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Minnesota Public Utilities Commission
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E-FILED

**Re: In the Matter of the Applications of Enbridge Energy, Limited Partnership for a Certificate of Need and a Pipeline Routing Permit for the Line 3 Pipeline Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border
PUC Docket Number: PL-9/CN-14-916 (Certificate of Need)
PL-9/PPL-15-137 (Pipeline Routing Permit)
Our File No.**

Dear Commission:

Thank you for providing an opportunity to comment on the new Line 3 docket. Carlton County Land Stewards (“CCLS”) entered the Sandpiper docket hoping to make a positive contribution to the environmental review. After participating in the Sandpiper CON docket, CCLS has come to a firm conviction that the alternative environmental review as administered in the Sandpiper proceedings has failed to meet the purpose and objectives of the alternative environmental review. CCLS recognizes that the Commission has tried to make the alternative review work, but despite those efforts, CCLS believes that it has failed to accomplish the objectives that MEPA intends. CCLS urges that the Commission instead commission a full MEPA compliant environmental review comprehensively assessing the environmental impacts of the full range of choices presented by both Sandpiper and Line 3, in light of the major market changes occurring in the petroleum industry.

We are mindful that public comments on the completeness of the application are not designed to challenge the facts or judgments contained in the applications. Nonetheless, CCLS wishes to take this opportunity to urge the Commission to rethink its management of the environmental process.

We are concerned with the following features of the procedure being followed:

1. **Multiplicity of Proceedings.** The multiplicity of proceedings in which related pipeline locations are being examined does not lead to efficient adjudication of the key environmental issues and makes it extremely costly for the parties to participate effectively and efficiently. The alternative pipeline review was to assure that an adequate environmental review document was prepared at the outset of the proceedings: but we are over a year into the proceedings still operating with an inadequate document. A true MEPA compliant review would actually be more efficient, more responsive to agency expertise, more expeditious, and more comprehensive, than the process that is now unfolding.

2. **Lack of an Early Review of all Connected Proposals.** It is very clear that the Line 3 program is legally connected and part of a coordinated plan to place Line 3 and Sandpiper concurrently in the same location¹. That plan clearly existed before the Sandpiper application was filed and accepted by the Commission. By separating one project into two, the applicants are forcing interested citizens, intervenors, to confront two separate environmental reviews, two separate alternatives analyses, and at least three separate contested case proceedings. This practice, of separating a project into two projects and multiple environmental reviews is fundamentally unfair and completely contrary to the intent of Minnesota Environmental Protection Agency (MEPA). MEPA intends that the environmental review should occur at the earliest possible stage of decision making; it embodies the look before you leap concept, and its policies demand that all related projects that flow from the decision should be considered together.

3. **Failure to Implement Commission's Orders to Consider Alternatives.** Despite the Commission's determination that it would provide an adequate environmental review prior to making a determination as to which routes and route system alternatives would be selected for further study, evidently the Administrative Law Judge assigned to conduct the contested case was not tasked to propose findings and conclusions on the adequacy of that review. Friends of the Headwaters (FOH) is now in the Court of Appeals asserting that the Commission is making Certificate of Need decisions based on an environmental review process that does not comply with MEPA. Without rearguing the legal merits of that issue here, we note the PUC now has before it two separate environmental review documents in four dockets, dealing with connected-

¹ We use the term "connected" here in its colloquial sense. Practically speaking, however one might rationalize the failure to consider all of these pipeline proposals separately, the result is an inefficient, uncoordinated, wasteful approach to environmental review which plainly does not meet the underlying purpose of MEPA's requirement that a review must be completed at the earliest possible stages of proposals for governmental action.

integrated projects, and the result has been that the State agencies charged with environmental protection have challenged the adequacy of the environmental review which has thus far been conducted. If, even now, the PUC were to conduct a regular environmental review for both of these project proposals, it is almost certain that the result would be a better, more efficient, more comprehensive and more professional environmental review.

