

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

**A18-1283**

**A18-1291**

**A18-1292**

In re Applications of Enbridge Energy, Limited Partnership,  
for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement  
Project in Minnesota from the North Dakota Border to the Wisconsin Border.

**Filed June 3, 2019**  
**Reversed and remanded**  
**Florey, Judge**  
**Dissenting, Connolly, Judge**

Minnesota Public Utilities Commission  
File Nos. PL-9/CN-14-916; PL-9/PPL-15-137

Paul C. Blackburn, Honor the Earth, Callaway, Minnesota; and

Frank Bibeau, Honor the Earth, Deer River, Minnesota (for relator Honor the Earth)

David J. Zoll, Charles N. Nauen, Rachel A. Kitze Collins, Arielle S. Wagner, Lockridge  
Grindal Nauen, P.L.L.P., Minneapolis, Minnesota (for relator Mille Lacs Band of Ojibwe)

Joseph Plumer, White Earth, Minnesota (for relators White Earth Band of Ojibwe and Red  
Lake Band of Chippewa Indians)

Scott R. Strand, Environmental Law & Policy Center, Minneapolis, Minnesota (for relator  
Friends of the Headwaters)

Thomas H. Boyd, Eric F. Swanson, Betsy Schmiesing, Kyle R. Kroll, Winthrop &  
Weinstine, P.A., Minneapolis, Minnesota (for respondent Enbridge Energy, Limited  
Partnership)

Keith Ellison, Attorney General, Lisa A. Crum, Assistant Attorney General, St. Paul,  
Minnesota (for respondent Minnesota Public Utilities Commission)

Considered and decided by Florey, Presiding Judge; Cleary, Chief Judge; and  
Connolly, Judge.

## **S Y L L A B U S**

I. In determining the project alternatives to be considered in an environmental-impact statement (EIS) under the Minnesota Environmental Policy Act (MEPA), a responsible governmental unit (RGU) does not err by taking the project proposer's objective into consideration when defining the purpose of and need for the project, or by excluding from consideration alternatives that would not meet that objective.

II. An RGU acts in a manner that is arbitrary, capricious, and unsupported by substantial evidence when it determines adequate a final EIS that fails to address potentially significant issues raised during scoping and in public comments on the draft EIS.

III. MEPA does not require completion of a traditional cultural properties (TCP) survey; an EIS may be determined adequate before a federal TCP survey is complete if the discussion of potential impacts to historic and cultural resources is otherwise sufficient.

## **O P I N I O N**

**FLOREY**, Judge

In these consolidated certiorari appeals, relators environmental organizations and tribal bands, challenge a decision by respondent Minnesota Public Utilities Commission (commission) determining adequate a final EIS (FEIS) for the proposed Line 3 pipeline project of respondent Enbridge Energy, Limited Partnership (Enbridge). Although we reject most of relators' assertions of error, we agree that the FEIS is inadequate because it does not address the potential impact of an oil spill into the Lake Superior watershed. Accordingly, we reverse the commission's adequacy determination and remand for further proceedings consistent with this decision.

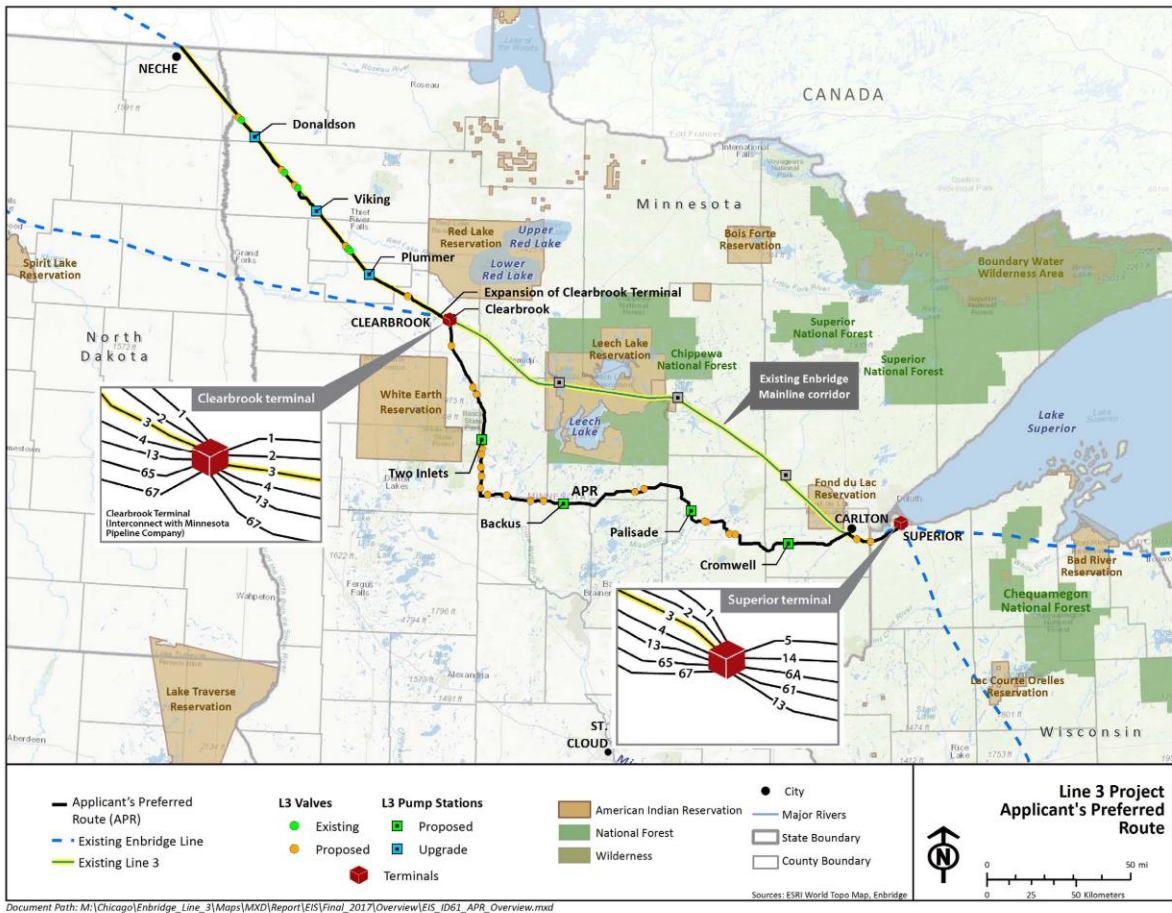
## FACTS

In April 2015, Enbridge filed applications for a certificate of need (CN) and routing permit (RP) to allow the installation of 337 miles of 36-inch diameter pipe, and associated facilities, from the North Dakota-Minnesota border to the Minnesota-Wisconsin border. The proposed pipeline would replace the existing Line 3, which is part of Enbridge's Mainline System.

Existing Line 3 crosses into northwestern Minnesota from North Dakota, connects to a terminal at Clearbrook (the Clearbrook terminal), and continues east across northern Minnesota, through Carlton, and into Wisconsin, where it connects with a terminal in Superior, Wisconsin (the Superior terminal). Existing Line 3 crosses through the Leech Lake and Fond du Lac Reservations pursuant to leases that will expire in 2029. In its CN and RP applications, Enbridge proposed a route for the replacement Line 3 that would follow the existing Line 3 corridor from North Dakota to Clearbrook and Carlton to Superior, but would take a more southerly route between Clearbrook and Carlton, which would avoid crossing the reservations. Figure 2.1-1 from the EIS, reproduced in color below, illustrates the location of the existing mainline corridor (which houses Line 3 and other pipelines) and Enbridge's proposed new route (Applicant's Preferred Route, or APR).<sup>1</sup>

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<sup>1</sup>This image is also available in color at: <https://mn.gov/eera/web/project-file?legacyPath=/opt/documents/34079/Line3%20FEIS%20Ch%2002%20Project%20Description.pdf>, on page 2-2.



After initially setting the CN and RP applications for separate contested-case proceedings and initiating environmental review in the RP docket, the commission combined the CN and RP dockets and ordered that a joint EIS be prepared. The commission, as the RGU, authorized the Minnesota Department of Commerce’s Energy Environmental Review and Analysis division (DOC-EERA) to prepare the EIS, and the Minnesota Department of Natural Resources (DNR) and Minnesota Pollution Control Agency (MPCA) were brought in as assisting agencies.

