No. A18-1283
No. A18-1291
No. A18-1292

State of Minnesota
In Court of Appeals

In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border.

OPENING BRIEF AND ADDENDUM OF RELATOR FRIENDS OF THE HEADWATERS

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LEGAL ISSUES

Whether the decision of the Minnesota Public Utilities Commission (PUC) that the Final Environmental Impact Statement (FEIS) for the proposed Line 3 pipeline project was "adequate" under the Minnesota Environmental Policy Act (MEPA) must be reversed when:

a. The FEIS did not analyze the potential environmental effects of a major oil spill at any specific site along the proposed route;

b. The FEIS defined the "purpose of need" of the project too narrowly, and therefore the FEIS did not fairly evaluate alternative pipeline routes that would have much less potential environmental impact; and

c. The FEIS did not evaluate the "cumulative potential effects" of downstream pipeline capacity needed if Line 3 is built or of opening a new corridor for future pipelines through Minnesota lake country to deliver Canadian heavy crude oil to refineries in the lower Midwest or the Gulf Coast;

d. The FEIS did not provide a useful estimate of the additional greenhouse gas emissions the project would likely cause.

The PUC issued its Order Finding Environmental Impact Statement Adequate on May 1, 2018, issued an Order Denying Reconsideration of its May 1 Order on July 3, 2018, and provided notice of that Order on July 9, 2018.

Apposite Authorities

Minnesota Environmental Policy Act, Minn. Stat. § 116D.04

Environmental Quality Board (EQB) Environmental Review Rules, Minn. R. pt. 4410

STATEMENT OF THE CASE AND THE FACTS[1]

A. Enbridge's Mainline pipeline system, its expansion, and the new corridor

Enbridge, the large Canadian pipeline company, has been operating crude oil pipelines through Minnesota since the 1940's, prior to the advent of any meaningful environmental or pipeline safety regulation. Those pipelines, together called the Enbridge "Mainline" system, follow a route from North Dakota, near the Canadian border, south to an Enbridge terminal in Clearbrook, Minnesota.[2] From Clearbrook, the Mainline pipelines essentially follow U.S. 2 across the state to Enbridge's terminal in Superior, Wisconsin. From Superior, some of the light crude products travel through Enbridge's Line 5 through the Upper Peninsula of Michigan and then across the bottom of the Straits of Mackinac to refineries in Sarnia, Ontario. Most of the heavier crude oil going through Enbridge's "Mainline" system, however, turns south at Superior, travels through Wisconsin and Illinois to terminals outside Chicago, and then is transported to

[1] The PUC has certified a record exceeding 100,000 pages. Most of those materials, however, really have little or nothing to do with the PUC's determination that the Line 3 Environmental Impact Statement (EIS) was adequate under the Minnesota Environmental Policy Act (MEPA). The key documents are the August 17, 2017 Final Environmental Impact Statement (FEIS) itself, which the PUC has inexplicably put into the record in reverse order. Doc. 1075-1223. Administrative Law Judge Lipman's November 1, 2017 Report and Recommendations, Doc. 1946, Addendum at 1-55; the February 12, 2018 Revised FEIS, also in reverse order, Doc. 2400 to 2425; and the PUC's Order Finding Environmental Impact Statement Adequate and Adopting ALJ Lipman's November 2017 Report as Modified, Doc. 2836, Addendum at 60-90. The previous written arguments of Relator Friends of the Headwaters (FOH) over the adequacy of the EIS are at Doc. 762 (June 20, 2017), Doc. 829 to 830 (July 10, 2017), Doc. 1430 (October 2, 2017), Doc. 2070 (November 21, 2017), and FOH's Petition for Reconsideration, Doc. 2888 (May 21, 2018). The May 15, 2017 Draft Environmental Impact Statement (DEIS), back to front, is at Doc. 612 to 689.

[2] At Clearbrook, the Mainline connects with the Flint Hills MinnCan line, which serves the two oil refineries in Rosemount and St. Paul Park.

refineries in the Midwest, like BP's big refinery in Whiting, Indiana, to eastern Canada refineries like those in Sarnia, and to refineries and export terminals along the Gulf Coast.

About ten years ago, during a period of high oil prices, the Alberta tar sands industry was expanding, and was looking for more transportation capacity. The tar sands mined or extracted in Alberta are too dense and thick to go through pipelines, so they are processed onsite into what is called "diluted bitumen" or "dilbit." The process of extracting tar sands oil is very expensive and very energy-intense and Canada's tar sands industry has been identified as a major source of greenhouse gas emissions.

In 2008, Enbridge proposed and, in 2010 built, a new pipeline for its Mainline corridor—Line 67, referred to as the "Alberta Clipper." When the Alberta Clipper came online in 2010, it expanded the Mainline system's capacity substantially, and it allowed Enbridge to cut back on the volume of oil going through its aging Line 3 without losing overall system capacity. At about the same time, the Bakken shale formation in western North Dakota, which produces light crude oil, was also booming, so Enbridge again proposed a new pipeline across Minnesota, called the "Sandpiper pipeline."

This time, however, with Sandpiper, Enbridge proposed a major deviation from its traditional Mainline corridor. Recognizing that its easements across the Leech Lake and Fond du Lac reservations were due to expire in 2029 and likely would not be renewed, Enbridge proposed a new route. This time, from the Clearbrook terminal, the pipeline would travel south through the La Salle Lake Scientific and Natural Area, just barely skirt the northeastern boundary of Itasca State Park, continue south through the shallow aquifer central sands region to Park Rapids. From there, it would turn east and run across

a part of Minnesota characterized by its clean lakes and rivers, valuable wetlands complexes, wild rice and wildlife habitat, and where the Chippewa bands have hunting, fishing, and gathering rights under the 1837 and 1854 Treaties. There are today no other crude oil or, for that matter, natural gas pipelines on the new proposed route between Park Rapids and Superior.

B. The Sandpiper Pipeline: Court of Appeals holds EIS required

The proposed Sandpiper pipeline and its new corridor engendered significant opposition. Enbridge applied to the Minnesota Public Utilities Commission (PUC) for a Certificate of Need (CN) and a Route Permit (RP) as required under Minnesota law. Several parties asked the PUC to prepare an Environmental Impact Statement (EIS) for the project, so that the PUC could properly evaluate the environmental risks, and the public would have the information they needed to be effective advocates for their position.

