oil spills can be highly toxic and persistent.

Compounds of particular concern present in light crude oils are within the group called the polycyclic aromatic hydrocarbons (“PAHs”). . . . These compounds may either evaporate into air, move into water providing an exposure field to organisms, or adhere to soil and wetland substrates for decades. They are also some of the more toxic compounds in oils, although toxicity depends on other factors, such as route and duration of exposure.

(Ex. 182 at 7:18-24.) PAH content can determine the extent of damage—both biologically (in terms of the numbers of organisms killed or harmed) and economically. (*Id.* at 8-9.)

Bakken oil is particularly toxic in its initial effects, and may persist for decades. (*See id.* at 7:21-24.) Bakken oil is chemically similar to diesel. (*Id.* at 5:22-24.) This gives it a tendency to spread quickly, more quickly than heavy crudes such as tar sands oil, for instance. (*Id.* at 6:1-10.) Additionally, diesel spills may cause immediate and widespread wildlife kills. (*Id.* at 7:11-13; 8:25-28.) Diesel spills may also persist in the environment over decades, still impacting wildlife many years later. (*Id.* at 8:19-22.)

Evaporation and natural attenuation may limit the impacts of oil spills in some locations, but the effects of these natural phenomena vary greatly based on the location of a spill, and may be much more limited than NDPC's expert proposes. (*See id.* at 8-10.) Mr. Wuolo testified that impacts on surface water and groundwater may be limited. (Ex. 28 at 3:94-4:105.) However, Mr. Wuolo notes that 171 of Minnesota's lakes are at risk from pipeline spills from the Project, and, further, 33 of these are immediately downstream. (*Id.* at 5:156-60.) While Mr. Wuolo attempts to minimize this number by suggesting that it is a small percentage of the total watershed, that percentage is meaningless because it only reflects the size and density of lakes in the total watershed. It only takes the destruction of one lake to constitute an unacceptable impact to Minnesota's natural resources.

Further, the Barr Engineering study entitled "Potential effects of the Operation of the Sandpiper Pipeline Project on Lakes" is not a study of "potential effects . . . of the Sandpiper Project." (*Id.* at Sch. 2.) Instead, it is merely *data* about lakes and watersheds in the area. "Data" are not an analysis—or even a rudimentary assessment—of potential impacts; data provide the underpinning for "analysis." Furthermore, the report contains insufficient data necessary to achieve its ambitious title, since it contains nothing about potential spill magnitude of the "worst-case" analysis that has been conducted by NDPC, as required by PHSMA rules. (Ex. 184 at 13:1-

5; 14:26-27.) Therefore, the lake study should be rejected as being nearly immaterial for the decisions on this Project.

With respect to groundwater, the impacts to groundwater are potentially much more significant than Mr. Wuolo acknowledges. Mr. Wuolo relied on U.S. Geological Survey (“USGS”) analyses of the Bemidji oil site for his conclusion that natural attenuation, or microbes, would limit the impacts of a spill on groundwater. (*Id.*, Sch. 3.) While microbes may consume some compounds very effectively, they are naturally “finicky” and it is very challenging to predict how they react in different situations. (Ex. 182 at 11:23-12:3.) In addition, each oil spill is unique. (T. Vol. VI at 42:17-19; Ex. 182 at 12:4-7.) Therefore, it stands to reason that the experience from the USGS study site therefore cannot necessarily be universalized.