The project proceeded through scoping, a process that determines the range of issues to be addressed in an EIS. A final scoping decision document was issued on December 5,

2016, and a draft EIS (DEIS) was released on May 15, 2017. Following a public-comment period, during which DOC-EERA received approximately 2,860 public comments, an FEIS was released on August 17, 2017.

After receiving the FEIS, the commission issued an order extending the statutory deadline for determining the adequacy of the FEIS and referring the matter to the Office of Administrative Hearings (OAH) for development of the record and a recommendation on the adequacy of the FEIS. On November 1, 2017, an administrative-law judge (ALJ) issued proposed findings and conclusions and a recommendation that the commission determine the FEIS adequate.

On December 14, 2017, the commission issued an order determining the FEIS inadequate and identifying four deficiencies to be remedied before the FEIS could be determined adequate. On February 12, 2018, DOC-EERA issued a revised FEIS,<sup>2</sup> which the commission met to discuss on March 15, 2018. On May 1, 2018, the commission issued an order adopting the ALJ report as revised and determining the FEIS adequate. The commission issued an order denying reconsideration on July 3, 2018.

Relators Friends of the Headwaters (FOH), Honor the Earth (HTE), and Mille Lacs Band of Ojibwe, Red Lake Band of Chippewa Indians, and White Earth Band of Ojibwe (the Bands), filed three certiorari appeals, which this court consolidated for consideration.<sup>3</sup>

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<sup>2</sup> Hereinafter, we refer to the February 12, 2018 revised FEIS as “the FEIS” unless there is a need to distinguish between the initial and revised documents.

<sup>3</sup> After oral argument, FOH submitted to this court a letter citing to supplemental authorities. *See* Minn. R. Civ. App. P. 128.05 (governing citation of supplemental authorities). Enbridge then submitted a responsive letter, requesting that the court strike FOH’s letter or allow additional argument. *See id.* (allowing letter response to citation to

## ISSUE

Is the commission's decision determining the FEIS adequate based on errors of law, unsupported by substantial evidence, or arbitrary or capricious?

## ANALYSIS

### Minnesota Environmental Review

Environmental review in Minnesota is governed by the Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2018). MEPA is patterned on the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12 (2012 & Supp. 2017), and Minnesota courts have in appropriate circumstances relied on federal caselaw applying NEPA. *See No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 323 n.28 (Minn. 1977) (noting that court had used federal caselaw to interpret MEPA); *In re N.D. Pipeline Co. LLC*, 869 N.W.2d 693, 698 (Minn. App. 2015) (noting that court may look to federal courts' application of NEPA for guidance), *review denied* (Minn. Dec. 15, 2015); *see also Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 826 (Minn. 2006) (*CARD*) (declining to apply language in NEPA regulations that is not present in MEPA regulations). As directed by MEPA, the Minnesota Environmental Quality Board (EQB) has promulgated administrative rules

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supplemental authorities). But Enbridge did not file a motion to strike, *see* Minn. R. Civ. App. P. 127 (requiring requests for relief to be made by motion), and has not established that FOH's submission was improper, *see* Minn. R. Civ. App. P. 128.05 (allowing submission of letter identifying "pertinent and significant authorities" that "come to a party's attention after the party's brief has been filed or after oral argument but before decision"). Nonetheless, the supplemental authority provided does not alter our analysis.

governing environmental review under the act. *See* Minn. Stat. § 116D.04, subd. 5a (directing promulgation of rules); Minn. R. 4410.0200-.9910 (2017) (EQB rules).

Preparation of an EIS is mandatory under MEPA in relation to both CN and RP proceedings, and the commission is the RGU tasked with completing the EIS. *See* Minn. Stat. § 116D.04, subd. 2a(a) (requiring EIS when “there is potential for significant environmental effects resulting from any major governmental action”); Minn. R. 4410.4400, subp. 24 (designating commission as RGU for “routing of a pipeline subject to the full route selection procedures under [Minn. Stat. §] 216G.02”); *see also In re N.D. Pipeline Co.*, 869 N.W.2d at 698 (interpreting MEPA to require commission to complete EIS before issuing CN).

An EIS is an “analytical rather than an encyclopedic document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated.” Minn. Stat. § 116D.04, subd. 2a(a). “The [EIS] shall also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented.” *Id.*

“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. “The agency’s role in the preparation of an EIS is not to serve as an arbiter between two opposing parties, as a judge is expected to do in the adversary process.”

*No Power Line*, 262 N.W.2d at 327. “Instead, it is expected to be a source of independent expertise whose scientific investigation can uncover the data necessary to make an informed environmental decision.” *Id.*

As an investigative tool, the EIS does not authorize or preclude an action and does not take the place of permit or other proceedings governing a particular project. *See, e.g., Iron Rangers for Responsible Ridge Action v. Iron Range Res.*, 531 N.W.2d 874, 880 (Minn. App. 1995) (“MEPA’s purpose is to force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions.” (quotation omitted)), *review denied* (Minn. July 28, 1995). When an EIS is required, however, no permits may be issued until an EIS has been determined adequate. Minn. Stat. § 116D.04, subd. 2b(3). And, “[t]o ensure its use in the decision-making process, the [EIS] shall be prepared as early as practical in the formulation of an action.” Minn. Stat. § 116D.04, subd. 2a.

The EIS process begins with “scoping” to determine the appropriate limits of the EIS in terms of “form, content, and level of detail” and to determine “the alternatives [to the project] that are appropriate for consideration in the [EIS].” *Id.*, subd. 2a(h); *see also* Minn. R. 4410.2100 (governing scoping process). For projects for which an EIS is mandatory, an environmental-assessment worksheet is used as a scoping document. Minn. R. 4410.2100, subp. 2. And the RGU must prepare a draft scoping-decision document that is released for public comment and hold at least one scoping meeting before a final scoping-decision document is completed. *See* Minn. R. 4410.2100, subps. 2-3.



Following scoping, an RGU must complete and make available for public comment a DEIS and hold an informational meeting in the county where the project is proposed. Minn. R. 4410.2600, subp. 2. The RGU must then respond to timely substantive comments received on the DEIS and prepare the FEIS. *Id.*, subp. 10.

After an FEIS is released and distributed, *see* Minn. R. 4410.2700, subps. 3-5, the RGU must make a determination on the adequacy of the FEIS, *see* Minn. R. 4410.2800 (2017). An FEIS shall be deemed adequate if it

- A. addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with [Minn. R.] 4410.2300, items G and H;
- B. provides responses to the substantive comments received during the [DEIS] review concerning issues raised in scoping; and
- C. was prepared in compliance with the procedures of the act and [Minn. R.] 4410.0200 to 4410.6500.

Minn. R. 4410.2800, subp. 4. “An [EIS] shall be prepared and its adequacy determined within 280 days after notice of its preparation unless the time is extended by consent of the parties or by the governor for good cause.” Minn. Stat. § 116D.04, subd. 2a(j). If the RGU determines the FEIS inadequate, the RGU has 60 days to prepare an adequate EIS. Minn. R. 4410.2800, subp. 5.

### **Certiorari Review**

An RGU’s decision on the adequacy of an EIS is appealable to this court by petition for a writ of certiorari. Minn. Stat. § 116D.04, subd. 10. This court reviews the decision

under the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-.69 (2018) to determine whether

the substantial rights of the [relators] may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69; *see* Minn. Stat. § 116D.04, subd. 10 (directing review under MAPA).

“Substantial evidence consists of: 1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than ‘some evidence’; 4) more than ‘any evidence’; and 5) evidence considered in its entirety.” *CARD*, 713 N.W.2d at 832 (quotation omitted). And

an agency ruling is arbitrary and capricious if the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency’s expertise.

*Id.*

Appellate courts “accord substantial deference to the agency’s decision.” *Id.* at 833.

The burden is on relators to demonstrate agency error. *Id.* “[This court’s] role when reviewing agency action is to determine whether the agency has taken a ‘hard look’ at the

problems involved, and whether it has ‘genuinely engaged in reasoned decision-making.’”  
*Id.* at 832 (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)).

