

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

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
121 Seventh Place East, Suite 350  
St. Paul, Minnesota 55101-2147

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

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**Joint Tribal Petition to Reconsider and Amend the PUC's December 14 Order**

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**Introduction**

On behalf of their 48,000 enrolled members, Intervenors Fond du Lac Band of Lake Superior Chippewa, Mille Lacs Band of Ojibwe, Leech Lake Band of Ojibwe, White Earth Band of Ojibwe, and Red Lake Band of Chippewa (collectively the “Tribes”) jointly move the Public Utilities Commission (“Commission”) to reconsider and amend its December 14 Order Finding Environmental Impact Statement Inadequate (“December 14 Order”).<sup>1</sup> The state’s historic-properties work on the Line 3 Replacement project (the “Project”) to date has been so inadequate that it could be used as a “what not to do” example in future guidance. The lead state agency, the

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<sup>1</sup> PUC Order Finding EIS Inadequate (Dec. 14, 2017), eDocket No. 201712-138168-02; *see also* Notice of Final EIS Adequacy Determination Line 3 Repl. Proj. (Dec. 13, 2017), eDockets No. 201712-138116-01. The Tribes maintain their respective positions regarding all other aspects of the Project. Hereafter, references to the “FEIS” refer to the version issued on August 17, 2017. *See generally*, Ex. EERA-29, FEIS.

Department of Commerce—Energy Environmental Review and Analysis Unit (“DOC”), has all but ignored its obligations under state historic-properties law. The DOC has disregarded the explicit advice and direction of the State Historic Preservation Office (“SHPO”) and the Minnesota Indian Affairs Council (“MIAC”). The DOC has ignored the guidance of its own tribal liaison—who was hired for the express purpose of coordinating with tribes on the Project.<sup>2</sup> Given that track record, perhaps it goes without saying that the DOC has also discounted extensive comments from the Tribes, other intervenors, and members of the public. The DOC’s approach violates a host of state laws, including the Minnesota Environmental Policy Act (“MEPA”),<sup>3</sup> the Minnesota Field Archaeology Act,<sup>4</sup> and the Minnesota Historic Sites Act.<sup>5</sup>

The DOC has taken the position that it can rely entirely on whatever tribal historic-properties work the U.S. Army Corps of Engineers (“Corps”), the federal permitting agency on the Project,<sup>6</sup> may conduct in the future as part of federal National Environmental Policy Act (“NEPA”)<sup>7</sup> and National Historic Preservation Act (“NHPA”) Section 106 compliance.<sup>8</sup> Section 106 review does require tribal consultation, survey, and evaluation of impacts on historic properties of importance to tribes, including a survey of tribal traditional cultural properties

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<sup>2</sup> Alleen Brown, “Tribal Liaison in Minnesota Pipeline Review is Sidelined After Oil Company Complains to Governor,” (Aug. 12, 2017), *The Intercept* (discussing the Enbridge political pressure and the DOC’s subsequent curtailment of tribal consultation and other work) at <https://theintercept.com/2017/08/12/tribal-liaison-in-minnesota-pipeline-review-is-sidelined-after-oil-company-complains-to-governor/>, attached hereto as Ex. A.

<sup>3</sup> Minn. Stat. §§ 116D.01 *et seq.*

<sup>4</sup> Minn. Stat. §§ 138.31 *et seq.*

<sup>5</sup> Minn. Stat. §§ 138.661 *et seq.*

<sup>6</sup> *See* Ex. EERA-29, FEIS at Sec. 3.6.1.1 (“The Project is expected to be required to obtain a permit to cross navigable waters under Section 10 of the Rivers and Harbors Act and an individual permit under Section 404 of the Clean Water Act.”)

<sup>7</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>8</sup> 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f).

(“TCPs”), a subtype of historic property protected by both state and federal law.<sup>9</sup> And it is true that a state agency can sometimes meet the requirements of state historic-properties law by adopting federal work product. But that only works where there is a joint state-federal EIS—or at least better coordination of state and federal work than has been conducted on this Project. Because Enbridge suspended its federal permit applications during the current iteration of the Project, Section 106 work was suspended, too (although, due to tribal insistence, Section 106 work has now restarted). But there is far more work to do to meet Section 106 requirements, including additional interviews, field work, and other analysis that remains to be done to fully assess TCPs on the Project. The Fond du Lac Band explained this in the “Interim Report: Line 3 Corridor Tribal Cultural Survey.”<sup>10</sup>

Instead of adjusting for the suspension of the federal Section 106 process, the DOC dropped an incomplete historic-properties analysis into the FEIS and called it a day. This approach falls far below the requirements of state law. Similarly, the DOC ignored calls for the FEIS to fully cover impacts to treaty resources, an evaluation that overlaps with TCP analysis.

Multiple intervenors explained the problem at the December 7, 2017 Commission hearing on FEIS adequacy. When asked for the DOC’s response to tribal requests for TCP analysis to be included in the state FEIS, the DOC Deputy Commissioner of Energy and Telecommunications told the Commission: “I think the Department said that yes, but we don’t do that, that is another

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<sup>9</sup> See Ex. EERA-29, FEIS at § 5.4.2.5.3 p. 5-604. See also Ex. FDL-10, ACHP Guidance, “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” (June 2012).

<sup>10</sup> Ex. FDL-11 (Nov. 16, 2017). This tribally-run Survey is the means by which the Corps seeks to partially comply with its Section 106 obligations, and it is applicant-funded. But the Corps only agreed to start it last fall, and field work could only begin in October 2017. As stated at the December 7 hearing, the Tribes also disagree that the limited scope of the work currently authorized by the Corps meets the requirements of Section 106 (not to mention state law). Only 66 miles of survey along the APR is currently included, and while the Corps has stated somewhat more scope should be added, there is not yet agreement to include the full length of the APR and alternatives.

agency's purview, and I believe it's a combination in this case of the Army Corps and the State Historic Preservation Office."<sup>11</sup> The Deputy Commissioner was wrong on both counts. First, as a federal agency, the Army Corps has no responsibility for ensuring that *state* agencies comply with state historic-properties laws. Second, the SHPO's role is to *advise* state lead agencies on the scope of the required analysis (which it has done)—not to conduct that work itself.<sup>12</sup> Under the Minnesota Field Archaeology Act of 1963,<sup>13</sup> the actual work remains with the state permitting agency—the DOC. That the DOC is unaware of its obligations under state law, much less at the last stages of environmental review, is profoundly troubling.

