

**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

**EXCEPTIONS TO THE ALJ'S REPORT
OF
FRIENDS OF THE HEADWATERS**

APRIL 28, 2015

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INTRODUCTION

Judge Lipman’s recommendation to the Commission suffers from four major errors of law, all of which form the basis of his Findings of Fact, Summary of Public Testimony, Conclusions of Law and Recommendation to grant a Certificate of Need (“CON”) for the applicant’s preferred location for its pipeline project. In contrast, the attached Proposed Findings of Fact and Conclusions of Law from Friends of the Headwaters¹ are grounded in the applicable statute and rule and the facts in evidence. As a result of these fundamental flaws, the Public Utilities Commission (“Commission”) should disregard the Administrative Law Judge’s (“ALJ’s”) recommendations and deny the Certificate of Need for the Sandpiper Pipeline.

First, contrary to the ALJ’s conclusions, the Commission has the discretion to deny a Certificate of Need for a pipeline, even if the application fulfills the bare requirements laid out in rule. The PUC has ample discretion to deny a Certificate of Need for a proposed pipeline based on the record evidence if it so chooses, under the both the statutory direction given by the state legislature and its own rules. To find otherwise would set a disastrous precedent for future pipeline projects.

The Commission has not traditionally denied “need” certification requests from pipeline companies. But now, the winds have shifted, and the time has come for the Commission to actively exercise the authority given it by the Minnesota legislature. As the Commission’s earlier actions in this proceeding demonstrate, Minnesota is not merely a speed bump for crude oil moving to distant markets. The burden of proof for a pipeline company must be more than a “check list” of requirements to fulfill. Simply because a pipeline company wishes to put a pipeline in a particular location does not make an inevitability. It is the right and the

¹ For the convenience of the Commission, a redlined version of the ALJ’s Proposed Findings of Fact and Conclusions of Law is incorporated by reference and attached to these Exceptions as Attachment A.

responsibility of the Commission to make this decision in the best interest of the state of Minnesota. Contrary to the ALJ's recommendations, the company's bottom line cannot determine the outcome of these proceedings.

Second, this case is about the public interest, an interest the ALJ's Findings of Fact do not recognize. The citizens of Minnesota have little or nothing to gain from this pipeline, while we are asked to risk a great deal, putting our clean water, other natural resources and our taxpayer dollars at risk during construction and in the event of an accident. The ALJ's Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendation (hereinafter "Findings of Fact") attempt to answer the question, "Is this the right pipeline for the oil shippers and the applicant?" But the question the Commission must answer is, "Is this the right pipeline for Minnesota?"

Third, the applicant continues to bear the burden of proof, and this burden is greater than merely checking off the minimum requirements of an application process. The construction of a large energy facility is not and should not be presumed. The Commission as well as the Minnesota Legislature have recognized that there are social costs to any large energy facility in the form of environmental impacts, and there are environmentally preferable alternatives such as energy conservation. The fact that Minnesotans aren't consuming any of this energy directly makes it all the more important for the state to assert its right to control the type and location of energy facilities that cross the state, as the state bears all the risks and enjoys none of the benefits.

Fourth, the ALJ's opinion ignores environmental issues, including the expert opinions of both the Minnesota Pollution Control Agency ("MPCA") and the Department of Natural Resources ("MDNR"). Despite the fact that the record contains opinions of four experts on

environmental impacts of pipelines, including Minnesota's two expert environmental state agencies, the ALJ fails to come to any meaningful conclusions about the comparative environmental effects of the system alternatives. This is not the kind of thorough, thoughtful and professional review of environmental impacts that the Commission clearly told parties it wanted when it set up this process last summer. It would be contrary to the Commission's own statements regarding the need for environmental analysis to adopt the proposed findings for this huge project, given its own stated requirements. Instead, we believe, based on sound law and policy, the PUC must conclude either: (1) the existing record is inadequate to evaluate the various system alternatives, in which case additional work must be done before a CON may be granted; or (2) the existing record is sufficient to demonstrate that NDPC's route is the least preferable environmental option, and therefore the requested CON must be denied. The record supports no other conclusion.

Finally, it should be noted that the ALJ's opinion distorts Friends of the Headwaters's ("FOH's") position. In fact, the Findings of Fact fail to acknowledge FOH's position at all, let alone any nuance among the parties. The Commission should be concerned about the ALJ's characterization of the parties' positions, which shows a complete lack of interest in the arguments that FOH has carefully and thoughtfully crafted throughout this proceeding and throughout the entire process for the Sandpiper Pipeline. The ALJ stated that the parties in this matter "diverge on a central point: whether the benefits of improving access to North Dakota crude oil are worth assuming the risks that there might later be a large-scale oil spill from the pipeline."² But FOH has never taken an anti-pipeline position; rather FOH has only advocated to relocate the proposed pipeline to a safer location in the state. FOH asks that the Commission re-

² Findings of Fact at 2.

evaluate NDPC's Certificate of Need application in light of the actual evidence presented, and not rely on a distortion of the parties' positions.

PROCEDURAL HISTORY

North Dakota Pipeline Company ("NDPC")³ applied for a Certificate of Need ("CON") and a Route Permit in November 2013.⁴ 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 pipeline routes."⁵ 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.⁶

In the public comment period that ensued,⁷ 402 citizens and 55 organizations and businesses wrote to oppose the proposed pipeline, as did one local unit of government and one tribal entity.⁸ Only 30 citizens and five organizations or businesses wrote to support the project.⁹ Among the concerns raised, over 380 expressed environmental concerns, over 350 comments expressed concern about water quality specifically, and 347 comments expressed a preference for an alternative route.¹⁰ As part of the same public comment period, FOH submitted alternative

³ 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.) The Exhibits referred to are the Exhibits as designated in the contested case hearing.

⁴ Ex. 1.

⁵ Ex. 42 at 2.

⁶ Ex. 42 at 10.

⁷ There was a second comment period that ended January 23, 2015, which is qualitatively summarized at paragraphs 618-625 of the ALJ's Findings of Fact.

⁸ DOC-EERA Comments and Recommendations, dated July 16, 2014 at 11.

⁹ *Id.*

¹⁰ *Id.*

routes for consideration.¹¹ 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.¹² The MPCA also filed a preliminary¹³ alternative to the Project, designated SA-03, and Honor The Earth filed a System Alternative as well.¹⁴ DOC-EERA filed a report describing these "System Alternatives" as well as several "route alternatives" in July 2014.¹⁵ DOC-EERA's report describes the System Alternatives as follows:

- 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.
- 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 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.

¹¹ *Id.* at 14-15. In order to distinguish proposals such as FOH, which are alternative locations for the pipeline and do not connect to Clearbrook and/or Superior, from the localized "route alternatives" that would make small adjustments to NDPC's Preferred Route, the alternative location proposals were dubbed "System Alternatives."

¹² *Id.*

¹³ Upon further analysis MPCA concluded that System Alternatives proposed by other parties were environmentally superior to SA-03. (Ex. 183, Sch. 1 at 7.)

¹⁴ DOC-EERA Comments and Recommendations, dated July 16, 2014 at 13-15.

¹⁵ *Id.*

- 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.¹⁶

The Commission considered DOC-EERA's report at a meeting on August 7, 2014.¹⁷ 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.¹⁸ The Commission accepted 53 route alternatives and one modified system alternative (Modified SA-03)¹⁹ for further consideration.²⁰ 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.²¹ 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.²² FOH stated that the System

¹⁶ *Id.*

¹⁷ Ex. 46 at 2.

¹⁸ *Id.* at 3 n. 7.

¹⁹The 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. *See* the attached maps from FOH, Attachment B.

²⁰ Ex. 46 at 2.

²¹ *Id.* at 10.

²² Ex. 183, Sch. 4.

Alternatives were sufficient to meet the need of transporting oil from the Williston Basin to refineries in Minnesota and elsewhere.²³

On September 11, 2014, the Commission met to decide whether to consider the System Alternatives further based on comments from the parties.²⁴ 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.²⁵ 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 analysis of the System Alternatives should be conducted.²⁶

The Commission bifurcated the proceedings based in part on the recommendation from MPCA and MDNR, who pointed out that bifurcating the proceedings would be a more efficient use of agency and public resources and improve public participation.²⁷ In its decision, the Commission expressed particular concern for citizen groups and the potential burden of participating in proceedings that addressed both need and routing simultaneously.²⁸

The Commission concluded that environmental review of the System Alternatives is “appropriate,” and its decision was guided by the “general charge” of MEPA, § 116D.03.²⁹ However, the Commission declined to order a form of environmental review recognized under

²³ *Id.* at 5-6.

²⁴ Ex. 47 at 3.

²⁵ *Id.*

²⁶ Ex. 48 at 11-13.

²⁷ *Id.* at 4-5.

²⁸ *Id.* at 6.

²⁹ *Id.* at 11.

