

**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

**RESPONSE BRIEF
OF
CARLTON COUNTY LAND STEWARDS**

March 13, 2015

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I. INTRODUCTION

The proposed findings that CCLS has submitted began with NDPC's template and then made changes to reflect our disagreements or alternative proposals for findings. We've tried to organize our findings, then, in a way that makes it easier to track the major differences between applicant and CCLS's position. In some parts of the findings, we have copied verbatim proposed findings from NDPC, even those particular findings are not central to our position, nor do they relate to issues that we raised. We do that to emphasize that we haven't sought to disagree merely for the sake of disagreement. We summarize our major points of agreement and disagreement as follows:

- While CCLS strongly supports major conservation and sustainability efforts to combat global warming, CCLS recognizes that the evidence establishes that for some time into the future, domestic petroleum is going flow either through pipelines or system alternatives like rail or truck. Our position and proposed findings recognize that if pipelines are properly located and properly maintained, pipeline transportation is superior to rail and truck. In this sense, CCLS recognizes that there is a need – under the PUC regulations and CON statute -- for additional pipeline transportation, but this pipeline has been improvidently located for business purposes, instead of public purposes. Our opposition to the issuance of a Certificate of Need is predicated upon the lack of an environmental review that meets MEPA standards, and upon the proposed location of this line.
- Contrary to Applicant's proposed findings, Applicant has not proven that there is a need for a pipeline that runs through Clearbrook and Superior, nor has it proven that there is a need for more petroleum in Minnesota. Minnesota is meeting its energy needs with existing supplies. The need, statutorily defined, is to move petroleum from Bakken to Chicago, Patoka, and the East Coast. Our proposed findings would reject the issuance of a certificate of need, with a recognition that there is a need for a system alternative, properly located.
- CCLS rejects NDPC's contention that the demand for pipeline services is economically so sensitive, that a pipeline must be confined to the shortest possible, least costly, route. Our findings reflect the record evidence that the demand for petroleum transport is so strong, that it is currently traveling via alternatives that cost as much as \$5 per barrel more. This difference demonstrates that there is plenty of economic strength available to locate pipelines properly and ensure their safety.

- CCLS has grave concerns about the environmental consequences of the new extraction technologies. Our recognition of the existence of a need, under statutory definitions, does not constitute an endorsement of the extraction techniques. The legal need for the pipeline represents a deep flaw in the legal framework that is allowing significant increases in the flow of petroleum at the very time when climate science is telling us that we face a crisis in our use of fossil fuels. This issue must be addressed nationally and systemically. CCLS has taken a practical approach to this issue given the legal constraints and framework. Environmental protection advocacy does not require us to be impractical.
- CCLS rejects the contention that it is the burden of citizens or parties representing citizens, to prove that there is an environmentally superior route. As we have persistently explained, MEPA – and the alternative environmental review – place that burden on the applicant, once it is established that there is significant environmental impacts. This principle is recognized in the attached PUC description of how the Certificate of Need, taken from PUC website. That burden begins with supplying a MEPA compliant environmental, one that is equivalent to an environmental impact statement. That environmental review must examine alternatives and their relative impacts, and it cannot artificially restrict the project definition so as to make it impossible to consider meaningful alternatives that meet the need.
- By asserting that judgments about environmental impacts are “subjective value judgments”, NDPC has implicitly propounded a view that the only impact that is valuable is the cost of the project. According to NDPC, cost can be measured, cost is objective, and environmental impacts are completely neutral, something that cannot be quantified or measured, or compared. This approach necessarily elevates cost, and NDPC’s business profits, above all other factors. It runs completely counter to the provisions of Chapter 116D and fundamental principles that drive both MEPA and NEPA. There is science, and regulatory policy behind evaluating impacts, the science of ecology, biology, chemistry, engineering, geology, hydrology, and geological information systems. Minnesota law does not treat all resources as equal, and it is absurd to prepare an environmental review that way.
- NDPC’s environmental review (and that of DOC-EERA) does not examine environmental impacts, it merely describes the environment through which the project runs. The word environmental impact is a synonym for environmental effect. NDPC’s EIR simply tells us how many and what kind of features are near the route. That describes the environment to some extent, but it does not describe the environmental impact or effect. Our proposed findings support the positions of MPCA and DNR that the environmental review was inadequate for this reason alone, the Certificate of Need must be rejected.