The PUC refused, claiming that an EIS was not required, that its CN and RP processes were exempt from the requirements of the Minnesota Environmental Policy Act (MEPA), and they could rely on the "comparative environmental analysis" Enbridge supplied for the PUC and its staff to review pursuant to Minn. R. 7852.1500. Friends of the Headwaters (FOH) appealed that decision to this court, and this court unanimously reversed the PUC and ordered the Commission to prepare an EIS before making any decisions on Enbridge's Certificate of Need application.[3]

[3] *In re N.D. Pipeline Co.*, 869 N.W.2d 693 (Minn. Ct. App. 2015). The Opinion contains the procedural history of the Sandpiper case.

While that appeal was pending, the PUC went ahead with its Certificate of Need and Route Permit process. Administrative Law Judge Eric Lipman conducted a hearing, and recommended that the PUC grant Enbridge's applications. He concluded, of course without the benefit of an EIS, that none of the environmental concerns raised about Sandpiper or its proposed route were persuasive, and the PUC ultimately agreed.

Before the EIS process ordered by this Court really got seriously underway, however, Enbridge "suspended" the Sandpiper project in favor of an alternative—the new proposed Dakota Access Pipeline (DAPL). DAPL carries light crude from the Bakken shale to refinery customers near Chicago and elsewhere without using either the Clearbrook or Superior terminals indeed crossing through Minnesota at all.

C. Continued expansion of tar sands pipelines and the Line 3 proposal

While DAPL was securing its necessary approvals, several new tar sands pipeline projects also got underway, all with the goal of getting tar sands oil to "tidewater," so it could ship in global markets. In 2014, oil prices declined sharply, and U.S. demand for refined petroleum products has remained flat or declining, so the tar sands producers have been determined to get their landlocked product to coastal export terminals and have been urging construction of new pipelines. TransCanada continues to pursue the KeystoneXL pipeline[4], which will transport 800,000 bpd of heavy crude oil from Alberta through Montana, Nebraska, and Kansas to the giant pipeline terminal in Cushing, Oklahoma, and

[4] On November 8, 2018, the U.S. District Court for the District of Montana enjoined KXL construction until the State Department completes a supplemental EIS and supplies additional reasoning for its reversal of position on whether to grant KXL an International Boundary Crossing Permit. *Indigenous Environmental Network v. U.S. Dept. of State*, 2018 WL 5840768 (D. Mont. Nov. 8, 2018)

from there to Gulf Coast refineries. Kinder Morgan proposed, and now the Canadian government has taken over, the Trans Mountain Expansion Project, which will transport 890,000 bpd of tar sands oil from Alberta to the Pacific Ocean in British Columbia.

Enbridge's contribution to this expansion effort has been twofold. First, it secured permission to expand the Alberta Clipper from 450,000 bpd to 880,000 bpd in 2017. Second, in 2015, Enbridge applied for a Certificate of Need and a Route Permit for the new Line 3 Project that is the subject of this appeal.[5] The current Line 3 carries only about 390,000 bpd of light crude oil, but the "new Line 3" would carry almost entirely tar sands oil at much higher volumes, 760,000 bpd up to 915,000 bpd. Unlike the current Line 3, the "new Line 3" would not stay in the traditional Enbridge Mainline corridor, but would instead follow the Sandpiper route Enbridge had previously proposed.[6]

D. Line 3 Environmental Review Process and This Appeal

This time, however, in light of this court's Sandpiper ruling, the PUC did order the preparation of an EIS. Instead of securing one of the natural resource agencies—the Department of Natural Resources (DNR) or the Minnesota Pollution Control Agency (MPCA) —to complete this task, however, the PUC directed the Department of Commerce (DOC) to complete an EIS for the project that met MEPA's requirements, and

[5] Docs. 1-5.

[6] The claim that the new Line 3 is a "replacement" for the old Line 3 is misleading. The new Line 3 will carry a different product at much higher volumes. What Enbridge is proposing is another significant expansion of its Mainline system's ability to transport "diluted bitumen" or "dilbit" from the Canadian tar sands, not a "replacement" of light crude transport capacity.

required completion of the final EIS prior to the due date for intervenor direct testimony.[7] The ALJ's prehearing order set a target date for issuance of the final EIS of August 10, 2017, with intervenors direct testimony due on September 11, 2017.

DOC did get a draft EIS out on May 15, 2017[8], and took comments until July 10, 2017.[9] Friends of the Headwaters and many other parties submitted detailed written comments.[10] DOC made what it called the Final EIS available on August 28, 2017.[11] The PUC referred the matter to Administrative Law Judge Lipman, the same judge that had recommended approval of the Sandpiper pipeline and route previously, for a recommendation on whether the FEIS was adequate. ALJ Lipman took comments, including comments from FOH[12], and on November 1, 2017, issued his report recommending that the PUC find the FEIS adequate.[13] FOH and several parties filed exceptions to ALJ Lipman's report on November 21, 2017.[14]

At the time ALJ Lipman issued his report, the trial-type hearing on Enbridge's Certificate of Need and Route Permit before a different ALJ, Anne O'Reilly, was underway and was completed in late November 2017. On December 14, 2017, during the post-hearing briefing period, the PUC decided that the FEIS was inadequate for a number of reasons, and ordered the Department of Commerce to prepare a revised FEIS to

[7] Order Joining Need and Routing Dockets (Feb. 1, 2016)
[8] Docs. 612-689.
[9] Notice of Availability of Draft Environmental Impact Statement and Public Information Meetings for the Line 3 Pipeline Project (May 15, 2017).
[10] Docs. 829-830 (July 20, 2017).
[11] Docs. 1075-1223.
[12] Doc. 1430.
[13] Doc. 1946, Addendum at 1-55.
[14] Doc. 2070.

address those problems. The department came back with a revised EIS on February 12, 2018. On April 24, 2018, ALJ O'Reilly issued her report and recommendations on the CN and RP applications. A week later, on May 1, 2018, the PUC made its determination that the revised FEIS was now adequate.[15] FOH and others petitioned for reconsideration[16], those petitions were denied on July 3, 2018, and published in the *State Register* on July 9, 2018. This appeal followed.