MEPA. Instead, it ordered an environmental report from DOC-EERA, stating 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.”³⁰ 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.”³¹ 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.”³² 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.³³

DOC-EERA filed its Systems Alternative Report on December 18, 2014, a little more than two weeks before rebuttal testimony was due.³⁴ Rather than providing any substantive analysis of the system alternatives, the DOC-EERA report was essentially an accounting of the features within the corridors.³⁵ FOH witness Stolen, Carlton County Land Stewards witness Chapman, the MDNR, and MPCA all provided substantial criticisms of the Systems Alternative Report and found it severely inadequate because it was not analysis, but limited data.³⁶ 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. Judge Lipman initially

³⁰ *Id.* at 11-12.

³¹ *Id.* at 12.

³² Transcript Sept. 11, 2014 at 5.

³³ Ex. 48 at 12.

³⁴ Ex. 80.

³⁵ “Sandpiper Pipeline: Comparison Environmental Effects of Reasonable Alternative,” DOC-EERA Report, December 2014 (*see, e.g.*, Chapter 6, Comparison of Alternatives, which compares numbers and types of resources within the corridors but does not analyze the impacts of a pipeline on those resources).

³⁶ *See* Exs. 184, 112, and 185, MPCA Comments dated January 23, 2015.

denied the subpoena requests, but invited FOH to refile its request. FOH did so, and Judge Lipman denied the requests again on January 20, 2015. MDNR eventually agreed to voluntarily appear, but none of the parties were allowed to question MPCA further about its analysis of the System Alternatives. All of the environmental experts agreed that NDPC's Preferred Route presents the least preferable location from an environmental standpoint for a pipeline to cross Minnesota.³⁷

On April 13, 2015, Judge Lipman issued his Findings of Fact, Summary of Public Testimony, Conclusions of Law, and Recommendation. In his Findings of Fact, Judge Lipman recommended that the Commission grant a CON for the project, noting that "NDPC has complied with all relevant statutes and regulations regarding its Certificate of Need application."³⁸ The Findings of Fact substantially mirror the suggested "Findings of Fact" from NDPC with minor modifications. In his final reflections, Judge Lipman complained that he was given no choice in making his recommendation, concluding that the "text and structure of Minn. R. 7853.0130 leads readers to conclude that if a proposed pipeline is the most effective response to genuine market demands, is designed well, and will be installed carefully, 'a Certificate of Need *shall* be granted.'"³⁹ Therefore, Judge Lipman concluded that the Commission itself had, through its regulations, limited his discretion in making recommendations to the Commission.

ARGUMENT

I. The ALJ's Opinion Is Flawed In Four Critical Areas, And Therefore Cannot Be Adopted As Written Based On The Evidentiary Record.

In resolving this case, the Commission must confront issues that are fundamental to the Commission's authority under statutory law, administrative law, and the role of public

³⁷ Exs. 112 and 185, MPCA Comments, dated January 23, 2015.

³⁸ Findings of Fact, p. 3.

³⁹ *Id.* at 102 (emphasis in original).

participation. The Commission's decision will set an important precedent, establishing standards that will apply well beyond the Sandpiper Project. This case is about the future of Commission's regulatory authority over pipelines in general. It is about whether the public can effectively participate in pipeline proceedings. And it is about whether Minnesota will have a say in how, or whether, crude oil will travel across our state, putting our landscape at risk. The Commission has the opportunity to positively influence the outcome of these significant issues, and it would be a mistake not to do so.

A. Contrary to the ALJ's opinion, the Commission has the discretion to deny a Certificate of Need, even if the company has completed the application process.

This case presents a defining moment for the Commission's ability to exercise authority over oil pipelines. If it were to agree with the ALJ, the Commission would almost entirely, with the stroke of a pen, sign away its authority over pipelines. In the future, Minnesotans would be subject to the demands of pipelines companies, who would use the ALJ's reasoning to claim that they are entitled to a pipeline in their chosen location simply because they filed an application that met the minimum requirements outlined in rule by the Commission. But the application process must be more than a checklist. Because in truth, any pipeline company can do what NDPC has done – file an application and hire the expertise to support it, as well as sign contracts to demonstrate some level of shipper support prior to entering the permitting process. That should not be the determining factor.

The Commission *must* maintain its authority to reject a pipeline application in favor of a different project or no project at all if Minnesota's statutes are to have any effect. And the Sandpiper is a test for those statutes and the Commission's authority, a test in which the citizens of Minnesota have come out by the thousands to express their concern and raise fundamental factual, legal and environmental questions about the proposal. Those citizens believed that

Minnesota law gave the Commission the power to protect the state's interests by effectively regulating the private enterprise of pipelines – pipelines that would, in this case, cross the most pristine and fragile lands and waters in Minnesota. The law supports the citizens' interpretation; it does not support the ALJ's. In the short term, if the Commission does not assert its authority now, it raises ominous public policy implications for the Line 3 enlargement proposed along this very same corridor. In the long term, it could affect other corridors as well that might attract future pipeline proposals.

As the Commission is well aware, it need not defer to the ALJ's findings. The ALJ's opinion is merely one piece of the evidence in the record, and the Commission need not treat the ALJ's recommendation with the same deference an appellate court might give the findings of a trial court.⁴⁰ "Agencies must make their own independent decisions and not 'rubber stamp' the findings of a hearing examiner."⁴¹

The Commission has ample discretion to deny a Certificate of Need, even when the proposer has completed the minimum application requirements. To the extent that Judge Lipman saw his authority as limited, he was relying on the text of Minnesota Rule 7853.0130, not the statute. But the statute in this case is the relevant provision, because it determines the Commission's scope of authority. The statutory requirements for a CON not only grant the Commission that discretion – they assume a critical examination by the Commission for any proposal, presuming that there are better, more environmentally sound alternatives.

Judge Lipman seems to assume that the use of the word "shall" leads inevitably to his conclusion, but that is a misinterpretation of the language.⁴² In fact, the word is used in the *negative* in the statutory prescription: "No large energy facility shall be sited or constructed in

⁴⁰ *In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264, 274 (Minn. 2001).

⁴¹ *Id.* (internal citations and ellipses omitted).

⁴² Findings of Fact, p. 102 ("Yet, for many, the words 'shall' and 'pipeline' are simply incompatible.").

Minnesota without the issuance of a Certificate of Need...” and “No large energy facility shall be certified for construction unless the applicant can show...”⁴³ In other words, the mandatory instruction of “shall,” often treated as a nondiscretionary command under traditional rules of statutory interpretation, is actually a “shall not” – as in the company shall not build an energy facility *unless* it has convinced the Commission that it is “needed,” considering the twelve factors listed in the rule, as well as others the Commission sees fit, based on the record evidence and in the exercise of its public policy powers.⁴⁴ There is no instruction that the Commission “shall” grant any certificate in any event.

If the Commission adopts the ALJ’s findings and grants the Certificate of Need, it is giving up its discretion in future pipeline cases. The Commission must retain the right to deny a completed application - even one completed correctly with supporting expert testimony from employees and consultants, as has been submitted here – or it condemns the state to allowing pipeline companies to place their pipelines as the company wishes, not as the state sees fit. This outcome should be unacceptable to the Commission. In his Memorandum, the ALJ acknowledges the “elephant in the room” – the fact that the public and the state agencies oppose this pipeline, yet the ALJ feels helpless to prevent it from being located along an inappropriate greenfield route. The Commission should reject the ALJ’s recommendations, and reject the certificate of need for this pipeline.

B. The Commission’s primary focus must always be the public interest.

This case is about the private interest of a few companies weighed against the public interest of the state of Minnesota and its citizens. The Legislature has specifically instructed that it intends for Minnesota laws to be interpreted “to favor the public interest as against any private

⁴³ Minn. Stat. § 216B.243, subs. 2&3.

⁴⁴ *Id.* at subd. 3.

interest.”⁴⁵ In addition, the certificate of need statute revolves around the public interest.⁴⁶ Almost every factor under the statute is designed to address whether there is a public interest in the proposed energy facility. For instance, Factors (1) and (3) address whether the facility is necessary to serve the state’s energy needs. Factors (2), (6) and (8) address whether conservation or efficiency may be used instead of building the facility, with the underlying assumption that increased efficiency and conservation are superior choices for the public interest. Factor (5) asks whether the output of the facility is socially beneficial, including its ability to “protect or enhance environmental quality” or “increase reliability” of energy supplies.

In fact, not a single criterion asks whether the proposed facility is economically viable or advantageous for the project proposer. And only a single factor – Factor (10) – considers whether the project proposer has completed the Certificate of Need application, a factor that the ALJ mistakenly elevates above all others.

NDPC stated in its Reply Brief that the “public interest” is not relevant, arguing that considering the “public interest” is equivalent to abandoning the current criteria.⁴⁷ But in fact, *only* the public interest is relevant, based on the plain language of the statute. NDPC’s interest is not the issue.

As discussed in Section IV.B., the Department of Commerce (“DOC-DER”) correctly concluded that there is no direct benefit to the state of Minnesota for the pipeline.⁴⁸ While NDPC hints at the interconnected nature of the petroleum market to imply that Minnesota has some interest, the reality is that it is to demonstrate any shortage or unreliability in the

⁴⁵ Minn. Stat. § 645.17.

⁴⁶ Minn. Stat. § 216B.243.

⁴⁷ NDPC Reply Brief at 17.

