BEFORE THE STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matthew Schuerger	Commissioner
Katie Sieben	Commissioner
John A. Tuma	Commissioner

AND

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, MN 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
St. Paul, MN 55191-2147

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Line 3 Replacement Project in Minnesota From the North Dakota Border to the Wisconsin Border	**OAH 65-2500-32764** **MPUC PL-9/CN-14-916**
In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Line 3 Replacement Project in Minnesota From the North Dakota Border to the Wisconsin Border	**OAH 65-2500-33377** **MPUC PL-9/PPL-15-137**

SIERRA CLUB'S EXCEPTIONS TO THE REPORT OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Pursuant to Minnesota Statutes Section 14.61 and Minnesota Rules 7829.2700, Sierra Club respectfully files these Exceptions to the Report of the Administrative Law Judge ("ALJ Report" or "Report") issued by Administrative Law Judge ("ALJ") Eric L. Lipman on November 1, 2017 to the Public Utilities Commission ("Commission") in the above-captioned matter. The Report offers ALJ Lipman's Findings of Fact, Conclusions of Law, and Recommendation on the adequacy of the Final Environmental Impact Statement ("FEIS") on Enbridge's proposed Line 3 pipeline replacement ("Line 3 Replacement").

The ALJ Report commits several significant errors of law that implicate the ALJ's Findings of Fact, Conclusions of Law, and Recommendation to the Commission that it find the FEIS adequate. As a consequence of these fatal flaws, the Commission should disregard the recommendations in the ALJ Report and find the FEIS inadequate. The Commission should then order a supplemental environmental review to remedy the below-addressed failings.

Sierra Club's recommendations at the end of these exceptions are based in applicable statutes and regulations and facts in evidence, and are intended to ensure the Commission's compliance with the Minnesota Environmental Policy Act ("MEPA") and its implementing regulations. These suggestions are meant to help the Commission to comply with the law and present a full and robust review of the environmental and socio-economic impacts of the proposed Line 3 Replacement.

Sierra Club's July 10, 2017 public comments on the Draft Environmental Impact Statement ("DEIS") in this matter[1] set forth that the Department of Commerce, Energy Environmental Review & Analysis unit ("DOC-EERA") had failed to satisfy the statutory requirements for an environmental impact statement ("EIS") under MEPA[2] and, in doing so, was also in violation of the Commission's EIS Order[3] and the Department's Commission-approved Final Scoping Decision Document ("FSDD").[4] As stated in our October 2, 2017 public comments on the FEIS,[5] the DOC-EERA failed to remedy these legal failures in preparing the FEIS.

As was the case with the DEIS, the FEIS fails to properly identify and assess reasonable alternatives to the proposed project, and to sufficiently evaluate the environmental and socio-economic impacts of the proposed project and its reasonable alternatives, in violation of MEPA and its implementing rules at Minnesota Rules 4410. Additionally, as explained in Sierra Club's FEIS Comments, the FEIS fails to adequately respond to substantive comments received during the DEIS review process concerning issues that

[1] Public Comments of the Sierra Club on the Draft Environmental Impact Statement for the Proposed Line 3 Pipeline Project, July 10, 2017 ("DEIS Comments").
[2] Minn. Stat. § 116D.
[3] Order Joining Need and Routing Dockets, February 1, 2016, eDockets Number 20162-117877-01 (ordering the Department of Commerce to prepare "a combined environmental impact statement that addresses issues related to the certificate of need and routing permit dockets in accordance with Minn. Stat. § 116D.04 and Minn. R. Ch. 4410.").
[4] Final Scoping Decision Document for Line 3 Replacement Project, December 5, 2016, eDockets Number 201612-127062-04 ("FSDD").
[5] Public Comments of the Sierra Club on the Final Environmental Impact Statement for the Proposed Line 3 Pipeline Project, October 2, 2017, eDockets Number 01710-136028-01 ("FEIS Comments").

should be included in the EIS in order for it to be legally adequate. Finally, the preparation of the FEIS violated the procedural requirements MEPA and its implementing rules. As such, the FEIS fails to satisfy MEPA's legal requirements for a determination of adequacy by the Commission.