With all of these principles in mind, we turn to relators’ arguments for reversing the commission’s decision determining the FEIS adequate. We address the numerous arguments in the following sections covering (1) the identification of alternatives in the FEIS; (2) the analysis of environmental impacts in the FEIS; and (3) alleged “danger signals” indicating that the commission failed to take a “hard look” at the adequacy question.

**I. The FEIS sufficiently identifies alternatives to the project, including a “no action” alternative.**

An EIS must address “appropriate alternatives to the proposed action and their impacts.” Minn. Stat. § 116D.04, subd. 2a(a). With respect to alternatives, the EQB rules provide:

[T]he EIS shall compare the potentially significant impacts of the proposal with those of other reasonable alternatives to the proposed project. The EIS must address one or more alternatives of each of the following types of alternatives or provide a concise explanation of why no alternative of a particular type is included in the EIS: alternative sites, alternative technologies, modified designs or layouts, modified scale or magnitude, and alternatives incorporating reasonable mitigation measures identified through comments received during the comment periods for EIS scoping or for the draft EIS. An alternative may be excluded from analysis in the EIS if it would not meet the underlying need for or purpose of the project, it would likely not have any significant environmental benefit compared to the project as proposed, or another alternative, of any type, that will be analyzed in the EIS would likely have similar environmental benefits but substantially less adverse economic, employment, or sociological impacts. Alternatives included in the scope of the EIS . . . that were

considered but eliminated based on information developed through the EIS analysis shall be discussed briefly and the reasons for their elimination shall be stated. The alternative of no action shall be addressed.

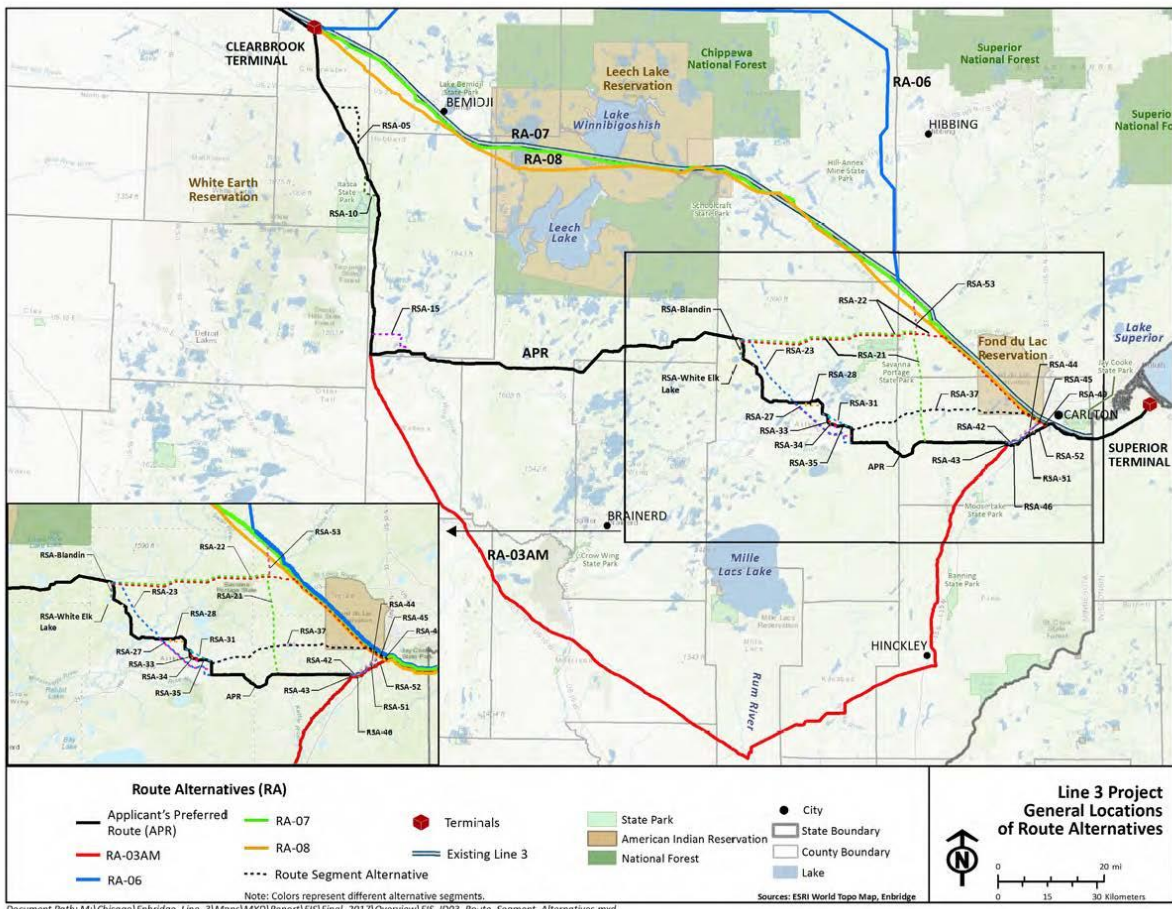
Minn. R. 4410.2300(G).

In this case, the FEIS examines the potential environmental impacts of Enbridge's proposed project and separately analyzes potential impacts of alternatives for the CN decision (system alternatives) and RP decision (route alternatives and route-segment alternatives). For the CN decision, the FEIS identifies and analyzes the alternatives of no action, continued use of existing Line 3, use of other pipelines, system alternative SA-04,<sup>4</sup> transportation by rail, transportation by truck, existing Line 3 supplemented by rail, and existing Line 3 supplemented by truck. For the RP decision, the FEIS identifies and analyzes impacts for four route alternatives (RA-03AM, RA-06, RA-07, and RA-08), and 24 route-segment alternatives. Figure 4.3-1, reproduced in color below, illustrates the locations of the various route and route-segment alternatives.<sup>5</sup>

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<sup>4</sup> SA-04 is a pipeline route that would pass through Minnesota but not connect to the Clearbrook or Superior terminals, rather connecting to Enbridge's Mainline System in Illinois.

<sup>5</sup> This image is also available in color at: <https://mn.gov/eera/web/project-file?legacyPath=/opt/documents/34079/Line3%20FEIS%20Ch%2004%20Alternatives%20Complete.pdf>, on page 4-21.



### A. Defining need for and purpose of project

Because “[a]n alternative may be excluded from analysis in the EIS if it would not meet the underlying need for or purpose of the project,” Minn. R. 4410.2300(G), determining the scope of appropriate alternatives necessarily depends in part on a need-and-purpose analysis. *See, e.g., Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011) (“Because the goals of an action delimit the universe of the action’s reasonable alternatives, determining whether an agency has included all reasonable alternatives requires us to decide first whether the agency has reasonably defined its stated goals.” (quotation and citation omitted)). It is the agency’s responsibility

to define the purpose of the project, and this court should not determine an EIS inadequate based on the stated purpose unless it is unreasonable. *See Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991); *see also Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598 (4th Cir. 2018) (“The statement of a project’s purpose and need is left to the agency’s expertise and discretion, and we defer to the agency if the statement is reasonable.” (quotation omitted)).

In this case, the FEIS defined the commission’s need for the EIS as “primarily to help inform the Commission’s decisions by evaluating the potential human and environmental effects of permitting the proposed Line 3 Project, considering reasonable alternatives, and exploring methods for reducing adverse effects.” The FEIS defined Enbridge’s purpose for the project as replacing the existing Line 3, which has been in operation since the 1960s, has suffered a high amount of corrosion and long-seam cracking, has been operating at a decreased pressure, and is required to be replaced under a consent decree between Enbridge and the Environmental Protection Agency and United States Coast Guard. Because the existing Line 3 connects to terminals in Clearbrook and Superior, the commission primarily limited its consideration to alternatives, including pipelines, that would serve those same locations.<sup>6</sup> The commission found that the “FEIS properly defined the need and purpose for the Project as replacing the existing Line 3

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<sup>6</sup> The one exception is SA-04, a system alternative that would connect to Enbridge’s Mainline System farther south.

pipeline with a new pipeline that increases the capacity of Enbridge's pipeline system to transport Canadian crude oil to Minnesota and regional refineries.”