⁴⁸ Ex. 50 at 24:1-19, Ex. 54 at 30:13-17.

“interconnected” petroleum market today that requires this investment.⁴⁹ Simply saying that Minnesota is connected to other markets isn’t enough; NDPC must demonstrate that there is a problem, and that this project could provide some or all of the remedy. But that is not what the record shows. The record establishes that the beneficiaries of the proposed pipeline are NDPC and Marathon Petroleum. Any other beneficiaries are vague, unquantified and unsubstantiated, or would enjoy those benefits wherever a pipeline is located.⁵⁰

NDPC threatens increased rail traffic if the pipeline is not approved as proposed, suggesting that Minnesota will be a super highway for oil in any case, due to its proximity to the Bakken region.⁵¹ Using this logic, NDPC urges the Commission to agree to build this pipeline or be subject to increased rail traffic. A number of factors in the record cast substantial doubt on this claim. First, the significant drop in the price of oil will inevitably decrease supply from the Bakken in the short-term, even if the price rises again in 2016 as the U.S. Energy Information Administration predicts.⁵² While NDPC claims that Bakken supply is practically immune from price drops, the reality is that the production in the Bakken is already affected by lower crude prices.⁵³

Second, if the transportation savings of pipelines as compared to rail are really as significant as NDPC claims, other pipelines proposals will inevitably be made, either by NDPC or others, and the Commission can use its discretion to ensure that those pipelines are suitably located. NDPC relies upon the testimony of its witness, Mr. Rennie, to show that pipelines are

⁴⁹ See, e.g., ex. 50 at 13:11-15:17 (noting flat or declining demand for crude oil nationally).

⁵⁰ T. Vol. I at 64:24-65:28.

⁵¹ NDPC Initial Brief at 92-93.

⁵² E-docket Document No. 20151-106576-01 (Public Comments dated Jan. 23, 2015, attachment 1 at 4, “This Week In Petroleum,” Jan. 14, 2015, U.S. Energy Information Administration).

⁵³ See, e.g., “N.D. Sees Second Consecutive Monthly Drop in Oil Output,” Shaffer, David, *Star Tribune*, April 15, 2015, attached as Attachment C. While FOH understands that this article is outside the public record, the oil price drop is a recent trend, and the themes of decreased oil production in the Bakken have become far more clear since the administrative hearing. The PUC has the discretion to taken note of such trends, especially one such as this that is widely reported in the media. Minn. R. 1400.811, subp. 2.

\$5-10 per barrel less costly to utilize than rail.⁵⁴ If that is indeed the case, then other pipeline proposals – or this proposal, simply in a different location - will present themselves in the future if the supply and demand of Bakken oil warrants it.

Third, even if it was conclusively shown by an objective, third-party analysis (and such an analysis has not been done yet in Minnesota) that an oil pipeline would significantly reduce oil transport by train, this analysis would be irrelevant with respect to locating the Sandpiper on this *particular* route. If a pipeline alleviates train traffic, other pipelines could do so, as well.

C. The ALJ ignores the burden of proof, an essential element of this case, to the detriment of the public interest.

The ALJ's Findings of Fact skirt the burden of proof question. If the Commission does the same, it has made most of this proceeding a waste of time for hundreds of citizens and underfunded nonprofit groups, and will have effectively excluded the public from any meaningful participation in future certificate of need proceedings. This is another defining moment for the Commission. The Commission must determine whether it accepts the claim that the only "reasonable and prudent alternative" is the one that an energy company has proposed and is prepared to build.⁵⁵ The ALJ, without ever evaluating the relevant burden of proof, adopts NDPC's proposed findings of fact, including the premise that because the system alternatives are less developed than the proposed route and FOH is not a pipeline company willing to build them, they are not valid alternatives. FOH does not believe, given its prior actions in this case, that the Commission is prepared to exclude the public from meaningful participation in need proceedings by holding that any "reasonable and prudent alternatives" must be as developed and detailed as the company's proposal, and must be submitted by a company that is willing to build it.

⁵⁴ Ex. 15, Sch. 2, Figure II-4 at 13.

⁵⁵ Findings of Fact at ¶ 509.

It is self-evident that the citizens groups and state agencies that have expressed concerns about the Sandpiper and offered alternatives to the proposed route are not in a position to put together a proposal that takes years to prepare and costs millions of dollars, let alone the interest or ability to actually build a competing pipeline proposal. It is an absurd conclusion to suggest that a citizens group should be required to do so to offer “reasonable and prudent alternatives,” and it is not supported in law, regulation or common sense. Adopting the ALJ’s interpretation puts Minnesota at the mercy of the pipeline companies. Under NDPC’s and the ALJ’s interpretation of Minnesota Rule 7853.0130(B), only another pipeline company could successfully challenge the location of a proposed pipeline, and the public could never do so, robbing the public of the opportunity to ever present “reasonable and prudent alternatives.”

The ALJ’s Findings of Fact render the entire contested case hearing process for the CON an expensive exercise in futility for all parties, except perhaps NDPC. The MPCA and MDNR recommended that the system alternatives be studied further because they did offer advantages for the state, and based on those recommendations, this Commission ordered that the the system alternatives be studied as part of the need proceeding. Although its proposed alternatives received high marks from the MPCA and MDNR, FOH’s goal in introducing system alternatives was not to make a formal pipeline proposal. The goal was to demonstrate that reasonable alternative locations are available, and the Commission and NDPC should consider them further, rather than cutting off consideration simply because NDPC does not want to engage in it. Such consideration could include evaluating market demand for alternative locations and ultimately developing a proposal for a pipeline in a different location.

And yet the ALJ held that the system alternatives were invalid because “[n]one of the entities that proposed a System Alternative is itself in the oil or pipeline industry, or offered into

the record engineering or operational assessments in support of their proposals.”⁵⁶ Further, the ALJ concluded that “[n]o party, participant, or commentator stated that it would develop one of the System Alternatives if the Commission signaled its willingness to grant it a CN.”⁵⁷

And, to point out the obvious, of course there was no evidence in the record that a pipeline company was willing to build the system alternatives. The only entity involved in the proceedings with the ability to offer direct proof on such a matter – NDPC – had a very strong incentive *not* to offer any such proof, because it had, years ago, determined that its preferred route was the best option for it financially. Nor, it is safe to say, does NDPC wish to submit a new application for a different pipeline, as it is already developed a full application and found a partner for its existing proposal. But if the fact that a company has invested time and effort into developing a particular proposal means that it must *by law* be accepted by the regulators, then the process of evaluating such a proposal becomes a farce indeed.

FOH’s approach to Minnesota law, described in Section II.A. of its Initial Brief, provides an alternative approach and a solution to this problem. The Commission should make clear that, consistent with the Certificate of Need statute, the pipeline company retains the burden or proof in any need proceeding. This includes circumstances such as here, where evidence is offered establishing alternatives that can meet the overall objectives of the proposed project – to deliver petroleum to a particular market in an environmentally preferable manner. While parties other than the project proposer may bear some burden in establishing alternatives as “reasonable and prudent,” once such evidence is offered, it must remain with the pipeline proponent to demonstrate, based on the factors in the rule, that its proposal is preferable. Any other

⁵⁶ Findings of Fact at ¶ 508.

⁵⁷ *Id.* at ¶ 509.

interpretation eliminates any benefit of offering alternatives and eviscerates the Commission's authority over pipeline construction.

This situation demonstrates why an Environmental Impact Statement ("EIS") is an essential tool for evaluating the various system alternatives. Under the Minnesota Environmental Policy Act, the Responsible Governmental Unit must evaluate alternatives to the proposal, including alternative sites, as part of an EIS.⁵⁸ The Responsible Governmental Unit, not the project proposer, determines the alternatives and whether they are reasonable. This process is designed to avoid precisely the type of manipulation that occurred here, where a company artificially narrowed the range of "reasonable alternatives" by defining its project so narrowly and providing such an inadequate analysis of the alternatives, that no other sites could be seriously considered. In the EIS process, companies don't have the luxury of telling the agency that they won't consider real alternatives. FOH understands that the Commission does not wish to complete an EIS prior to deciding the Certificate of Need. But an EIS would fulfill FOH's and the Commission's interest in creating a robust record on the system alternatives, something the contested case hearing failed to do, in part because the ALJ ignored the burden of proof and expected FOH and other citizens' groups to do the impossible.

D. The ALJ recommendations are in direct conflict with MPCA and MDNR expert conclusions regarding the environmental impacts of NDPC's preferred route and system alternatives.

Environmental issues are central to these proceedings based on governing state law. The Minnesota Legislature has directed 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

⁵⁸ Minn. R. 4410.2300, A(7).

forth in [the Minnesota Environmental Policy Act].”⁵⁹ 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.”⁶⁰ In particular, it is the state’s policy to “minimize the environmental impact from energy production and use.”⁶¹ 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.”⁶²

1) The ALJ erroneously ignored the testimony of the two state agencies tasked with protecting Minnesota’s environment.