Whatever the reason, in refusing to include a full historic-properties review in the FEIS, the DOC has both ignored state law and continued an ugly legacy of state and federal agencies ignoring tribal interests despite devastating consequences. As the Commission knows, in 2017, the state Department of Transportation failed to conduct full historic-properties review and consult with tribal governments in the area of the Highway 23 road and bridge project in Duluth.<sup>14</sup> The result was destruction of a tribal burial site.<sup>15</sup> There is no substitute for full and timely historic evaluation.

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<sup>11</sup> See Video of PUC Agenda Meeting (Dec. 7, 2017) at 5:05:23-5:05:52 (questioning by Comm'r Tuma; responses by Fond du Lac Attorney Sara K. Van Norman and DOC Deputy Commissioner of Energy and Telecommunications Bill Grant), at [http://minnesotapuc.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=677](http://minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=677).

<sup>12</sup> Minn. Stat. §§ 138.40 (requiring state agencies to cooperate with the SHPO); 138.665 subd. 2 (requiring SHPO consultation and mitigation planning); 138.666 (requiring agencies to cooperate with the SHPO); see also Ex. EERA-20, FEIS at Sec. 3.6.3.4 p. 3-15 (SHPO's role).

<sup>13</sup> *Id.*

<sup>14</sup> See Lisa Kackze, "MnDOT redesigning highway project after damaging Native American burial site," Pioneer Press/Twin Cities.com, at <https://www.twincities.com/2017/08/09/mndot-redesigning-highway-project-after-damaging-native-american-burial-site/>, attached hereto as Ex. B.

<sup>15</sup> *Id.* Note that while both the DOC tribal liaison and others asked that discussion of this incident be include in the FEIS, the DOC refused, as it did with a number of other tribal issues. See A.Brown, "Tribal Liaison in Minnesota Pipeline Review is Sidelined After Oil Company Complains to Governor," (Aug. 12, 2017) at 9-13, Ex. A.

Furthermore, this is one of the same, avoidable errors that the Corps made on the Dakota Access Pipeline (“DAPL”) in North Dakota. Permitting that project on an incomplete record has meant the destruction of tribal sacred sites, irreversible impacts to treaty resources, and extensive litigation—litigation in which the Corps is now being held accountable and where additional environmental review is even now being conducted.<sup>16</sup> Moreover, the mass civil disobedience, protest camps, and worldwide demonstrations opposing DAPL are well-documented.<sup>17</sup> The Commission has every reason to do a better job for Minnesota.

Therefore, the Tribes together take the earliest opportunity to brief this matter and petition the Commission to reconsider its December 14 Order.<sup>18</sup> The Tribes expressly ask that the Commission amend the Order to direct that full historic-properties review be completed as part of the FEIS. Specifically, the Tribes request that the December 14 Order at Deficiency 4 be amended to read: “The FEIS must include a completed TCR Survey along the entire Applicant’s Preferred Route and the alternate routes before any routing or need decision will be made. Additionally, cumulative impacts to treaty resources must be evaluated and included here, including valuation data.” At Section V below, the Tribes propose a structure for accomplishing the work. The Tribes ask for both a reply and oral argument on this Petition.

### **Factual Background**

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<sup>16</sup> See *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F.Supp.3d 101, 131 (D.D.C. 2017).

<sup>17</sup> See, e.g., U.N. Human Rights, Office of the High Comm’r, “Native Americans facing excessive force in North Dakota pipeline protests” (Nov. 15, 2016), at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20868&LangID=E>, attached hereto at Ex. C; Robinson Meyer, The Standing Rock Sioux Claim ‘Victory and Vindication’ in Court” (June 14, 2017), The Atlantic, at <https://www.theatlantic.com/science/archive/2017/06/dakota-access-standing-rock-sioux-victory-court/530427/>, attached hereto at Ex. D.

<sup>18</sup> The Tribes acknowledge the Commission’s inclusion in the December 14 Order of an improvement, the requirement that the TCR Survey be completed “before construction.”

There is no dispute regarding the tribal background and historic-properties work performed (or not performed) to date. The relevant facts are all in the record (or are subject to judicial notice, in the case of news articles and state policy guidance), with appropriate exhibits attached hereto.

### **1. Tribal historic properties in Minnesota.**

Ojibwe, Dakota, and other tribal people have for millennia occupied the land now recognized as Minnesota.<sup>19</sup> There is extensive evidence of this habitation throughout northern Minnesota in the form of TCPs.<sup>20</sup> TCPs in northern Minnesota take many different forms (and their classification may overlap with other historic-property types), such as “cultural corridors” including waterways, portages, and trails; historic villages and camps; gravesites; wild-rice water; maple sugar bush; essential animal habitats; sites where medicinal plants grow; and other sacred places.<sup>21</sup> Many of these places are not recorded in a written record but are part of the confidential knowledge passed down through tribal elders.<sup>22</sup>

It is undisputed that permitting agencies must conduct appropriate evaluation and plan mitigation of impacts to TCPs through and with tribes as the experts regarding both locations and preservation needs. Even Enbridge’s own consulting archaeologist Dr. Christopher Bergman

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<sup>19</sup> See Ex. EERA-29, FEIS at § 9.3 at 9-5.

<sup>20</sup> See, e.g., *id.* at § 5.4.2.5.3 at 5-604. Note: Sections 5.4 (Certificate of Need, “Cultural Resources”) and 6.4 (Route Permit, “Cultural Resources”) contain similar text throughout. Citation herein is solely made to Chapter 5, although the same analysis equally applies to the parallel sections in Chapter 6.

<sup>21</sup> See Ex. FDL-11, Draft FDL “Interim Report: Line 3 Corridor Tribal Cultural Survey” (Nov. 16, 2017) at § 1.2; see also Ex. EERA-29, FEIS at §9.5.1. p. 9-19.

<sup>22</sup> *Id.* Note: there is extensive guidance regarding how to review and protect even confidential, tribal TCPs. See, e.g., Ex. FDL-10, ACHP Guidance, “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” (June 2012).