II. NDPC'S FINDINGS INCORRECTLY EQUATE AN ENVIRONMENTAL INFORMATIONAL INVENTORY WITH AN ASSESSMENT OF ENVIRONMENTAL IMPACTS.

In our opening trial brief, we described the history of the alternative environmental review. We showed there that the EQB intended to create a shortened environmental review process in return for the requirement that the applicant file a full-environmental review with its application. That environmental review was to be functionally equivalent to an environmental impact statement in all of its essential aspects. The document itself, and the testimony of principal author Ploetz, however, demonstrate that Enbridge and DOC-EERA have acted as if they have been granted the license to file a mere environmental inventory, which simply describes the environment through which the pipeline travels, and then leaves it to citizens and parties to advocate which environmental features will be subject to negative effects, and which of these effects are more serious than others.

The testimony of both Ploetz and Pyle, as well as the documents they were respectively charged with authoring, tell us that in one ecosystem, a pipeline traverses more forest than another ecosystem, or more or less streams and rivers, or more or less aquifers. But we are not provided with a scientific, ecological, and risk-based analysis of the impacts on these resources. This analysis cannot be left to citizens: the action-forcing nature of an environmental review document depends upon an analysis of their impacts. This concept, that an environmental review is complete, merely by asserting, as NDPC and DOC do, that since a pipeline spill will pour petroleum into the environment wherever it occurs, the impact on the environment is the same, wherever the pipeline is located is, really, unprecedented in environmental law. As both DNR and MPCA explain, spilling petroleum onto the land is different from spilling it into lakes, rivers, streams or wetlands. Spilling it into land above a large sole source aquifer may be

different from spilling it into a shallow isolated aquifer. Even among these resources, some have greater value than others, and it is the job of the environmental review to provide the scientific and ecological information necessary to make these judgments. Both MEPA and NEPA, upon which MEPA was modelled, regard impacts in the same way. Impact is a synonym for effects. It is the effect of the project that is critical. These effects include ecological, aesthetic, historic, cultural, economic, social, or health impacts, whether adverse or beneficial. 40 C.F.R. §§

1508.7, 1508.8. An impact is:

A direct result of an action which occurs at the same time and place; or an indirect result of an action which occurs later in time or in a different place and is reasonably foreseeable; or the cumulative results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions (40 CFR 1508.8).

See also, Minn. Rules sec. 4410.2300¹. Parenthetically, we would note that there is no difference in definition of impact between state and federal policy acts. However, if NDPC contends that somehow there is an unwritten exception to these basic principles applicable to pipelines under Minnesota law, then that exacerbates the problem cause by NDPC's intentional refusal to proceed with its federal permit application. It would suggest that NDPC felt that it could sail through an eviscerated Minnesota environmental review process, and then argue the USACE that it should avoid a comprehensive review, because Minnesota has already done the job.

The central concept of the environmental review under MEPA and NEPA is that before permitting or authorizing a project, the government charged with authorization should "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may

¹ [F]or the proposed project and each major alternative there shall be a thorough but succinct discussion of potentially significant adverse or beneficial effects generated, be they direct, indirect, or cumulative.

have an impact on man's environment.” 42 USC § 4332(A). DOC-EERA and NDPC have distorted this purpose by essentially treating this as a question of geographical mapping and counting. They have described the location, but they have left out all of the rest of the natural science and environmental design arts, and simply said to the public, here is what is there, you figure out the impacts. This contradicts the purpose of the environmental review, which is to initiate and utilize ecological information in the planning and development of resource-oriented projects 42 USC § 4332(H).

Identifying the potentially impacted features is just the beginning of an environmental review. The central feature is the section of the environmental review that describes environmental consequences:

The environmental consequences section of the EIS provides the scientific and analytic basis for the comparison of alternatives. It must include a discussion of the direct effects of the proposed action and alternatives; indirect effects; possible conflicts with the objectives of federal, regional, state, and local (including local Indian tribes) land use plans; policies and controls in the area concerned.....” Bell, Environmental Law Handbook (22d edition 2013) p 632.