SUMMARY OF ARGUMENT

This appeal involves the Public Utilities Commission (PUC) determination that the Environmental Impact Statement (EIS) for Enbridge's controversial Line 3 crude oil pipeline project met the standard of "adequacy" in the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04.[17] Petitioner Friends of the Headwaters (FOH) submits that that decision should be reversed because the EIS does not answer the most basic questions:

- What would happen to Minnesota's environment if a major pipeline spill occurred at vulnerable points along the route?
- This project opens up a brand-new oil pipeline corridor in Minnesota lake country, largely because the easements on Indian reservations for the old

[15] Doc. 2836, Addendum 60-90.
[16] Doc. 2888.
[17] The PUC has indicated its intent to grant a Certificate of Need (CN) for the project, but is still considering possible modifications and conditions. The PUC also recently granted a Route Permit (RP). Neither of those decisions are yet before this Court, but neither can go forward unless and until an adequate EIS has been prepared.

corridor expire in ten years. What would be the "cumulative potential effect" if other new pipelines follow?

- The tar sands oil that would run through Line 3 is destined for refineries elsewhere in the Midwest, eastern Canada, and mostly along the Gulf Coast. Are there alternative routes that would bypass Minnesota lake country but still get the oil to its customers?
- Tar sands oil is a major source of greenhouse gas emissions. Will a new Line 3 likely boost tar sands production and what threat does that pose to the climate?

Instead the EIS offers little more than what is essentially a generic literature review on the damage oil spills can do, it largely ignores the possibility of more pipelines to come, it falsely assumes that the purpose and need for the project is only to deliver oil to Enbridge's terminal in Superior, Wisconsin, and it finds it plausible that the project's climate impact will be zero because the oil will just find another way to market if Line 3 is not built.

As a result, the PUC is going – indeed, has gone - ahead to decide whether to approve the pipeline and the route without having those answers, and the public has been denied the right to the information necessary to participate fully in this process, contrary to the goals of MEPA. The proper course for this court, then, is to vacate the PUC's EIS adequacy finding, and enjoin the granting of any certificates or permits until an adequate EIS has been prepared.

STANDARD OF REVIEW

The decision of the Public Utilities Commission (PUC) that the Final Environmental Impact Statement for the proposed Line 3 project was "adequate" under the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, must be reversed if "it was unsupported by substantial evidence in view of the entire record as submitted or was arbitrary and capricious." *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency,* 644 N.W.2d 457, 463-64 (Minn. 2002). An agency ruling is "arbitrary and capricious" if the agency (1) relied on factors not intended by the legislature; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation that runs counter to the evidence; or (4) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise." *Citizens Advocating Responsible Development (CARD) v. Kandiyohi County Bd. of Com'rs,* 713 N.W.2d 817, 832 (Minn. 2006).

Judicial review of Environmental Impact Statements cannot just be a "rubber stamp." Instead, it requires what the federal courts have called a "hard look."[18] As the Fourth Circuit put it, the question for the reviewing court is whether the EIS "encompasses a thorough investigation into the environmental effects of an agency's action and a candid acknowledgment of the risks that those impacts entail?" *National Audubon Society v. Department of Navy,* 422 F.3d 174 (4th Cir. 2005). If "there is a

[18] The state case law analyzing the "EIS adequacy" standard under the Minnesota Environmental Policy Act (MEPA) is sparse, but there is ample federal case law under the analogous National Environmental Policy Act (NEPA), which can be helpful and which will be cited throughout this brief.

combination of danger signals which suggest the agency has not taken [its own] 'hard look' at the salient problems and has not genuinely engaged in reasoned decision-making," the court has a duty to intervene. *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 825 (Minn. 1977).

ARGUMENT

I. THE LINE 3 FINAL ENVIRONMENTAL IMPACT STATEMENT DOES NOT MEET THE REQUIREMENTS OF THE MINNESOTA ENVIRONMENTAL POLICY ACT (MEPA) BECAUSE IT DOES NOT ASSESS POTENTIAL SITE-SPECIFIC IMPACTS FROM A MAJOR PIPELINE OIL SPILL.

Before the environmental review process began for Line 3, most people understood that a major oil spill in Minnesota lake country could have catastrophic consequences for Minnesota's natural resources. Therefore, all parties had reason to expect that the EIS would provide that analysis. What would happen if a Kalamazoo-type spill[19] occurred near the Mississippi Headwaters, in the wetlands and wild rice habitat north of Itasca State Park, in the central sands area with its vulnerable shallow aquifers and already-compromised drinking water supplies, into the Straight River, a nationally recognized trout stream, and in those parts of the state where the Chippewa tribes have treaty-based hunting, fishing, and gathering rights? How far could the oil eventually travel? What would it do to wetlands, rivers, lakes, and groundwater? What would be the potential impact on drinking water supplies? What would be the fish, wildlife and plant life impacts? Could a spill be cleaned up without doing additional

[19] In 2010, an Enbridge pipeline near Kalamazoo, Michigan ruptured, sending well over a million gallons of heavy crude oil into the river and surrounding wetlands. So far, the cost of remediation is over $1.4 billion.

damage? What would a clean-up cost? What would it take to compensate for natural resource losses?

None of that is in the FEIS. The FEIS provides only the following:

1. A catalog of natural resources near the proposed routes for the pipeline;[20]
2. Relying on Enbridge's estimates of the volume of oil that would be spilled, projections of how far that volume of oil would travel in the first 24 hours at seven selected locations under several sets of circumstances;
3. Blanks where numbers ought to be, redacted because of Enbridge's claim that the data on how much oil might spill is non-public; and
4. Generic discussions about environmental impacts oil spill can have.[21]

There, however, the analysis stops. If there was a major oil spill at one of the Mississippi River crossings, for example, the FEIS would not tell you how much oil could spill or what assumptions Enbridge used to make its estimates. The FEIS would tell you how far downriver that volume of oil might travel in 24 hours. And it would tell you that contact with oil can do irreversible damage to many natural resources. But it is left to the reader to try to figure out which vulnerable natural resources might be in that area, whether a spill would be a temporary problem that could be promptly cleaned up or a permanent disaster that would compromise wildlife and water for decades to come. The FEIS does not identify the specific sites where special protections might need to be put in place. The FEIS does not estimate what it would cost to clean up an oil spill at any

[20] FEIS Ch. 5-6, Docs. 1193 to 1216.
[21] FEIS Ch. 10, Docs. 1178 to 1179, Addendum 56 to 59.

particular site, or put a valuation on threatened natural resources. It does not explore whether the financial resources would be available to manage a major oil spill at any spot along the route.

