November 14, 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 reply comments on the Minnesota Public Utilities Commission's (Commission) above-captioned comment period.

I. Responses to initial comments

A. Mille Lacs Band of Ojibwe (Mille Lacs)

PEER agrees with Mille Lacs that the Commission must consult with all tribes with a cultural or legal interest (e.g. rights under treaties, the National Historic Preservation Act, state historic preservation law, landowner rights or as beneficiaries of land held in trust, or other legal or cultural connections) in land within the state as a part of the environmental review process. Tribes are not mere stakeholders, they are independent nations with unique legal rights that the Commission cannot discount any more than it can ignore the preemptive nature of federal agency authority.[1]

Treaties are federal law, supreme and above state law according to the U.S. Constitution's Supremacy Clause.[2] The U.S. Supreme Court and other federal courts have been

[1] For example, Minnesota law appears to intentionally avoid overstepping federal regulatory authority on natural gas pipeline routing or pipeline safety standards, Minn. Stat. §§ 216G.06, 216G.07, Subd. 4, but Commission practice continues to treat tribes as akin to local government stakeholders, failing to acknowledge their unique and preemptive legal rights.

[2] U.S. CONST, Art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

consistently clear on the point that: "A state law that burdens a treaty-protected right is pre-empted by the treaty."[3]

Tribal Nations in the upper Midwest have long reserved rights over lands they have ceded to the federal government and any subsequent landholders, and have proven in federal courts that these rights continue to nullify inconsistent state law and policy.[4] Treaty-making is the tribes' and federal government's prerogative, displacing states' authority over natural resources.[5] In the face of established treaty rights retained by tribes, generally-applicable state laws must give way to what the federal government and tribe agreed between themselves.[6] Additionally, individual tribal members can assert treaty rights on their own behalf against state regulations even when tribes are not parties to a case.[7] With all of these issues to consider, it is not only inappropriate for the Commission to ignore treaty rights, it can expose the Commission's permit decisions to legal challenges for failing to respect such treaty rights.

For example, Ojibwe tribes both inside and outside of Minnesota have used treaties to preserve their rights to hunt, fish, and gather in ceded territories.[8] Federal courts have

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the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[3] Wash State Dept. Of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1015 (2019); *see also* Chase v. McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978) ("We hold that New Town's action is precluded by the Supremacy Clause because it impaired Chase's right . . . to enjoy the beneficial use of land held in trust for her without the obligation to pay local taxes and thereby interfered with the operation of an important means of implementing a policy adopted by the federal government"); U.S. v. Gotchnik, 222 F.3d 506, 510 (8th Cir. 2000) (Finding that modern weaponry, but not modern transportation, could be used in the exercise of treaty-based hunting and fishing rights in a wilderness area.).

[4] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[5] *Id.* at 204 ("Although States have important interests in regulating . . . natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.").

[6] Washington State Department of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019) (invalidating gasoline tax on tribal business as inconsistent with treaty right).

[7] Herrera v. Wyoming, 139 S.Ct. 1686, 1697 (2019).

[8] Ann McCammon-Soltis and Kekek Jason Stark, Great Lakes Indian Fish & Wildlife Commission Division of Intergovernmental Affairs, *Fulfilling Ojibwe Treaty Promises – An Overview and Compendium of Relevant Cases, Statutes and Agreements*, 1 (2009) https://glifwc.org/minwaajimo/Papers/Legal%20Paper%20-%20DIA.pdf ("In treaties signed in 1836, 1837, 1842, and 1854, the tribes reserved hunting, fishing and gathering rights in the areas (land and water) ceded to the United States. It must be emphasized

made extensive findings concerning Ojibwe knowledge and traditions preserved by these treaty rights.[9] To the extent that any pipeline permitted by the Commission would impair these rights to hunt, fish, and gather—by limiting access to the resources, harming the resources themselves, or encumbering the cultural practices in other manners—the Commission would be in violation of the treaty and federal law. The interpretation of treaties is complicated, and the Commission should not attempt to do so without the guidance of potentially impacted tribes and treaty authorities.[10] Also, the Commission should fully consider the perspectives of tribal members, who retain their own legal rights to enforce treaties in certain situations.

As Mille Lacs also pointed out in its initial comment, this project obviously could impact the resources and legal rights of tribes across the region – including those in Nebraska, Iowa, South Dakota, and North Dakota. Any decision the Commission makes in this proceeding will have cumulative knock-on effects across the entire project network, and therefore tribes across the region should be properly notified and consulted to assure that their concerns and rights are being respected.