Mr. Wuolo uses the USGS study site to imply or even reach two unsupported general conclusions: (a) that oil that reaches groundwater will biodegrade from microbial action and thus will reduce impacts to a non-significant level, and (b) that the USGS study site largely is representative of other groundwater sites along the NDPC route. (Ex. 28 at 8:258-9:276, Sch. 3 at 13-14.) But Mr. Wuolo admitted that groundwater has movement rates of six or seven feet per day in the aquifers in the vicinity of Park Rapids. (T. Vol. VI at 57:7-12.) Assuming that Mr. Wuolo’s numbers are correct this is a groundwater movement rate 35 times that of the Bemidji USGS study site. Furthermore, the rate of biodegradation—and its importance in reducing impacts to groundwater—is a function of how the length of time before microbial populations adapt to the oil—which can be a matter of weeks,—and how far the oil travels as the adaptation occurs (Ex. 28, Sch. 3 at 10-11.) The USGS study site is looking at oil that has been in groundwater for 36 years and the plume has traveled about 650 feet. (*Id.* at 13.) Doing the simple

math, groundwater could travel up to 73 feet per year at the USGS study site versus up to 2,550 feet (almost one-half mile) per year in aquifers south of Park Rapids.

The record demonstrates that even small spills and leaks present a great risk. (*Id.* at 10:17-19.) Very small leaks, or pinhole leaks, can go undetected for months, resulting in potentially very large leaks over time (e.g. 35,300 gallons per month over several months). (Ex. 184 at 23:18-26.) NDPC's response to this disturbing figure was only to refer to its integrity management plan without any substantive details other than visual observation along the pipeline route. Neither these plans nor other submitted information adequately assess or characterize the magnitude, likelihood, or significance of this risk, which is quite significant. (*Id.*; MPCA Comments dated January 23, 2015 at p. 13; Ex. 180 at 30:1-35.)

The record also demonstrates that oil spills are expensive, time-consuming endeavors. (Ex. 182 at 8; 9:1-15.) Enbridge's recent highly publicized leak from a pipeline in Michigan has cost the company more than \$1.2 billion to clean up. (Ex. 180 at 32:13-14.) In 2010, an Enbridge pipeline ruptured into a tributary of the Kalamazoo River. (*Id.* at 56:37.) Approximately 20,000 barrels of crude oil were released, and the cleanup costs now exceed \$1 billion. (*Id.* at 32:13-14; 56:37-37.) It took pipeline operators 17 hours to shut down the pipeline after its safety monitoring systems indicated that the rupture occurred. (*Id.* at 24:26-28.) Impacts occurred over 35 miles downstream. (*Id.* at 24:22-30; App. 1.) Mr. Stolen's testimony also details other major spills since 2010, including two at Line 14 in Wisconsin that released over 2,500 barrels of oil even though Enbridge mobilized a rapid response, a pipeline rupture in 2011 under the Yellowstone River that resulted in 1,509 barrels of oil released and cleanup costs at \$135 million and rising, and a natural gas pipeline explosion in 2010 that was the direct result of a lack of oversight from the federal government. (*Id.* at 24-25.)

Finally, very little is currently known about how Bakken oil will behave when an oil spill inevitably occurs. (Ex. 182 at 5:1-8.) Bakken oil is highly variable in its content, and the content may dramatically change where oil goes, the damages it causes, and decisions on how and even whether to remediate a spill. (*Id.* at 7:1-14.) NDPC is asking Minnesota to bear the risk of the consequences of an oil spill based on very little information about those potential consequences. Therefore, NDPC's assurances that any impacts will be limited should ring hollow to any decision-maker given the lack of information.

Thus, it is clear that the environmental consequences of granting a CON for a pipeline in NDPC's Preferred Route are potentially catastrophic. In contrast, the socioeconomic consequences of denying a CON so that a pipeline can be constructed in a more appropriate location are minimal. NDPC provided testimony from several witnesses and sponsored an outside expert report espousing the economic benefits the Project will bring to Minnesota. But all of these purported benefits will come to Minnesota whether the pipeline is built in NDPC's Preferred Route (the most ecologically sensitive area) or in the location of one of the System Alternatives (the more resilient areas recommended by state agencies and FOH). (T. Vol. I at 64:24-65:8.) None of these alleged benefits weigh in favor of granting a Certificate of Need for a pipeline in the proposed location.

iii. Granting a certificate of need for a pipeline in this location will lead to future pipeline development in an ecologically sensitive part of Minnesota.