There is substantial evidence in the record to conclude that NDPC’s Preferred Route is the worst of all the proposed routes, particularly the statements of MPCA and MDNR. By neglecting entirely the expert testimony offered by the parties and the agencies, the ALJ’s report is rendered meaningless and ignores perhaps the most important evidence in the record. It is not that the Findings of Fact reviewed the expert opinions in the record and rejected them, on balance, in favor of NDPC’s arguments. The expert opinions were never addressed at all, as if they were never offered. This is a very troublesome approach.

There is a strong and consistent chorus of expert voices in the record stating that there *are* significant environmental differences between the routes. The Findings of Fact states that “none of the System Alternatives present a clear advantage over the proposed Project.”⁶³ But the record is replete with testimony and statements from expert sources on behalf of FOH, CCLS, MDNR and the MPCA that NDPC’s proposed route poses the greatest environmental risks. When

⁵⁹ Minn. Stat. § 116D.03, subd. 1.

⁶⁰ Minn. Stat. § 116D.02, subd. 2.

⁶¹ *Id.*

⁶² Minn. Stat. § 116D.03, subd. 2.

⁶³ Findings of Fact ¶ 504.

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.⁶⁴
- 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.⁶⁵
- The time frame for such risks as the project life. This is on the order of 40 or 50 years.⁶⁶
- 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.⁶⁷
- The locations where there are closely adjacent facilities also transporting oil products that are susceptible to damage from a pipeline rupture and accompanying ignition.⁶⁸

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

⁶⁴ Ex. 180 at 31:8-12.

⁶⁵ *Id.* at 35:25-36:9.

⁶⁶ *Id.* at 41:34.

⁶⁷ Ex. 184 at 10:13-11:11.

⁶⁸ Ex. 180 at 18:32-36; 27:29-30.

feasible and prudent System Alternatives that merit consideration.”⁶⁹ 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.”⁷⁰ 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.”⁷¹

In addition, CCLS witness Dr. 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.⁷² Based on his study and analysis, he concluded that NDPC’s Preferred Route posed the greatest environmental risk:⁷³

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.⁷⁴

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.⁷⁵ FOH witness Stolen documented in detail how certain landscapes, such as the Lake Country

⁶⁹ Ex. 185 at 2.

⁷⁰ MPCA Comments, dated January 23, 2015 at 4.

⁷¹ *Id.*

⁷² Ex. 110.

⁷³ Ex. 112 at 9.

⁷⁴ *Id.*

⁷⁵ Ex. 185; MPCA Comments, dated January 23, 2015.

environmentally sensitive resources, may be more sensitive to oil spills, harder to clean up, or more difficult to access than other landscapes.⁷⁶ Similarly, 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.**⁷⁷

MPCA continues: “[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.”⁷⁸

NDPC’s Preferred Route presents many problems, including a greater number of 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.”⁷⁹ 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.”⁸⁰ MPCA concluded that “[f]rom the perspective of

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⁷⁷ MPCA Comments, dated January 23, 2015, footnotes omitted, emphases added.

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 13.

⁸⁰ *Id.* at 3.

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.**⁸¹

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.⁸² MPCA concluded that FOH's System Alternatives were superior to NDPC's Preferred Route as well as SA-03, which MPCA had originally proposed.⁸³

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, but the ALJ simply ignored it, instead concluding that all the routes looked about the same, and so he should approve NDPC's proposal. Given the evidence in the record directly contradicting NDPC's proposal, the ALJ's conclusion should be given no weight. Based on the evidence, NDPC's CON application for its Preferred Route must therefore be denied.

In his recommendations, the ALJ came to a conclusion that misstates the record and distorts the positions of the parties. He stated that the record did not demonstrate that the System Alternatives would decrease the risk of catastrophic failure of the pipeline.⁸⁴ This claim is unsupported in the record. Different landscapes, including terrain and the presence of water bodies, result in different configurations of the pipeline system. In other words, the risks of failure are related to the engineered system and are thus unique to the route selected. And if the

⁸¹ *Id.* at 14 (emphasis added).

⁸² *See Id. generally.*

⁸³ *Id.* at 7.

⁸⁴ Findings of Fact ¶ 502.

various alternatives were actually subjected to any analysis, the analysis would reveal these differing risks.⁸⁵ Here, Mr. Stolen provided clear testimony as to the need for such risks to be determined. No such information has been prepared. The ALJ then turns this testimony on its head and uses this failure to say there is no difference between the routes.

2) The ALJ's report relies only on NDPC's experts and the DOC-EERA report, neither of which provide any substantive conclusions about environmental impacts of NDPC's Preferred Route or the System Alternatives.

Environmental considerations are largely dismissed in the ALJ's Findings of Fact. And it is not surprising, given that he relied only on the information supplied to him by the DOC-EERA and NDPC. Both DOC-EERA and NDPC presented reports summarizing environmental data, but this evidence is meaningless without additional analysis because they are based on strictly "numerical" comparisons of natural features. Neither DOC-EERA nor NDPC provided analysis of their accounting results. For instance, based on NDPC's findings of fact, the ALJ concludes that NDPC's Preferred Route:

Has the least number and lowest acreage of first downstream lakes; lowest topographic slopes and drainages; least amount of susceptible water table aquifer crossed; least amount of acreage of principal aquifer crossed; no fractured carbonated bedrock over which to cross; and the fewest sites with nearby potential groundwater contamination.⁸⁶

Meanwhile, the DOC-EERA reported that the Preferred Route has the largest percentage of forested land, the largest percentage of wetlands, and the largest percentage of shrubland.⁸⁷ One cannot conclude, based on this information, whether the route is comparatively better or worse without knowing more about these features, or how to evaluate the potential impacts on these features. The information provided by NDPC and DOC-EERA is qualitative, not quantitative.

⁸⁵ Ex. 184 at 7, 10:19-11:11, 13:10-14:5.

⁸⁶ Findings of Fact at ¶ 500.

⁸⁷ "Sandpiper Pipeline: Comparison of Environmental Effects of Reasonable Alternatives," DOC-EERA Report, December 2014, Table 6.1 at 249.

Indeed, NDPC’s self-described approach was not to present any environmental questions to the ALJ, starting with the witnesses it chose to put on the stand. The head of its environmental team, Ms. Ploetz, had never conducted an environmental review process before.⁸⁸ Ms. Ploetz was either unable or unwilling to identify any differences between a shallow lake and a man-made ditch.⁸⁹ Ms. Ploetz’s testimony was sadly consistent with NDPC’s theme throughout the proceeding—that it is impossible to differentiate between impacts on natural resources because that is a “value judgment,” using the example of deciding whether it is worse to impact waterways than cities.⁹⁰ The ALJ made the unfortunate decision to parrot this conclusion in his Findings of Fact, noting that “By avoiding certain high-quality water resources in the Central Lakes Region, the System Alternatives prioritize protection of a special set of resources over other potential impacts.”⁹¹ But that is a radical oversimplification that is disproved by the fact that MPCA, MDNR, CCLS witness Dr. Chapman and FOH witness Stolen were able to make substantial, reasoned conclusions about the various routes.

Without the assistance of the expertise of the MPCA, the MDNR, Mr. Stolen or Dr. Chapman, these numerical comparisons are meaningless. An expert is able to provide context and analysis that provides some meaning to those numbers. Indeed, once expertise is applied, an alternative that appears quite attractive in a numeric sense might be turn out to be a very poor alternative, if the resources impacted are sensitive, valuable or rare. Thus, the Commission should turn to the expertise available in the record in order to make a reasoned comparison between NDPC’s Preferred Route and the System Alternatives.

⁸⁸ T. Vol. 5 at 8:15 – 9:8.

⁸⁹ T. Vol. 5 at 113:19-116:13; 118:1-11.

⁹⁰ T. Vol. 5 at 41:7-22 stating that giving “weights” to various environmental features would be “an extremely difficult, if not impossible, task to achieve.”; *see also* T. Vol. 5 42:21-24 stating that a weighting system would “introduce subjectivity or one’s own values, essentially, into that analysis.”

⁹¹ Findings of Fact at ¶ 504.

3) The ALJ erred when he relied on the DOC-EERA report, which does not provide the analysis that the Commission requested.

The Findings of Fact incorrectly describe DOC-EERA report as an “analysis,”⁹² and do not address the fact that DOC-EERA’s report simply does not meet the requirements of the PUC’s Order of October 7, 2014. 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.⁹³ The Commission specifically instructed the DOC-EERA to prepare a report that “examines and evaluates the potential impacts of the proposed project.”⁹⁴ 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.”⁹⁵

But the study conducted by the DOC-EERA did not evaluate or examine the impacts of a pipeline in the various locations. It did not evaluate how NDPC’s Preferred Route and the System Alternatives compare to one another. Rather, the study was merely a data compilation and was not an analysis of impacts.⁹⁶ 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.⁹⁷ As Ms. Pile testified, DOC-EERA did not attempt to place any “values” on environmental features but instead simply counted the number of features in a two-mile wide corridor for proposed alternatives.⁹⁸ Therefore, the document cannot be used to evaluate and analyze the environmental effects of the System Alternatives, as

⁹² Findings of Fact at 18.

⁹³ Ex. 48.

⁹⁴ *Id.* at 11.