The due date for these exceptions comes less than 24 hours from the conclusion of the three week evidentiary hearing for these same dockets. As such, the Commission's chosen timetable has made it prohibitively difficult for Sierra Club to prepare these exceptions with the level of detail it otherwise would. Sierra Club has done its best to identify significant legal issues, including by incorporation by reference to specific pages in prior filings we have made in these dockets. However, as we have not been able to do this in every instance, Sierra Club hereby incorporates by reference all its prior filings and comments in these dockets into these Exceptions.

ARGUMENT

A. ALJ Report improperly discounts the significance and weight of federal case Law on the Development of an EIS

The ALJ Report mischaracterizes the repeated assertion of Sierra Club and other intervenors that Minnesota courts look to federal case law interpreting MEPA's federal equivalent, the National Environmental Policy Act ("NEPA"), to help inform their understanding of and decisions about MEPA.[6] In turn, the U.S. Supreme Court defers to guidance on NEPA written by the Council on Environmental Quality ("CEQ"),[7] an agency created by NEPA and charged with its correct enforcement.[8] Following this precedent federal courts have deferred to CEQ's interpretation of the requirements for environmental review, and Minnesota courts incorporate federal case law on NEPA into their own interpretation of MEPA. CEQ's formal guidance is therefore worthy of deference on to how to correctly develop an EIS and will often be used by Minnesota Courts to evaluate whether an agency acted arbitrarily or capriciously in making an adequacy determination on an EIS.

The ALJ Report mischaracterizes the relevance of CEQ's guidance on the development of an EIS under MEPA by stating that "regulatory guidance from the [CEQ] did not impose additional duties on DOC-EERA when it developed the EIS in this proceeding"[9] because NEPA and its regulations are not directly binding on state agencies.[10] Here, the ALJ clearly misses the point that, while CEQ guidance is not directly binding on DOC-EERA (it bears noting that, by its very definition, guidance is not binding but is owed deference when interpreting legal duties), it should inform Minnesota courts' understanding of whether an agency's decision pursuant to an obligation created under MEPA is arbitrary or capricious absent some contradictory state guidance. In fact, the very case cited to by the ALJ Report as "construing '[NEPA] and its

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[6] *See, e.g.,* FEIS Comments at 3 and DEIS Comments at 4 (citing, as examples, *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 468 (Minn. 2002); *No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 325 (Minn. 1977); and *MPIRG v. Minn. Envtl. Quality Council*, 237 N.W.2d 375 (1975)).
[7] *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).
[8] 42 U.S.C. §§ 4342, 4344.
[9] ALJ Report ¶ 37.
[10] ALJ Report ¶ 35-36.

regulations' were inapposite when construing [a Responsible Unit of Government's] obligations under Minnesota Law",[11] *Minn. Ctr. for Envtl. Advocacy v. City of St. Paul Park*, 711 N.W.2d 526, 532 (Minn. Ct. App. 2006), was decided on the basis of Minnesota's Environmental Quality Board (EQB) having had provided its own specific guidance on the obligation in question under Minnesota law, eliminating the necessity of the court to look at the federal guidance. Thus, the Commission ignores CEQ's interpretations at its own risk, and doing so is contrary to Minnesota courts' interpretation of the applicable law.

The closest the ALJ Report comes to acknowledging the relevance of federal case law and guidance on determining the adequacy of an EIS is in its Finding that:

> [H]owever, the federal experience is still useful. The approaches that DOC-EERA's sister agencies regularly use point to the kind of expectations that Minnesotans should have about state EIS processes. For example, if a federal agency would find a particular inquiry unreasonably demanding or impractical, it is a fair inference that this same assessment is not required before a Minnesota EIS would be adequate.[12]

But here, again, the ALJ Report mischaracterizes the appropriate use of the federal experience. First, the approaches that federal agencies "regularly use" are by no means dispositive of the obligations created by MEPA as federal agencies may regularly be using approaches that are inadequate under NEPA and in contravention of the CEQ guidance. As such, it is federal case law and guidance that is useful for understanding the expectations of state EIS requirements, not the regular practices of federal agencies. Second, the ALJ Report is misleading in that it seems to suggest that the federal experience should be used to interpret obligations created under MEPA in the light most lenient toward the state agency responsible for preparing the EIS which would, by its very nature, fail to meet the stringent requirements of environmental review. The ALJ cannot use federal examples only to exempt state agencies from their work. To the contrary, Minnesota Statute 645.17 provides that the laws of the state should be interpreted in accordance with the intent of the legislature "to favor public interest as against any private interest."