Future development is already planned in NDPC's Preferred Route if a CON is granted for the Project, and this weighs against NDPC's application. *See* Minn. R. 7853.0130(C)(3). If NDPC is successful in its bid to place a pipeline among the Lake Country Sensitive Resources, the Project will not be the only pipeline to be located in this corridor pursuant to NDPC plans. NDPC has already announced plans to locate a second pipeline, Line 3, along this corridor.

(Ex. 184 at 22:16-28.) Line 3 will carry tar sands oil from the Alberta tar sands region, and may carry as much as 760,000 bpd. (Wuolo Cross at 27:3 (tar sands); Ex. 183, Sch. 2 at 24 (volume).) Thus, in all, this corridor will carry over a million bpd, and the Lake Country Environmental Resources along this corridor will be at risk from both Bakken oil, which is light and may spread quickly, and tar sands oil, which is heavy and sinks. (Ex. 182 at 11.)

In addition, the construction of the Project and Line 3 will prompt further expansion of pipelines out of Superior, which is not the final destination for any of the oil NDPC plans to transport. (T. Vol. II at 114:18-115:10.) In order to get the crude oil shipped on the Sandpiper and Line 3, shippers will need additional pipeline capacity to carry the oil to refineries in the lower Midwest. (T. Vol. II at 99:25-100:1-5.) In contrast, FOH's proposed System Alternatives would transport the oil directly to Enbridge's Illinois locations and avoid the need for more capacity through Wisconsin. Therefore, the FOH approach would not only spare Minnesota from some of the environmental threats posed by pipelines, it would also save our neighboring states from the future development that follows from granting a CON for a particular corridor.

Minnesota Rule 7853.0130(C)(3) explicitly requires the Commission to consider the possibility that the proposed energy facility will induce future development. Additionally, the Commission has acknowledged the applicability of MEPA. (Ex. 48 at 11.) While it has declined to order an EIS, an agency must nevertheless consider cumulative effects under MEPA. Minn. Stat. § 116D.04, subd. 7; Minn. R. 4410.2300(H). If these cumulative effects are properly considered, it becomes clear that the consequences to society of granting a CON for NDPC's preferred location are not favorable.

iv. The socially beneficial uses, if any, of the output of the pipeline are not dependent on location.

The “output” of the Project does not have socially beneficial uses, particularly when considering if those uses are “to protect or enhance environmental quality.” Minn. R. 7853.0130(C)(4). Crude oil is not beneficial to the environment, but instead it is refined, burned as fuel and contributes to climate change. (Comments of Frank Hornstein, Minnesota State Representative and Scott Dibble, Minnesota State Senator, January 23, 2015 at 4). Second, to the extent that the output is beneficial, the system alternatives can provide the same benefit.

D. The Design, Construction, And Operation Of The Sandpiper Pipeline Would Not Comply With Minnesota State Law.

NDPC cannot establish that it “has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.” Minn. R. 7853.0130(D). The operation of this pipeline will fail to comply with both MEPA and MERA.

MEPA states that:

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state’s paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations shall not justify such conduct.

Minn. Stat. § 116D.04, subd. 6 (2014) (emphases added).¹⁰

Similarly, MERA states that:

In any such administrative, licensing, or other similar proceedings, the agency shall consider the alleged impairment, pollution, or destruction of the air, water, land, or other natural resources located within the state and **no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative** consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction. **Economic considerations alone shall not justify such conduct.**

Minn. Stat. § 116B.09, subd. 2 (2014) (emphases added).