<sup>22</sup> Ex. FDL-11 (Nov. 16, 2017).

testified in the evidentiary hearing that tribes are the “experts” who must identify tribal TCPs.<sup>23</sup> Furthermore, when asked whether it would be “best management practice[] to do a full traditional resources survey along the entire scope of this pipeline on the preferred route,” Dr. Bergman agreed that it was “absolutely essential.”<sup>24</sup>

## **2. Historic properties evaluation to date on the Project.**

### **A. References to TCPs in the FEIS.**

Despite the fact that there is no legal distinction between tribal TCPs and other types of historic properties, and the FEIS acknowledges the evidence showing TCPs are present along the APR and alternatives, the FEIS includes no TCP surveys because the DOC did not conduct or coordinate any. FEIS Section 5.4.2.5.3, “Traditional Cultural Properties,” states:

To date, no specific studies... of TCPs have been completed within the ROI, and as such, no specific locations and/or details are known at this time. However, information gathered from the consultation with American Indian tribes with an interest within the ROI [Region of Interest] have indicated that TCPs are present (see Appendix P).

At another point, in a particularly garbled statement, the FEIS seems to say that, due to the lack of TCP “studies” (which rarely exist before a given project triggers a survey), then no TCPs are present:

Research conducted as part of this assessment did not identify any known studies that are specific to TCPs. Therefore, the assumption that none are present within the ROI (and for those of other alternatives) does not preclude the potential for studies of this nature to exist. This assumption is carried over into the discussion in Chapter 6 of this EIS, as well.<sup>25</sup>

In another switchback, the FEIS elsewhere correctly identifies the variability of TCPs and the need to obtain “specific knowledge” to assess impacts to them:

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<sup>23</sup> See Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 136:10-15, 136:18-25, 137:1 (Bergman Cross).

<sup>24</sup> Evid. Hrg. Tr. Vol. 3A (Nov. 3, 2017) at 25:7-11 (Bergman Cross).

<sup>25</sup> Ex. EERA-29, FEIS at § 5.4.2.5.3 p. 5-604.

Without specific knowledge of the particulars of a TCP, the assessment of potential impacts is difficult to accomplish. A TCP may be important for a variety of reasons, may incorporate a small or large geographic area, and may have unique qualities that make it eligible for listing on the NRHP. In this manner, impacts would vary greatly depending on the location of the TCP in relation to a project component.<sup>26</sup>

Given the DOC's failure to undertake TCP survey work, the prospective mitigation methods set forth in the FEIS for protecting the as-yet-unsurveyed TCPs are general and non-specific<sup>27</sup>—little more than a plan for ongoing consultation after the need and routing decisions are made.<sup>28</sup>

### **B. Other historic-properties work to date.**

The historic-properties evaluation that the DOC has allowed is discussed under Section 5.4.1, “Regulatory Context and Methodology.”<sup>29</sup> The only fieldwork includes a conventional archaeological survey, which the applicant's contractor conducted along the APR without notifying tribes and without gathering TCP data.<sup>30</sup> The contractor also did a literature review for sites along the APR and SA-04, which relied on “existing data ... obtained from MHS [the Minnesota Historical Society] for archaeological and historic resources within the ROI.”<sup>31</sup> This means the literature review considered only: (1) the limited number of well-known properties actually listed on the State or National Register of Historic Places; and (2) sites that happen to have been evaluated in connection with earlier projects and therefore put into the state

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<sup>26</sup> *Id.* at § 5.4.3.1.3 p. 5-614.

<sup>27</sup> *Id.* at § 5.4.4.2 p. 5-614 (general proposal of fencing and tribal construction monitors; ongoing consultation); § 5.4.4.2 at 5-625-26 (ongoing consultation on mitigation); § 9.6.6 p. 9-38 (proposing avoidance of pesticide use where important tribal medicines and plants grow).

<sup>28</sup> *See, e.g., id.* at § 5.4.4.2 5-625-26 (before construction, this section only states that “the need for minimization and mitigation for impacts on archaeological and historic resources would be discussed with MHS, SHPO, the OSA, affected American Indian tribes, and other parties through continuing consultation efforts.”)

<sup>29</sup> Ex. EERA-29, FEIS at § 5.4.1 p. 5-588 *et seq.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at § 5.4.1.2 p. 5-596.



database—a data set that the SHPO has long advised is limited.<sup>32</sup> The FEIS, at least in this section, actually recognizes the limits of the records:

Information concerning sacred places or resources with importance to American Indian tribes is not available through SHPO databases, but may be available through consultation with affected American Indian tribes with geographic and/or traditional interests in Minnesota, North Dakota, Iowa, Illinois, and Wisconsin. Where information is known on resources of this type or TCPs, information is provided within this chapter.

Here, too, the FEIS admits “the Applicant did not conduct any surveys for cultural resources for any CN Alternative,” and states only that “DOC-EERA’s consultation with SHPO is ongoing, and the results of the consultation concerning determinations of eligibility, potential Project effects, and any necessary treatment for impacts are not available.”<sup>33</sup>

### **3. SHPO and MIAC communications with the DOC.**

In July 10, 2017 DEIS comments, the SHPO informed the DOC that the federal Section 106 consultation with the Corps was “at a very early stage” and that the scope of the federal review “does not at this point include the entire pipeline route or any alternative routes.”<sup>34</sup> The SHPO also identified the limits of the database upon which the archaeological survey in the DEIS had relied:

...[I]t is critical to note that only data included in the SHPO’s current inventory of recorded historic/architectural and archaeological sites was utilized for the ROIs of the other alternative routes... While the SHPO inventory data is considered current, it is by no means considered a comprehensive inventory of all potential archaeological and historic/architectural resources which may be present in the ROIs for alternative routes.<sup>35</sup>

Regarding alternative routes, the SHPO also confirmed that the DEIS

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<sup>32</sup> *Id.* at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

<sup>33</sup> *Id.* at § 5.4.1.2 p. 5-596.