In the case of Sandpiper and now Line 3, the choice of system and route alternatives considered by the applicant seems to be driven primarily by the applicant's business considerations, without any deference to the position of the regulators depending on that environmental review to consider applicants permit applications. Despite the fact that both of Minnesota's regulatory agencies have urged consideration of southerly routes based upon their respective conclusion as to what those permitting regulations require neither the Sandpiper, nor the Line 3 applications present an environmental review that considers and compares the impacts of the alternative routing locations of interest to Minnesota agencies. If the environmental review prepared by the applicant is to be a genuine action forcing document, then it should reflect the major choices identified by State agencies and the Commission. In orders issued by the Commission in August, September and October, the Commission identified system and route alternatives that should be considered. Yet, the application submitted in this docket examines none of those alternatives. The environmental review process is not only being conducted *by* the applicant, but the scope of the review is being determined by the applicant, even when State agencies insist that a broader review is required.

I. Enbridge Should Not be Permitted to Submit a Second and Separate Application, Proposing a the Same Route as Under Consideration in the Sandpiper Docket.

Because we have grave concerns about the fairness of allowing Enbridge to open a second certificate of need docket, with a second environmental review, before the first is concluded, we examine the procedural history leading up to this point. Our intent is to show that at the time the Sandpiper application was submitted, Enbridge knew that two lines, not one, were planned for the new Minnesota route through the headwaters. Having made the choice to submit only Sandpiper to the Commission, it is impermissible now to commence a second set of contested case hearings regarding what is essentially the same project. In the litigation world, we would call this splitting your cause of action: in the administrative and environmental sphere, breaking a project into two pieces like this is fundamentally unfair. Enbridge chose to attempt to obtain a certificate of need without analyzing all of the impacts that would flow from location of Sandpiper and relocating a new high volume Line 3 to carry Canadian petroleum in the same right of way. The consequence of intentionally submitting an inadequate environmental review, as Enbridge has done, must be denial of the application, not commencing two more dockets to conduct a second environmental review.

On November 20, 2012 Enbridge submitted its Line 67 application to the United States Government to obtain and increase the operational capacity of pipeline facilities at the international boundary between Canada and the United States. This action represents an early

step towards a massive restructuring of Enbridge's pipeline system, to accommodate Canada and United States new role as the lead worldwide petroleum producer instead of a major petroleum importer. The four dockets, now open before the Commission, are simply components of that overall strategy, and the central issue we face in Minnesota is whether the system that results is going to be defined by Enbridge's business interests first and foremost as opposed to the public interest. There is no question that Enbridge has been moving forward with this restructuring for at least two years, and there is really no excuse for presenting the issues regarding pipeline location in a single proceeding instead of two or four.

On December 13, 2013 Enbridge filed its Section 7 Endangered Species permit to the Fish and Wildlife Service for joint Line 3 and Sandpiper projects. On Feb 5, 2014 Enbridge officially notified State Department of its plan to replace Line 3 at the border with new pipe and advised the State Department that it was undertaking a line 3 replacement program throughout its international system. That request would not have been submitted without many years of advance planning. However, the documents submitted to the Commission in December of 2013 treated Sandpiper as if it were a single project in its own right. On February 11, 2014 the NDPC application for a Certificate of Need and Routing permit for the Sandpiper project only was accepted by the Commission².

In the meantime, however, Enbridge was clearly moving forward with the planning, design, and financing of a newly minted version of Line 3 that Enbridge proposed to co-locate with Sandpiper. On February 26, 2014 Enbridge notified the Department of State that its Board of Directors had found the funding for a \$7 billion Line-3 replacement program for its entire international system. The administrative record filed with the United States District Court clearly shows that Enbridge had already received shipper support for the project before February 26, 2015. It is inconceivable that Enbridge could have put together a project of this magnitude in the few months following its submission of a completed Sandpiper application. The projects have been interdependent and connected in virtually every way for some considerable time.