The FEIS acknowledges these gaps, but argues that "[t]he specific impacts of large oil releases are highly dependent on incident-specific factors that are impossible to predict with certainty." No one, of course, expects anyone to predict the future with certainty. But that is not a valid excuse for refusing to make the best estimates the science will allow.

The federal courts have consistently held that, under the National Environmental Policy Act (NEPA)[22], the rule is that "[r]easonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussions of future environmental effects as 'crystal ball inquiry.' If it is reasonably possible to analyze the environmental consequences in an EIS . . . , the agency is required to perform that analysis." *Pacific Rivers Council v. U.S. Forest Service,* 689 F.3d 1012, 1026-27 (9th Cir. 2012) (rejecting forest plan EIS that did not analyze site-specific impacts on fish) (citations omitted). The "reasonably possible" test has been a bedrock principle in the NEPA case law for decades, *e.g. California v. Block*, 690 F.2d 753 (9th Cir. 1982), and is the standard this court should adopt under MEPA.

[22] The Minnesota Supreme Court has long endorsed using NEPA precedent to interpret MEPA, because the purposes and language of the two statutes are so similar. *Minnesota Ctr. for Envtl. Advocacy v. Minnesota Pollution Control Agency,* 644 N.W.2d 457, 468 (Minn. 2002).

There is no question that it would have been "reasonably possible" to do site-specific analyses of potential Line 3 oil spill damages. There are well-established methodologies for calculating potential pipeline spill volumes, and there was no reason DOC had to rely on Enbridge's estimates.[23] There are well-established risk assessment methodologies FOH urged the DOC to use.[24] The EPA has both ecological risk assessment (ERA) and natural resource damage assessment (NRDA) tools that have long been in place.[25] Most recently, a consortium of academic and government researchers led by Michigan Technological University conducted exactly the kind of site-specific analysis that should be in the Line 3 EIS. This group assessed the potential cleanup costs and natural resource damages that would be incurred if there were a major oil spill from Enbridge's Line 5 in the Straits of Mackinac.[26]

The tools are there, but the DOC simply decided not to use them, and the PUC decided that was acceptable. It is not acceptable. The FEIS should have focused on the locations of greatest concern to natural resource managers[27] and the public. Using the

[23] Oak Ridge National Laboratory, *Studies for the Requirements of Automatic and Remotely Controlled Shutoff Valves on Hazardous Liquids and Natural Gas Pipelines with Respect to Public and Environmental Safety* (2012), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/technical-resources/pipeline/16701/finalvalvestudy.pdf

[24] That included Exponent's *Third-Party Consultant Environmental Review of the TransCanada Keystone XL Pipeline Risk Assessment* (2013), https://keystonepipeline-xl.state.gov/documents/organization/221278.pdf

[25] https://www.epa.gov/superfund/natural-resource-damages-assessments

[26] *Independent Risk Analysis for the Straits Pipelines* (July 20, 2018), https://mipetroleumpipelines.com/document/risk-analysis-straits-pipelines.

[27] The sites selected for even the limited analysis contained in the EIS were apparently the result of interagency discussions, but the substance of those discussions was not

available risk assessment tools, and of course not just accepting Enbridge's oil spill volume estimates, the DOC could have assessed potential natural resource damages, potential clean-up costs (both financially and in terms of potential future harm to the environment), and potential private and public property damages. With that, the PUC and the public would have had a much clearer picture of the potential environmental impacts along the proposed route.

Instead, the PUC and the public were asked to extrapolate from "representative" water crossing samples, make their own estimates of "worst case" spill amounts, pull up information about potentially vulnerable natural resources in any particular area, and then project possible water and resource damages from the resource inventory and literature review that was included in the FEIS. Under MEPA, that kind of analysis is the responsibility of the responsible government unit, not the public. Without it, the FEIS cannot meet the statutory standard.

II. THE FEIS DEFINES THE "PURPOSE AND NEED" OF THE PROJECT FAR TOO NARROWLY, AND AS A RESULT, THE RANGE OF ALTERNATIVES EVALUATED DOES NOT MEET THE STATUTORY STANDARD.

The Minnesota Environmental Quality Board's (EQB) Environmental Review Rules require that EISs "compare the potentially significant impacts of the proposal with those of other reasonable alternatives to the proposed project." Minn. R. 4410.2300, subp. G. That rule requires that:

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available to the public, and it is not at all clear that the resource agency positions prevailed.

> The EIS must address one or more alternatives of each of the following types of alternatives or provide a concise explanation of why no alternative of a particular type is included in the EIS: alternative sites, alternative technologies, modified designs or layouts, modified scale of magnitude, and alternatives incorporating reasonable mitigation measures identified through comments received during the comments periods for EIS scoping or for the draft EIS.

Id. The analogous Council on Environmental Quality (CEQ) rules at the federal level describe the alternatives requirement as the "heart" of environmental review. 40 C.F.R. § 1502.14. The purpose of the alternatives requirement is:

> To ensure that each agency decisionmaker has before him [sic] and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.

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

The *range* of alternatives that must be considered of course depends on the "purpose and need" of the project; the narrower the definition of "purpose and need," the narrower the range of alternatives. Not surprisingly, then, Enbridge has proposed a definition of "purpose and need" so narrow as to preclude most reasonable alternatives to their project.

Enbridge's definition of the purpose and need of this project is to deliver crude oil to Enbridge's terminal in Superior, Wisconsin through its terminal in Clearbrook, Minnesota. That precludes serious consideration of any alternatives that do not move crude oil through those Enbridge terminals. Unfortunately, the FEIS simply accepts Enbridge's definition of the

purpose and need as a given, and, as a result, only alternatives that move crude oil through those Enbridge terminals get serious attention in the FEIS.[28]

That was a fundamental error. The purpose and need for this project is *not* to deliver crude oil to Superior. There is no economic value in that. The purpose and need for this project is to deliver crude oil to Enbridge's *refinery customers*, almost all of which are located in the lower Midwest, eastern Canada, and the Gulf Coast. None of the oil stops in Superior.[29] All of it moves on to other Enbridge pipelines which will carry the oil south through Wisconsin and Illinois to Enbridge terminals there, and then on to the refineries themselves.

The "alternatives" question in this case, then, should be whether there are reasonable alternatives to deliver crude oil from Canada to refineries and export terminals in the U.S. And, that of course opens up a much broader range of alternatives, which is what the law requires.