<sup>34</sup> *Id.* at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

<sup>35</sup> *Id.* at 3.

only included consideration of known cultural resources, which is a very limited data set and an incomplete representation of all significant cultural resources, and that there is a likelihood of additional cultural resources to be present within the ROI for any of the alternative routes.<sup>36</sup>

For these and other reasons, the SHPO's ultimate opinion of the DEIS's Cultural Resources sections for both the need and routing chapters was that the "office considers information and documentation presented in the DEIS as incomplete in terms of what state law requires for consultation with our office and in an effort to identify and protect the state's significant historic and archaeological resources."<sup>37</sup> There is nothing in the record to indicate whether the DOC ever addressed any of these SHPO requirements in the FEIS.

Nor has the DOC heeded the advice of the MIAC, which early last year reiterated to the DOC the need to do a complete TCP survey.<sup>38</sup> On March 31, 2017, MIAC Cultural Resource Director Jim Jones advised the DOC that he had met with Jamie MacAlister, Environmental Review Manager at the Department of Commerce, and Danielle Oxendine Molliver, the former DOC Tribal Liaison, and notified them that:

One major resource that is missing from the evaluations are the Traditional Cultural Places (TCP's). These types of sites include wild rice beds, and areas that are utilized by tribal communities both on and off reservation lands. I know that the proposed route will go through these types of areas, the McGregor, MN area being one known example. This area is rich with wild rice beds that are beneficial to a number of tribal communities.<sup>39</sup>

Along with giving details regarding certain cultural corridors, MIAC Cultural Resource Director

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<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.*

<sup>38</sup> Ex. EERA-29, FEIS at § 9.5.2 p. 9-20; *see also id.* at App'x P, Tribal Resources and Impacts Pt. 5 at p. 494-96, Ltr. of J.Jones (MIAC) to A.O'Connor (DOC) (March 31, 2017); Ltr. of J.Jones (MIAC) to J.McAlister (DOC) (May 26, 2016) (stating concern on Sandpiper and L3R over "burial and archaeology sites and important sacred sites as well as sites that have yet to be identified" and "[a]s established by MN Statue 307.08, MIAC has the joint responsibility under the law to protect all American Indian Burial Sites within the State.")

<sup>39</sup> *Id.* at App'x P, Tribal Resources and Impacts Pt. 5 at p. 494, Ltr. of J.Jones (MIAC) to A.O'Connor (DOC) (March 31, 2017).

Jones laid out the required consultations and survey approach. He stressed twice the need to begin work immediately: “[t]here has to be a complete survey of the entire proposed route, and this survey needs to take place immediately”; “[d]ue to the timeline of the project, these surveys would also need to start immediately.”<sup>40</sup> Finally, he noted that “[t]here are both applicable state and federal laws which govern cultural resource management and the cultural areas of the state.”<sup>41</sup> But again, there is no follow-up from the DOC in the record.

#### **4. State-tribal consultation to date.**

The tribal consultation record also demonstrates the extent of the TCP work yet to do. For example, Section 9.4.4, “Interviews with Tribal Elders and Historians,” confirms the DOC has sought answers mainly to general questions regarding Tribal resources and values, such as “What are sacred places? How is this different from sacred sites? What are culturally significant sites or cultural sites?”<sup>42</sup> These interviews primarily served as part of the DOC’s efforts to comply with its general tribal consultation policy, rather than a coordinated effort to prepare a full TCP survey or plan mitigation.<sup>43</sup> And the problems with the DOC’s tribal consultation process have also been publicly documented.<sup>44</sup>

#### **5. Relevant comments at scoping, DEIS, and FEIS stages.**

The Tribes, and others, have raised the need for full TCP review, not to mention evaluation of treaty impacts, in writing and since the earliest iterations of this Project.<sup>45</sup> The

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at § 9.4.4.

<sup>43</sup> *Id.*

<sup>44</sup> See A. Brown, “Tribal Liaison in Minnesota Pipeline Review is Sidelined After Oil Company Complains to Governor,” (Aug. 12, 2017) at 9-13, Ex. A.

<sup>45</sup> See, e.g., Ex. EERA-29, FEIS at App’x P, Tribal Resources and Impacts Pt. 5, Mille Lacs

Tribes likewise filed comments on both the DEIS and FEIS regarding what remains to be done.<sup>46</sup>

For example, in its October 2017 FEIS comments, Fond du Lac highlighted “the profound lack of knowledge about archaeological resources and Traditional Cultural Properties along the preferred route”:

While a superficial amount of knowledge was obtained from an archaeological survey conducted by a contractor along the applicant’s preferred route, no survey was even attempted on the alternative routes that are supposedly being evaluated by this FEIS. The Band has worked with the Applicant in a very short period of time to organize a tribal cultural survey to evaluate the preferred alternative route for Traditional Cultural Properties [“TCPs”] that the project would put at risk. The tribal cultural survey is scheduled to begin immediately after the publication of these comments. It is imperative that this survey be allowed to complete its work so that knowledge of tribal cultural properties may be used to properly form this FEIS.<sup>47</sup>

## **6. Analysis of Project impacts upon off-reservation treaty resources.**

The tribes that occupied this part of the Upper Midwest in the 19<sup>th</sup> century were forced to cede nearly their entire homeland under a series of treaties with the federal government.<sup>48</sup> These

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Cmts. on Comp. Env. Analysis DSD on Sandpiper and L3R (Sept. 30, 2015) (requesting consultation regarding “potential cultural impacts, including to wild rice waters); Mille Lacs Cmts. on DSD for Sandpiper and L3R (May 26, 2016) (requesting additional alternatives analysis, as well as review and consultation on extensive tribal cultural resources in the region); App’x P, Tribal Resources and Impacts Pt. 1, Fond du Lac Scoping Cmts. on Sandpiper and L3R (May 25, 2016) at p. 79 (“Any route alternative proposed will impact the Great Lakes, as well as the treaty-protected resources of the Band.”); *id.* at FDL Ltr. to J.MacAlister (DOC) (March 16, 2017) at p. 83 (raising concern over treaty-resource impacts).

<sup>46</sup> *See, e.g.*, Ex. EERA-29, FEIS, at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” Subst. Tribal Cmts., FDL DEIS Cmts. (July 10, 2017) #2617; eDocket No. 20178-134845-01; *see also* FDL Cmts. on FEIS, eDocket No. 20177-134110-04 (Oct. 2, 2017).