As witness Chapman explained, environmental consequences involved considerations of context and intensity. This is another way of saying that one cannot simply announce that a spill is a spill wherever it occurs. See 40 CFR sec 1508.27. Context requires an analysis of the biological, chemical, hydrological, and geological impact of the project in the particular context of the proposed action and its alternatives, using science and regulatory experience, and applying the legal and policy preferences found in Minnesota and national law and policy. Intensity refers to the severity of that impact, and again requires the application of ecological and other sciences to determine the magnitude and severity of the risk. What NDPC has done is to say, here is where we are going, here are the resources nearby, now you, public, if you want to

consider the actual impacts, go out and find biologists, chemists, ecologists and prove what the impacts will be and then, by the way, go out and design the alternatives, and do the same with them.

CCLS was so concerned that NDPC and DOC-EERA seemed flagrantly to be equating the counting of environmental features with analyzing environmental impacts, that we retained the services of a highly qualified and experience ecologists to explain the difference. He chose to describe in considerable detail an example of why merely describing the fact that a route goes through a forest or the plains is not sufficient to evaluate its environmental impacts. But the cost of doing this for all impacts, cannot be passed along to CCLS, FOH or citizens: one of the key purposes of MEPA is to recognize that this cost is a public cost or an applicant cost, so that a project won't depend upon whether an organization can be formed to raise the money to prove that an environmental impact exists.

NDPC says that it cannot evaluate the relative weights of these impacts, because that requires judgment. There are several answers to that contention. First, NDPC has made economic judgments about the relative worth of routes by asserting that more costly routes are worse than less costly routes. And, of course, cost is a valid consideration when discussing the merits of routes or system alternatives. But by saying that cost is an objective measure of a route, but that all other measures of routes are subjective and therefore should not be weighed in the environmental review, NDPC is stacking the deck in favor of NDPC's business profit. And that is exactly the line of reasoning that MEPA and NEPA were designed to combat. NEPA and MEPA are action forcing legal instruments that require development of an evaluation of relative environmental impacts before governmental decisions are made.

Second, NDPC's contention that judgments are required in assessing the relative environmental impacts of routes does not justify failing to make the basis of those judgments transparent. The judgments involved in assessing routes involve a combination of scientific fact, scientific judgment, and policy preferences. NDPC's belief that a drainage ditch is environmentally equivalent to a shallow lake is not objective: it is a subjective abdication of its responsibility to use qualified ecological science to describe the value of the resources to the environment. It is a product of failing to have a qualified scientifically trained person who understands ecology supervise the preparation of the EIS. Claiming that shallow lakes is equivalent to a ditch would earn a failing grade on an introductory environmental sciences final exam. Shallow lakes are entitled to a high level of protection in Minnesota law because they perform critical biological and hydrological functions in Minnesota's lake-based ecosystem. That is not a value judgment; it is a scientific fact. They are entitled to a high level of protection, because the science of limnology has identified vulnerabilities to mesotrophic lakes. By treating all resources as of the same value, NDPC has completely deprived the Commission of the information that it needs to make its important policy judgments.

This point does not suggest that a man-made ditch might not be important, or that it might not deserve some consideration in determining the environmental effects. But the claim that a man made ditch is equivalent to a shallow lake for environmental impact purposes sweeps away both science and policy in a breathtaking way, and the problem here is that NDPC and EERA both used this approach not only with shallow lakes, but with all resources. A shallow lake is part of an integrated ecosystem. If it is destroyed, it cannot readily be replaced. A man made ditch is, well, man-made.

NDPC located its pipeline on the theory that polluting a manmade ditch is environmentally equivalent to a shallow lake, and that decision alone renders its environmental review unlawful. But, as we have said, the failure of NDPC to complete a valid environmental review has generated a broad list of defects, identified by qualified witnesses and agencies alike. In our findings, we enumerate those defects, and we repeat them here:

130. The environmental review for Applicant's Proposed Project does not satisfy the Chapter 116D and the requirements of Minnesota Rules parts 7852.2100-.3100 and the requirements for alternative environmental review in Minnesota Rules part 4410.3600.