FOH argues that the FEIS defines the purpose of the project too narrowly as delivering crude oil to the Clearbrook and Superior terminals and, as a result, does not analyze certain alternatives that would have less potential environmental impact. FOH argues that the true purpose of the project is to “deliver crude oil to Enbridge's *refinery customers*, almost all of which are located in the lower Midwest, eastern Canada, and the Gulf Coast.” Thus, it asserts, the alternatives to the project considered by the FEIS should encompass other methods of delivering to the refineries that do not involve the Clearbrook and Superior terminals.

In support of this argument, FOH relies on *Van Abbema v. Fornell*, in which the Seventh Circuit held that “the evaluation of ‘alternatives’ mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative means by which a particular applicant can reach his goals.” 807 F.2d 633, 638 (7th Cir. 1986). The D.C. Circuit, however, has rejected this view, reasoning that “[w]hen an agency is asked to sanction a specific plan . . . the agency should take into account the needs and goals of the parties involved in the application.” *Busey*, 938 F.2d at 196; *see also Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73 (holding that Bureau of Land Management (BLM) did not err by stating purposes as to act upon a private proposal: “This objective permits a reasonable range of alternatives that either reject the proposal or adopt it to varying degrees or with alterations.”). And other circuits similarly have recognized the relevance of a project proposer's goals in defining the need

for and purpose of the project. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1071 (9th Cir. 2010) (“Our task is to determine whether the BLM’s purpose and need statement properly states the BLM’s purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives.”); *see also Louisiana Wildlife Fed’n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985) (“Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose it deems more suitable.”).

Based on our review of MEPA, the EQB rules, and the federal caselaw, we conclude that the commission did not err by defining the purpose of and need for the project with reference to Enbridge’s stated purpose. Because the commission was asked to “sanction a specific plan”—the Line 3 replacement project proposed by Enbridge—it appropriately took “into account the needs and goals of the parties involved in the application.” *Busey*, 938 F.2d at 196, 199 (“An agency cannot redefine the goals of the proposal that arouses the call for action . . . .”). Enbridge’s stated need and goal is to replace a pipeline that connects to the Clearbrook and Superior terminals. Accordingly, we conclude that the decision to exclude from consideration alternatives that would not connect to these terminals was reasonable and does not provide a basis for reversal.

#### **B. No-action alternative**

An EIS must address the alternative of “no action.” Minn. R. 4410.2300(G). Neither MEPA nor the EQB rules define the nature of the no-action alternative, but the federal Council of Environmental Quality (CEQ) has provided some helpful guidance. *See*



Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026-27 (Mar. 23, 1981). Under that guidance, in a case involving a government decision on a proposed project, the alternative of no action means that the proposed activity would not take place. *Id.* And, “[w]here a choice of ‘no action’ by the agency would result in predictable actions by others, this consequence of the ‘no action’ alternative should be included in the analysis.” *Id.* Nevertheless, extensive analysis of the no-action alternative is not required. *See Hammond v. Norton*, 370 F. Supp. 2d 226, 241-42 (D.D.C. 2005) (holding that discussion of no action that “recapitulat[ed] the possible negative effect of pipeline construction and, by extension, the environmental effects that would *not* occur absent pipeline construction” and discussed unmet demand for petroleum products, laid “out the costs and benefits of the no action alternative with enough specificity to allow meaningful comparison with other alternatives. No more is required.”). And, under certain circumstances, it may be appropriate to analyze multiple no-action alternatives. *See, e.g., Indigenous Env'tl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561, 575 (D. Mont. 2018) (“Uncertainty regarding what would happen in the absence of Keystone supported the discussion of three no action alternatives in the 2014 [supplemental EIS].”).

In this case, the FEIS acknowledged the need to address a no-action alternative and reasoned that “a Commission decision to deny the CN is the ‘No Action’ alternative.” The FEIS further reasoned that, “[i]f the Commission determines that the demand for increased shipping capacity exists but denies the CN, [Enbridge or other entities] could reasonably be expected to meet shipper demand through other means, such as a different pipeline

system, or by train or truck.” And the FEIS reasoned that denial of the CN could lead to any of the following: (1) continued use of existing Line 3, (2) use of other pipelines; (3) system alternative SA-04 (a pipeline not connecting to the Clearbrook and Superior terminals); (4) use of rail; (5) use of trucks; (6) existing Line 3 supplemented by rail; and (7) existing Line 3 supplemented by truck. The FEIS accordingly analyzed environmental impacts for each of these no-action alternatives.

HTE asserts that the no-action analysis in the FEIS is inadequate because it (1) fails to consider effects of upgrades to Enbridge’s existing pipelines; and (2) incorporates an unrealistic rail alternative. Essentially, HTE challenges the commission’s predictions of the actions that Enbridge or others would take in reaction to a decision denying the CN. These predictions are findings based on agency judgment, which we review to determine “whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record.” *Minn. Power & Light Co. v. Minn. Pub. Utils. Comm’n*, 342 N.W.2d 324, 330 (Minn. 1983).

With respect to upgrades to existing pipelines, HTE asserts that the commission erred by not considering the potential environmental impacts of upgrades to existing Enbridge pipelines that HTE asserts have been proposed by Enbridge and could accommodate the additional demand proposed for the Line 3 replacement. HTE bases this argument on several slides from Enbridge investor presentations that HTE submitted to the commission. The commission responds that there is no evidence in the record of any upgrades that would meet the capacity provided by the project. The commission’s explanation is reasonable on the basis of the record. The investor slides on which HTE

relies support no more than speculation about Enbridge's expansion plans. Although the commission is required to take into account "predictable actions by others" in its no-action analysis, the commission reasonably determined not to include speculative Enbridge upgrade plans in the no-action analysis. HTE has not met its burden to demonstrate agency error in this regard.

With respect to the railroad analysis, HTE asserts that the commission erred by failing to consider a "realistic" rail alternative as part of the no-action analysis. HTE bases this argument on expert testimony presented by Enbridge during the CN proceedings, indicating the rail routes that would most likely be used if the Line 3 replacement were not built. HTE argues that the FEIS analysis of a rail alternative is flawed because it relies on different routes, and thus analyzes different environmental impacts than would be analyzed for the routes identified by Enbridge's experts. The commission responds that the FEIS rail analysis was based on "information the DOC-EERA had in hand, which included assumptions about oil being transported from Gretna at the Canadian border to Superior, WI via Clearbrook, MN to mirror the delivery capabilities of the Project to transport oil between those two end points." The commission's explanation is reasonable on the basis of the record, and HTE has failed to meet its burden to demonstrate error in this regard as well.

## **II. The FEIS fails, in part, to address environmental impacts identified in scoping and raised by public comments.**

An EIS must discuss environmental impacts of the proposed action and appropriate alternatives. Minn. Stat. § 116D.04, subd. 2a(a). With respect to environmental effects, the EQB rules provide:

[F]or the proposed project and each major alternative there shall be a thorough but succinct discussion of potentially significant adverse or beneficial effects generated, be they direct, indirect, or cumulative. Data and analyses shall be commensurate with the importance of the impact and the relevance of the information to a reasoned choice among alternatives and to the consideration of the need for mitigation measures; the RGU shall consider the relationship between the cost of data and analyses and the relevance and importance of the information in determining the level of detail of information to be prepared for the EIS. Less important material may be summarized, consolidated, or simply referenced. The EIS shall identify and briefly discuss any major differences of opinion concerning significant impacts of the proposed project on the environment.

Minn. R. 4410.2300(H) (2017). An EIS may be determined adequate only if it “addresses the potentially significant issues and alternatives *raised in scoping*,” and “*provides responses* to the substantive comments received during the draft EIS review.” Minn. R. 4410.2800, subp. 4 (emphasis added).