Constructing the pipeline in NDPC's Preferred Route does not comply with these statutory provisions. There are feasible and prudent alternatives to constructing a pipeline in NDPC's Preferred Route; alternatives which are more "consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land, and other natural resources from pollution, impairment, or destruction." Minn. Stat. § 116D.04, subd. 6; Minn. Stat. § 116B.09, subd. 2. The state policy is clear from these provisions: the protection of the Minnesota's air, water, land, and other natural resources from pollution, impairment, or destruction is a "paramount concern" and should be of paramount consideration by agencies when making decisions such as the one at hand. "By definition, the word 'paramount' as used in the phrase 'the state's paramount concern for the protection of its air, water, land and other natural resources' means 'superior to all others.'"

¹⁰ FOH addresses MEPA and MERA compliance in the context of the CON rule, but also asserts that these statutes provide a separate and independent basis on which the applicant's Preferred Route for the Project must be denied. Both MEPA and MERA—independent of any consideration required under the CON statute—prevent the Commission from allowing a project that will cause pollution, impairment, or destruction of the state's natural resources to proceed where there are feasible and prudent alternatives.

Floodwood-Fine Lakes Citizens Group v. Minn. Env'tl. Quality Council, 287 N.W.2d 390, 399 (Minn. 1979).

Because protection of our state's resources is the concern that must be considered "superior to all other" concerns, and because granting a CON for a pipeline in this location ignores those concerns, there is no question that granting a CON for a pipeline in NDPC's preferred location will violate both MERA and MEPA. As discussed below, the System Alternatives under consideration are "feasible and prudent" compared to NDPC's Preferred Route. Moreover, NDPC's objection to the System Alternatives and Modified SA-03 is purely economic—a consideration that cannot be used as the sole criterion under both statutes.

i. The System Alternatives are "feasible and prudent" under MERA and MEPA.

The record demonstrates that there are alternatives to a pipeline in NDPC's Preferred Route that are "more reasonable and prudent" as that phrase is used in Minn. R. 7853.0130. The record also demonstrates that there are "feasible and prudent" alternatives to the proposed Sandpiper Pipeline as that phrase is used in MERA and MEPA.

"As interpreted by [the Minnesota Supreme Court], the prudent and feasible alternative standard is analogous to the principle of nonproliferation in land use planning." *People for Env'tl. Enlightenment and Responsibility (PEER) v. Minn. Env'tl. Quality Council*, 266 N.W.2d 858, 868 (Minn. 1978). Minnesota courts have followed the principle of nonproliferation of utility corridors. *Id.* According to the Minnesota Supreme Court, when considering alternatives, agencies must "comply with this policy of nonproliferation in choosing between alternative sites." *Id.* This policy reflects the state's "strongly held commitment to protecting the air, water, wildlife, and forests from further impairment and encroachment." *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 832 (Minn. 1977)). Based on the state's "strong held

commitment” to protect the environment and the policy of nonproliferation expressed in legislative enactments, the court stated:

We therefore conclude that in order to make the route-selection process comport with the Minnesota’s commitment to the principle of nonproliferation, the MEQC must, *as a matter of law*, choose a pre-existing route unless there are *extremely strong reasons* not to do so.

Id. at 868 (emphases added).

This principle would prohibit choosing an alternative that encroaches or impairs greenfield areas rather than using existing corridors. As previously discussed, NDPC’s Preferred Route has the highest percentage of greenfield than any other System Alternative. (NDPC’s Comments Regarding System Alternatives, August 21, 2014 at 2.) Based on this fact alone, the System Alternatives that use existing corridors, e.g. FOH’s SA-04 and SA-05, are feasible and prudent alternatives to NDPC’s Preferred Route unless there are “extremely strong reasons” to reject them. NDPC has not overcome that strong presumption against its Preferred Route.

NDPC proposed the *most* environmentally harmful location for the Sandpiper Pipeline and is now claiming that because there are no alternatives that are also located in this destructive corridor, there are no feasible alternatives. This kind of attempt to box Minnesotans into a corner and force an environmentally destructive decision is precisely the reason that MERA and MEPA were passed. “Prior to the passage of these laws, holders of eminent domain rights could simply decide to construct new . . . facilities, decide on a route, and go ahead and acquire the rights of way.” *No Power Line Inc. v. Minn. Env’tl. Quality Council*, 262 N.W.2d 312, 331 (Minn. 1977) (Yetka, J, concurring specially).