⁹⁵ *Id.* (emphasis added).

⁹⁶ Ex. 184 at 9:3-18.

⁹⁷ Ex. 80 at 12.

⁹⁸ T. Vol. VII at 242:11-15.

the Commission requested. 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.”⁹⁹ MPCA also noted that the tool used by DOC-EERA—ArcGIS—does not demonstrate the quality of the resources when comparing corridors.¹⁰⁰

NDPC also prepared its own comparison of System Alternatives using similar methods.¹⁰¹ However, its report was also a “data” report, and not an assessment or analysis of impacts.¹⁰² Furthermore, testimony from Enbridge indicated that studies in the vicinity of the proposed route over a several-year period resulted in a significant number of route modifications to avoid sensitive features and reduce impacts.¹⁰³ 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.

The expertise brought to bear by MPCA, MDNR, FOH, and CCLS, the only competent testimony in the record regarding environmental impacts, requires a decision that the certificate of need for NDPC’s Preferred Route must be denied. The DOC-EERA report itself cannot be relied upon as a basis for granting or denying the certificate of need, as it does not comply with the Commission’s Order and only counts; it does not analyze. By the description of its own manager, Ms. Pile, it was designed *not* provide the kind of information the Commission requested. The findings of the experts of MDNR, MPCA, FOH and CCLS in the record provide the most independent and scientifically based information concerning environmental impacts the System Alternatives to be found in the current record.

⁹⁹ Ex. 185 at 1.

¹⁰⁰ MPCA Comments, dated January 23, 2015 at 14.

¹⁰¹ Ex. 17, Sch. 1.

¹⁰² *Id.*

¹⁰³ T. Vol. V at 94:19-23.

II. The ALJ Improperly Denied Requests To Issue Subpoenas For Witnesses From The Department Of Natural Resources And The Pollution Control Agency, Refusing To Grant What Should Have Been A Routine Request To Present Relevant Evidence.

The ALJ tainted these proceedings irreparably when he denied subpoena requests from FOH to allow MPCA and MDNR staff to testify at the evidentiary hearing. Both MPCA and MDNR have been heavily involved in the Sandpiper proposal from the beginning. When this Commission bifurcated the need and routing proceedings, it was based in part on recommendations from those agencies.¹⁰⁴ When ordering EERA to draft an environmental report, MPCA offered to support that effort, backed by decades of expertise in environmental review.¹⁰⁵ Similarly, MDNR made specific recommendations about the type of environmental review that should occur, as well as the resources that should be evaluated.¹⁰⁶

On the strength of these recommendations, the Commission entrusted the need proceedings to the ALJ. Yet the comments of these agencies were not only ignored in the Findings of Fact - the ALJ made an active effort to exclude these agencies from the proceedings.

Granting subpoena requests should be a routine matter. In fact, both Minnesota and Federal rules for civil proceedings were recently changed to allow attorneys to issue subpoenas directly because the role of the court in issuing subpoenas was ministerial at best.¹⁰⁷ In administrative matters, a party must request the ALJ to sign the subpoena.¹⁰⁸ But to stay consistent with the federal rules, as long as minimal explanation of relevance has been offered, the judge is expected to sign the subpoena.¹⁰⁹

¹⁰⁴ Ex. 47 at 4-6

¹⁰⁵ *Id.* at 9.

¹⁰⁶ *Id.* at 10.

¹⁰⁷ David Siegel Practice Commentary, Rule 45 at 13 attached as Attachment D.

¹⁰⁸ Minn. R. 1400.7000.

¹⁰⁹ David Siegel, Practice Commentary at 13.

In this case, the ALJ refused to sign the subpoenas, even though no party objected to their issuance. In his refusal, he cited a Second Circuit case from 1976, in which a judge expressed skepticism about a party's efforts to avoid hiring an outside expert by asking the court to subpoena an outside expert who was unaffiliated with the case.¹¹⁰ The United States government motioned to quash the subpoena.¹¹¹ This case is not applicable here. As FOH pointed out in its refiling, FOH did not subpoena MDNR and MPCA witnesses to get free expertise from outside experts with no affiliation or knowledge of the matter (FOH already retained both paid and volunteer experts of its own). It subpoenaed them because the opinions of these agencies are extremely important to these proceedings, as the Commission clearly stated.¹¹² Agency witnesses have not only expertise but also factual knowledge of this specific case, and had submitted multiple sets of comments throughout the process. No other witnesses could testify about the positions of these agencies; thus the presence of these particular witnesses was crucial to create a full evidentiary record that FOH desired and the Commission itself explicitly stated it wanted. Indeed, every party who chose to go on record commented that these agency witnesses would offer relevant testimony, including NDPC.¹¹³ Thus Judge Lipman arbitrarily and erroneously denied these subpoenas even though neither the agencies themselves nor any other party raised any objections to them whatsoever.

As a secondary matter, the ALJ's Findings of Fact incorrectly recount the sequence of events surrounding the denial of the subpoena requests. The ALJ fails to state that FOH

¹¹⁰ Twentieth Prehearing Order, January 16, 2015.

¹¹¹ *Kaufman v. Edelstein*, 539 F.2d 811, (2d Cir. 1976).

¹¹² Letter from MCEA and FOH to Judge Lipman renewing request for subpoenas, January 20, 2015, attached as Attachment E.

¹¹³ Transcript of January 22, 2015 Telephonic Hearing, attached as Attachment F, 13:9 (Statement by Mr. Von Korff that the agency testimony is "tremendously relevant"); 22:23 (Statement by Mr. Bibeau that the agency witnesses are "very important"); 24:24-25:1-4 (Statement by Ms. Brusven that there is "value" in agency witnesses being available for questioning).

resubmitted its request pursuant to his invitation and that he denied the request again. This error appears have been adopted wholesale from NPDC's submissions; its proposed Findings of Fact suffered from the same oversight.¹¹⁴

When reviewing the ALJ's Findings of Fact, excluding this relevant testimony had a significant impact on the outcome of the proceedings. As a result, the ALJ found it possible to ignore the agencies' positions entirely. The MDNR merited mention only six times in the Findings of Fact. Three of those were in connection to the denied subpoenas,¹¹⁵ and the remaining times were only in relation to features that the agency managed, i.e. the Public Waters Inventory. MDNR's public comments and testimony were never mentioned.

As for MPCA, it also merited only a few mentions, again mostly in connection with the denied subpoenas. Most significantly, the ALJ favored NDPC's testimony over MPCA's comments, without even giving MPCA the opportunity to testify. The ALJ quoted MPCA's position from a comment letter that SA-03 is a better alternative than the proposed alternative due to the proximity of high quality surface waters and other natural resources to NDPC's alternative, but then rejected MPCA's explanation in favor of NDPC's statement that SA-03 would travel near residential areas.¹¹⁶ The ALJ discredited MPCA's comments while simultaneously refusing to admit relevant evidence from MPCA witnesses that could have addressed his concerns. Furthermore, the comments from MPCA were not even the most recent, as MPCA's position evolved throughout the process and it conducted additional studies.

MPCA and MDNR submitted comments on the central issue in these proceedings – whether the system alternatives are environmentally preferable to NDPC's proposed route. And both agencies agreed that the system alternatives are environmentally preferable to NDPC's

¹¹⁴ NDPC Proposed Findings of Fact, Conclusions of Law and Recommendations, February 27, 2015, at 9, ¶ 69.

¹¹⁵ See *e.g.* Findings of Fact ¶ 116

¹¹⁶ Findings of Fact ¶ 361-362.

Preferred Route. Yet the ALJ discounted these comments entirely, even as he actively sought to exclude the participation of agency witnesses in the evidentiary hearings. For these reasons, the ALJ's opinion as to environmental issues should receive no weight because critical evidence was excluded and ignored.

III. The Commission Should Not Approve A Pipeline Proposal Where The Proposer Has Been Demonstrably Unwilling To Show Proof That It Will Protect Minnesota's Taxpayers.

To date, NDPC has not provided to the Department of Commerce sufficient evidence of financial assurance or insurance to protect Minnesota from the financial impact of a pipeline catastrophe. As MDOC stated in its reply brief, NDPC has fallen short on its commitments for financial assurance, which should be sufficient to clean up and remediate a spill of the magnitude of the spill in Kalamazoo "through insurance, third party guaranties and/or other means acceptable to the Commission."¹¹⁷ The cleanup costs for the Kalamazoo River spill in Michigan are now predicted to exceed \$1 billion.¹¹⁸ MDOC recommended that the granting of a certificate of need be conditioned on a showing that the applicant is willing to provide such financial assurance, but the applicant has not done so.

In a follow-up letter on April 7, 2015, the MDOC reported that it does not consider the documents that NDPC has provided to satisfy MDOC's recommendation that financial assurance be "adequate and enforceable."¹¹⁹ MDOC stated that it will continue to work with NDPC. Judge Lipman's only acknowledgement of this issue in the Findings of Fact is to state that the conversations between MDOC and NDPC are "constructive and helpful."¹²⁰ He then

¹¹⁷ Minnesota Department of Commerce Reply Brief at 7.