### **A. Potential impacts of an oil spill on Lake Superior**

As the FEIS acknowledges, a potential environmental impact of this pipeline project is an accidental release of crude oil—an oil spill. Chapter 10 of the FEIS is devoted to analyzing the potential impacts of an oil spill for the APR and each of the project, route, and route-segment alternatives. In addition to providing a baseline spill-risk analysis based

on past spills, analyzing the behavior of crude oil in a spill, assessing the potential resource impacts of an oil spill on resources along the APR and alternatives, and addressing spill prevention and mitigation, the FEIS incorporates a study modeling the potential spread of oil from spills at seven sites along the APR and alternative routes. The seven spill-modeling sites were chosen to represent a diversity of environmental conditions. Three of the sites are at separate locations on the Mississippi River; none of the sites are in the Lake Superior watershed.<sup>7</sup>

HTE argues that the FEIS is inadequate because it fails to address the impact of an oil spill into the Lake Superior watershed. Throughout the environmental-review process, environmental organizations and members of the public raised concerns about the impact of an oil spill on Lake Superior and its watershed, including the St. Louis River Estuary. The final scoping decision document (FSDD) addressed this concern, stating:

Impacts to Lake Superior and Great Lakes: The EIS will consider potential impacts to the Lake Superior watershed including potential impacts of oil spills along the proposed Project. Potential impacts to the Great Lakes from incidents involving transportation of crude oil by ship, rail, or other pipelines are existing potential effects and not changed by the construction or operation of the proposed pipeline.<sup>8</sup>

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<sup>7</sup> The seven selected sites are (1) Mosquito Creek to Lower Rice Lake (47.4604-95.3066); (2) Mississippi River at Ball Club (47.2360-93.9596); (3) Sandy River (46.6363-93.2431); (4) Shell River Crossing to Twin Lakes (46.8196-95.0430); (5) Red River (48.70533-97.1148); (6) Mississippi River at Palisade (46.6983-93.4950); and (7) Mississippi River at Little Falls (46.0483-94.3420).

<sup>8</sup> This language appears in a section titled “Issues Entirely or Partially Outside the Scope of the EIS,” but it makes affirmative statements that the impact to Lake Superior and its watershed will be considered.

Notwithstanding this language in the FSDD, the DEIS did not address the potential impacts of an oil spill in the Lake Superior watershed. Concerns about Lake Superior were renewed in public comments on the DEIS. But, in spite of these persistent concerns, neither the FEIS nor the responses to comments directly address the failure to analyze potential impacts of an oil spill on Lake Superior and its watershed.

The responses to comments generically addressed concerns over the modeling approach used. While those responses may support the reasonableness of a decision to model spills at a limited number of locations, they do not explain why none of those locations were situated within the Lake Superior watershed, or otherwise address the very specific concerns raised about Lake Superior and its watershed.

During a hearing on the adequacy of the FEIS, one member of the commission asked why the spill analysis did not include a location in the Lake Superior watershed. A representative for DOC-EERA explained that the sites were chosen for their environmental diversity, and identified a site that would provide the closest comparison to a spill in the Lake Superior watershed. The representative asserted that modeling in the Lake Superior watershed would not be particularly helpful, in light of multiple existing pipelines and the fact that all route alternatives would cross through the area. And the representative asserted that a spill at a potential modeling site within the watershed would be unlikely to reach Lake Superior. There would be little point in compiling an FSDD if the requirements of the document—that the identified potential impacts be evaluated and analyzed in the FEIS—could be ignored and replaced by cursory oral assertions during the adequacy hearing before the commission. The determination of whether the FEIS is adequate

necessarily focuses on the contents of the FEIS itself. *See* Minn. Stat. § 116D.04, subd. 2b(3); Minn. R. 4410.2800, subp. 4. Thus, even had DOC-EERA presented more substantiated analysis at the adequacy hearing, it would not have cured deficiency of the FEIS itself.

Notwithstanding its expressed concerns about the lack of analysis in the FEIS of the impact of an oil spill on Lake Superior and its watershed, the commission determined that the FEIS was adequate. We agree with HTE that the commission's decision is, in this regard, arbitrary and capricious and unsupported by substantial evidence. As we note above, an RGU shall determine an EIS adequate if it addresses the potentially significant issues raised in scoping and responds to substantive comments received on the DEIS. Minn. R. 4410.2800, subp. 4. With respect to Lake Superior and its watershed, this FEIS does neither.

In determining the FEIS adequate, the commission acted in a manner arbitrary and capricious because it failed to consider a critical aspect of the analysis, as directed in the FSDD, and it acted contrary to the substantial evidence because the record reflects that neither the FEIS, nor the responses to comments, addressed the impact of an oil spill on the Lake Superior watershed. *See CARD*, 713 N.W.2d at 833. Even considering the deferential standard of review, the failure to specifically address the potential impacts to the Lake Superior watershed renders the finding of adequacy arbitrary and capricious and unsupported by substantial evidence. Because HTE has met its burden to demonstrate agency error in this regard, we reverse the commission's adequacy decision and remand for further proceedings consistent with this decision.

## **B. Sufficiency of oil-spill analysis at modeled sites**

FOH argues that, even with respect to the seven sites chosen for modeling, the FEIS is inadequate because it does not analyze the specific impacts that would result from an oil spill originating from any particular location. As the FEIS explains, however, the impact of any particular spill will depend on multiple variables, many of which are subject to chance. Rather than attempting to predict the consequences of an oil spill from a particular location, the FEIS focuses on analyzing the potential resource impacts of a spill at all locations along the APR and alternatives. *See* Minn. Stat. § 116D.04, subd. 2a(a) (“The environmental impact statement shall be an analytical rather than an encyclopedic document . . . .”); Minn. R. 4410.2300(H) (providing that “the RGU shall consider the relationship between the cost of data and analyses and the relevance and importance of the information in determining the level of detail of information to be prepared for the EIS”). We conclude that FOH has not met its burden to demonstrate the commission acted unreasonably in this regard.<sup>9</sup>

## **C. Potential impacts on climate through greenhouse-gas emissions**

FOH argues that the FEIS fails to adequately analyze potential impacts to upstream and downstream greenhouse-gas (GHG) emissions. Recent federal decisions have held

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<sup>9</sup> Our conclusion that the commission reasonably selected a methodology to analyze potential impacts from oil spills does not contradict our conclusion that the FEIS must analyze the potential impacts from a spill into the Lake Superior watershed. As we note above, the issue of potential impacts to Lake Superior and its watershed was raised both in scoping and public comments on the DEIS. Under these circumstances, the commission erred by determining adequate an FEIS that does not discuss those potential impacts. *See* Minn. R. 4410.2800, subp. 4.



that an EIS must address impacts of GHG emissions, including indirect impacts from upstream and downstream emissions. *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sierra Club v. FERC*); *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1244 (D.N.M. 2018); *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003). And federal courts addressing GHG issues generally have rejected arguments that the impact of a single project on GHG emissions need not be analyzed because climate change is a global problem with many causes. *See WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1222 (10th Cir. 2017) (holding arbitrary and capricious agency's assumption "that there was no real world difference between approving . . . leases . . . and declining to issue them because third party sources of coal would perfectly substitute for any volume lost on open market should [the agency] decline to issue leases"); *Sierra Club v. FERC*, 867 F.3d at 1372-73 (rejecting argument that downstream GHG emissions need not be forecasted because permit would not be legally relevant cause of emissions). *But see Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1134 (D. Minn. 2010) (holding that EIS for pipeline project was not required to analyze impacts caused by increased exploitation of Canadian tar sands, because tar sands would continue to be developed regardless of whether pipeline is built).

In this case, the FEIS addresses the impact of the project on GHG emissions, including upstream emissions (from oil extraction) and downstream emissions (from oil consumption). The FEIS summarizes market forecasts, which seem to suggest that demand for petroleum products has plateaued in the United States, "with some variance depending

on price developments.” But the FEIS nevertheless analyzes the “life-cycle GHG emissions that could result if upstream or downstream changes did occur.” The FEIS provides average life-cycle GHG emissions for the various crude types that are expected to be transported by the project, and provides life-cycle emissions estimates that “bookend the possible outcomes from full displacement to zero displacement.” And the project estimates a 30-year social cost of carbon for the life-cycle GHG emissions of up to \$120 billion.