<sup>47</sup> eDocket No. 20178-134845-01; *see also* FDL Cmts. on DEIS, eDocket No. 20177-134110-04 (July 20, 2017). The Tribes also provided a detailed explanation of the errors of the FEIS regarding the TCR Survey in its Exceptions to ALJ Lipman. *See* FDL Exceptions to the Report of the ALJ (Nov. 21, 2017), eDocket No. 201711-137568. The Fond du Lac and Mille Lacs Bands also reiterated these comments at the last Commission hearing.

<sup>48</sup> *See, e.g.*, Ex. EERA-29, FEIS at § 9.3.3 p. 9-7 (discussing treaties).

treaties recognized the 11 reservations now within the state's borders. Certain of these treaties also reserved to the tribes off-reservation hunting, fishing, and gathering rights (or "usufructuary rights") in the ceded lands to provide tribal members with resources to survive (and to protect the resources themselves).<sup>49</sup>

The dimensions of Minnesota tribes' off-reservation harvest rights are recognized today via various court decisions.<sup>50</sup> The federal government has a trust responsibility to the Tribes to protect these off-reservation resources.<sup>51</sup> But the state also has certain obligations to the tribes, in addition to a government-to-government relationship,<sup>52</sup> For example, Minnesota and tribal governments co-manage off-reservation natural resources and enforce regulations in the 1837 and 1854 Ceded Territories.<sup>53</sup>

There is no question that tribal off-reservation hunting, fishing, and gathering resources (some or all of which can also be classed as TCPs) will be impacted by the Project, regardless of route (although the SA-04 route would have fewer impacts of every kind on Native Americans).<sup>54</sup> Correspondingly, the Tribes have repeatedly asked for inclusion of appropriate

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<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 184 (1999) (noting "the 1854 Treaty established new hunting and fishing rights in the territory ceded by the Treaty"); *Fond du Lac v. Carlson*, Civ. No. 5-92-159 (D.Minn. March 18, 1996) (unpubl. op.) (holding that Fond du Lac retains usufructuary rights in the 1854 Ceded Territory); *United States v. Bresette*, 761 F. Supp. 658, 661 (D. Minn. 1991) (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 348 (7th Cir.1983)) (noting "Seventh Circuit has interpreted the 1837, 1842, and the 1854 treaties as reserving full usufructuary rights for the Chippewa on the ceded territories.").

<sup>51</sup> *See, e.g.,* FEIS at § 9.3.3 at p. 9-8.

<sup>52</sup> Minn. Exec. Order 13-10, Affirming the Government-to-Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation; Rescinding Executive Order 03-05 (Aug. 8, 2013).

<sup>53</sup> *See, e.g.,* DNR Treaty Page, at [http://dnr.state.mn.us/aboutdnr/laws\\_treaties/index.html](http://dnr.state.mn.us/aboutdnr/laws_treaties/index.html) (discussing 1837 and 1854 Treaties and co-management).

<sup>54</sup> *See* EERA-29, FEIS at § 9.5.4.1, Tribal Lands ("Every mile of the Applicant's preferred route crosses ceded lands (1854, 1855, and 1863 treaties)...The Applicant's preferred route and RA-

cumulative-impacts analysis on treaty uses of the APR and the alternatives,<sup>55</sup> but the FEIS does not contain these data. The FEIS omits any valuation for the projected or potential loss to any wild-rice waters or wildlife habitat in the ceded territories where the APR and alternatives would run.<sup>56</sup> Chapter 11 on the potential impacts on environmental justice from different system and route alternatives are inherently incomplete.<sup>57</sup> Similarly, Chapter 12’s cumulative potential effects analysis omits nearly any discussion of *past* projects on the locations and resources that would be affected by the new line, including treaty resources.<sup>58</sup>

### Argument

#### **I. The Commission can and should grant a petition to reconsider here because it is the earliest and most effective way to address defects in the FEIS.**

In the December 14 Order, the Commission found the FEIS is inadequate—but included only the minimal requirement that the FEIS must state that the TCR Survey needs to be completed “before construction.”<sup>59</sup> The Commission has effectively excused the DOC’s failure to make reasonable efforts to undertake a full historic-properties survey and to include the results in the FEIS. Put another way, the Commission has decided that it will make routing and need

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03AM would not cross any American Indian reservation land; however, these routes would cross near the White Earth Reservation and Fond du Lac Reservation on ceded land.”)

<sup>55</sup> See, e.g., FDL FEIS Cmts. (Oct. 2017), eDocket No. 20178-134845-01 (“...[I]t is unclear how the FEIS can acknowledge that the Band’s Treaty Rights to hunt, fish, and gather under treaties with the United States are a type of easement but then go on to fail to attempt to ascertain the value of this easement to the Band. The FEIS fails to even attempt to evaluate the potential damage by the Applicant’s proposed pipeline project to the valuable easement held by the Band.”)

<sup>56</sup> *Id.*

<sup>57</sup> Minn. R. 4410.2300(H).

<sup>58</sup> *Id.* (requiring consideration of past projects in cumulative-impacts analysis); compare Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 118:23-25, 119:1-25, 120:1-22 (stating that “a cumulative impact assessment would be looking forward at a reasonably foreseeable future,” that the lead environmental contractor Merjent has not performed an analysis of past projects’ impacts, and that Merjent also has not performed “any analysis of cumulative impacts on off-reservation treaty resources” that will be affected by the preferred route) (Bergland Cross).

<sup>59</sup> Dec. 14 Order at 4, eDocket No. 201712-138168-02.

decisions on one of the state's largest ever construction projects without ever considering a full record of the impacts on historic properties. This violates MEPA and other state law.

Minnesota Rule 7829.3000 allows “[a] party or a person aggrieved and directly affected by a commission decision or order [to] file a petition for rehearing, amendment, vacation, reconsideration, or reargument within 20 days of the date the decision or order is served by the executive secretary.” The petition “must set forth specifically the grounds relied upon or errors claimed.”<sup>60</sup> Here, the Tribes are not just parties, but their thousands of members are directly affected by the Commission's December 14 Order. All the people of Minnesota stand to lose profoundly important historic resources if the Commission does not reconsider.

