



October 31, 2022

**Via e-filing**

Scott Ek  
Minnesota Public Utilities Commission  
121 7th Place East, Suite 350  
St. Paul, MN 55101

**Re: In the Matter of the Application of Summit Carbon Solutions, LLC, for a Routing Permit for the Otter Tail to Wilkin Carbon Dioxide Pipeline Project in Otter Tail and Wilkin Counties, Minnesota; PUC Docket Number: IP-7093/PPL-22-422**

Dear Mr. Ek,

Public Employees for Environmental Responsibility (PEER) respectfully submits these comments on the Minnesota Public Utilities Commission's (Commission) above-captioned comment period.

**I. Questions Presented**

- Does the application contain the information required under Minn. R. 7852.2100 to 7852.3100?
- Are there any contested issues of fact with respect to the representations made in the application?
- What additional procedural processes should be applied to the review of the application?
- What action should the Commission take on the outstanding petition for an Environmental Assessment Worksheet for the Midwest Carbon Express pipeline project filed in dockets 21-836 and 21-879, including whether the comparative environmental review required under Minn. R. 7852.1500 is the appropriate form of environmental review for this application?

**II. Short Answers**

- In this initial comment PEER takes no position on completeness under specific provisions of the rules. The Commission may view contested issues of fact raised by parties as a completeness matter to be remedied before the application is accepted.
- Yes. Contested issues of fact of relevance to the Commission's decision include, but are not limited to: public safety; cumulative impacts, including the host of impacts arising from the induced demand of ethanol at the heart of the project;

- and environmental justice impacts. On all of these matters the applicant has provided inadequate information or was totally silent, and each need to be fully assessed in environmental review and vetted in a contested case before the Commission can proceed with any formal decision on this application.
- A contested case hearing is an appropriate procedural process to investigate such a new and unstudied pipeline technology, and to address new routing issues for such projects. Additionally, the contested case hearing should only be conducted after an Environmental Impact Statement (EIS) has been deemed adequate by the Commission. Only by having a final and adequate EIS prior to the contested case hearing will there be sufficient and credible vetting of the facts and issues arising out of this application.
  - The Commission is required by law to order an EIS for this pipeline proposal. By ordering an EIS the Commission can satisfy the requirements of the Minnesota Environmental Policy Act (MEPA) and grant the petitioned-for environmental review. The Commission may order an Environmental Assessment Worksheet (EAW) as an initial step towards the EIS, or could proceed directly to the EIS.

### III. Analysis

For the sake of clarity, in this comment PEER addresses the Commission’s four topics for comment in reverse order.

#### A. What action should the Commission take on the outstanding petition for an Environmental Assessment Worksheet for the Midwest Carbon Express pipeline project?

Any decision on this application must await the Commission’s existing duty to respond to a citizen petition filed in accordance with MEPA. The petition filed by Clean Up the River Environment (CURE) on November 9, 2021, and re-filed recently, requires the Commission to either grant or deny the request for an EAW. As a result of the petition and MEPA’s application to route permits, the Commission must comply with the MEPA rules in Chapter 4410.

Minnesota Rule 4410.4400, titled “Mandatory EIS Categories,” answers the question for the Commission, and requires an EIS for this project. Section 4410.4400 lays out categories of actions where an EIS is required by law,<sup>1</sup> regardless of the supplemental duty to determine whether or not this project has the potential for significant environmental effects. Subpart 24 clearly states that “For routing of a pipeline subject to the full route

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<sup>1</sup> “An EIS must be prepared for projects that meet or exceed the threshold of any of subparts 2 to 25. Multiple projects and multiple stages of a single project that are connected actions or phased actions must be considered in total when comparing the project or projects to the thresholds of this part.” Minn. R. 4410.4400, subp. 1 (emphasis added).

selection procedures under Minnesota Statutes, section 216G.02, the Public Utilities Commission is the [Responsible Government Unit].” The applicant’s proposed project requires a full route permit under the relevant statute. Therefore, even without conducting any EAW, the Commission will ultimately be responsible for the preparation of an adequate EIS.

Ordering an EIS is good policy for such a novel project. “The purpose of an EIS is to provide information for governmental units, the proposer of the project, and other persons to evaluate proposed projects which have the potential for significant environmental effects, to consider alternatives to the proposed projects, and to explore methods for reducing adverse environmental effects.” Minn. R. 4410.2000, subp. 1. It is beyond question that this type of comprehensive information is needed when dealing with a new form of pipeline construction, which has new and different environmental and public health considerations than all other pipelines built to date in the state of Minnesota.