FOH relies on a recent federal district court decision to assert that the commission was required to conduct a market analysis to more specifically determine the upstream impact on GHG emissions. *See Indigenous Env'tl. Network*, 347 F. Supp. 3d 561. In that case, however, the government had relied on outdated market forecasts to conclude that there would be *no* upstream impact. *See id.* at 576-77. The court held that more recent market information required the government to prepare a supplemental EIS. *Id.* at 576.

In this case, the FEIS similarly concludes that demand for crude oil is likely to remain flat, but relies on recent (2017) information from the U.S. Energy Information Administration. And, notwithstanding its conclusions about the market, the FEIS goes on to estimate the range of impacts to upstream GHG emissions that the project could have. Thus, this case is distinguishable from the federal caselaw on which FOH relies, and FOH has not demonstrated that the commission acted unreasonably in determining the FEIS adequate in this regard. *See Sierra Club v. FERC*, 867 F.3d at 1371 (concluding that “at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible”).

#### **D. Potential impacts on historic and cultural resources**

The Bands assert that the FEIS fails to adequately address potential impacts to historic and cultural resources. The EQB rules define “environment” to encompass “artifacts or natural features of historic, geologic, or aesthetic significance,” Minn. R. 4410.0200, subp. 23, and it is generally understood that an EIS must include a discussion of cultural and historic resources, including impacts to tribal properties and culture. However, neither MEPA nor the EQB rules prescribe particular procedures that must be employed to investigate the scope and nature of impacts on tribal property and culture.

The Bands assert that the commission erred by determining the FEIS adequate before completion of a survey of traditional cultural properties (TCP) under the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6. “The NHPA is a procedural statute designed to ensure that, as part of the planning process for properties under the jurisdiction of a federal agency, the agency takes into account any adverse effects on historical places from actions concerning that property.” *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd.*, 252 F.3d 246, 252 (3d Cir. 2001). To comply with the NHPA, federal agencies must engage in consultation with interested parties through a process referred to as “Section 106 consultation” to determine whether historic properties or TCPs exist in the area of the planned activity. *Id.*; *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270, 1280 (D.N.M. 2008). A Section 106 consultation was undertaken for the Line 3 project, but was not complete at the time that the commission determined the FEIS adequate.

Relying on federal caselaw, the Bands assert that the FEIS could not be considered adequate until the Section 106 consultation was complete for the APR and all alternative routes considered by the FEIS. But the NHPA does not govern a decision determining the FEIS adequate under MEPA. And, as we note above, MEPA does not require any particular approach to analyzing potential impacts to historic and cultural impacts. Accordingly, we conclude that an EIS may be determined adequate before a federal Section 106 TCP survey is complete if the discussion of potential impacts to historic and cultural impacts is otherwise sufficient.

The FEIS addresses historic and cultural resources in several chapters. Chapter 5 discusses the comparative effects of the project and alternatives on resources, including historic and cultural resources. And Chapters 6 and 7 discuss the comparative effects of route alternatives and route-segment alternatives on resources, including historic and cultural resources. Chapters 5 and 6 cross-reference Chapter 9, which is devoted to “an alternative, qualitative measure of the impacts of Enbridge’s proposed Line 3 Project . . . on American Indian Tribes.”

The FEIS describes the efforts undertaken to determine impacts to historic and cultural resources of the APR and alternatives, which included obtaining existing data on historic places from the Minnesota Historical Society and reviewing cemetery data from available Geographic Information Systems data. The FEIS also considers archaeological surveys completed by Enbridge for the APR. The FEIS acknowledges the limitations of available data with respect to TCPs, particularly with respect to sacred tribal places, and notes that, although no specific studies of TCPs were complete, “information gathered from

the consultation with American Indian tribes with an interest within the [region of interest] have indicated that TCPs are present.” The FEIS discusses historic and cultural resources, based on available information, with respect to the APR and each of the project, route, and route-segment alternatives.<sup>10</sup>

In Chapter 9, the FEIS summarizes the tribal consultation undertaken by DOC-EERA in connection with preparing the FEIS, which included community meetings and interviews with tribal elders and historians, through which “Commerce Department Staff collected information about traditionally important cultural and spiritual sites across Northern Minnesota.” The FEIS also discusses the spiritual nature of the tribes’ relationship with the land, which extends to both reservation land owned by or held in trust for the tribes, and to territory ceded by the tribes pursuant to treaties.

Chapter 9 expresses the challenge presented by any attempt to comparatively analyze the potential impacts to the tribes of the APR and alternatives. The FEIS notes that “[a]ll of the proposed routes and route alternatives cross ceded lands” and that “[p]otential impacts to tribal resources associated with the CN alternatives would be similar for those areas that cross reservation or ceded lands.” On the issue of impacts, Chapter 9 states:

The CN alternatives would have varying levels of quantifiable impacts to tribal resources dependent on their geographic proximity and the construction activities necessary for

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<sup>10</sup> The Bands fault a table included in the executive summary as representing that there are zero cultural resources in the area of interest for the APR, notwithstanding the acknowledgment in the FEIS that TCPs are present along this route. But the FEIS also cautions that the quantitative tables should be read in conjunction with more detailed information in the text of the FEIS.

operation (see Chapters 5 and 10 for a discussion of potential impacts to CN alternatives and those related to releases). The qualitative discussion of impacts to tribal resources, however, would be similar to that presented within Chapter 9 regardless of the CN alternative.

In summarizing overall impacts, Chapter 9 states:

For American Indians, cultural resources cannot be separated from natural resources; therefore, the conclusion is that any pipeline route would affect cultural and natural resources. The degree to which these resources are affected would vary; if quantitative values are assigned, the impacts are direct and localized. If a holistic tribal perspective is used to determine impacts, any pipeline would have direct and permanent effects.

In support of this reasoning, the FEIS recounts an interview with one elder, who, when informed that DOC-EERA was trying to analyze the impacts of each route, “responded that it could not be done, and the impact could not be isolated or measured—any impact is harmful and equally concerning.”

The Bands assert that the FEIS is inadequate because it fails to sufficiently analyze the comparative impacts to tribal properties and resources, as required by MEPA. In support of this argument, the Bands rely on a federal district court decision addressing the State Department’s issuance of a presidential permit for the Keystone pipeline despite an acknowledgement in the SEIS that 1,038 acres of the pipeline route had not yet been surveyed for cultural resources. *Indigenous Env’tl. Network*, 347 F. Supp. 3d at 581. The court held that the State Department “jumped the gun when it . . . acted on incomplete information regarding potential cultural resources along the 1,038 acres of unsurveyed route.” *Id.* That decision arises under federal law, which requires a Section 106 consultation under the NHPA before a federal undertaking, including issuance of a permit.

As is noted above, under MEPA, there is no requirement for any particular type of level of analysis of cultural resources.

The Bands also rely on two other cases, neither of which is helpful to our analysis. See *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768 (9th Cir. 2006) (reversing lease extensions granted without any environmental review or NHPA consultation); *Diné Citizens Against Ruining Our Env't v. Klein*, 747 F. Supp. 2d 1234 (D. Colo. 2010) (reversing permit decision based on finding of no significant impact (FONSI), holding that government erred by relying on perfunctory description of mitigation measures to conclude that cultural impacts did not require EIS).

In determining the FEIS adequate, the commission concluded:

Although the FEIS does not contain the results of the still-underway traditional cultural properties survey, it does contain extensive analysis of the potential impacts to traditional cultural properties and other cultural resources in compliance with MEPA, including a summary of all known cultural resources located in each of the route alternatives.

Based on our careful review of the record, we conclude that the Bands have not met their burden to demonstrate that the commission's decision is unreasonable in this regard.

#### **E. Relative impacts of alternative routes**

“[T]he EIS shall *compare* the potentially significant impacts of the proposal with those of other reasonable alternatives to the proposed project.” Minn. R. 4410.2300(G) (emphasis added). The Bands argue that the analysis of alternatives is inadequate because it fails to account for existing conditions in the analysis of the impacts of each alternative. In particular, the Bands assert that a table in the executive summary of the FEIS

inaccurately represents the risk of exposure of resources along the APR and alternative routes because it does not reflect the extent to which the routes are co-located with existing pipelines—such that there is already some oil-spill risk.