Acting now is also in keeping with the purpose of MEPA to ensure timely and complete EIS work. Minnesota courts recognize that MEPA requires early environmental review, just as NEPA does:

This emphasis on timing is also consistent with the way federal courts have applied the [NEPA], which we may look to for guidance when interpreting MEPA. The United States Supreme Court has explained that the early-stage environmental review similarly required by NEPA is critical because it ‘ensures that that important [environmental] effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.’<sup>61</sup>

By far the most efficient way for the Commission to address this serious omission in the FEIS is reconsideration of the Order.

## **II. State law requires full historic-properties review to be completed and included in the FEIS.**

There is no question that a state FEIS is inadequate if it omits review of project impacts on historic properties. Both MEPA and state historic-preservation laws confirm this. On this

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<sup>60</sup> Minn. R. 7829.3000 subp. 2.

<sup>61</sup> *In re N. Dakota Pipeline Co.*, 869 N.W.2d 693, 698 (Minn. App. 2015) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

Project, that means a full TCR Survey along both the APR and alternative routes.

**A. MEPA requires full evaluation of historic and cultural resources before the routing and need decisions.**

MEPA creates a comprehensive environmental review process that includes evaluation and protection of historic and cultural resources as a central factor in decisionmaking—not simply as permit conditions. MEPA also encourages early and inclusive coordination among agencies to avoid duplication of efforts. In MEPA, the legislature declared the state’s environmental policy, identifying an affirmative obligation of the state to “use all practicable means” to “preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever practicable, an environment that supports diversity, and variety of individual choice.”<sup>62</sup> MEPA also requires the state to “assure for all people of the state safe, healthful, productive, and aesthetically and culturally pleasing surroundings.”<sup>63</sup> The Act further includes a broad definition of “natural resources,” which “shall include, but not be limited to, all mineral, animal, botanical, air, water, land, timber, soil, quietude, recreational, and historical resources.”<sup>64</sup> Historic and cultural protection is fundamental to environmental protection in Minnesota.

Consequently, state environmental impact statements must “analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented.”<sup>65</sup> This is why “[t]o ensure its use in the decision-making process, the environmental impact statement shall be prepared as early as practical in the formation of an action.”<sup>66</sup> Additionally, the agency completing the EIS has to ensure state and federal coordination, and “[w]henever practical, information needed by a governmental unit for making

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<sup>62</sup> Minn. Stat. §116D.02, subd. 2(4).

<sup>63</sup> *Id.* at subd. 2(2).

<sup>64</sup> *Id.* at §116D.04, subd. 1a(a) (adopting the definition in Minn. Stat. 116B.02, Subd. 4).

<sup>65</sup> *Id.* at subd. 2a(a).

<sup>66</sup> *Id.*



final decisions on permits or other actions required for a proposed project shall be developed in conjunction with the preparation of an environmental impact statement.<sup>67</sup>

MEPA's implementing regulations further confirm these requirements, and require comparison of reasonable alternatives.<sup>68</sup> Among these are "alternative sites" and "alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping for the draft EIS."<sup>69</sup> There is no allowance for the state to omit historic-properties analysis on alternatives.

### **B. State historic-properties law dovetails with MEPA.**

Minnesota law requires state agencies "to protect the physical features and historic character of properties designated [in state law] or listed on the National Register of Historic Places."<sup>70</sup> It also requires the DOC to "cooperate with the Minnesota Historical Society in safeguarding state historic sites and in the preservation of historic and archaeological properties."<sup>71</sup> Indeed, the FEIS itself acknowledges that state agencies "must consult with the SHPO prior to state approval of state sponsored projects or those undertaken on non-federal public lands for which a state agency or department has jurisdiction."<sup>72</sup> Additionally, "when significant archaeological sites exist, or are predicted to exist 'on public lands or waters' the 'agency controlling said lands or waters' are required to submit construction or development

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<sup>67</sup> *Id.* at subd. 2a(i).

<sup>68</sup> Minn. R. 4410.2300 subp. G.

<sup>69</sup> The Commission appropriately ruled in its December 14 Order that: "The EIS needs to (i) indicate how far and where SA-04 would need to be moved to avoid the karst topography it would otherwise traverse and (ii) provide a revised environmental-impact analysis of SA-04 specifically to reflect the resulting relocation of that alternative." The additional TCR Survey work the Tribes argue for here is inherently part of that impact analysis on SA-04.

<sup>70</sup> Minn. Stat. § 138.665 subd. 2.

<sup>71</sup> Minn. Stat. § 138.666.

<sup>72</sup> Ex. EERA-29, FEIS at § 3.6.3.1. *See also id.* at App'x T, "Public Comments and Responses," Pt. 1, "Substantive Comments," "State and Local," #2368, SHPO DEIS Cmts. (July 10, 2017) at 2.

plans to the Minnesota Historical Society (SHPO) and the Office of the State Archaeologist (OSA) for review and comment.”<sup>73</sup>

When “sites are related to Indian history or religion, the state archaeologist shall submit the plans to the Indian Affairs Council for the council’s review and recommend action.”<sup>74</sup> The state archaeologist then works cooperatively with the MIAC on Indian-related sites.<sup>75</sup>

Again, the SHPO long ago told the DOC that what was needed was something “above and beyond the scope of the federal Section 106 review.”<sup>76</sup> It is not clear whether the DOC submitted plans to the SHPO or the OSA for comment ahead of time, or whether the DOC simply submitted the results of the work that it had already authorized. But the DOC appears to have ignored the SHPO’s comments about the limits of the databases consulted and the additional work to be done—no follow-up appears in the record. Without a legal basis to do so, the DOC also disregarded the MIAC comments regarding the need for a full TCR Survey.

**C. NEPA case law also persuasively illustrates the necessity of full TCP review even within a Minnesota FEIS.**

While there is little state case law discussing the results of a Minnesota agency’s failure to conduct full historic properties review, NEPA case law is relevant. MEPA is modelled after NEPA, and Minnesota courts hold case law interpreting federal EIS requirements is instructive.<sup>77</sup> In fact, MEPA and NEPA both contain identical language with respect to historic and cultural

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<sup>73</sup> See Ex. EERA-29, FEIS at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. (July 10, 2017) at 3. See also Minn. Stat. § 138.40 subd. 2 and 3.