131. Under the alternative environmental review authorized in the routing rule, the primary environmental review document is prepared by the applicant and submitted with the certificate of need and routing applications. The Environmental Assessment Supplement presented for public review, merely counted feature quantitatively and made no qualitative judgments regarding environmental impacts². Neither the environmental review provided in this docket, nor the information yet supplied by the parties, allows a systematic, fair comparison of system alternatives from an environmental effects standpoint. As a result, the process thus far does not give policy-makers a complete or fair assessment of alternatives³.

132. The MPCA, DNR and other parties provided persuasive evidence that there were route or system alternatives (that is route alternatives with different endpoints than those proposed by applicant) that should have been studied in the environmental assessment supplement submitted by the applicant.⁴

133. In general, the alternative environmental review documents failed to fulfill the requirements of the alternative review, in its:

- A. failure to identify the potential environmental impacts of the proposed project;
- B. failure to address substantially the same issues as an Environmental Impact Statement
- C. failure to use procedures similar to those used in preparing an EIS but in a more timely or more efficient manner;

² Ploetz Tr. pg. 22, 37. 41.

³ Dr. Chapman Surrebuttal, paragraph 1.; (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3

⁴ (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3; (WS_MPCA-2) page 5

- D. failure to consider alternatives to the proposed project in light of their potential environmental impacts
- E. Failure to adequately analyze potential mitigation measures where environmental impacts are identified
- F. Both Minnesota Environmental Policy Act – MEPA-- (and its implementing regulations) and the National Environmental Policy Act --NEPA—(and its implementing regulations) call for close coordination between the federal and state environmental reviews. When an applicant proposes to use the alternative environmental review described by the routing rule, it is thus imperative that the applicant trigger that cooperation before the application and environmental assessment supplement are submitted.

134. The environmental review documents were inadequate to satisfy the needs of both the Minnesota Pollution Control Agency and the Department of Natural Resources for use in connection with its permitting process.

135. The environmental review's treatment of impacts to undisturbed lands versus previously disturbed lands is inadequate⁵ and fails adequately to

- i. Include impacts of fragmentation to forests due to the construction of corridors
- ii. Include sites containing area sensitive avian species
- iii. Describe the impact of invasive species introduced
- iv. Acknowledge construction through undisturbed areas results in habitat loss, conversion, degradation, and fragmentation
- v. Recognize ag land has impacted soils already
- vi. Recognize that BMPs are not practical for undisturbed areas
- vii. Consider the impact to natural ecoregions versus ag land or developed regions
- viii. Recognize the distinction between regular ag land and agricultural land that is devoted to sustainable or organic farming.

136. The environmental review fails to consider the value of water resources being crossed and provide alternative routes or systems to avoid these areas.⁶

⁵ JS 1, pages 3-4; (WS_MPCA-1) page 11, page 13 paragraph 1

⁶ JS 1, page 5

137. The environmental review fails to consider the Tamarack state mineral lease in route determination and fails to identify safety concerns on the possibility of having both future crude oil pipeline and mining operations on the same state-owned land.⁷

138. The environmental review failed to discuss the potential of additional/future pipeline infrastructure constructed through Clearbrook, MN and did not assess the site from an environmental impact view, failing to recognize the Clearbrook area as one of Minnesota's largest concentration of sensitive surface and groundwater. The potential impacts to the natural resources of this area include degradation due to oil spills or releases into some of the State's most valuable surface and groundwater resources.⁸

139. The environmental review failed to assess impact of contamination to Minnesota's most susceptible groundwater areas through which the proposed route crosses.⁹

140. The environmental review failed to include a risk assessment of potential damages as a result of an oil leak.¹⁰

141. The environmental review failed to adequately address Minnesota State listed threatened and endangered species and Minnesota sites of biodiversity significance.¹¹

142. The environmental review failed to evaluate impacts to sensitive species, including plants, permanent alteration due to disruption of sensitive-specific and balanced conditions.¹²

143. The environmental review failed to adequately address standard measures of preserving undisturbed soil, organic and sustainable agricultural, and related impact to undisturbed areas.¹³