On May 14, 2014, Enbridge filed its *joint* application and Environmental Information Report for Sandpiper and Line 3 project to the State of Wisconsin. In that report, Enbridge described the two projects as a single project and reported the cumulative environmental impacts of the two projects as one. In fact, the Environmental review described the proposed project as the co-location of Sandpiper and relocated Line 3. The EIR describes the joint cumulative environmental impacts of the two routes on waterbodies, wildlife, and wetlands³. The

² The Commission stated: The ultimate issue in this case is whether NDPC's proposed pipeline meets the need criteria set forth in Minn. Stat. § 216B.243 and Minn. Rules Chapter 7853. This issue turns on numerous factors that are best developed in formal evidentiary proceedings. The parties to this proceeding should address whether the proposed project meets these criteria and address these factors. The parties may also raise and address other issues relevant to the application.

³ The application explains: "The Wisconsin portion of the Project consists of two approximately 14-mile-long pipelines that will be constructed between the Minnesota border and Enbridge's Superior Terminal. The proposed Sandpiper pipeline will move crude oil from the Bakken and

Wisconsin application Document represents that permits for the joint Line 3 and Sandpiper projects were submitted in 2013 and early 2014, including a February 2014 application to the USACE for a section 404 permit and a Section 7 Endangered Species permit to the Fish and Wildlife Service for joint Line 3 and Sandpiper projects.

On May 30, 2014, over three months after approving the financing of the Line 3 replacement project, Enbridge filed supplemental documents in the Routing docket acknowledging the decision to proceed with Line 3 and stating Enbridge's intent to file for a Certificate of Need in 2015⁴. Thus, Enbridge intentionally attempted to defer environmental review of the importation of Canadian oil through the headwaters region until 2015. On August 25, 2014, the Commission issued in Sandpiper, its Order Accepting Alternative Route and System Alternatives for Evidentiary Development, Requiring Notice, and Setting Procedure. In its order, the Commission accepted the 53 route alternatives recommended by the Minnesota Department of Commerce Energy Environmental Review and Analysis unit (EERA), and accepted system alternative SA 03 as modified by EERA for review. By this time, then, Enbridge knew that these alternatives were in play for both Sandpiper and Line 3.

On October 27, 2014 FOH sought PUC reconsideration of the failure to order a MEPA compliant environmental review culminating in a true EIS.

Given the high risks to the counties, state and private lands and waters along the proposed southern route, Friends of the Headwaters strongly disagrees with the PUC/DOC's position that a full environmental impact study is not necessary for the confirmation of Enbridge/NDPC's route proposal. A PUC/DOC conducted CEA (comparative environmental analysis) will fail to meet MEPA standards. Friends of the Headwaters believes a complete EIS with the requisite and cumulative leak/spill scenarios and assessments for the lakes and river, trout streams, wild rice beds, lake homes and resorts, ground water sources, farmlands, wetlands, wildlife, local communities and their economies will validate Friends of the Headwaters' position of moving the Sandpiper route to a lower risk part of the state.

In November of 2014, a number of environmental organizations, including the Sierra Club and

Three Forks formations in the Williston Basin of eastern Montana and western North Dakota to meet the increased demands of refineries and markets in the Midwest and on the East Coast of Canada to the U.S. Midwest. The Line 3 pipeline replacement originates in Edmonton, Alberta and transports crude oil originating in Alberta. The Project supports Enbridge's pipeline system to satisfy rising demand for crude petroleum at a time when production of U.S. domestic crude oil is declining and demand is rising."

⁴ In Minnesota, Line 3 will be replaced along the existing pipeline route from the North Dakota/Minnesota border to Clearbrook, Minnesota. Enbridge is proposing to route the 224.6 mile long Clearbrook, Minnesota to Wisconsin border portion of the Line 3 Pipeline along the preferred route for the Sandpiper Pipeline Project (the "Co-located Right-of-Way"). Enbridge plans to file Certificate of Need and Pipeline Route Permit applications for the L3R Project with the Minnesota Public Utilities Commission in 2015.

tribal authorities, filed a complaint in United States District Court, captioned White Earth Nation v. Kerry, 4-cv-4726. The Complaint alleged that the Line 3, Line 67 and Sandpiper projects are part of a coordinated action to move petroleum from Canada to the United States. In their subsequent Motion for Partial Summary Judgment, they argue that Line 3 is part of major system changes that dwarf even the Keystone pipeline project, but that the project is evading meaningful environmental review⁵. In its response, the United States denies the allegations that the project is evading environmental review and points out that Line 3 will be subjected to permitting and environmental review by the Commission. Whatever the merits of the Federal litigation, it is clear these projects are interrelated, and that the environmental issues presented are clearly interrelated.