Though it has been used to assess more commonplace pipeline projects in the past the Commission’s comparative environmental review (CEA) required under Minn. R. 7852.1500 process is not appropriate when there is a MEPA petition under Chapter 4410 regarding the proposed project. The applicable rules only allow citizens to petition for an EAW,<sup>2</sup> which is by definition a step in the process of determining the need for an EIS.<sup>3</sup> The requisite number of residents and property owners in Minnesota have petitioned under the 4410 rules for an EAW, and thereby for an EIS. They have not petitioned for anything under Chapter 7852, and the Commission has no ability to convert their clear exercise of a right under MEPA into something that was not petitioned for.<sup>4</sup>

Aside from the obvious thrust of the petition and the applicable MEPA regulations, there is good reason to opt for the most robust environmental review standards for these new types of pipelines. While the Commission and the Department of Commerce have developed an alternative process under Chapter 7852 for well-understood forms of infrastructure projects, it is not appropriate to streamline environmental review of the first carbon pipeline networks proposed for the state of Minnesota. As many public

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<sup>2</sup> Minn. R. 4410.1100, subp. 1 (“Any person may request the preparation of an EAW on a project by filing a petition . . .”).

<sup>3</sup> An EAW is defined by law to mean “a brief document which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed project or to initiate the scoping process for an EIS.” Minn. R. 4410.0200, subp. 24.

<sup>4</sup> Furthermore, the petition calls for environmental review of the entire project envisioned by the applicant, not a phased or disconnected small piece of the overall network. While the applicant seeks to segment the environmental analysis, this is not possible considering the scope of the petition and the known plans of the company to expand further into Minnesota in other branches of its network.

comments have illustrated, this is not an everyday pipeline with known and readily mitigated issues.

It is entirely possible that some tools relevant to the CEA process could be added to the analysis that is required for an EIS. PEER would not oppose the Commission ordering an EIS with additional enhancements and opportunities for additional analysis and comment. However, any attempt to shorten, limit, or streamline the EIS process or curtail public input on this application would be a mistake and would not be consistent with MEPA's clear requirements when an EAW petition is pending. Minnesotans must be involved in scoping and commenting upon the EIS in full compliance with MEPA.

**B. What additional procedural processes should be applied to the review of the application?**

As discussed above, the Commission should order an adequate EIS be prepared before any other procedures take place on the application. While in the past the Commission has allowed EIS preparation to run concurrently with other proceedings, for the Line 3 contested case hearing this caused timing problems that abridged parties' due process rights by forcing them to brief their positions while the environmental review was still incomplete and legally inadequate.<sup>5</sup> To avoid repeating this error, especially when dealing with a new type of project with unexplored potential environmental impacts that may again result in an inadequate initial analysis, it is essential for the Commission to have a complete and adequate environmental review in hand before there is any procedural phase for challenging contested facts and the application.

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<sup>5</sup> See Joint Motion of Petitioners Sierra Club, Friends of the Headwaters, Honor the Earth, Fond du Lac Band of Lake superior Chippewa, White Earth Band of Ojibwe, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, Northern Water Alliance of Minnesota, and Youth Climate Intervenors for Adjustment of Briefing Schedule, *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need/Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, Document ID No. [201712-138191-02](#) (in light of the Commission finding its EIS inadequate, explaining how "Anything but a delay in the briefing schedule has a high probability of violating parties due process rights and unnecessarily complicating the duties of the ALJ."); Order Granting Motion for Adjustment of Briefing Schedule, *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need/Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket Nos. PL-9/CN-14-916, PL-9/PPL-15-137, Document ID No. [201712-138416-01](#) (agreeing with the motion to change briefing schedule because "Due to the Commission's Order Finding the Environmental Impact Statement inadequate, a new briefing schedule is warranted to allow all parties the opportunity to respond to the revised EIS once it is issued."). Ultimately the Commission overrode the ALJ's order, and the parties were forced to brief before the EIS was adequate and final.

Importantly, an EIS is a useful starting point for parties to build upon in a contested case hearing. “The purpose of an EIS is to provide information for governmental units, the proposer of the project, and other persons to evaluate proposed projects which have the potential for significant environmental effects, to consider alternatives to the proposed projects, and to explore methods for reducing adverse environmental effects.” Minn. R. 4410.2000, subp. 1. By assuring that the Commission finds the EIS adequate *before* parties commence submitting testimony and briefing, the Commission can assure that the EIS provides the best possible information to all the stakeholders known to need such information.

Once an EIS is deemed adequate by the Commission, a contested case hearing would be appropriate to settle contested issues of fact that are material to the application. The Commission can send the application and adequate EIS to the Office of Administrative Hearings to develop and assess the complex facts and legal issues. Allowing an administrative law judge to find facts and vet arguments will provide the Commission with a robust record upon which to decide whether and where to permit this project to proceed.