Similar to how the Commission would not view FERC or PHMSA regulatory authorities as optional considerations, consultation with affected tribes is not optional. It is a necessary part of a robust environmental review process.[11] As Summit is proposing to begin building a network of pipelines that could grow to cover the entire state, it is appropriate for the Commission to engage in consultation with all affected tribes now, rather than allowing the company to creep into treaty territories one phased action at a time.

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that these ceded territory rights were not given or granted by the United States, but were reserved by the tribes for themselves.").

[9] *Id.* at 1 n.6 (citing Lac Courte Oreilles Band v. Wisconsin, 653 F. Supp. 1420, 1422-1429 (W.D. Wis. 1987), Mille Lacs Band v. State of Minnesota, 861 F.Supp. 784, 791-793 (D. Minn. 1994)).

[10] *See generally id.* (giving background on the complex interpretation of Ojibwe treaty rights and courts' interpretations of these rights against state laws).

[11] White House Council on Environmental Quality guidance, discussed further below, lays out the federal best practice that the Commission can follow: "Agencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments . . . and any treaty rights." CEQ, Environmental Justice: Guidance Under the National Environmental Policy Act 9 (1997), https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf.

The Commission should design its government-to-government consolation process based on feedback received from affected tribes.[12] As discussed further below, there is also federal guidance available to the Commission that provides tools for designing meaningful public participation opportunities for tribal communities and individuals.

B. Labor Unions

PEER agrees with the International Union of Operating Engineers Local 49 and LIUNA Minnesota & North Dakota (Labor Unions) that it makes sense to complete the environmental review process prior to engaging in the next procedural step of vetting the application and hearing contested issues of fact. PEER also agrees that an environmental review process must include analysis of the "no-action alternative" required by MEPA, to fully understand alternative uses of resources that may be better for both the environment and the economy if properly considered.

If the Commission orders a full Environmental Impact Statement (EIS), with sufficient consultation with tribes and public participation, there will be sufficient time and opportunity for the Department of Commerce to weigh many of the questionable factual statements made by the applicant. It is possible, as the Labor Unions suggest, that a fully developed EIS could resolve some contested issues of fact for the Commission and parties, such that they may not need to be rehashed in a contested case hearing. While it remains unlikely that the Commission will not need to order a contested case hearing,[13] a full and adequate EIS prior to such a hearing would improve the factual understanding of parties and make any process that follows more meaningful and valid.

A robust analysis of the no-action alternative is a necessary step, both in aligning the environmental review with MEPA and in developing the Commission's understanding of these types of projects. Such analysis may reveal that alternative technologies or alternative routes (to totally different sources of industrial carbon pollution) may be a better use of resources and lead to more economic benefits.

PEER also agrees with LIUNA Minnesota & North Dakota and dozens of other commenters that a "piecemeal approach" to environmental review of this pipeline network is both a waste of resources and a misunderstanding of the project's scope. The EIS should review the entire project contemplated by the applicant, not one segmented part of the whole.

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[12] The Commission should work with Mille Lacs and other tribes and treaty authorities in Minnesota to assure that all affected tribes, both inside and outside Minnesota, are properly notified so that they can provide feedback.

[13] At the very least the Commission should plan and schedule a contested case hearing, in accordance with Minn. R. 7852.1700, which could be reconsidered after the Commission deems the EIS adequate and parties had a chance to resubmit comments identifying contested issues of fact.

C. Department of Commerce Energy Environmental Review and Analysis (EERA)

PEER disagrees with EERA's assertion that the Commission can dismiss the citizen petition before it for an EAW. The Commission should only deny the petition if it can find that the project has no potential for significant impacts to the environment, and it is apparent from the applicant's materials and many comments[14] that this is not a plausible finding for the Commission to make. Further, the citizen petition can assist the Commission and EERA in scoping environmental review, as it covers the company's entire project and not just a single segmented portion of the project. Thus, granting the petition is a productive step in defining the outer bounds of the environmental review of this project.

PEER also disagrees with EERA's blanket assertion that the Commission does not conduct an EAW or EIS for pipeline routing – the Commission ordered a full EIS for the Line 3 pipeline project after it learned that its procedures violated MEPA when it attempted to issue a premature Certificate of Need to the Sandpiper project.[15] The best way for the Commission to assure that its environmental review will "address the same issues and utilize similar procedures as an environmental impact statement"[16] is to order an EIS.