¹¹⁸ Ex. 180 at 32:13-14; 56:37-37.

¹¹⁹ Doc. No. 20154-109034-01 (Letter from Department of Commerce to Judge Lipman dated April 7, 2015).

¹²⁰ Findings of Fact ¶ 591.

recommended that NDPC file a document describing the financial arrangements it has made,¹²¹ which falls far short of MDOC’s recommendation that NDPC “provid[e] sufficient financial assurances of its ability and commitment to fund all cleanup and remediation of a Minnesota oil spill from the Project of the magnitude of the Kalamazoo spill...”¹²²

This failure alone justifies denial of the application for a CON. FOH questions why the Commission would continue a permit process for a company that is demonstrably unwilling to protect the state of Minnesota and its taxpayers from the significant risks of its operations. Unless NDPC is willing to provide a bond, Letter of Credit, or other financial collateral to insulate the public from the risks of a catastrophic incident in this sensitive environment, the Commission should deny its application. There is no reason to proceed with the routing permit. Unless NDPC is able to provide this kind of assurance, the Commission should reject its request for Minnesota to bear all of the risks of the Sandpiper Pipeline while it reaps all of the rewards.

IV. NDPC Did Not Meet The Burden Of Proof Required Under Minnesota Law To Justify A Certificate Of Need.

A. The question before the Commission is whether there is a need for a pipeline in NDPC’s preferred location.

The Commission should evaluate the question of need in the way that NDPC has framed it – tied to the specific location. The ALJ’s Findings of Fact accept unquestioningly NDPC’s position that the pipeline cannot be relocated, despite evidence that a different location would be environmentally preferable and even potentially economically viable, based on the final destination of most of the crude oil that would be shipped in the Sandpiper. The Commission must therefore 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

¹²¹ Findings of Fact ¶ 592.

¹²² Minnesota Department of Commerce Response Brief at 7.

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 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.¹²³

Of these three arguments, 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. NDPC has not met its burden of proof regarding this aspect of establishing need.

¹²³ Ex. 6 at 4:108-21.

B. 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.

1) 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.”¹²⁴ 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 ALJ ignored the significant flaws in NDPC’s case. The record contains strong evidence that NDPC is proposing a connection at Clearbrook that would serve only two refineries, but those refineries oppose the pipeline. Much of that evidence comes from the proceedings before the Federal Energy Regulatory Commission. Yet since the ALJ merely adopted NDPC’s Findings of Fact, whose account of the Federal Energy Regulatory Commission (“FERC”) proceedings omits any reference to the objections raised by shippers, including the St. Paul refineries, at the FERC proceedings.¹²⁵

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.¹²⁶ These refineries do not appear to be shippers,¹²⁷ and have not expressed support for the Project. Moreover, the shipping capacity between Clearbrook and these refineries will not

¹²⁴ Minn. R. 7853.0130(A)(1).

¹²⁵ Findings of Fact ¶¶ 11-42.

¹²⁶ Ex. 20 at 10:283-84.

¹²⁷ 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.

increase, nullifying any potential benefit to these refineries.¹²⁸ 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.¹²⁹ NDPC also claims that Project, if it connects at Clearbrook, will provide the benefit of avoiding apportionment on the NDPC Pipeline System.¹³⁰

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.”¹³¹ 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.”¹³² 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.¹³³ The effect of the pipeline, would be simply to “harm, not benefit, the business of SPPRC and its customers” due to increased costs.¹³⁴

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

¹²⁸ Ex. 9 at 5:158-60.

¹²⁹ Ex. 7 at 10:287-92.

¹³⁰ *Id.* at 3:80-86.

¹³¹ Ex.183, Sch. 4 at 42.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 43.)

prove overly optimistic.¹³⁵ 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.¹³⁶ Notably, Flint Hills's concerns seemed aimed at whether shippers would in fact demand oil from the Sandpiper, or whether it would be underutilized compared to NDPC's projections.

The Department of Commerce also agreed that Minnesota does not benefit from the Clearbrook connection, and that Minnesota refineries would not benefit from the proposed pipeline.¹³⁷ MDOC'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.¹³⁸ Mr. Heinen also responded to the alleged benefit of redundancy to Minnesota refineries. He stated that while redundancy is potentially a benefit, it is not clear whether Minnesota refiners would benefit from redundancy in this case.¹³⁹

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.¹⁴⁰ The only shipper of record who has admitted publicly to shipping oil on the proposed Sandpiper pipeline to be delivered in Superior is Marathon,¹⁴¹ who is also a 27% owner

¹³⁵ *Id.* at 159.

¹³⁶ *Id.* at 159-60.

¹³⁷ Ex. 50 at 24:1-19; Ex. 54 at 30:13-17.

¹³⁸ Ex. 50 at 25-26.

¹³⁹ *Id.* at 27-28.

¹⁴⁰ Ex. 183, Sch. 4 at 182-83.

¹⁴¹ T. Vol. III at 77:13-18. 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.)

of the Project and therefore has a strong financial interest in its construction, independent of its shipping needs.¹⁴²

Marathon, NDPC's largest, and possibly only, shipper that prefers delivery at Superior, will ship the oil either to, or through, Illinois.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ Marathon is also investing in a Kentucky facility to increase the capacity of light, sweet crude that the facility can process.¹⁴⁶ The crude oil from the Project would travel via pipeline to these facilities.¹⁴⁷ This all demonstrates that Superior is not the final destination for any of this oil, as NDPC has confirmed.¹⁴⁸

Despite what appears to be an obvious lack of demand for oil at Clearbrook or 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."¹⁴⁹ As the protesting shippers clarified, they are not opposed

¹⁴² *Id.* at 183; T. Vol. III at 71:20-24.

¹⁴³ T. Vol. III at 77:13-18.

¹⁴⁴ T. Vol. II at 45:15-18.

¹⁴⁵ Ex. 13 at 7:179-84.

¹⁴⁶ *Id.* at 7:186-92.

¹⁴⁷ T. Vol. III at 45:13-21.

¹⁴⁸ *See, e.g., North Dakota Pipeline Company LLC's Application for A Certificate of Need for the Sandpiper Project*, Application Summary, stating that from the Clearbrook and Superior terminals, the "crude oil can be shipped on various other pipelines, ultimately providing refineries in Minnesota, other states in the Midwest, upper Great Lakes regions and the East Coast with crude oil."

¹⁴⁹ Ex. 183, Sch. 4 at 11.

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.¹⁵⁰

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.¹⁵¹ 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 very few, that is an important, and perhaps deciding 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, 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.

In sum, according to the record in this case, NDPC has overstated the demand for this pipeline; furthermore, 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.

¹⁵⁰ *Id.* at 41.

¹⁵¹ *Id.*

2) “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.¹⁵² For example, increased fuel economy and decreased vehicle miles traveled have resulted in flat or declining demand for crude oil nationally.¹⁵³

The ALJ adopted NDPC’s odd argument that existing conservation programs “will not eliminate Minnesota’s near-term need for petroleum products.”¹⁵⁴ The question here isn’t whether Minnesota consumes some petroleum-based products now, or will continue to do so. It is whether Minnesota is conserving oil sufficiently that it does not need a new or additional source of petroleum. And the answer is yes, our conservation programs have successfully reduced demand and Minnesota does not need a new petroleum source, especially one that does not directly serve our state.

3) 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.¹⁵⁵ 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

¹⁵² Minn. R. 7853.0130(A)(2).

¹⁵³ Ex. 50 at 13:11-15:17.)

¹⁵⁴ Findings of Fact, paragraph 178.

¹⁵⁵ Minn. R. 7853.0130(A)(3)

for which it did not have any state approval.¹⁵⁶ In addition, NDPC's two shippers of record, Marathon and Enerplus, also made calculated business decisions by upgrading refineries 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.¹⁵⁷

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 2013.¹⁵⁸ 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.¹⁵⁹

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.¹⁶⁰ 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. As a matter of law and public policy, the Commission discourages companies from using promotional practices to encourage use of their services.¹⁶¹ 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.

¹⁵⁶ T. Vol. II at 70:1-8, 69:3-6.

¹⁵⁷ T. Vol. III at 48: 8-18; Enerplus Comments, January 7, 2015.

¹⁵⁸ Ex. 13 at 4.

¹⁵⁹ T. Vol. III at 37:1-8.

¹⁶⁰ 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").

¹⁶¹ Minn. Stat. § 216B.243, subd. 3(4); Minn. R. 7853.0130(A)(3).

4) 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 shown that current facilities cannot meet demand.¹⁶² Although FOH does not oppose a pipeline in an environmentally appropriate location, it has also consistent stated that NDPC must prove its case, pursuant to Minnesota law. 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.¹⁶³ Marathon can supplement the supply of crude to its refineries with light crude from other sources, including domestic, Canadian, and non-Canadian foreign sources.¹⁶⁴ 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.¹⁶⁵

¹⁶² Minn. R. 7853.0130(A)(4).

¹⁶³ Ex. 13 at 5:134-35.

¹⁶⁴ Ex. 13 at 10:253-58.

¹⁶⁵ Minn. R. 7853.0130(A).