The basic principle was articulated in *Van Abbema v. Fornell,* 807 F.2d 633 (7th Cir. 1986), where the court declared that "the evaluation of 'alternatives' . . . is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals." *Id.* at 638 (emphasis in original). As that same court recognized a decade later:

> The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the

[28] The one exception is the SA-04 alternative proposed by Friends of the Headwaters, which the PUC ordered DOC to consider. As explained later, however, the definition of purpose and need compromised the evaluation of that alternative as well.

[29] A very small amount may go to the Calumet/Husky refinery in Superior, the one that exploded last year.

> definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.

Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 666 (7th Cir. 1997); *accord National Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010).

By constricting the definition of "purpose and need" to require utilization of Enbridge's Clearwater and Superior terminals, the FEIS's evaluation of alternatives—the "heart" of environmental review—goes off course in several ways.

First, the FEIS (and ALJ Lipman's Report) reject the notion that the FEIS should have evaluated non-Enbridge pipelines like TransCanada's Keystone XL or the Trans Mountain Expansion Project (TMEP), now under the control of the Canadian federal government. Both of those projects are designed to get Canadian crude oil to the same Gulf Coast refineries that Enbridge's proposed Line 3 and pipeline system serves, and both of them have gone through much more extensive environmental review than Line 3 has. Both of them would also take pressure off the Enbridge Mainline system, and reduce or eliminate any bottlenecks or need to apportion capacity on that system. Yet, the ALJ dismissed them as possible alternatives because they "are not capable of bringing crude oil to a refinery in Superior, Wisconsin."[30]

Second, the FEIS's consideration of "System Alternative 04" or "SA-04," the alternative route Friends of the Headwaters proposed and the resource agencies endorsed as having fewer potential environmental impacts became completely skewed. SA-04 follows an existing Enbridge natural gas pipeline route, which stays west and then south of Minnesota lake country,

[30] ALJ Report, finding 171, at 25.

crosses the Mississippi near the Quad Cities, and then delivers product to the same Enbridge terminals in Illinois that would be taking crude oil traveling through a new Line 3.

The FEIS concludes that SA-04 would pose greater environmental risks than Enbridge's proposed Line 3 because it would be "longer," and shorter is generally better than longer when it comes to oil pipelines. The way the FEIS gets to that conclusion, however, is by measuring SA-04 all the way to Illinois, but only measuring the proposed Line 3 to *Superior*, a classic apples-to-oranges comparison.[31]

In fact, SA-04 takes a more direct route from the tar sands in Alberta to the refineries, terminals, and pipeline connections in the Chicago area where the oil will actually go. Enbridge's proposal, in contrast, follows a more convoluted route from the tar sands to Superior, where none or virtually none of the oil will be used, and then makes a sharp right turn to travel through Wisconsin and northern Illinois. As it goes, that oil will travel through environmentally sensitive areas in those states, including hundreds of additional watercourses and the fragile "karst" (cracked limestone) topography near the Wisconsin Dells and continuing south. If the FEIS had compared apples to apples, then its "shorter is better than longer" maxim would have redounded in favor of SA-04. If the FEIS had done a qualitative comparison, we would have learned that SA-04 travels primarily through easy-access flat farmland, where cleanup of a spill would be simpler and the natural resources at risk are more easily recoverable, while Enbridge's

[31] As with the non-Enbridge pipeline projects, ALJ Lipman found that SA-04 was not entitled to serious consideration because it has "a different endpoint" that Enbridge's proposed route. That presumably means that the FEIS did not need to evaluate SA-04 because it did not "end" in Superior. ALJ Report, Finding 198, at 31-32.

Mainline corridor to Illinois runs across very sensitive water resources, with limited access, and poses substantially greater environmental risks.

What the FEIS should have done, then, is to evaluate the non-Enbridge pipeline projects, SA-04, and other alternatives such as rail that would accomplish the same purpose of transporting crude oil from Canada to refinery customers in the Midwest and the Gulf Coast. Each alternative should have received the same treatment as Enbridge's proposed route, including, if necessary, mitigation measures that would reduce the oil spill risk from each alternative. Only then will the PUC and the public have the information they need to determine whether there is a better way to meet the purpose and need of this project, properly defined.

III. THE FEIS'S ANALYSIS OF "CUMULATIVE IMPACTS" OR "CUMULATIVE EFFECTS" IMPROPERLY DID NOT INCLUDE REASONABLY FORESEEABLE FUTURE PIPELINE PROJECTS THAT MIGHT RESULT FROM APPROVAL OF THIS PROJECT.

The Environmental Quality Board's (EQB) rules require that environmental impact statements (EISs) contain "for the proposed project and each major alternative... a thorough but succinct discussion of potentially significant adverse or beneficial [environmental, economic, employment, and sociological] effects generated, be they direct, indirect, or *cumulative."* Minn. R. 4410.2300, subp. H (emphasis added).[32] A

[32] In *Citizens Advocating for Responsible Dev. (CARD) v. Kandiyohi County Board of Comm'rs,* 713 N.W.2d 817 (Minn. 2006), the Minnesota Supreme Court found a distinction between "cumulative impacts," to be considered in deciding whether a generic EIS should be prepared under Minn. R. 4410.3800, and "cumulative potential effects," to be considered in deciding whether a project-specific EIS is needed under Minn. R. 4410.1700, subp. 7. The applicable rule provision in this case—Minn. R. 4410.2300, subp. H—adds a third phrase—"cumulative effects"—to which the Court has not decided whether a third definition should apply.

"cumulative impact" is defined in CEQ's rules as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions." 40 C.F.R. § 1508.7.

The "cumulative impact" discussion in the FEIS is insufficient because it does not analyze at least three reasonably foreseeable future actions, the effects of which should have been assessed in tandem with the Line 3 project:

1. The proposed new Line 66, or "twinning" the existing Line 61, or some other alternative, through Enbridge's existing pipeline corridor through Wisconsin and northern Illinois, which will have to take up any additional crude oil coming through Line 3 (especially if Line 5 under the Straits of Mackinac is retired);
2. Rerouting of all the Enbridge pipelines that currently cross the Leech Lake and Fond du Lac reservations on easements that are due to expire, and likely will not be renewed. The likely corridor would be the new Line 3 corridor, if it is ultimately approved;
3. A new Sandpiper pipeline along the same corridor Enbridge previously proposed to carry light crude oil from the Bakken Shale formation in western North Dakota.[33]

[33] Sandpiper is described in the supplemental EIS for the Line 67 (Alberta Clipper) expansion as being "on hold," not "abandoned." U.S. Department of State, Supplemental EIS for the Line 67 Project, https://www.state.gov/e/enr/applicant/applicants/environmentalreview/

Enbridge of course denies that it has any such plans, but each of these easily meets the "reasonable foreseeability" test. They are all "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *Northwest Bypass Group v. U.S. Army Corps of Eng'rs,* 552 F.Supp.2d 97 (D.N.H. 2008) (collecting cases).