<sup>74</sup> Minn. Stat. § 138.40 subd. 3.

<sup>75</sup> Minnesota Historical Society, SHPO Manual for Archaeological Projects in Minnesota (July 2005) at 4-5, excerpt attached at Ex. E.

<sup>76</sup> Ex. EERA-29, FEIS at § 3.6.3.1. See also *id.* at App’x T, “Public Comments and Responses,” Pt. 1, “Substantive Comments,” “State and Local,” #2368, SHPO DEIS Cmts. at 4.

<sup>77</sup> See *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977) (finding that MEPA was “[p]atterned on NEPA” and then considering federal case law on NEPA EIS requirements to apply MEPA).

preservation. In *Save the Courthouse v. Lynn*, the Southern District of New York interpreted the NEPA’s declaration of national environmental policy imposing an obligation on the government to “preserve important historic, cultural, and natural aspects of our national heritage,” language identical to MEPA’s declaration.<sup>78</sup> That court found that this language “extends [NEPA’s] procedural protections both to natural and cultural resources.”<sup>79</sup>

MEPA, like NEPA, imposes an independent obligation on an agency to evaluate project impacts on historic and cultural resources—which must include evaluation of tribal TCPs, as discussed below.<sup>80</sup> In *Pit River Tribe v. U.S. Forest Service*, the 9th Circuit found that a tribe had demonstrated an injury in fact under NEPA where the Forest Service’s EIS failed to adequately consider the environmental impact on TCPs of the tribe.<sup>81</sup> In *Pit River*, the Forest Service extended federal leases and subsequently approved a geothermal plant on lands spiritually and culturally significant to the tribe. But the court held the initial environmental reviews were insufficient, and that *ex post facto* reviews premised on the validity of the original leases could not cure the inadequacy.<sup>82</sup>

To satisfy NEPA’s requirements with respect to historic and cultural resources, including TCPs an agency must evaluate and compare potential impacts on these resources both for the applicant’s preferred site and alternatives. For this to be possible, the information must be in the EIS. MEPA should be read the same way.

**D. Likewise, National Historic Preservation Act case law provides persuasive authority regarding the specific scope of required work.**

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<sup>78</sup> 408 F.Supp. 1323 (S.D.N.Y. 1975).

<sup>79</sup> *Id.* at 1340 (citing *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971)).

<sup>80</sup> *Diné Citizens Against Ruining our Environment v. Klein*, 747 F.Supp.2d 1234, 1258 (D.Colo. 2010) (agency did not meet the “hard look” requirement in NEPA when it issued a FONSI without mitigation measures relating to the preservation of historic and cultural resources).

<sup>81</sup> 469 F.3d 769, 779 (9th Cir. 2006)

<sup>82</sup> *Id.* at 787.

NHPA case law also lends specific support to inclusion of a complete TCR Survey in the FEIS. In addition to the NEPA protections, the NHPA creates additional safeguards for historical and cultural sites.<sup>83</sup> The requirements of the two laws “should be integrated closely,”<sup>84</sup> as with MEPA and state historic-preservation laws. MEPA, too, directs agencies to coordinate state and federal review and to obtain “information needed by a governmental unit for making final decisions on permits or other actions required for a proposed project” during “the preparation of an environmental impact statement.”<sup>85</sup> Indeed, whether a project complies with other “relevant policies, rules, and regulations of other federal, state, and local agencies” is one of the criteria the Commission must consider when determining whether to grant a Certificate of Need.<sup>86</sup>

On a project where tribal properties will be impacted, this requires full TCP evaluation. In *Pueblo of Sandia v. U.S.*,<sup>87</sup> the 10th Circuit laid out clear guidelines for evaluation of the claimed TCP status of a given property. In connection with a proposed project therein, the Forest Service received “numerous claims” that a canyon project site contained TCPs. Nevertheless, the Forest Service still issued a finding that there were no TCPs in the canyon, and the Pueblo filed suit upon the issuance of the draft EIS.<sup>88</sup> The court held that the Forest Service’s process of evaluating TCPs did not constitute the requisite “reasonable effort” under

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<sup>83</sup> 54 U.S.C. §§ 300101 *et seq.*

<sup>84</sup> *Apache Survival Coalition v. U.S.*, 21 F.3d 895, 906 (9th Cir. 1994); *see also* Walter E. Stern & Lynn H. Slade, *Effects of Historic and Cultural Resources and Indian Religious Freedom on Public Lands Development: A Practical Primer*, 35 Nat. Resources J. 133, 144 (1995) (evaluating overlapping policies of NHPA and NEPA).

<sup>85</sup> Minn. Stat. § 116D.04, Subd. 2a(i).

<sup>86</sup> Minn. R. 7853.0130(D). *See also* Ex. EERA-29, FEIS at § 3.1.1.1 and Table 3.1-1.

<sup>87</sup> 50 F.3d 856 (10<sup>th</sup> Cir. 1995).

<sup>88</sup> *Id.* at 860-61.

the NHPA,<sup>89</sup> and there were sufficient communications to put the Forest Service on notice that more work was needed.<sup>90</sup>

And current, complete information must be used. In *Montana Wilderness Association v. Connell*, the 9th Circuit found that the Bureau of Land Management (“BLM”) did not make a “reasonable and good faith effort” to identify historic and cultural resources, as required by the NHPA, by including in its FEIS an outdated, general study of the land affected.<sup>91</sup> These cases provide a roadmap for the state’s TCP work here.

**E. Sufficient historic properties review must be completed in the FEIS for *both* the APR and the alternative routes before the route is approved.**

Minnesota law requires a pipeline EIS to analyze the impacts of the proposed action on the preferred and alternative routes—including comparative impacts on historic properties. Minnesota Rule 7852.1900 lists the criteria that the Commission must use to determine pipeline route.<sup>92</sup> The Commission must “consider the characteristics, the potential impacts, and methods to minimize or mitigate the potential impacts of *all proposed routes* so that it may select a route that minimizes human and environmental impact.”<sup>93</sup> The rule requires that “in selecting a route for designation and issuance of a pipeline permit,” the Commission must consider “lands of historical, archaeological, and cultural significance.”<sup>94</sup> Additionally, Minnesota Rule 4410.2300(H) directs that an EIS must include “[f]or the proposed project and each major alternative... a thorough but succinct discussion of potentially significant adverse or beneficial impacts generated.”