144. The environmental review failed to adequately conduct hydraulic conductivity ratings at appropriate standard pipeline depths.¹⁴

145. The study, Stream-Aquifer Interactions in the Straight River Area, Becker and Hubbard Counties, Minnesota, studied a representative portion of the investigation area that is underlain by an extensive surficial aquifer consisting of glacial outwash. Stark Study, page 3. The study explains: This aquifer is part of a large surficial aquifer system, called the Pinelands

⁷ JS 1, page 6 paragraph 4

⁸ (WS_MPCA-2) page 14 paragraph 2

⁹ (WS_MPCA-2) page 12

¹⁰ JS 1, page 6

¹¹ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

¹² (WS_MCPA-1) page 12 paragraph 1

¹³ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

¹⁴ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 7

Sands (Helgesen, 1977), which underlies 770 square miles of Becker, Cass, Hubbard, and Wadena Counties. Confined drift aquifers also underlie most of the investigation area. (Stark Study, page 3).

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

147. The environmental review failed to distinguish between all public lands and inadequately address the functionality and services provided by said lands to the public.¹⁵

148. The environmental review failed to clearly define the definition of impaired water across different regions crossed in the suggested route; therefore it fails to adequately account for existing water quality conditions.¹⁶

149. The environmental review failed to account for the biological quality ranking of specific communities; hydrological continuity, species diversity, disease, regeneration and presence of invasive species.¹⁷

150. The environmental review failed to quantify the acres of public land crossed, therefore the varying sizes of parcels is not accounted for and the impact assessment cannot be evaluated appropriately¹⁸

151. The environmental review failed to adequately provide information regarding the Spire Valley AMA therefore impact assessment does not include all potential impacts and ramifications.¹⁹

152. The environmental review failed to provide an adequate cost analysis based on evaluation of a system’s ability to reduce the risk of a costly spill to a sensitive environment area²⁰ It fails to recognize that the cost associated with restoration and rehabilitation of a site is significantly greater compared to preservation and protection methods. The Evaluation of Spill

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

¹⁶ Exhibit 185, doc 20151-106574-01 (Jamie Schrenzel 1/23/15 Comments Letter) page 10; see also (William Sierks 1/23/15 Letter -WS_MPCA-1) page 7, paragraph 3

¹⁷ Exhibit 185, page 10

¹⁸ Exhibit 185, page 10

¹⁹ (JS-3) (Jamie Schrenzel 5/30/14 Letter) page 2, paragraphs 1-2

²⁰ (WS_MPCA-1) page 3, paragraph 2-3

Response, failed to include factors that minimize potential for costly spills or discharge and failed to evaluate the risk associated with limited access to potential release sites.²¹

153. The environmental review failed to adequately consider limited access to water bodies crossed by the proposed systems.

154. The environmental review failed to adequately evaluate damage to aquatic systems from potential spills²² including impact assessment of cleanup processes.

155. The environmental review failed to recognize that significant data gathering must be performed in the SA-Application route that transverses glacial moraines prior to understanding the movement of oil discharge in the area and understand the difficulty to accurately assess the potential for groundwater contamination based solely on GIS layers.²³

156. The environmental review failed to adequately include an impact assessment for the native wild rice of Minnesota²⁴ and failed to assess the cultural importance of wild rice in Minnesota.

157. The environmental review failed to adequately recognize Minnesota's wild rice crops sensitivity and ecoregion-specific qualities which limit its ability to grow abundantly in other areas or after contamination to its native site.

158. The environmental review failed to recognize that temporary economic benefits would occur regardless of project location, therefore analysis should include other economies that may potentially be effected permanently.²⁵

159. The environmental review failed to adequately assess potential damage from hydrostatic testing discharges and failed to include passable prevention methods.²⁶

160. The environmental review failed to seriously evaluate impacts to potentially undetectable sites that limited access may prevent timely detection.²⁷

161. The environmental review failed to adequately provide a systematic, fair comparison of system alternatives from an environmental effects standpoint. As a result, the process thus far does not give policy-makers a complete or fair assessment of alternatives.²⁸

²¹ (WS_MPCA-1) page 4, paragraph 2; (WS_MPCA-2) page 10

²² (WS_MPCA-1) page 8 paragraph 3

²³ (WS_MPCA-1) page 10, paragraph 1

²⁴ (WS_MPCA-1) page 10, paragraph 3; (WS_MPCA-2) page 8

²⁵ (WS_MPCA-2) page 7

²⁶ (WS_MPCA-1) page 9 paragraph 2

²⁷ (WS_MPCA-1) page 13 paragraph 3

162. The environmental review failed to provide comparison of potential environmental effects among the system alternatives, including failing to complete a water sensitivity analysis and flow path analysis.