C. The record demonstrates that there are more reasonable and prudent alternatives.

- 1) FOH's System Alternatives deliver oil where it is needed—to Illinois refineries. The record demonstrates that SA-04 and SA-05 would serve NDPC's shippers by way of the Flanagan Terminal.**

In an issue largely ignored by the ALJ's Findings, 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.¹⁶⁶ 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 and the lower Midwest.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

In its comments, MPCA also stated that the record supports the potential need for a pipeline that directly serves the Chicago area.¹⁷¹ MPCA strongly questioned whether alternatives through Clearbrook and Superior are the only alternatives that served the applicant's needs,

¹⁶⁶ See Minn. R. 7853(B)(1).

¹⁶⁷ T. Vol. III at 48:19-24.

¹⁶⁸ Ex. 14 at 6:104-07.

¹⁶⁹ T. Vol. I at 123:2-17; see also Ex. 3, Table 7853.0240-C.1 at 6.

¹⁷⁰ *Id.*

¹⁷¹ MPCA Comments, dated January 23, 2015 at 5.

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.”¹⁷² NDPC and Marathon may wish for the Sandpiper Pipeline to be located in a place that is most financially advantageous for their pipeline structure and their bottom line. But the System Alternatives are more reasonable and prudent when considering the ultimate goal of getting the oil where it needs to go: Midwest refineries.

2) 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” requires that the Project to be located in NDPC’s Preferred Route.¹⁷³ 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.¹⁷⁴

To the extent that NDPC attempts to make a cost comparison, the focus of NDPC’s study is inappropriately narrow.¹⁷⁵ 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

¹⁷² *Id.*

¹⁷³ Minn. R. 7853.0130(B)(2).

¹⁷⁴ Minn. Stat. § 116D.04, subd. 6.

¹⁷⁵ *See Ex. 17, Sch. 1.*

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.¹⁷⁶ For instance, NDPC claimed that the additional cost of materials to build SA-03 is \$210 million for additional pipe and a pumping station.¹⁷⁷ 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.¹⁷⁸ There is no consideration of the potential remediation costs or other costs in the event of a spill.¹⁷⁹ 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 mileage¹⁸⁰ 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. Furthermore, if one wants to do a proper analysis of costs and impacts of alternatives, the fact that the Sandpiper route from Bakken to the Chicago area is longer than a route that goes to the Chicago area

¹⁷⁶ Ex. 6, Sch. 1.

¹⁷⁷ *Id.* at 32.

¹⁷⁸ T. Vol. IV at 59:15-60:6; 73:22-74:6.

¹⁷⁹ *Id.*

¹⁸⁰ Ex.6, Sch. 1.

directly, rather than the divergence to Superior, and then south through Wisconsin. Such a longer total route also increases the risk of oil releases.

Indeed, once total shipping 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,¹⁸¹ which may soon be connected to the Patoka area by way of the Southern Access Extension pipeline.¹⁸² 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.¹⁸³

If the actual costs of the Project were fully and properly 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.

3) 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.¹⁸⁴ As discussed in Section I.D., above, the ALJ abdicated his responsibility to evaluate the evidence in the record

¹⁸¹ T. Vol. VII at 53:4-15.

¹⁸² T. Vol. III at 50:3-16

¹⁸³ T. Vol. III at 77:13-18.

¹⁸⁴ Minn. R. 7853.0130(B)(3).

on the environmental impacts of the various system alternatives, instead declaring that “none of the System Alternatives present a clear advantage over the proposed route.”¹⁸⁵

FOH agrees that the evidence in the record could be developed more fully if nonprofit citizen organizations were blessed with the kind of unlimited economic resources that NDPC enjoys, but nevertheless there is significant evidence in the record that *all* of the system alternatives are environmentally preferable to the proposed route. The only experts who supported NDPC’s proposal were NDPC’s experts. Even in the event that the Commission determines that NDPC’s witnesses have some bias as employees or consultants of the companies, and decides that Mr. Stolen and Dr. Chapman may have some bias because of their association with a particular group, still the neutral opinions of the MPCA and DNR as described in Section I.D., above, remain and must be followed.

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

NDPC did not present any evidence that there is demand for a pipeline to go through Clearbrook to Superior or that current facilities cannot adequately meet that demand, as discussed in Section VI.B. As such, any delay caused by forcing NDPC to apply for a Certificate of Need for a System Alternative in an environmentally appropriate location will not cause any reliability concerns.¹⁸⁶ 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.

¹⁸⁵ Findings of Fact ¶ 504.

¹⁸⁶ See Minn. R. 7853.0130(B)(4) (requiring the Commission to compare the expected reliability of the proposed facility with reasonable alternatives).

D. 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.

1) The proposed pipeline does not serve state energy needs.

As demonstrated above in Section IV.B.2, the state of Minnesota does not need additional crude oil sources. While the state does consume petroleum, demand has been dropping and there is no evidence in the record to tie this proposed pipeline to any of the state's petroleum needs. In addition, as discussed in Section IV.B.1, there is no evidence that the St. Paul refineries, the only potential shippers in the state of Minnesota, want or need a connection at Clearbrook. Thus, the state's energy needs are wholly indifferent to location of this pipeline, or whether there is a pipeline at all.

2) 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.¹⁸⁷ 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 over the project life. Major oil spill 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, resulting in permanent damage. Approval of the Sandpiper project on the route desired by NDPC also greatly increases the likelihood that the replacement and expansion of Line 3 will be approved on the same corridor, increasing the risk even more. These risks are further heightened by NPDC's refusal to adequately respond to the MDOC regarding the need for financial assurance.

¹⁸⁷ Minn. R. 7853.0130(C)(2).

The record reflects that 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.¹⁸⁸ There is no question that a crude oil pipeline presents a significant 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.¹⁸⁹

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.¹⁹⁰

PAH content can determine the extent of damage—both biologically (in terms of the numbers of organisms killed or harmed) and economically.¹⁹¹

Bakken oil is particularly toxic in its initial effects, and may persist for decades.¹⁹²

Bakken oil is chemically similar to diesel.¹⁹³ This gives it a tendency to spread quickly, more

¹⁸⁸ Ex. 180 at 9:34-10:2.

¹⁸⁹ MPCA Comments, dated January 23, 2015 at 4.

¹⁹⁰ Ex. 182 at 7:18-24.

¹⁹¹ *Id.* at 8-9.

quickly than heavy crudes such as tar sands oil, for instance.¹⁹⁴ Additionally, diesel spills may cause immediate and widespread wildlife kills.¹⁹⁵ Diesel spills may also persist in the environment over decades, still impacting wildlife many years later.¹⁹⁶

The ALJ's Findings of Fact erroneously relied upon the reports by Mr. Wuolo of Barr Engineering, ignoring the criticisms by the parties that significantly diminish the credibility and usefulness of this testimony. 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."¹⁹⁷ 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.¹⁹⁸

In his report, Mr. Wuolo noted that 171 of Minnesota's lakes are at risk from pipeline spills from the Project, and, further, 33 of these are immediately downstream.¹⁹⁹ 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. Thirty-three lakes still represent thirty-three aquatic communities, thirty-three ecosystems, and thirty-three recreational destinations (not to mention potentially thousands of Minnesotans who use any given lake). It only takes the destruction of one lake to constitute an

¹⁹² *See id.* at 7:21-24.

¹⁹³ *Id.* at 5:22-24.

¹⁹⁴ *Id.* at 6:1-10.

¹⁹⁵ *Id.* at 7:11-13; 8:25-28.

¹⁹⁶ *Id.* at 8:19-22.

¹⁹⁷ *Id.* at Sch. 2.

¹⁹⁸ Ex. 184 at 13:1-5; 14:26-27.

¹⁹⁹ *Id.* at 5:156-60.

unacceptable impact to Minnesota’s natural resources. The conclusions of this 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.²⁰⁰ 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.²⁰¹ In addition, as Mr. Wuolo himself was forced to admit, each oil spill is unique.²⁰² 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 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.²⁰³ 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.²⁰⁴ 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 the length of time before microbial populations adapt to the oil (which may be a matter of weeks), and how far the oil travels as the adaptation occurs.²⁰⁵ The USGS study site contains oil that has been in

²⁰⁰ *Id.*, Sch. 3.

²⁰¹ Ex. 182 at 11:23-12:3.

²⁰² T. Vol. VI at 42:17-19; Ex. 182 at 12:4-7.

²⁰³ Ex. 28 at 8:258-9:276, Sch. 3 at 13-14.

²⁰⁴ T. Vol. VI at 57:7-12.

²⁰⁵ Ex. 28, Sch. 3 at 10-11.

groundwater for 36 years and the plume has traveled about 650 feet.²⁰⁶ Doing the simple math, groundwater could travel up to 73 feet per year at the USGS study site versus up to 2,550 feet, or almost one-half mile, per year in aquifers south of Park Rapids, a much more concerning rate of spread.