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<sup>89</sup> *Id.* at 861-62.

<sup>90</sup> *Id.*

<sup>91</sup> 725 F.3d 988, 1005 (9th Cir. 2013).

<sup>92</sup> See also Ex. EERA-29, FEIS at § 3.2.1.

<sup>93</sup> Minn. R. 7852.1900 subp. 2 (emphasis added).

<sup>94</sup> *Id.* at subp. 3(C).

Historic-properties analysis is also required on these alternatives, and NHPA case law is again instructive. In *North Idaho Community Action Network v. U.S. Department of Transportation*, the 9th Circuit upheld an agency decision in part because the EIS considered impacts on historic properties and the agency’s choice among alternatives was in part because one alternative affected fewer historic sites than the others.<sup>95</sup> For the same reasons, a full TCR Survey must be included in this state FEIS and the Commission must consider the comparative impacts to TCPs in deciding among routes.

**III. The Commission also cannot determine that the FEIS is adequate because FEIS fails to analyze the impact on known, treaty-protected resources.**

The recent, hard lessons of the Dakota Access Pipeline, and current litigation over it, reinforce the principle that off-reservation, treaty-resource impacts must be considered in a federal FEIS.<sup>96</sup> MEPA, too, must be read as requiring a state EIS to include a full analysis of treaty-protected resources. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the Court acknowledged the requirement under NEPA that an EIS analyze “the effects on a specific resource identified in the treaty.”<sup>97</sup> The Court found the environmental assessment was inadequate because it “offered only a cursory nod to the potential effects of an oil spill...”<sup>98</sup> An agency “generally must examine both the probability of a given harm occurring and the

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<sup>95</sup> 545 F.3d 1147, 1156 (9th Cir. 2008)

<sup>96</sup> See *No Power Line, Inc. v. Minnesota Environmental Quality Council*, 262 N.W.2d 312 (Minn. 1977) (finding that MEPA was “[p]atterned on NEPA” and then considering federal caselaw on NEPA EIS requirements to apply MEPA).

<sup>97</sup> 255 F.Supp.3d 101, 131 (D.D.C. 2017) (citing *Ground Zero Ctr. For Nonviolent Action v. Dept. of the Navy*, 918 F.Supp.2d 1132, 1152 (W.D. Wash. 2013) (assessing impact on tribe’s treaty fishing rights by considering surveys of fish patterns and Navy’s mitigation efforts); *Nw. Sea Farms, Inc., v. U.S. Army Corps. of Eng’rs*, 931 F.Supp. 1515, 1521-22 (W.D.Wash. 1996) (explaining Corps correctly concluded that project would impair treaty fishing rights by conserving impact on tribe’s access to fish)). Note that the *Standing Rock* court rejected the tribes’ federal trust responsibility argument, concluding that the requirement to analyze the impact on treaty-protected resources was based on NEPA itself.

<sup>98</sup> *Id.* at 134.

consequences of that harm if it does occur.”<sup>99</sup>

The FEIS only addresses treaty rights in the cursory manner and fails to address the probability of impact to specific treaty rights for the various routes proposed and the consequences of the harm. It attempts to describe important treaty rights as easements but fails to “ascertain the value of this easement.”<sup>100</sup> The FEIS also fails to address cumulative impacts to treaty rights.<sup>101</sup> By failing to acknowledge the treaty-protected interests of a large group of Minnesotans, the FEIS fails to fully analyze the impacts of this Project. The Commission should require it to be revised.

**IV. The DOC has not even attempted to obtain all the “information that can reasonably be obtained” for this FEIS.**

As discussed above, Minnesota Rule 4410.2800 subpart 4 requires that, to be adequate, an FEIS must include all “information that can reasonably be obtained.” But this is not intended as an allowance for permitting agencies to simply wait until the clock runs on a planned project timeline and then say that information is “not reasonably obtainable.” Beyond the plain obligations of state law, the DOC has long been on specific notice that a TCR Survey was necessary. The SHPO, MIAC, Tribes, and many others told it so.

Nor is there any excuse because Enbridge currently has access to “only” 94% of the APR and will only have further access to the remaining 6% of the lands upon issuance of the routing and need permits, as their attorney argued at the last hearing. In fact, this means a TCR Survey *could* now be prepared for the vast majority of the APR. Moreover, tribal experience shows that most landowners *do* allow access to private land if the sole purpose is tribal or other historic-

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<sup>99</sup> *Id.* at 132 (citing *New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 482 (D.C. Cir. 2012)).

<sup>100</sup> *See, e.g.*, FDL Cmts. on FEIS (Oct. 2, 2017), eDocket No. 20178-134845-01 at 1.

<sup>101</sup> *Id.*; *see also* Minn. R. 4410.0200 subp. 11 (defining cumulative impacts as including past, present, and future impacts).

properties survey. There is no basis upon which the Commission can excuse this defect in the FEIS—a TCR Survey was and is “reasonably obtainable information.”

**V. The required scope of the TCR Survey can and should be resolved by the DOC, the SHPO, and the Tribes (along with the other consulting tribes).**

As the Tribes informed the Commission at the last hearing, given the seasonal nature of fieldwork, TCR Survey work cannot be completed within the 60-day timeframe set forth in the December 14 Order. The Tribes propose that the SHPO, DOC, MIAC, and the Tribes work together on: (1) an ongoing tribal consultation plan (the Tribes are not the only consulting tribes on this Project); (2) a survey workplan building from the existing TCR Survey approach; and (3) a realistic schedule for the work. All these efforts must be funded by the applicant.

**Conclusion**

There is no legal basis upon which the Commission can waive the DOC’s failure to undertake full historic-properties and treaty-impacts review on this Project. The work must be done now and included in the FEIS before the Commission makes the routing or need decisions, and the work must include a full TCR Survey along the APR, SA-04, and all other alternatives. Therefore, the Tribes respectfully ask that the Commission reconsider its December 14 Order to include this requirement as part of the work the DOC is already doing to revise the FEIS.

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