163. The MPCA, DNR and other parties provided persuasive evidence that there were route or system alternatives (that is route alternatives with different endpoints than those proposed by Applicant) that should have been studied in the environmental assessment supplement submitted by the Applicant.²⁹

164. Instead, the assessment documents merely list the number of resources in the region, which does not provide adequate data to determine which potential routes pose the greatest risk to resources.

165. The environmental reviews are materially and substantially incomplete, and in the absence of a complete environmental review, neither a certificate of need nor routing permit can be granted.

III. NDPC'S ATTEMPT TO SHIFT THE BURDEN OF PROOF ESTABLISHED BY MERA IS CONTRARY TO LAW.

It is understandable that NDPC would like to shift the burden of proof to citizens to establish that there are superior routes. But that proposed allocation of proof is contrary to law. NDPC's interpretation of Minnesota law would make it virtually impossible for citizens to challenge its project, no matter how poorly it is located. NDPC leaped before we looked; it locked in a single choice before it had an environmental review that was supposed to be action-forcing; moreover:

- NDPC eliminated from consideration all alternative routes. It eliminates even the route that NDPC itself established. That avoids a genuine comparison of routes in the environmental review document filed with the application, which is the lynchpin of the EQB's original waiver from the general MEPA procedure, and shifts the task onto other agencies and parties.

²⁸ Dr. Chapman Surrebuttal, paragraph 1.; (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3

²⁹ (WS_MPCA-1) page 1 paragraph 1, page 14; JS-2 page 1 paragraph 3; (WS_MPCA-2) page 5

- NDPC defined the project purposely narrowly so that the project not only must deliver petroleum from Bakken to the refinery points that actually use it, but also must go through two points, Clearbrook and Superior, points that are neither sources nor delivery points for the petroleum. It substitutes its own business purpose for a public purpose, preventing a genuine open governmental consideration at the time that the environmental review is presented, again, eliminating the comparative data that the EQB intended would be supplied at the outset of the case.
- Third, it completely eliminated from its environmental impact review any analysis of environmental impacts, and adopted the position that all impacts are equal, except the impact of cost of construction. Once again, this choice shifted to others the analysis which should have been provided at the front end. Pipeline proceedings were supposed to be an opportunity to critique of a professionally prepared environmental impact review, but NDPC's approach turns them into procedure where agencies and citizens have to scramble to generate the impact review at the last minute.
- Fourth, it arranged shipper agreements with Marathon whose refineries are in Illinois and other places east of Lake Michigan, but arranged with Marathon that in return for giving Marathon a major share of the profits and guaranteed capacity, Marathon must agree that the pipeline must go through Clearbrook and Superior, even though that refiner has no need for petroleum at either one of those locations. Then, it presented to potential other shippers an opportunity to ship on the pipeline but constrained those agreements also to limit the shipments to go

through Clearbrook and Superior, even if their real need is to receive delivery elsewhere. Having entered into those agreements, it then argued that because all of shippers had signed up only for a pipeline that goes from Bakken to Chicago and Patoka via Clearbrook and Superior.

- Finally, NDPC visited county governments, unions and chambers of commerce and told them that the only way they are going to get a pipeline now is if they support a pipeline that Enbridge has selected.

We won't repeat here the point that we have previously made in prior submissions: that MEPA places this burden, not on citizens or other parties, but upon the proponent of the project. The burden is placed explicitly on NDPC because Section 116D.04 subdivision 2b bars approval of any governmental action until an environmental impact statement has been approved. Hence, any burden relative to the Certificate of Need cannot be allocated, until the environmental review is deemed adequate and all parties have the right to utilize that review before any one is required to take positions on the statutory standard.