On November 17, 2017, in testimony before the evidentiary hearing on the CN and RP permits at the Commission, Mr. Eric White testifying for the DOC-EERA confirmed that the FEIS taken as a whole obviously assumes that oil must be transported from Alberta to the Midwest. In doing so he further confirmed what is evident in the document—the FEIS only considers the applicant's "project" as the purpose and need of the FEIS, totally ignoring any public purpose or any alternative the Commission must consider by law. The FEIS assumes Enbridge's proposed pipeline is needed and then works backwards from that premise, which fails to take any hard look at alternatives that the Commission must weigh in its relevant government actions.

B. Like the FEIS, the ALJ Report Misidentifies the "Project" that is the Subject of the Environmental Review--This is a Fundamental and Fatal Error of Law

The ALJ Report suffers from the same fundamental error of law that has plagued the entirety of the process of by which this EIS has been prepared and by which the Commission now finds itself tasked with making a determination of adequacy—it mistakes Enbridge and its preferred alternative for a Line 3

[11] ALJ Report note 35.
[12] ALJ Report ¶ 38.

Replacement as the *only* subject of the environmental review to be vetted and compared against, as opposed to the government actions the Commission must weigh in its Certificate of Need ("CN") and Routing Permit ("RP") decisions. This error of law has been and continues to be fatal to the adequacy of the FEIS because it has resulted in a total failure to correctly identify and evaluate the reasonable alternatives that constitute the heart of the environmental review process.

Minnesota Rule 4410.0200, Subpart 65 defines for the purposes of environmental review a "project" as "*a governmental action*, the results of which would cause physical manipulation of the environment, directly or indirectly" (emphasis added). In the present matter, the project is comprised of two government actions: the grant of a CN and the issuance of an RP for Enbridge's proposed Line 3 Replacement pipeline. As such, every instance of the word "project" in Minnesota Rules 4410 refers not to Enbridge's project to build a Line 3 Replacement pipeline but, rather, the Commission's granting of a CN or RP for that proposed pipeline.

This interpretation is consistent with the statutory language of MEPA that enables Minnesota Rules 4410. Section 116D.04 of MEPA, which lays out the requirements for an EIS, states:

> Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement shall be an analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formulation of an action.

This interpretation is also consistent with the holding of the Minnesota Supreme Court that, like NEPA, MEPA "primarily operate[s] by requiring administrative agencies to take a 'hard look' at the environmental consequences of governmental action."[13] It is also consistent with MEPA's substantive requirement in Minnesota Statute Section 116D.04, subdivision 6, that an agency must deny a permit for a project if there exists a feasible and prudent alternative that is safer for the environment, regardless of economic considerations.

The ALJ Report's section titled "Description of the Project"[14] exclusively describes Enbridge's proposal for a replacement Line 3 pipeline and makes no mention of the government actions that constitute the "project" that is the subject of this FEIS. It is very clear that the government actions in this case require the Commission to look at numerous alternatives and impacts outside of the applicant's preferred alternative, but due to this original mistake, the FEIS fails to address most of the elements of the CN and RP laws and regulations for which the Commission is responsible.

[13] Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency, 644 N.W.2d 457, 468 (Minn. 2002).
[14] ALJ Report ¶¶ 6-19.

1. As a Result of Misidentifying the Project, the ALJ Report, like the FEIS, Fails to Correctly Identify Purpose and Need and Fatally Flaws the Alternatives Analysis of the FEIS

Under Minnesota Rules Chapter 4410.2300 (G), the FEIS is required to compare the impacts of the proposed project with those of "other reasonable alternatives" that meet "the underlying need for or purpose of the project. As such, in order to identify which alternatives to include and exclude in the FEIS, the Department must necessarily first identify an explicit purpose and need for the proposed project.