**C. Are there any contested issues of fact with respect to the representations made in the application?**

Yes. Since this proposed project would be a new and untested technology in the state of Minnesota with many new and different potential significant impacts to the environment, there are many contested issues of fact that will be suitable for analysis within a contested case hearing. Among these are:

- **Public safety.** These pipelines carry highly-pressurized supercritical carbon dioxide (and sometimes other gases), which can explode from the pipeline and create a public safety hazard. The federal regulators who are in charge of pipeline safety have identified that their current regulations are not stringent enough, and are conducting additional rulemaking for these types of pipelines.<sup>6</sup> As the federal regulatory system is known to be weak and insufficient, the issue of siting carbon pipelines to maximize public safety will be a complex and evolving issue the Commission must master.
- **Induced demand for ethanol.** Numerous comments in support of the applicant in this docket have already asserted that this project is essential for the ethanol

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<sup>6</sup> Press Release, U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *PHMSA Announces New Safety Measures to Protect Americans From Carbon Dioxide Pipeline Failures After Satartia, MS Leak*, May 26, 2022, <https://www.phmsa.dot.gov/news/phmsa-announces-new-safety-measures-protect-americans-carbon-dioxide-pipeline-failures>.

- industry to expand to new markets that have refused, or will soon refuse, to accept high-polluting ethanol. This is by definition an argument that this project will create new and additional demand for ethanol, an industry that dominates much of the regional agricultural space. Such demand can perpetuate, or increase, the amount of land devoted to corn production in Minnesota and the region. What some view as an economic benefit also has measurable and calculable environmental costs. This proposed project's landscape-level impacts must be assessed.
- **Cumulative impacts.** In addition to induced demand for ethanol, this proposed project will likely have larger cumulative impacts on water quality, agricultural productivity, treaty rights, rural depopulation, endangered and threatened species, and many other issues. The proposed project's overall impacts on climate change are something that the company offers as a benefit of the application, but numerous expert studies show that this technology has never achieved the promised climate change benefits – and due to the high energy burden of these technologies projects may actually increase climate pollution.
  - **Environmental justice.** Numerous tribes, rural Minnesotans, and other concerned organizations and individuals have participated in Commission dockets on carbon pipeline regulation and voiced serious concerns about the potential environmental justice impacts of yet another set of pipelines crossing the state and lands that are important to various constituencies. Tribes have pointed out that the destruction of lands and waters and the dangers posed to their communities must be adequately addressed in Commission oversight of these types of projects, even requesting a special Commission meeting to consult on the issue. In that context, the application's total silence on the issue of environmental justice is significant and irresponsible. This is a key factual issue to develop.

By ordering an EIS for this project the Commission can assure that these important factual issues are sufficiently vetted by the Department's environmental review staff. The analysis of alternatives is the centerpiece of an EIS and by comparing the no-action alternative to the proposed project the Commission and the public can better learn what the cumulative impacts, environmental justice, induced demand, and public safety risks should be. By having a robust analysis of alternatives, the Commission can better understand if there are other options available that would have less negative impacts on Minnesotans and their environment. Only after an EIS fully addresses these issues, and they are subjected to further development in a contested case hearing, will the Commission be able to confidently determine the best action to take on this application.

**D. Does the application contain the information required under Minn. R. 7852.2100 to 7852.3100?**

PEER looks forward to other commenters' opinions regarding the completeness of the applicant's submission, and looks forward to commenting on this topic in reply and supplemental comments. If the applicant views the contested issues of fact raised by



PEER as unintentional omissions it is possible that the applicant could cure this error by offering a more complete application for the Commission to review. For example, the applicant's total failure to discuss environmental justice appears to be a glaring omission in the application, which might be viewed by the Commission as incomplete.

#### IV. Conclusion

For the reasons stated above the Commission should grant CURE's citizen petition and order an EIS for the applicant's proposed pipeline network. Only after the EIS is deemed adequate should the Commission go on to order a contested case hearing on this application. By doing the EIS first and then the contested case the Commission is most likely to get a robust record and avoid foreseeable procedural due process issues – assuring that the ultimate decision on the application is well-informed, and reflects both the science and the input of Minnesotans impacted by these new pipeline networks.

/s/ Hudson Kingston

Hudson B. Kingston

Litigation and Policy Attorney

Public Employees for Environmental Responsibility

962 Wayne Ave., Suite 610, Silver Spring, MD 20910

Tel: (202) 265-7337

[hkingston@peer.org](mailto:hkingston@peer.org) | [www.peer.org](http://www.peer.org)