IV. NDPC'S FINDINGS INCORRECTLY TREAT AGENCIES AS IF THEY ARE MERE CITIZEN COMMENTS.

Throughout its findings and trial brief, NDPC dismisses the position of DNR and MPCA as if they were mere bystanders, or random citizen commenters. That is completely wrong. The PUC, Minnesota DNR and MPCA have overlapping jurisdiction. Both DNR and MPCA retain permitting authority over this pipeline and the lands that it will impact. Both DNR and MPCA have greater regulatory experience in the environmental areas, and their regulatory experience and expertise in evaluating environmental consequences vastly exceed that of the MN PUC and DOC. When a court reviews the decisions of the PUC regarding the adequacy of the environmental review respecting environmental issues within the purview of those agencies, it

would be very difficult to defend a decision of the PUC that disregards MPCA or DNR determinations that the PUC failed adequately to study, evaluate and describe impacts on the resources that fall within another agency's jurisdiction. It is one thing for the PUC to claim agency expertise on pipeline rates, or the need for increased petroleum delivery systems: that is within the PUC's area of expertise. But it would be indefensible, we assert, if the PUC were to blithely disregard determinations by DNR and MPCA that the environmental reviews fail to address major impacts on resources within their jurisdictions.

That's why our findings (paragraphs 165 and following) don't refer to the DNR and MPCA presentations as comments. They are not. They are positions taken by the agency, they are like adjudications made after the environmental review has been subjected to detailed agency scrutiny. Both agencies will have to consider permits, and there is no suggestion in the law that they can be forced to grant permits without adequate environmental review. The Minnesota Department of Natural Resources has broad jurisdiction over Minnesota's public waters (including rivers, streams, lakes and wetlands). See Minnesota Chapter 103G (game and fish), Chapter 97-102, and broad powers over conservation, state lands, forestry and lands and minerals. The Commissioner of DNR has charge and control of "all...waters of the state and of the use, sale, leasing, or other disposition thereof..." Minn. Stat. § 84.027, subdiv. 2. The Department of Natural Resources issues pipeline permits for crossings over public waters and thus has important regulatory authority over pipelines that cross public waters and public lands. All utility crossings (transmission and distribution) of wild, scenic or recreational rivers, or of state lands within their land use districts which are under the control of the commissioner, require a permit from the commissioner pursuant to Minnesota Statutes, section 84.415 or

103G.245 under Minn. Rules 6105.0170. The position of the Department of Natural Resources on matters within its jurisdiction are thus entitled to great weight.

Minnesota Rule 6135.1600, administered by the Department of Natural Resources, explicitly states that utility crossing permits are subordinated to the Minnesota Environmental Policy Act as follows:

There are other Minnesota and Federal laws and rules and regulations concerned with utility crossings and the environment. In case of conflict with other environmental regulations, the parts included herein will be subordinated to any law, rule, or regulation which is stricter in its protection of the environment. Other related environmental laws and rules and regulations include but are not limited to those associated with: A. federal and state wild, scenic, and recreational rivers; B. the Minnesota Environmental Protection Act; and C. natural and scientific areas.

Minnesota Rule Section, 6135.1100 also under Minnesota DNR jurisdiction, explicitly incorporates the avoidance and least impact principles of MEPA as follows:

Subp. 4. Crossing public waters. With regard to crossing of public waters: A. avoid streams, but if that is not feasible and prudent, cross at the narrowest places wherever feasible and prudent, or at existing crossings of roads, bridges, or utilities; and B. avoid lakes, but where there is no feasible and prudent alternative route, minimize the extent of encroachment by crossing under the water.

Similarly, as our proposed findings (par 103) indicate, The Minnesota Pollution Control Agency was established “To meet the variety and complexity of problems relating to water, air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state consistent with the maximum enjoyment and use thereof in furtherance of the welfare of the people of the state...” Minn. Stat. § 116.01. The Commission has extensive experience in the preparation of environmental reviews under its statutory authority. Minn. Stat. § 116.02. It has broad and extensive jurisdiction in the protection of Minnesota’s waters, and has regulatory authority over pollution in cooperation with

the federal Environmental Protection Agency and the United States Army Corps of Engineers under the Clean Water Act. Minnesota PUC simply cannot ignore the applied expertise of these agencies on matters within their agency competence.