This argument by the Bands formed the basis for one of the modifications directed by the commission in its order determining the FEIS inadequate as originally submitted. The commission ordered that the FEIS “need[ed] to clearly identify the extent to which resource impacts of route alternatives in the existing Line 3 corridor are or are not additive—i.e., the extent to which that route alternative would introduce new or additional impacts beyond the impacts of the existing pipelines in that corridor.”

In response to the commission’s order, Chapters 5 and 6 were amended to include additional information on co-location of the various routes and to clarify that impacts discussed were incremental. In addition, footnotes were added to tables summarizing comparative impacts, stating that: “Impacts reported in this EIS are the incremental impacts of the [specified route]” and that “[w]here the fact that [that route] is in an existing corridor influences the extent of the incremental impacts, relevant discussion is included in the text of the impacts assessment.”

Chapter 10 of the EIS was amended to explain that, because the proposed project “includes both the construction of a new pipeline and the abandonment of an old one,” the “extent and type of resources at risk due to an accidental release could change in the old corridor as well as in the new corridor, depending on the route alternative selected.” The FEIS further explains that, regardless of the route selected, construction of a new pipeline would cause an incremental decrease in risk based on existing Line 3 being removed from



service, and an incremental increase in risk based on the new pipeline. If built in the existing Line 3 corridor, the increased incremental risk “would not cause any notable change in the existing type, number, or geographic distribution of resources exposed, [but] it would perpetuate the existing exposure of these resources.” If built in a different corridor, it would change “the type, number, [and/or] geographic distribution of resources exposed.”

In its order determining the FEIS adequate, the commission found the added language regarding incremental effects fulfilled the commission’s directive for clarification of whether impacts were additive.

On appeal, the Bands assert that the commission acted arbitrarily and capriciously by reversing its position and failing to respond to comments from other agencies regarding the revisions to the initial FEIS. We find both arguments unpersuasive. As to the first argument, the commission does not appear to have changed its position. It sought clarification on whether impacts being assessed were additive, and it subsequently was satisfied that it had received that clarification. As to the second argument, it ultimately was the commission’s responsibility to determine whether the revised FEIS was adequate. The MPCA and DNR expressed reservations about whether the revisions were sufficient to fulfill the commission’s directive in requiring supplementation. The commission—which issued the directive—determined that the revisions were sufficient. Accordingly, this case is distinguishable from those in which an agency has acted arbitrarily by failing to consider the opinions of sister agencies. *See, e.g., Trout Unlimited, Inc. v. Minn. Dep’t of Agric.*, 528 N.W.2d 903, 908 (Minn. App. 1995) (holding that commissioner of agriculture acted

arbitrarily by determining that water-appropriate permit would not have cumulative potential effects in light of letters from the MPCA, DNR and Minnesota Department of Health indicating to the contrary), *review denied* (Minn. Apr. 27, 1995).

#### **F. Cumulative potential effects**

In an EIS, “for the proposed project and each major alternative there shall be a thorough but succinct discussion of potentially significant adverse or beneficial effects generated, be they direct, indirect, or *cumulative*.” Minn. R. 4410.2300(H) (emphasis added). The EQB rules define “cumulative potential effect” to mean the “effect on the environment that results from the incremental effects of a project in addition to other projects in the environmentally relevant area that might reasonably be expected to affect the same environmental resources, including future projects actually planned or for which a basis of expectation has been laid.” Minn. R. 4410.0200, subp. 11a.<sup>11</sup> “In determining if a basis of expectation has been laid for a project, an RGU must determine whether a project is reasonably likely to occur and, if so, whether sufficiently detailed information is

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<sup>11</sup> Prior to 2009, the EQB rules did not define cumulative potential effects, and the supreme court, in its *CARD* decision, declined to equate them with “cumulative impacts,” which were defined under the rules. 713 N.W.2d at 823. *CARD* held that “a cumulative potential effects analysis is limited geographically to projects in the surrounding area that might reasonably be expected to affect the same natural resources—for instance, a nearby lake—as the proposed project.” *Id.* at 830. In 2009, the EQB amended the rules to incorporate the above definition of “cumulative potential effects,” which is consistent with the *CARD* decision, although the new rule uses the phrase “environmentally-relevant area” rather than “surrounding area.” See EQB, *Guide to Minn. Env'tl. Review Rules* 17 (May 2010), <https://www.eqb.state.mn.us/sites/default/files/documents/Guide%20to%20MN%20ER%20Rules-May%202010.pdf>.

available about the project to contribute to the understanding of cumulative potential effects.” *Id.* Further, under the EQB rules:

In making these determinations, the RGU must consider: whether any applications for permits have been filed with any units of government; whether detailed plans and specifications have been prepared for the project; whether future development is indicated by adopted comprehensive plans or zoning or other ordinances; whether future development is indicated by historic or forecasted trends; and any other factors determined to be relevant by the RGU.

*Id.*

Chapter 12 of the FEIS considers cumulative potential effects. The FEIS identifies as reasonably foreseeable actions affecting the environmentally relevant area multiple pipeline projects by Enbridge and others, multiple high-voltage transmission-line projects, and the Fargo-Moorhead flood management project. The FEIS also identifies an additional pipeline in the same corridor as the APR as a potential cumulative effect, “acknowledge[ing] that if a new pipeline corridor is permitted for this Project outside of the existing Enbridge Mainline, the new corridor creates an opportunity for future corridor sharing that could ultimately result in accumulation of multiple pipelines within the corridor chosen for the Line 3 project.” The FEIS then considers potential cumulative impacts to each of the resources identified in Chapters 5 and 6 of the FEIS for each of the APR, project alternatives, and route and route-segment alternatives.

HTE asserts that the FEIS is inadequate because it does not consider as a cumulative potential effect operation of the new Line 3 at its full flow capacity of 915,000 barrels per day (bpd) rather than the 760,000 bpd proposed for the project by Enbridge. But HTE cites

only ambiguous slides from Enbridge investor presentations to support its assertion that this expansion in capacity is likely to occur. FOH argues that the FEIS is inadequate because it does not consider the cumulative potential effects of other pipelines that FOH asserts are likely to be built in Minnesota and Wisconsin. But FOH concedes that Enbridge denies having plans to build such pipelines, and FOH offers nothing beyond its own assertion that the pipelines are likely to be built.

The commission was required to analyze only those projects “actually planned or for which a basis of expectation has been laid.” Minn. R. 4410.0200, subp. 11a. Because there is no basis, beyond speculation, for either of the scenarios posited, neither HTE nor FOH has met its burden to demonstrate the commission erred by determining the FEIS adequate with respect to its analysis of cumulative potential effects. *See White v. Minn. Dep’t of Nat. Res.*, 567 N.W.2d 724, 732 (Minn. App. 1997) (holding that DNR did not err by excluding from cumulative-effects analysis future trails when no future projects were anticipated: “Because there were no specific plans . . . any effects they may have . . . are speculative, and any consideration of these effects is equally speculative.”), *review denied* (Minn. Oct. 31, 1997).

**III. The alleged “danger signals” do not indicate that the commission failed to take a “hard look” at the adequacy of the FEIS.**

This court may intervene on agency action when “there is a combination of danger signals which suggest the agency has not taken a ‘hard look’ at the salient problems and has not genuinely engaged in reasoned decision-making.” *Reserve Mining Co.*, 256 N.W.2d at 825 (quotation omitted). FOH argues that the following “danger signals” in this

case warrant intervention: (1) failure to assign the EIS to the DNR or MPCA; (2) limiting the time to complete the EIS; and (3) assigning the adequacy review to the ALJ who had presided in previous, related proceedings.<sup>12</sup>

With respect to the failure to assign the EIS to the DNR or MPCA, the EQB regulations expressly designate the commission as the RGU, and “[t]he RGU may request that another governmental unit help in the completion of the EIS.” Minn. R. 4410.2200, .4400, subp. 24. Here the commission sought assistance from DOC-EERA to complete the EIS, and DOC-EERA designated the DNR and MPCA as assisting agencies. As the commission notes, the department of commerce is statutorily obligated to provide technical expertise and other assistance to the commission in relation to pipeline-routing matters. *See* Minn. Stat. § 216E.03, subd. 11 (2018). Accordingly, we reject the assertion that the assignment of DOC-EERA to complete the EIS was a “danger signal.”