With the passage of the environmental policy contained in c. 116, however, the legislature clearly intended to place conditions and limitations on further destruction of the environment. The legislature decided, with the wisdom which must guide the courts,

that before generating and transmission facilities could be constructed the need for those facilities and the impact on the environment must be considered.

Id. In *No Power Line*, Justice Yetka criticized the fact that a route for a power line was selected before there was any determination of need. Specifically, he stated that it is inappropriate to narrow possible alternatives by allowing a utility “to select the entry point from North Dakota and the terminal point.” *Id.* As he stated, “It is entirely possible that if these two points had not been decided upon early in the game, new corridors could have been selected far from the point of actual selection.” *Id.* MEPA and MERA were enacted to prohibit the type of behavior criticized in *No Power Line* and displayed by NDPC in this case—forcing the state to accept an environmentally destructive activity when less harmful alternatives exist.

ii. Economic considerations do not justify selecting NDPC’s Preferred Route.

NDPC has offered no allowable basis for selecting its Preferred Route over a System Alternative. NDPC argues that System Alternatives are not feasible is based on speculative financial harm to shippers. (Ex. 14, Sch. 2 at 52.) For example, Marathon claims that the longer pipeline routes are not reasonable because they will result in increased costs to shippers of \$0.33-\$0.36 per barrel. (Ex. 22 at 2:47-48.) Similarly, NDPC claims that the System Alternatives are not reasonable because they put the viability of the TSAs and FERC approval at risk. (Ex. 21 at 5:139-42; 166-69.) But NDPC admitted that it took a calculated business risk to enter into contracts that include these specific delivery points (T. Vol. II at 69:3-6) and to seek regulatory approval for a rate structure that allegedly hinges on specific delivery points (T. Vol. II at 70:1-8). NDPC admitted it did not have state approval to construct a pipeline in this location when it took these risks. (T. Vol. II at 68:24-69:2.)

NDPC's arguments as to why the System Alternatives are not reasonable are purely economic. And even those arguments are speculative and not backed up with the kind of analysis that its resources would allow it to develop. NDPC has not provided any evidence aside from its unsupported claims of self-inflicted economic harm that justifies its Preferred Route over the System Alternatives. And the speculative economic harm cited by NDPC does not take into consideration the potential costs of a spill in the Preferred Route compared to a spill in the System Alternatives. But the statutes are clear: economic considerations alone are insufficient to justify an environmentally destructive choice under both MERA and MEPA. Minn. Stat. §§ 116B.09, subd. 2, 116D.04, subd. 6.

The law is clear that the System Alternatives are "feasible and prudent" under MERA and MEPA and, therefore, if NDPC's Preferred Route is granted a CON, the pipeline construction and operation will violate MEPA and MERA. Accordingly, NPDC cannot meet the requirement in Minn. R. 7853.0130 (D) and a CON for a pipeline in this location should be denied.

IV. MEPA PROHIBITS THE COMMISSION FROM MAKING A FINAL DECISION TO GRANT A CERTIFICATE OF NEED FOR THE SANDPIPER PIPELINE UNTIL IT HAS COMPLETED ENVIRONMENTAL REVIEW REQUIRED BY STATUTE AND RULE.

The Commission may not grant a CON for a proposed pipeline prior to completion of environmental review as required by MEPA. The purpose of environmental review is to allow agencies and the public to fully understand the environmental impacts of a project before the agencies take action on the project. It has no purpose after action has already been taken, because it cannot inform those decisions. The plain language of MEPA and its implementing regulations preclude the Commission from taking action on the certificate of need prior to satisfying their procedural and substantive requirements.