The record demonstrates that even small spills and leaks present a great risk.²⁰⁷ 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).²⁰⁸ 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.²⁰⁹

The record also demonstrates that oil spills are expensive, time-consuming endeavors.²¹⁰ Enbridge's recent highly publicized leak from a pipeline in Michigan has cost the company more than \$1.2 billion to clean up.²¹¹ In 2010, an Enbridge pipeline ruptured into a tributary of the Kalamazoo River.²¹² Approximately 20,000 barrels of crude oil were released, and the cleanup costs now exceed \$1 billion.²¹³ It took pipeline operators 17 hours to shut down the pipeline after its safety monitoring systems indicated that the rupture occurred.²¹⁴ Impacts occurred over 35 miles downstream.²¹⁵ 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

²⁰⁶ *Id.* at 13.

²⁰⁷ *Id.* at 10:17-19.

²⁰⁸ Ex. 184 at 23:18-26.

²⁰⁹ *Id.*; MPCA Comments dated January 23, 2015 at p. 13; Ex. 180 at 30:1-35.

²¹⁰ Ex. 182 at 8; 9:1-15.

²¹¹ Ex. 180 at 32:13-14.

²¹² *Id.* at 56:37.

²¹³ *Id.* at 32:13-14; 56:37-37.

²¹⁴ *Id.* at 24:26-28.

²¹⁵ *Id.* at 24:22-30; App. 1.

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.²¹⁶ At the Yellowstone River, ice on the river has greatly hampered the cleanup and response effort, a cautionary tale for Minnesota.²¹⁷

Very little is currently known about how Bakken oil will behave when an oil spill inevitably occurs.²¹⁸ 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.²¹⁹ 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 regardless of 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).²²⁰ None

²¹⁶ *Id.* at 24-25.

²¹⁷ E-dockets 20151-106575, Public Comment at 11.

²¹⁸ Ex. 182 at 5:1-8.

²¹⁹ *Id.* at 7:1-14.

²²⁰ T. Vol. I at 64:24-65:8.

of these alleged benefits weigh in favor of granting a Certificate of Need for a pipeline in the proposed location.

3) Future pipelines will follow any corridor approved in this location, leading 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.²²¹ 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, including filing its Notice Plan, to locate a second pipeline, Line 3, along this corridor.²²² Line 3 will carry tar sands oil from the Alberta tar sands region, and may carry as much as 760,000 bpd.²²³ 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.²²⁴

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.²²⁵ 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.²²⁶ 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's sensitive waters, including Lake Superior. Therefore, the FOH approach would not only spare Minnesota from some of the environmental

²²¹ See Minn. R. 7853.0130(C)(3).

²²² Ex. 184 at 22:16-28.

²²³ Wuolo Cross at 27:3 (tar sands); Ex. 183, Sch. 2 at 24 (volume).

²²⁴ Ex. 182 at 11.

²²⁵ T. Vol. II at 114:18-115:10.

²²⁶ T. Vol. II at 99:25-100:1-5.

threats posed by pipelines, it would also save our neighboring states from the future development that follows from granting a certificate of need 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.²²⁷ While it has declined to order an EIS, an agency must nevertheless consider cumulative effects under MEPA.²²⁸ At the very least, the record is woefully inadequate on the question of the cumulative impacts of co-locating Line 3. If these cumulative effects are properly considered, it would become clear that the consequences to society of granting a Certificate of Need for NDPC's preferred location are significant.

This Commission has expressed concern in the past about the number of future pipeline proposals, as has the MDNR and MPCA.²²⁹ If Minnesota is going to permit these projects, it makes sense to designate some corridors that minimize environmental impact. If the Commission approves this project as proposed, however, at least one corridor for which future use is almost guaranteed will already be designated, and it would be a corridor chosen by a pipeline company against the will of the public.

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

The “output” of the Project – crude oil - does not have socially beneficial uses, particularly when considering if those uses are “to protect or enhance environmental quality.”²³⁰

To the extent that the output is beneficial, the system alternatives can provide the same benefit.

²²⁷ Ex. 48 at 11.

²²⁸ Minn. Stat. § 116D.04, subd. 7; Minn. R. 4410.2300(H).

²²⁹ Transcript of Commission Agenda Meeting September 11, 2014 at 40:5-14; MPCA Letter to Commission dated August 6, 2014; Ex. 185 at 6.

²³⁰ Minn. R. 7853.0130(C)(4).

E. The ALJ failed to acknowledge relevant state law in his decision, including MERA and MEPA. The design, construction, and operation of the Sandpiper Pipeline would not comply with Minnesota state law.

Even if the Commission does not agree that it needs to complete an EIS prior to considering the question of need, MEPA still governs the decision before the Commission. Specifically, MEPA requires that the Commission consider all “feasible and prudent” alternatives, and forbids the Commission from choosing a course of action that is “likely to cause pollution, impairment or destruction of the air, water, land or other natural resources,” so long as there is a feasible and prudent alternative “consistent with the reasonable requirements of the public health, safe, and welfare and the state’s paramount concern for the protection of its air, water, land, and other natural resources...” “Economic considerations alone shall not justify such conduct.”²³¹

Similarly, the Minnesota Environmental Rights Act, another bedrock environmental statute that governs these proceedings, 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.**²³²

NDPC’s proposed route fails this test. Ultimately, the ALJ’s reasons for rejecting the system alternatives came down to the company’s financial interest. They have proposed a particular pipeline. They have devoted resources to the application, an “open season” process,

²³¹ Minn. Stat. § 116d.04, subd. 6.

²³² Minn. Stat. § 116B.09, subd. 2 (2014) (emphases added).

obtaining a financial partner, and the proceedings at the FERC. To ask them to evaluate a different route that is potentially more expensive for the company costs them money, and that is why they oppose it. It did not have to be this way, if NDPC has considered alternatives earlier. But even where NDPC's proposal stands now, these considerations are impermissible under state law. The ALJ's conclusions must be rejected.

1) 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.”²³³ Minnesota courts have followed the principle of nonproliferation of utility corridors.²³⁴ According to the Minnesota Supreme Court, when considering alternatives, agencies must “comply with this policy of nonproliferation in choosing between alternative sites.”²³⁵ This policy reflects the state's “strongly held commitment to protecting the air, water, wildlife, and forests from further impairment and encroachment.”²³⁶ Based on the state's “strongly held commitment” to protect the environment and the policy of nonproliferation expressed in legislative enactments, the court stated:

²³³ *People for Env'tl. Enlightenment and Responsibility (PEER) v. Minn. Env'tl. Quality Council*, 266 N.W.2d 858, 868 (Minn. 1978).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 832 (Minn. 1977)).

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.²³⁷

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 of any System Alternative.²³⁸ 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 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."²³⁹

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.²⁴⁰

²³⁷ *Id.* at 868 (emphases added).

²³⁸ NDPC's Comments Regarding System Alternatives, August 21, 2014 at 2.)

²³⁹ *No Power Line Inc. v. Minn. Env'tl. Quality Council*, 262 N.W.2d 312, 331 (Minn. 1977) (Yetka, J, concurring specially).

²⁴⁰ *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.”²⁴¹ 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.”²⁴² 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.

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

The ALJ has offered no allowable basis for selecting its Preferred Route over a System Alternative. For instance, the ALJ notes that the cost of each system alternative is higher than the cost of the proposed route because the system alternatives are longer (although the system alternatives also terminate much closer to the refineries that are the final destination for the crude oil).²⁴³ NDPC’s argument that System Alternatives are not feasible is based on speculative financial harm to shippers.²⁴⁴ 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.²⁴⁵ Similarly, NDPC claims that the System Alternatives are not reasonable because they put the viability of the TSAs and FERC approval at risk.²⁴⁶ But NDPC admitted that it took a calculated business risk to enter into contracts that include these specific delivery points²⁴⁷ and to seek

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *See, e.g.*, Findings of Fact ¶351 in relation to SA-03. There were similar findings for each of the system alternatives citing additional cost of pipe as a result of a longer pipeline.

²⁴⁴ Ex. 14, Sch. 2 at 52.

²⁴⁵ Ex. 22 at 2:47-48.

²⁴⁶ Ex. 21 at 5:139-42; 166-69.

²⁴⁷ T. Vol. II at 69:3-6.

regulatory approval for a rate structure that allegedly hinges on specific delivery points.²⁴⁸ NDPC admitted it did not have state approval to construct a pipeline in this location when it took these risks.²⁴⁹

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 in the evidentiary record with the kind of analysis that its resources would allow it to develop. NDPC has not provided any competent evidence; it only provided the record unsupported claims of self-inflicted economic harm to justify its Preferred Route over the System Alternatives. And the speculative economic harm alleged by NDPC does not take into account the potential costs of a spill in the Preferred Route as compared to a spill in the System Alternatives. In any event, the statutes are clear: economic considerations alone, even if based on credible factual evidence, are insufficient to justify an environmentally destructive choice under both MERA and MEPA.²⁵⁰

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

²⁴⁸ T. Vol. II at 70:1-8). NDPC

²⁴⁹ T. Vol. II at 68:24-69:2.

²⁵⁰ Minn. Stat. §§ 116B.09, subd. 2, 116D.04, subd. 6.

CONCLUSION

For the foregoing reasons, FOH asks that the Commission deny the Certificate of Need for the Sandpiper Pipeline.

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