The ALJ's error of substituting Enbridge's proposal for the Commission's proposed actions as the "project" that is the subject of the environmental review mirrors the error of the DOC-EERA in its preparation of the FEIS. In both the DEIS and FEIS, the DOC-EERA opted to define the purpose and need for the project in terms of Enbridge's stated purpose and need for the Line 3 Replacement pipeline. Instead, the both the ALJ and the DOC-EERA should have looked to the purpose and need for the Commission's grant of a CN and RP. More specifically, rather than looking at alternatives for Enbridge to expand its pipeline capacity to deliver crude oil from North Dakota to its customers in Superior, Wisconsin, the FEIS should have looked at alternatives for satisfying the purpose and need for the Commission's grant of a CN which is defined in Minnesota Statute 216B.243 and Minnesota Rules Chapter 7853.0130.

The ALJ Report quite obviously missed the point of the underlying law and regulations when it stated, "To the extent that some of the crude oil supplies sought by area refiners is intended to be fashioned into pharmaceuticals, plastics or asphalt, it was not error for the DOC-EERA to focus on methodologies that were capable of delivering supplies of oil from one point to another."[15] The Commission's statutory mandate is not to regulate pharmaceuticals, plastics, or asphalt and, to the extent that the FEIS is only justifiable because the oil that Enbridge wants to ship could be used for these industries, the FEIS is inadequate because it is serving a purpose that has nothing to do with the Commission's duties or authorities. Simply put, the Commission cannot approve an oil pipeline that has no energy purpose, and the ALJ Report suggests that the Commission do just that and find the FEIS adequate so that it can do so.

The legal error of substituting Enbridge's purpose and need for the proposed Line 3 Replacement for the purpose and need for the CN is also evident in the fact that the DOC-EERA has, in essence, allowed Enbridge to control which alternatives are included or excluded from the EIS based exclusively on their ability to meet the company's economic need for the pipeline. Unsurprisingly, the handful of alternatives that made it into the DEIS are all as or more environmentally unsound as Enbridge's proposal and preferred route. By contrast, under Minnesota Statute Section 216B.243, the criteria that the Commission must use to assess need for a project are entirely focused on the public interest matters including: the extent to which the project contributes to overall state energy needs and security, whether the need could instead be met through energy conservation or efficiency measures, whether the project offers any benefits in terms of protecting or enhancing environmental quality, and whether demand for the project may be the result of promotional activities. None of the criteria are concerned with the economic interests of the applicant.

[15] ALJ Report ¶ 177.

2. No Action Alternative is Fatally Flawed

The ALJ Report fails to identify a fundamental error in the FEIS' approach to the no-action alternative in which the Commission denies the CN. Like the DEIS, the FEIS assumes that under a no-action alternative, Enbridge would either (a) use a different pipeline system to move Line 3 oil, (b) use an alternative transportation mode such as rail or trunk to move Line 3 oil, or (c) continue using the existing Line 3, with or without rail or truck supplement, to move Line 3 oil. Here, again, the alternatives analysis is fatally compromised by the mistake of substituting Enbridge's purpose and need for the Line 3 Replacement pipeline with that of the Commission's CN decision. Had the FEIS approached this correctly, the no-action alternative should have been a surrogate for an alternative in which renewable energy satisfies the energy needs that underlie the purpose of the Commission's grant of a CN for a large energy facility under Minnesota Statute Section 216B.243 and Minnesota Rules Chapter 7853.0130. In fact, the FSDD for the EIS stated that the no-action alternative would be "an effective surrogate for the evaluation of energy alternatives because it assess the consequences of the only action available to the [Commission]—denial of the Project—to implement a change in regional or national energy use."[16]

Because the no-action alternative is flawed and incomplete, it is impossible for the Commission to evaluate whether the consequences to society of granting the CN are more favorable than the consequences of denying it.[17] The FEIS is framed such that Commission is forced to falsely weigh a subset of the positive consequences of granting of the CN (a state-of-the-art pipeline) against a subset of the negative consequences of denying the CN (the adverse risks of using a failing pipeline, a different pipeline systems, or rail/truck transport) where Enbridge has had the advantage of define the scope of those subsets. However, if as the FSDD indicated, the no action alternative had served to "assess the consequences of the only action available to the PUC…to implement a change in regional or national energy use,"[18] then the FEIS should provide the Commission with information to also weigh the negative consequences of granting of the CN (the risks and hazards of continued transport and consumption of tar sands oil) versus the positive consequences of denying the CN (stable, economically-beneficial, and environmentally-friendly energy supply from renewable sources).