A. The Certificate Of Need Is A “Final Governmental Decision” Under MEPA.

MEPA prohibits any “final governmental decision . . . to grant a permit, approve a project or begin a project” until the EIS has been determined to be adequate. Minn. Stat. § 116D.04, subd. 2b; Minn. R. 4410.3100. A permit is defined to include “a permit, lease, license, certificate, or other entitlement for use or permission to act that may be granted or issued by a governmental unit.” Minn. R. 4410.0200, subp. 58.

MEPA’s prohibition applies to all permitting and approval decisions, including a CON for a large pipeline. The definition of “permit” is intentionally broad to encompass any sort of agency approval, including, notably, the term “certificate.” Minn. R. 4410.0200, subp. 58. The Environmental Quality Board (“EQB”) 2010 Guide (hereinafter “EQB Guide”) uses similarly broad language, stating that one of the “key purposes of environmental review is to provide information about potential environmental effects and how to avoid or minimize those effects to each of the governmental units which will approve or conduct the project.” EQB Guide at 13. The information has no utility unless the governmental units have that information available when they take action on the permits. *Id.*

B. A “Final Governmental Decision” Such As A Certificate Of Need May Not Be Made Prior To Fulfilling The Procedural And Substantive Requirements Of MEPA.

The EQB Guide states that a “moratorium is automatically placed on action or project approval and construction” whenever environmental review is required. EQB Guide at 5. The EQB explains in its Guide that this prohibition on granting approvals prior to completing environmental review is one of the “key purposes” of environmental review. “To issue permits or approvals before the information is available undermines the very purpose of the review. That is the reason why all decisions approving the project (or parts of the project) are prohibited until the review has been completed.” *Id.* at 13.

The EQB has specifically explained that a “final governmental decision” in the context of MEPA means “not to be altered or undone; rather than ‘last.’” *Id.* In fact, the EQB Guide explains that granting a preliminary approval prior to completion of MEPA review is a violation of the statute, and the EQB has had to correct this error in the past:

Governmental units have taken the position that permits or approvals that did not directly authorize the construction or operation of the project were not subject to the prohibition. To the contrary, the statutory wording applies to *all* permitting and approval actions that apply to a project for which environmental review is required and not yet completed. Again, the intent of the law is that all project-related governmental decisions benefit from the information disclosed through the process.

Id. at 14.

The CON decision is precisely the sort of “final” government decision that is prohibited because it prejudices the ultimate decision prior to a completed environmental review. “Prejudicial actions are those that limit alternatives or mitigative measures or predetermine subsequent development.” *Id.* at 15. Actions that “make one option, including the option of not building the project, more or less likely to be chosen are prohibited.” *Id.* The CON will determine which route or routes will be examined as part of the Route Permit, and will eliminate other routes from consideration, thereby limiting alternatives and prejudicing the ultimate decision prior to completion of environmental review.

C. The Environmental Review Ordered By The Commission Does Not Comply With MEPA.

Although the Commission recognized the importance of conducting environmental review as part of the CON proceedings, the environmental review ordered the Commission is not, by its own admission, in compliance with MEPA. When the Commission ordered the environmental review, it “recognize[d]” that it would “not be equivalent in terms of the

specificity and level of detail to a comparative environmental analysis undertaken in the Route Permit proceeding.” (Ex. 48 at 12.) It also “emphasize[d]” that it “is not attempting to establish a separate form of alternative environmental review for certificate of need proceedings.” (*Id.*) Thus, the Commission did not and never intended to comply with MEPA, but merely made a nod to its requirements and then pursued a different form of environmental review that is not recognized under MEPA and does not include any of MEPA’s procedural safeguards. *See, e.g.*, Minn. R 4410.2100, .2600, .2700, .2800. Instead, it simply ignored the requirements of MEPA.