On January 25, 2015, the Minnesota Department of Natural Resources filed its official position statement in the Sandpiper CON proceedings. All of the parties to the contested case tried that case believing that one of the key issues before the Administrative Law Judge was whether an adequate environmental review had been prepared. The DNR wrote strongly that the environmental review had not produced an adequate document with which the agency could evaluate system alternatives and stated that southern alternatives were substantially superior⁶.

To emphasize its concern, the Department of Natural Resources sent an official representative to defend and explain its position at the contested case hearing. At the same time, the MPCA sent a statement of official position endorsing the superiority of alternative routes, and urged that if need were examined without a local emphasis, that further routes should be considered superior. Almost concurrently with the filing of Enbridge's Line 3 application, the Administrative Law Judge issued proposed findings and conclusions which completely ignored the issue of whether the environmental review was adequate. As discussed below, this failure to task the ALJ to consider whether the environmental review is adequate contradicts the representations made to the Court of Appeals when MCEA challenged the use of the alternative review.

In the Sandpiper docket, CCLS has challenged the adequacy of the environmental review supporting and supplementing many of the same issues advanced by MPCA and DNR, but we also warned that it appeared that Enbridge expected to utilize the Certificate of Need and Routing proceedings in the Sandpiper Docket to prejudice the outcome of a proposed Line 3 pipeline location. Like Friends of the Headwaters, we urged that the environmental review for

⁵ Enbridge is proposing to construct and operate a new 36-inch diameter pipeline to import heavy tar sands crude oil from Alberta, Canada to its terminal facilities in Superior, Wisconsin (the "New Pipeline"). However, Enbridge has already constructed a 17.5-mile segment of the New Pipeline that crosses the U.S.-Canada border with 34-inch diameter pipe (the "New Border Segment"), claiming it is an existing pipeline known as Line 3 and subject to a permit that it claims allows unlimited crude oil imports.

⁶ In general, due to the limited scope requested for this document, the broad geographic area, and challenges related to the type of data and analysis used, DNR was not able to use this document alone to identify the least environmentally impacting System Alternatives. Examples will be provided below of the type of information that would further inform the Certificate of Need decision for context when considering the most reasonable and prudent System Alternative.

Sandpiper should have encompassed the impacts and concerns arising from Line 3.

Within a few days of the impending issuance of the Administrative Law Judge's recommendations, Enbridge filed its application for Line 3 to be co-located with the Sandpiper route. The environmental review document filed has substantial differences from that submitted in the Sandpiper docket, but repeatedly, the Line 3 review connects directly to ongoing discussions with regulatory agencies and references concerns raised by those agencies in the Sandpiper Docket. Examples are set out in the footnote⁷. Most significantly, however, the application is submitted as if the Commission's order on System and Route alternatives was never issued.

II. The Multiplicity of Proceedings in Which Pipeline Locations are Being Examined Does Not Lead to Efficient Adjudication of the Key Environmental Issues and Makes it Extremely Costly for the Parties Effectively and Efficiently to Participate.

The alternative review was authorized to use "procedures similar to those used in preparing an EIS but in a *more timely or more efficient manner*." Minn. Rules § 4410.3600 Subpart 1. Despite that injunction, the environmental review of the Sandpiper route has been neither timely, nor efficient, nor has it utilized the procedures similar to those used in preparing an Environmental Impact Statement. Whatever the merits of the alternative review has been for individual local pipeline applications, the alternative review has proven itself incapable of meeting MERA objectives here.