First, a new Line 66, or "twinning" the existing Line 61 through Enbridge's Wisconsin corridor is certainly foreseeable because the new 760,000 barrels per day (bpd) of crude oil coming to Superior in a new Line 3 has to go somewhere. Enbridge has already proposed a new pipeline at least once, they have done extensive planning, the volume of oil that would need to be transported is highly predictable, and so assessing the potential environmental impact would be straightforward.

Second, returning with a new Sandpiper pipeline is also reasonably foreseeable, particularly if Bakken production continues to ramp up. The alternative Enbridge previously chose—the Dakota Access Pipeline (DAPL)—is running near capacity, and more pipeline transportation options may well be on the drawing table.

Third, and perhaps most important, the other old Enbridge pipelines in the Mainline corridor across Minnesota are likely to have to move. Those pipelines have only limited-time easements across the reservations, and the Leech Lake easements expire in 2029, just over ten years from now. With Minnesota policy favoring the use of existing corridors, it is very likely, and certainly "reasonably foreseeable," that Enbridge will propose using the new Line 3 corridor to escape its easement problem. That might increase the volume of oil going through that corridor from Line 3's 760,000 bpd up to 2

million bpd or more. Having several pipelines in one corridor also increase the risk of accidents when work is being done on any one of the individual pipelines. The FEIS does not even attempt to analyze the environmental risks of that volume of oil moving through the new corridor past Itasca State Park, through the central sands, and across the lake country where the Chippewa bands have federally recognized treaty hunting, fishing, and gathering rights.

Even the EQB definition of "cumulative potential effects," which applies to determining whether an EIS is required for a project, not whether an EIS is adequate, is consistent with the conclusion that these other foreseeable projects should have been included in the FEIS's analysis. As the EQB rule explains:

> "Cumulative potential effects" means the effect on the environment that results from the incremental effect of a project in addition to other projects in the environmentally relevant area that might reasonably be expected to affect the same environmental resources, including future projects actually planned or which a basis of expectation has been laid.

Minn. R. 4410.0200, subp. 11a. The rule goes on to list the factors a responsible government unit should evaluate to determine if "a basis of expectation has been laid," "whether a project is reasonably likely to occur," or "whether sufficiently detailed information is available about the project to contribute to the understanding of cumulative potential effects."

> [W]hether any applications for permits have been filed with any units of government; whether detailed plans and specifications have been prepared for the project; whether future development is indicated by adopted comprehensive plans of zoning or other ordinances; whether future development is indicated by historic or forecasted trends; and any other factors determined to be relevant by the RGU.

Id. Sandpiper and Line 66 (or "twinned" Line 61) meet most of these criteria already, and moving a pipeline where the property owner has expressed its intent not to renew a time-limited easement certainly meets any definition of "reasonably foreseeable."

Each of these projects should have been included in the "cumulative impacts" analysis. They were not. Environmental degradation often comes as a "death by a thousand cuts," and that is why assessing potential cumulative impacts is so critical. This FEIS does not pass this test.

IV. THE FEIS FAILED TO MAKE ANY USEFUL ASSESSMENT OF THE POTENTIAL EFFECT OF THE LINE 3 PROJECT ON GREENHOUSE GAS EMISSIONS.

Global climate change is an existential crisis, largely caused by the combustion of fossil fuels. To keep the average temperature increase less than 2 degrees celsius—the minimum goal set by the Paris Climate Accord—most of the world's known fossil fuel reserves will have to stay in the ground.[34] Production of Canadian tar sands oil must fall to negligible levels after 2020 if the 2º scenario is to be fulfilled.[35]

A shortage of transportation capacity makes additional tar sands extraction less economic, and therefore less likely to happen. The "pipeline bottleneck" has driven the price of Canadian tar sands oil below $20/barrel, and tar sands producers like Cenovus

[34] *E.g.* Christophe McGlade & Paul Ekins, "The geographical distribution of fossil fuels unused when limiting global warming to 2º C," *Nature* 187-90 (Jan. 8, 2015)(paywall). The findings of the McGlade/Ekins report are summarized in Damian Carrington, "Leave fossil fuels buried to prevent climate change, study urges," *The Guardian* (Jan. 7, 2015)
[35] *Id.*

are losing money and cutting production.[36] It follows that new tar sands transportation capacity will make tar sands extraction and eventually refining and combusting *more* economic, and therefore *more* likely to happen. For this pipeline project then, the question for the FEIS should have been how much more crude oil production is it likely to generate, what are the greenhouse gas emissions consequences, and what are the social costs of those additional GHG emissions.

The FEIS does not attempt to answer those questions.[37] It acknowledges and endorses the federal "social cost of carbon" methodology, and it calculates that the social cost of the carbon emissions from combustion—the "indirect" emissions—of all the oil that will run through this new pipeline will be $120 billion.[38] So far, so good, but there the analysis stops. The FEIS simply concludes that the social cost of additional indirect GHG emissions resulting from the new pipeline will be somewhere between zero and $120 billion, which is not particularly useful information for either the PUC or the public.

According to the FEIS, then, the "perfect substitution" model – where construction of the pipeline has zero effect on the amount of oil extracted and eventually combusted – is just as credible as any other scenario. The courts have, at least recently, consistently rejected that position. In *WildEarth Guardians v. U.S. Bureau of Land Mgmt.,* 870 F.3d 1222 (10th Cir. 2017), the BLM argued that the net greenhouse gas emissions from

[36] Goeffrey Morgan, "Cenovus urges oilpatch to cut output to ease glut—"We are not going to carry this industry on our back," *Financial Post* (Oct. 31, 2018), https://business.financialpost,com/commodities/cenovus-says-entire-industry-needs-to-mull-production-to-ease-oil-glut.