V. THE DELAY THAT WILL BE CAUSED BY CON DENIAL IS ATTRIBUTABLE TO NDPC, AND WILL NOT MATERIALLY IMPACT THE CONSTRUCTION SCHEDULE.

Throughout these proceedings NDPC has devoted considerable attention to the claim that if the proceedings are delayed, it will be an environmental law abomination, because there is a national crisis of some kind that requires immediate action. There is simply no truth to this assertion. This misimpression has motivated numerous comments by NDPC allies: trade unions, chamber of commerces, and local government hoping for early receipt of tax revenues. But as our proposed findings point out, NDPC has put the PUC in the position of being asked to approve an improperly prepared project, based upon a document which is not an environmental assessment, but rather a geographic feature inventory.

Although NDPC contends that the Commission should approve the preferred route because the preferred route can be approved more quickly than environmentally superior alternatives, the reasons offered do not provide adequate justification for grant of a Certificate of Need. The following factors lead to this conclusion:

- a. NDPC intentionally filed an application proposing only a single route alternative, when the facts and circumstances should have led NDPC to recognize that alternatives were likely to be considered in order to comply with Minnesota law.
- b. NDPC failed to proceed with its US Army Corps of Engineers Permit and has thus intentionally delayed the environmental review required under NEPA.
- c. NDPC submitted a defective Environmental Information Review which fails to comply with Chapter 116D and the alternative environmental review. There is no legal basis for sanctioning a defective environmental review to facilitate a more rapid approval.

- d. NDPC should have allowed for potential system alternatives in its shipper agreements, since it could not presume acceptance of the only route that it submitted.
- e. NDPC knew or should have known that it intended to submit a Line 3 application traversing the same route, but failed to treat those applications as connected action for environmental review purposes.
- f. NDPC acknowledges the existence of a glut of oil in today's markets. While NDPC is planning for the long run, current market conditions do not support NDPC's suggestion that suitable alternatives should be ignored simply to facilitate more rapid approval.

It is actually possible for NDPC to meet its revised construction deadline by proposing to amend its certificate of need with a genuine compliant environmental-impact-statement-quality-EIR. It needs to be emphasized that an adjudicatory procedure will follow this CON proceeding, even if the CON is approved. NDPC faces the prospect, even if the CON is granted, that a CON appeal will follow, and in that appeal, NDPC faces the prospect of defending a decision which claims that the environmental review was adequate, despite the strong positions to the contrary of MPCA and DNR. NDPC must recognize that, since it failed to file a USACE Section 404 permit, there remains a NEPA procedure at the federal level which has yet to begin. Had NDPC chosen to proceed in the usual manner, that is to run the two environmental reviews together, then PUC would now have the benefit of that review, and the two reviews would have communicated and mutually benefitted from each other. But NDPC has, unwisely we think, attempted to propagate the suggestion that a Minnesota environmental review is less robust than a federal environmental impact statement, and that virtually compels the conclusion at the federal level, that the alternative review cannot be used by the USACE, except as an initial environmental assessment. It is inconceivable that should the Minnesota PUC reject the positions of MN DNR and MN PUC that the environmental review conducted here was inadequate, that the USACE and EPA will accept the PUC's position as persuasive, in the teeth

of contrary robust recommendations from MN DNR and MN PUC. Moreover, while NDPC has seemingly concluded that Minnesota will allow it to conduct two connected projects without considering the second project in the environmental review, unquestionably the USACE will not sanction that procedure. It is far more likely that some project, appropriately located, with a compliant environmental review will advance expeditiously, if the MN PUC orders NDPC to comply with Minnesota environmental law, than if it allows NDPC to attempt to slide by with an EIR that will not ultimately pass muster on review.

The surest way to advance the objective of a new Bakken to Midwestern refinery bound pipeline is to deny the CON without prejudice to submitting an amended application with a properly located, properly reviewed, proposed pipeline.

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Respectfully Submitted,

RINKE NOONAN

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