3. The FEIS Should Have Considered Alternatives for Different Pipeline Infrastructure

As in the DEIS, the FEIS opts not to evaluate alternative pipelines owned by Enbridge or other companies for meeting the purpose and need for the project. As Sierra Club has previously argued, this is problematic because Minnesota Statute Section 216B.243, subdivision 3(6) requires that the Commission consider "possible alternatives for satisfying the energy demand or transmission needs including but not limited to potential for increased efficiency and *upgrading of existing energy generation and transmission facilities*, load-management programs, and distributed generation" (emphasis added) and Minnesota Rule Chapter 7853.0130 requires consideration of such alternatives during a contested case hearing for a CN if parties can show that it is reasonable and that there is sufficient evidence to support it. Our concern, which proved well-founded in the course of the evidentiary hearing on the CN and RP dockets where testimony was offered on the use of such alternative pipeline capacities, was that the Commission would find itself in a situation where it has to either violate Minnesota Statute Section 216B.243 by excluding consideration of existing facilities as an

[16] FSDD at 36.
[17] Minn. R. 7853.0130 (C).
[18] FSDD at 36.

alternative or violate MEPA by considering these alternatives without them having been subject to environmental review.

C. The FEIS Does Not Address Cumulative Effects as Required Under MEPA

The ALJ Report fails to address any of the concerns we raised in our FEIS Comments pertaining the requirements of MEPA to evaluate cumulative effects. We renew those comments by reference here as exceptions to the ALJ Report.[19]

D. The FEIS Does Not Respond to Substantive Comments Received About Issues Raised in Scoping During DEIS Review

The ALJ Report fails to address any of the concerns we raised in our FEIS Comments pertaining to the DOC-EERA's perfunctory responses and failure to make any substantive changes based on substantive comments received during the DEIS comment period. We renew those comments by reference here as exceptions to the ALJ Report.[20]

E. Preparation of the EIS Violated Minnesota Rules 4410.2600

In our FEIS Comments, Sierra Club set forth several ways in which the DOC-EERA violated the requirements of Minnesota Rule 4410.2600 in its preparation of the FEIS. We renew those comments by reference here as exceptions to the ALJ Report.[21]

F. The FEIS was Developed Pursuant to a Legally Deficient FSDD which Rendered the EIS also Deficient as a Matter of Law.

Sierra Club has been and continues to be critical of the FSDD that was the basis for the FEIS. On December 20, 2016, Sierra Club petitioned the Commission to reconsider its order approving the FSDD and to amend its contents.[22] In that petition, we identified and explained the many ways in which the FSDD was unlawful and unreasonable and cautioned that it would result in an EIS that falls well short of MEPA requirements—and, indeed, it has. As anticipated, many of the most substantial problems we identified with the FSDD are the very same that we subsequently identified in our DEIS Comments and our FEIS. We incorporate the arguments raised in those filings by reference here as exceptions to the ALJ Report.[23]

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[19] FEIS Comments at 10-14.
[20] FEIS Comments at 14-15.
[21] FEIS Comments at 16-17.
[22] Sierra Club Petition for Rehearing and Reconsideration of Order Approving Scoping Decision and for Amendment to Proposed Final Scoping Decision Document, December 20, 2016, eDockets Number 201612-127463-02.
[23] *Id.* Sierra Club Comments on Proposed Final Scoping Decision Document, October 26, 2016, eDockets Number 201610-126036-01.

CONCLUSIONS OF LAW

Based on the above argument and Sierra Club's original filings on scoping, the DEIS, and the FEIS, the Commission must reject the ALJ Report's Conclusions ¶ ¶ 2, 9, 13, 14, 17, and 20.

RECOMMENDATIONS & CONCLUSION

Pursuant to the above conclusions the Commission must find that the FEIS is inadequate, and that it must be supplemented with a Supplemental EIS based on a corrected scoping process, purpose and need, and full consideration of the applicable reasonable alternatives within the Commission's statutory duties.