PEER agrees with EERA that the Commission should vary the regular time limits in this process, as well as EERA's proposals to include a scoping decision, a draft environmental review, and an adequacy decision. Varying the schedule and including these procedural milestones will better allow for public participation and will lead to a better environmental review. However, the EIS process is far more robust than EERA's proposed additions to a CEA process and the Commission should not choose to fall short of MEPA's requirements, which is what EERA invites by proposing a modified CEA instead of an EIS.

D. Minnesota Center for Environmental Advocacy and Sierra Club (MCEA)

PEER agrees with the analysis provided by MCEA regarding the Comparative Review process's ill-fit to the requirements of MEPA for a full environmental review. As PEER also said in initial comments, the Commission is constrained by MEPA regulations and the MEPA petition before it to either order an EAW or an EIS – MCEA's analysis further clarifies that it was never the case that the Comparative Review process without a Certificate of Need proceeding could be viewed as a legitimate replacement for an EIS under MEPA. MCEA's analysis of the *Sandpiper* decision is correct, and demonstrates how

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[14] Comments offered by numerous public comments, CURE, the Nature Conservancy in Minnesota, North Dakota, and South Dakota, and Minnesota Interfaith Power and Light raise many important issues that demonstrate a full EIS is necessary to assure routing that can protect the public and irreplaceable resources from foreseeable negative impacts.
[15] In re Application of North Dakota Pipeline Company, LLC for a Certificate of Need for the Sandpiper Pipeline Project, 869 N.W.2d 693 (Minn. App. 2015).
[16] Minn. Stat. § 116D.04, Subd. 4a.

relying upon only the Comparative Review process in the absence of a Certificate of Need would necessarily fall short of what was required by the Minnesota Court of Appeals.

E. Clean Up the River Environment (CURE)

PEER agrees with CURE and other commenters that the Commission should increase and assure the public participation rights of Minnesotans. Having additional public meetings is an appropriate procedural enhancement, especially when dealing with a new form of pipeline technology that creates new concerns and hazards for communities. As such, three accessible meetings per affected county is an improvement on the Commission's normal public meetings standards.

CURE also mentioned tribal outreach as a part of the public meeting process. While the Commission must engage with tribes in a government-to-government process that will not necessarily overlap directly with general public meetings, it is also the case that allowing tribal members to fully participate in the public meeting process is an identified best practice the Commission should endeavor to follow. As the White House Council on Environmental Quality's (CEQ) *Environmental Justice: Guidance Under the National Environmental Policy Act*[17] explains:

> Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes . . . . These barriers may range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families.[18]

The guidance goes on to suggest "[u]se of locations and facilities that are local, convenient, and accessible to the disabled, low-income and minority communities, and Indian

[17] CEQ, Environmental Justice: Guidance Under the National Environmental Policy Act, (1997), [hereinafter "CEQ EJ Guidance"] https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf. Minnesota courts apply relevant NEPA case law when interpreting MEPA, and numerous federal courts have relied upon the CEQ EJ Guidance in determining whether an agency complied with NEPA. Significantly here, a federal court found that the Dakota Access pipeline's environmental review was in violation of the law when the CEQ EJ Guidance was not properly followed. *See generally* Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F.Supp.3d 101(D.D.C. 2017). As such, this guidance is both a good starting point and can be viewed as a relevant legal interpretation.

[18] CEQ EJ Guidance at 12–13.

tribes[.]"[19] In order to follow this suggestion and others in the guidance,[20] the Commission should schedule additional public meetings for affected tribal communities, regardless of whether or not the tribes' reservation lands are within the counties that are crossed by the pipeline segment described in the instant application. Since tribes' interests and cultural connections stretch across the entire state of Minnesota, and the applicant's apparent goal is to similarly route pipelines throughout the region to capture carbon from a growing number of facilities, it is appropriate for the Commission to plan additional public meetings to get feedback from tribal members now, in anticipation of the likely proposed expansion of this and other carbon pipeline networks.

II. Conclusion

For the reasons stated above and in PEER's initial comment, 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 completing an EIS and then turning to a contested case the Commission is most likely to get a robust record and assure compliance with MEPA.

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[19] *Id.* at 13.

[20] The guidance has numerous useful tips regarding public engagement and specific communities, for example: "Agencies should encourage the members of the communities that may suffer a disproportionately high and adverse human health or environmental effect from a proposed agency action to help develop and comment on possible alternatives to the proposed agency action as early as possible in the process." *Id.* at 15.