Before the filing of the Line-3 applications, there were already two proceeding pending before the Commission in which the environmental review of system and route alternatives are an issue. In the Sandpiper CON proceedings both MPCA and DNR identified a lengthy list of serious inadequacies in the environmental review, which the applicant used to select the preferred route. The list of problems consumes page after detailed page of concerns which should have been addressed through consultation at the time that the application environmental review was being prepared. Yet, despite these concerns, the Administrative Law Judge's report makes no proposed findings on the adequacy of the environmental review utilized by the applicant to

⁷ 7.6.3 Operations Impacts and Mitigation: Recreational Areas (Enbridge will continue coordinating with MNDNR to address the balance between resource impacts, landowner needs, and maintenance and safety considerations); 7.7.2 Construction Impacts and Mitigation: Mineral Resources: (Enbridge is presently working with Kennecott, Carlton County, and MNDNR to seek a resolution to routing in this area so that future mining activities will not be encumbered by the pipeline); 7.7.3 Construction Impacts and Mitigation: Mineral Resources: (Enbridge will continue to work with MNDNR Division of Lands and Minerals staff related to license conditions for its Utility License across DNR-administered lands to address long-term maintenance); 7.9.1 Vegetation Existing Environment: Sites of Biodiversity Significance: (Enbridge will continue to consult with MNDNR to reduce or avoid impacts to sensitive forest resources.); 7.10.1 Wildlife Existing Environment: Large Block Habitats (reflecting continuing disagreement regarding treatment of large block habitats).

locate Sandpiper in the proposed route. More than a year after the Sandpiper application was submitted in dockets 473 and 474, and after a week of testimony directed by the parties and agencies to concerns about the adequacy of the environmental review filed by applicant, the issue has still not been adjudicated.

Now, a second docket is being opened with an application that contains a second environmental review covering much of the same territory. Basic principles of environmental law lead to the conclusion that the environmental impacts of these two projects should have been described and considered in the Sandpiper docket. The application just now filed, offers another environmental review in support of location of Line -3 along the preferred route under review in Docket 13-473. That environmental review overlaps, but also contains different data differently analyzed and thus threatens to force parties concerned about the location of petroleum pipelines to go litigate the issues a second time.

The Commission's order invites comments on the adequacy of the application and contested issues of fact. CCLS contends that the environmental review now submitted by Enbridge remains inadequate. CCLS contends that the review should have examined the system and route alternatives placed in issue by the Commission in Sandpiper, especially in light of the strong concerns raised by MPCA and DNR. That being said, CCLS objects most strenuously to creating another contested case proceeding in which the parties are forced to litigate a second environmental review regarding a second, but integrally- connected, project proposed for the same location. Whatever the merits of the federal White Earth litigation, the parties are not disputing that a major restructuring of Enbridge's pipeline delivery system is underway. The approach currently being taken by the Commission has allowed Enbridge to pretend that each of these proposals is a local individual project, unconnected to all of the other projects, and thus avoid the overarching issue: in what manner should the public's eminent domain power be used, to assist, in the public interest, Enbridge's request to restructure the delivery of petroleum across the Midwest in light of radically different market conditions.

The Commission should not launch another separate contested case proceeding, but should stay the Line 3 proceedings, find the initiating environmental review for Sandpiper inadequate and order a MEPA compliant environmental review.

III. No Further Proceedings of Any Kind Should be authorized until the Commission orders a Traditional Environmental Review.

In our Memorandum in support of Exceptions to the ALJ's report, we showed that the EQB's approval of the pipeline alternative environmental review required that the applicant must prepare and submit an Environmental Impact Statement – equivalent document with its application. The pipeline rule and the EQB's SONAR demonstrate that the rationale for the alternative review was that the applicant would prepare a comparative analysis of environmental factors before submitting its application. By doing that, the environmental review conducted in advance of application submission would be truly "action-forcing." See CCLS Summary Memorandum in Support of Exceptions, pages 10-17. If the environmental review submitted with the application fails to consider viable system and route alternatives, then the parties are left

without a record upon which they can advocate for these alternatives.

This Commission beat back a challenge to the pipeline environmental review in the Court of Appeals by representing that its administration of the alternative review was fully consistent with the EQB's authorization of the alternative environmental review. *See Brief of the Minnesota PUC, Minnesota Center for Environmental Advocacy v. Minnesota Public Utilities Commission, Court of Appeals No. A-812, page 9 (2010)*. In the Commission's Brief, the Court of Appeals was told that the Commission requires the applicant to submit a MEPA compliant analysis of the environmental impacts with the application. The absence of the procedural protections available in a regular environmental review (scoping comment, scoping decision, opportunity to comment, agency response to comments, followed by contested case challenging adequacy) was explained with the assertion that the applicant would present the commission with an adequate environmental review prepared before the public comments period began.