[37] The FEIS discussion of GHG emissions is in its "air quality" section, 5.2.7, at 5-466 to 5-484, Doc. 1216.

[38] *Id.* at 5-461 to 5-466.

renewing a set of major coal leases would be zero, because if the coal did not come from the proposed leased areas, it would just come from somewhere else. The court concluded that BLM's argument defied all the laws of economics—that the addition of more coal supply would likely have an effect on price, which would in turn affect demand, and it was the duty of BLM to analyze those market impacts to make a forecast of likely additional downstream GHG emissions.

Likewise, in *Sierra Club v. Federal Energy Reg. Comm'n*, 867 F.3d 1357 (D.C. Cir. 2017), the D.C. Circuit found a pipeline Environmental Impact Statement from the Federal Energy Regulatory Commission inadequate because, as in *WildEarth Guardians,* the agency had not estimated the likely downstream GHG emissions that might result from construction of a new natural gas pipeline. Like the PUC here, FERC argued that it was impossible to know exactly what quantity of greenhouse gases would be emitted as a result of the project, because it depended on so many uncertain variables. True enough, said the Court, but environmental review "necessarily involves some 'reasonable forecasting'" and "agencies may sometimes need to make educated assumptions about an uncertain future." *Id.* at 1374.

Most recently, in *Indigenous Environmental Network v. U.S. Department of State,* 2018 WL 5840768 (D. Mont. Nov. 8, 2018), the Court found the State Department's most recent EIS for the KeystoneXL crude oil pipeline inadequate for failure to do a current market analysis to determine what KeystoneXL's impact on tar sands production would be. The Court found that any reliance on a 2014 market analysis, before the

collapse of oil prices, was no longer useful, and the new market analysis needed to reflect the new low oil price environment.[39]

The FEIS in this case does no such market analysis at all. Without it, as in *IEN*, the FEIS has no way to make an estimate of the effect a new Line 3 would have on tar sands production. The FEIS refers to a range of possible economic situations, but it provides no way for any decisionmaker to evaluate which situation was most likely to occur.

FOH suspects that the most likely scenario is that construction of Line 3 will result in a substantial increase in Canadian tar sands production. The discount tar sands producers have to absorb because of transport capacity bottlenecks will be reduced. Higher prices will mean higher production; higher production will mean more energy use upstream at extraction, and more tar sands oil refined and combusted downstream; and the result will be substantially increased GHG emissions. It may not be the $120 billion the FEIS mentions, a number so large as to be essentially meaningless, but it will not be zero either. Both the PUC and the public need an informed estimate of those impacts to make any kind of sound decision about this project.[40]

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[39] The Court recommended using the updated Greenhouse Gas, Regulated Emissions, and Energy Use in Transportation ("GREET") model with its updated economic and market data. The GREET model, or suite of models, was developed by the Argonne National Laboratory. At this point, FOH offers no opinion on which model to use, only that the PUC or the DOC need to use a model like GREET to estimate GHG emissions under a range of reasonably likely market scenarios, and explain which outcome was most likely.

[40] *See generally* Michael Burger & Jessica Wentz, "Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review." *41 Harv. Envtl. L. Rev.* 109 (2017).

V. THE LINE 3 ENVIRONMENTAL REVIEW PROCESS HAS BEEN FRAUGHT WITH "DANGER SIGNALS" THAT STRONGLY INDICATE THE PUC DID NOT TAKE THE REQUIRED "HARD LOOK" AT THE ENVIROMENTAL CONSEQUENCES OF THIS PROJECT.

Reserve Mining Co. v Herbst, 256 N.W.2d 808 (Minn. 1977) is a case this Court often cites to support judicial deference to administrative agencies. But it is important to remember two other critical elements of that opinion. First, the Court clarified that deference is only owed to "agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Id.* at 824. If the agency making a particular decision has no such "special knowledge" or "expertise," there is no special deference owed. Second, the Court in *Reserve Mining* also squarely held that:

> [W]here there is a combination of danger signals which suggest the agency has not taken a "hard look" at the salient problems and "has not genuinely engaged in reasoned decision-making," it is the duty of the court to intervene.

Id. at 825, *citing Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970); *see also In re City of Owatonna's NPDES/SDS Proposed Permit Reissuance for the Discharge of Treated Water,* 672 N.W.2d 921, 926 (Minn. Ct. App. 2004).

This is precisely such a case. From the beginning, the environmental review process for this controversial project has been plagued with the kind of "danger signals" about which the *Reserve* Court was concerned.

The first danger signal was when the PUC did not assign the responsibility for conducting the environmental review to either of the agencies in state government that actually have expertise on the state's natural resources—the DNR or the MPCA—but rather sent it to the Department of Commerce (DOC). DOC may have considerable

"special knowledge" and "expertise" on utility ratemaking and on economic analysis, but not on environmental protection, as DNR and MPCA have. The legal frameworks for the agencies are different. The energy law the DOC applies comes out of public utility and antitrust law, and its focus is on controlling the economic pathologies of natural monopolies, such as excessive capital investment and excessive rates. Environmental law, on the other hand, comes out of tort and property law, and its focus is on protecting public health and welfare. The agencies have different stakeholders, staffs with different qualifications and experience, and, in most years, separate legislative oversight.[41]

In this case, not only were the resource agencies not given the responsibility to do the analytical work that is in their wheelhouse, but their participation was deliberately and expressly limited. Both the DNR and the MPCA had been highly and publicly critical of the route chosen for the Sandpiper pipeline, and had publicly endorsed alternatives like the SA-04 route FOH had proposed as posing much smaller environmental risk. To keep that kind of public interagency discord from occurring again, the resource agencies were obligated to enter into an agreement that they would *not* submit written comments that the public could review and incorporate into their own advocacy efforts. Discussions apparently occurred, but DNR and MPCA input was provided out of the public eye, and, as pointed out in earlier sections of this brief, was often ignored. Indeed, DNR and MPCA found themselves obligated to submit late critical comment letters on several occasions, because DOC was not following their

[41] *See generally* Jody Freeman, "The Uncomfortable Convergence of Energy and Environmental Law," 41 *Harv. Envtl. L. Rev.* 339 (2017).

guidance. Those resource agency comments were not available to the public so that members of the public could incorporate those concerns into their own comments.