Moreover, the EQB-approved alternative environmental review conducted during the Route Permit stage will not comply with the requirements of MEPA for the CON determination because that alternative environmental review will not take place until *after* the CON is granted or denied. The Commission is authorized to conduct joint hearings on the Route Permit and CON hearings, Minn. Stat. § 216B.243, subd. 4, but in this case the Commission decided that it was in the public interest to bifurcate these decisions (Ex. 48). The Commission also decided that the need determination should occur first. Accordingly, the entire pipeline Route Permit process has been suspended indefinitely, including the EQB-approved alternative form of environmental review.

Without first completing an EIS or an EQB-authorized alternative form of environmental review, Commission cannot make a final decision about whether NDPC has justified a need for the Project.

V. THE DOC-EERA SYSTEM ALTERNATIVES REPORT DOES NOT COMPLY WITH THE COMMISSION’S OCTOBER 7 ORDER.

The Commission considered the issues raised by FOH and others about the poorly chosen location of NDPC’s Project to be significant enough to order that the environmental features of the System Alternatives be considered and compared as part of the CON decision. (*Id.*) The

Commission specifically instructed the DOC-EERA to prepare a report that “examines and evaluates the potential impacts of the proposed project.” (*Id.* at 11.) The Commission stated that the report should investigate the “natural and socioeconomic *impacts*” and would evidence “the relative risks and merits of choosing a different system alternative.” (*Id.*)

But the study conducted by the DOC-EERA did not evaluate how the System Alternatives compare to one another. Rather, the study was merely data and was not an analysis of impacts. (Ex. 184 at 9:3-18.) DOC-EERA did not attempt to come to *any* conclusions about the various alternatives, but instead simply stated that its data compilation could be used by others to argue for or against the alternatives. (Ex. 80 at 12.) There is no analysis in its report. As Ms. Pile testified, DOC-EERA did not attempt to place values on environmental features but instead simply counted the number of features in a two-mile wide corridor for proposed alternatives. (T. Vol. VII at 242:11-15.) Therefore, the document cannot be used to evaluate and analyze the environmental effects of the System Alternatives, as the Commission requested. (Ex. 184 at 9:3-18.) As noted by the MDNR, “due to the limited scope requested for this document, the broad geographic area, and challenges related to the type of data and analysis used, MDNR was not able to use this document alone to identify the least environmentally impacting System Alternatives.” (Ex. 185 at 1.) MPCA also noted that the tool used by DOC-EERA—ArcGIS—does not demonstrate the quality of the resources when comparing corridors. (MPCA Comments, dated January 23, 2015 at 14.)

Enbridge also prepared its own comparison of System Alternatives using somewhat different methods (Ex. 17, Sch. 1.) However, its report was also a “data” report, and not an assessment or analysis of impacts. (*Id.*) Furthermore, testimony from Enbridge indicated that studies in the vicinity of the proposed route over a several-year period resulted a significant

number of route modifications to avoid sensitive features and reduce impacts. (T. Vol. V at 94:19-23.) This means that a bias in favor of the proposed route would result, since the System Alternatives were not subject to the same degree of study.

FOH contends that the expertise brought to bear by MPCA, MDNR, FOH, and CCLS provides a sufficient record on which to conclude that the CON for NDPC's Preferred Route should be denied. The findings of these experts provide by far the most independent and scientifically based information concerning environmental impacts the System Alternatives to be found in the current record. The DOC-EERA report itself cannot be relied upon as a basis for granting or denying the CON, as it does not comply with the Commission's Order.

CONCLUSION

It is clear that NDPC has not established a need for the Project. NDPC is a joint venture between two companies that will benefit from a pipeline that traverses Minnesota's Lake Country's Environmentally Sensitive Resources. Other than these two companies, the record contains little-to-no information about any benefits that a pipeline in this location might provide to society, Minnesota, or neighboring states. Given this lack of record evidence establishing a public need for a pipeline to be located in NDPC's Preferred Route, FOH respectfully recommends that Your Honor recommend denial of NDPC's application.

Dated: February 27, 2015

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