But so far, the representations of the Commission to the Court of Appeals have proven as elusive as the red Ace in a game of Three-card-Monte. Overwhelming evidence has been submitted, supported by the positions of MPCA and DNR, that NDPC did not supply an environmental impact review with its application, but instead simply provided an enumeration of the types of resources located in the vicinity of the pipeline. Either the Commission should accept the consequences of an inadequate environmental review document – that is to stop the proceedings in their tracks – or the Commission should launch a MEPA review under the traditional procedural protections, encompassing the full range of options and alternatives.

IV. The Line 3 Application Fails to Recognize the Commission's August 2014 Order by Failing to Consider Alternatives in the Environmental Review Document.

The Commission's August, September and October orders made it clear that the Commission expected that there would be a robust environmental analysis comparing designated system and route alternatives. Yet, the environmental review document submitted by the applicant completely ignores those options. NDPC's failure to include those alternatives in the Sandpiper dockets may be traced to its decision to advance only its preferred alternative, an option that is fundamentally inconsistent with the Alternative Review rules. It may also be traceable to failure to launch appropriate consultations with the agencies that use the environmental review in their permitting process. But there is no such explanation for the failure of applicant to explore these alternatives in the Line 3 Application. Applicant made transparent its current belief that a location that is near a town or city is inherently worse than a location that crosses high value natural resources. Applicant has the right to advance this position in its briefs and position statements before the Commission, but it does not have the right to cleanse the environmental review of choices that might differ from its own priorities.

V. A Full MEPA Review Offers Substantial Procedural Protections Which are Necessary in these Proceedings.

Several decades of experience have proven that the standard environmental review procedure

offers protections to the public, to the decision maker, and to the proposer. The scope of the review is controlled by the government, not the proposer. But here, the environmental review document, and the choice of alternatives considered were made by the proposer. In a traditional environmental review, regulatory agencies are actively involved at the beginning of the review. But here, the regulatory agencies are reduced to second-rate parties, begging to have their views on scoping and relevant inquiries heard. These regulatory agencies care about the content of the environmental review, because it is supposed to impact their ultimate decision on permits issued under their jurisdiction. It should be a rare circumstance indeed, where regulatory agencies are forced to testify at the contested case to itemize the deficiencies in the environmental review.

Traditional environmental reviews issue a scoping decision. That scoping decision serves accountability and transparency objectives. Issuance of the scoping decision gives agencies, for example, the opportunity to step forward and provide the information here provided on the eve of the contested case proceeding where the PUC is forced to choose between rejecting the environmental review as inadequate, or holding its regulatory nose and approving a document that State regulators regard as inadequate. A scoping disclosure, formal or informal is important because it allows parties to plan to fill any gaps with their own expertise, and it allows parties to provide advance information to the RGU if there are specific concerns about the proposed environmental review. The scoping disclosure makes an environmental review stronger, because it exposes problems with the intended review, before the work is undertaken, and it gives all parties fair advance notice of what issues may be presented in the event a contested case becomes necessary. Eliminating the scoping disclosure makes preparation for a contested case vastly more difficult and should require more time to prepare, not less; but on the contrary, parties are allocated far less time to address concerns in the review intended her than would normally be the case.

A traditional environmental review provides the public with a draft environmental review. Issues with the draft are resolved by expertise within the agency, and addressed by responses to comments, not by a lay environmental law judge, but by experts. If there is doubt about the approach that is taken with respect to aquifers, for example, the concerns are addressed efficiently and authoritatively by experts working for the agency. Once these comments are addressed, a contested case is only held to resolve contested factual issues relating to the environmental impact statement. The testimony is focused; the issues are defined. A traditional environmental review for a major decision like that presented to the Commission in these dockets is more likely to be fair to proposer and adverse parties alike.

Sincerely,



Gerald W. Von Korff
For Carlton County Land Stewards
JVK/dvf

Cc: Carlton County Land Stewards