In a normal, proper environmental review process, comments from the resource agencies are used by the public to formulate, direct, and support their advocacy efforts, and they often play a central role in judicial review of the adequacy of Environmental Impact Statements. *E.g. Western Watersheds Project v. Kraayenbrink,* 632 F.3d 472, 492 (9th Cir. 2011) (Bureau of Land Management EIS held inadequate because there was no reasoned response to adverse comments from the U.S. Fish and Wildlife Service, EPA, and state resource agencies); *National Audubon Soc'y v. Department of Navy,* 422 F.3d 174 (4th Cir. 2005) (Navy EIS inadequate, focus on comments from fish and wildlife agencies); *Center for Biological Diversity v. U.S. Forest Service,* 349 F.3d 1157, 1169 (9th Cir. 2003) (Forest Service EIS inadequate because of insufficient response to adverse comments from resource agencies); *see generally* Michael C. Blumm and Marla Nelson, "Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation," 37 *Vt. L. Rev.* 5 (2012) (review of impact of resource agency comments in NEPA cases). The effort to curtail the role of the DNR and the MPCA in this case was the first "danger signal."

The second danger signal was the limited amount of time the PUC gave DOC to do this work. From the beginning, the 280-day "deadline" in MEPA[42] was treated as more important than getting the job done right. As all agencies except perhaps the PUC

[42] Minn. Stat. § 116D.04, subd. 2a(j). This is a "directive" aspirational goal, not a mandatory deadline, because the statute does not spell out consequences if the timeline is not met. *Johnson v. Cook County,* 786 N.W.2d 291 (Minn. 2010).

understand, environmental review of complex, controversial projects like this pipeline often takes years, not months, to complete. For the Keystone XL pipeline, it took three years to complete the first FEIS, and then three years more once crossing the Nebraska Sand Hills region was ruled out. TransCanada applied for permits in 2008, the first FEIS came out in 2011, the second FEIS in 2014,[43] and the most recent EIS was just vacated by the U.S. District Court for the District of Montana. That environmental review has been going on for the better part of a decade. Here in Minnesota, the PolyMet mining project environmental review process took several years to finish, and the litigation over the final EIS for that project has not yet commenced, even though the process was begun in the mid-2000s. The 2016 National Association of Environmental Professionals (NAEP) report on NEPA found that the average time to prepare the 177 final EIS's prepared that year was 5.1 years.[44]

Doing an adequate EIS takes time. Most of the fundamental flaws in the Line 3 FEIS were likely due, at least in part, to DOC having to rush to meet PUC-imposed deadlines. Assessing site-specific impacts and potential costs, evaluating cumulative impacts of future pipelines, doing a proper greenhouse gas impact estimate, properly comparing potential alternatives—each of these takes considerable time to complete, but they are absolutely necessary to an informed decision.

[43] Department of State, *Final Supplemental Environmental Impact Statement for the Keystone XL Project,* sec. ES 1.2 at ES-1 (January 2014), https://2012-keystonepipeline-xl.state.gov/documents/organization/221135.pdf.
[44] https://www.naep.org/nepa-annual-report.

The third danger signal was when the responsibility for reviewing the FEIS and making a recommendation on the FEIS's adequacy went to the *only* administrative law judge on the staff at the office of administrative hearings who had already made up his or her mind on the significance of the environmental concerns posed by this pipeline route.[45] Judge Lipman is thorough and professional, but he was hardly neutral on this particular set of issues, and the outcome was preordained.

The fourth danger signal was when the PUC forced the intervenors to prepare their testimony, prepare their cross-examination, and go through both the public and the evidentiary hearings on the Certificate of Need and the Route Permit without an EIS that had been determined to be adequate under MEPA. Indeed, the PUC's initial finding that the "final" EIS was *inadequate* came several weeks after all of those hearings had been completed. Contrast that with the DNR's process for evaluating the environmental impact of the proposed PolyMet mine, where no permit proceedings even started until after the final EIS had been deemed "adequate" by the commissioner. The clear import was that the PUC considered the FEIS to be, at best, peripheral to their ultimate decision.

And the fifth major danger signal was that, in fact, the FEIS *was* peripheral to the PUC's ultimate decisions on both the CN and the RP.[46] The PUC found itself with no way to evaluate the risks from a possible light crude spill from the old Line 3 before its retirement or the longer-term risks of a "dilbit" spill from a larger pipeline in a new corridor over the next 40 or 50 years. The PUC had nothing with which to evaluate the

[45] FOH did move to disqualify the ALJ, but the motion was denied.
[46] Addendum at 94.

potential environmental risks of shifting much if not all of Enbridge's Mainline system to the new corridor away from the reservations in the next ten years, or from the necessary expansion of pipeline capacity between Minnesota and Enbridge's refinery customers. The PUC had no way to evaluate the potential contribution of a new pipeline, or several new pipelines, to greenhouse gas emissions and climate change. And the PUC had no way to make a fair comparison between the proposed route and alternative routes that could have met the purpose and needs of the project.

The result is a PUC decision that does not substantively address any of these issues, other than in terms of a "concern" about the environmental risks of a spill, a "concern" that obviously could have been raised even if no environmental review had occurred at all. For the PUC, it seems clear that the EIS they had to do because of this court's Sandpiper decision was a box to be checked, not something it needed or wanted to make a fully informed decision.

These are exactly the kind of "danger signals" the Court in *Reserve* wanted courts reviewing administrative agency decisions to watch out for—cutting out the agencies that genuinely have the relevant expertise, limiting the time for analysis, using ALJs who are not neutral, and scheduling the process so that the relevant analysis would not be a significant part of the ultimate substantive decision. Perhaps no single one of these concerns would be enough to justify reversal; however, all of them together should tell this Court that the PUC decision in this case is one that merits a very hard look.

CONCLUSION

For the reasons stated above, relator Friends of the Headwaters respectfully requests that this Court:

1. VACATE the Public Utilities Commission's May 1, 2018 Order Finding Environmental Impact Statement Adequate and Adopting ALJ Lipman's November 2017 Report as Modified;
2. ENJOIN the Public Utilities Commission, Enbridge Energy Limited Partnership (EELP) and EELP's affiliates from engaging in any activity in furtherance of the construction or operation of the Line 3 Project and any associated facilities until the Commission has completed an Environmental Impact Statement that complies with the requirements of MEPA; and
3. REMAND the matter to the Commission for further consideration consistent with the Court's order.

Respectfully submitted,

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