With respect to the limitation on time to complete the EIS, MEPA expressly provides a 280-day deadline for completion of an EIS and determination of its adequacy, unless the time is extended by the commission with consent of the parties, or by the governor. Minn. Stat. § 116D.04, subd. 2a(j). FOH argues that this deadline is directory rather than mandatory because the statute provides no consequence for noncompliance. This directory-mandatory analysis goes to whether a decision-maker is divested of jurisdiction when it fails to comply with a deadline; it does not authorize the disregard of

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<sup>12</sup> FOH also labels as “danger signals” the commission’s commencement of the CN and RP proceedings before the final FEIS adequacy decision and treatment of the FEIS as “peripheral.” But FOH does not explain how actions in the CN and RP proceedings impugn the adequacy determination.

an express statutory requirement. *See Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 638 n.3 (Minn. 2012) (explaining that “mandatory-directory dichotomy is irrelevant here because this case does not involve a question about the consequences of an entity’s *failure to comply* with the duties imposed upon it”). Moreover, the commission *did* extend the deadline, as permitted by the statute with Enbridge’s consent, to allow development of a record on adequacy by an ALJ and more deliberate consideration by the commission. Accordingly, we reject the assertion that the commission’s failure to further extend the statutory deadline was a “danger signal.”

With respect to the assignment of the ALJ, the record demonstrates that OAH, not the commission, assigned the ALJ. *See also* Minn. R. 1400.5400 (2017) (providing that chief ALJ assigns ALJ to hear matter upon agency request for contested-case proceedings). Moreover, neither familiarity with a case nor prior adverse rulings demonstrate bias requiring recusal of a judge. *See United States v. Beneke*, 449 F.2d 1259, 1261 (8th Cir. 1971) (holding insufficient to require removal “[a] mere showing of prior judicial exposure to the present parties or questions” (quotation omitted)); *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986) (“Prior adverse rulings, however, clearly cannot constitute bias . . .”). Accordingly, we reject the assertion that the assignment of the same ALJ was a “danger signal.”

## **DECISION**

The FEIS properly defined the purpose of the project, sufficiently identified alternatives, including a “no action” alternative, and utilized an appropriate methodology to analyze potential impacts from oil spills. The FEIS adequately analyzed potential

impacts to GHG emissions, potential impacts on historic and cultural resources, the relative impacts of alternative routes, and cumulative potential effects. However, the commission acted in a manner unsupported by substantial evidence and arbitrary and capricious when it determined the FEIS adequate despite its failure to address the issue—raised during scoping and in public comments on the DEIS—of how an oil spill from Enbridge’s Line 3 project would impact Lake Superior and its watershed. Accordingly, we reverse the commission’s adequacy decision and remand for further proceedings consistent with this decision.

**Reversed and remanded.**

**CONNOLLY**, Judge (dissenting)

I respectfully dissent. I do not believe that the decision of respondent Minnesota Public Utilities Commission (commission) was arbitrary and capricious or unsupported by substantial evidence. Relator Honor the Earth (HTE) contends that the final environmental-impact statement (FEIS) failed to consider the effect of oil spills on the Lake Superior watershed. HTE is wrong. It did.

We review the commission's decision under the Minnesota Administrative Procedure Act (MAPA) to determine whether

the substantial rights of the [relators] may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69 (2018); *see* Minn. Stat. § 116D.04, subd. 10 (2018) (directing review under MAPA). We “accord substantial deference to the agency’s decision.” *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm’rs*, 713 N.W.2d 817, 832 (Minn. 2006). We “adhere to the fundamental concept that decisions of administrative agencies enjoy a *presumption of correctness*, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training,



education, and experience.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977) (emphasis added).

The “hard look” analysis relating to environmental review is borrowed from federal cases reviewing agency decisions. *See id.* at 825 (adopting language from *Greater Boston Tel. Corp. v. F.C.C.*, 444 F.2d 841, 851-53 (D.C. Cir. 1970)). In reviewing the adequacy of an EIS, federal courts have applied a “rule of reason.” *See No Power Line, Inc. v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977) (collecting federal cases). Describing that standard, one federal court has stated:

This does not mean that the courts are to “fly speck” environmental impact statements. The preparation of such a statement necessarily calls for judgment, and that judgment is the agency’s. But the courts can, and should, require full, fair, bona fide compliance with [the National Environmental Policy Act].

*Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974), *quoted with approval in No Power Line*, 262 N.W.2d at 327.

An environmental-impact statement (EIS) is an “*analytical rather than an encyclopedic*” document which describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated.” Minn. Stat. § 116D.04, subd. 2a (2018) (emphasis added).

As respondent Enbridge Energy Limited Partnership (Enbridge) argues,

The FEIS is not required to exhaustively review every conceivable permutation of the Project and every possible alternative and theoretical effect. Instead, the [Minnesota Public Utilities Commission] “shall” find the FEIS is adequate

if it satisfies the standards for adequacy set forth in Minnesota Rules 4410.2800, subpart 4. The FEIS far exceeds the standards for adequacy.

This argument has merit.

“It is of course always possible to explore a subject more deeply and to discuss it more thoroughly. The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.” *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987). The FEIS was thoughtfully prepared by the Minnesota Department of Commerce’s Energy Environmental Review and Analysis division (DOC-EERA) with assistance from other responsible agencies. It consists of 13 chapters, 21 appendices, and thousands of pages that address the potentially significant issues and alternatives raised in scoping. It was subjected to extensive public hearings and comments. It was thoroughly reviewed and determined adequate both by an experienced administrative-law judge (ALJ) and a unanimous commission.

The majority appears to opine that the FEIS is inadequate because it did not conduct a *specific* analysis of the Lake Superior watershed or include it as one of the seven modeling sites. The final scoping decision document (FSDD) committed the FEIS to

consider potential impacts to the Lake Superior watershed including potential impacts of oil spills along the proposed Project. Potential impacts to the Great Lakes from incidents involving transportation of crude oil by ship, rail, or other pipelines are existing potential effects and not changed by the construction or operation of the proposed pipeline.

*See* Minn. R. 4410.2800, subp. 4 (2017) (“The final EIS shall be determined adequate if it: (A) *addresses the potentially significant issues and alternatives raised in scoping* so that

all significant issues for which information can be reasonably obtained have been analyzed in conformance with part 4410.2300, items G and H; [and] (B) *provides responses to the substantive comments received during the draft EIS review concerning issues raised in scoping[.]*” (emphasis added)). While I agree that the FEIS needed to address the concerns raised in scoping, which committed it to “consider potential impacts to Lake Superior watershed,” I would nonetheless conclude that the representative-modeling approach sufficiently considered the effect of oil spills on the Lake Superior watershed.

I start my analysis by reviewing a case in which this court unanimously found that an administrative agency acted in an arbitrary and capricious manner. In *Builders Ass’n of Twin Cities v. Minn. Dep’t of Labor & Indus.*, a challenge was raised to an amendment to the Minnesota Residential Code (MRC) promulgated by the Minnesota Department of Labor and Industry, which “required sprinkler systems in all newly constructed townhouses and one- and two-family dwellings, with an exception for one-family dwellings with a floor area under 4,500 square feet (Sprinkler Rule).” 872 N.W.2d 263, 266-67 (Minn. App. 2015). Under the arbitrary-and-capricious standard, we reviewed the record and queried the parties for an explanation of how the 4,500-square-foot threshold was reached. *Id.* at 268-70. We found that the record reflected “no *reasoned* determination of how respondent arrived at the indefinite 4,500-square-foot exception.” *Id.* at 270 (emphasis added). We concluded that the Sprinkler Rule’s exception for new one-family dwellings under 4,500 square feet was arbitrary because it was unsupported by the record. *Id.* at 274.

Distinguishable from *Builders Ass’n of Twin Cities*, the record here reflects a reasoned determination of why the representative-modeling approach was selected to

consider the potential impacts to the Lake Superior watershed, as opposed to a site-specific approach. As the FEIS explains, the impact of any particular spill will depend on many variables, including “weather, time of year, water levels, human error, and even what type of wildlife is present.” Considering these unpredictable factors, the FEIS does not present an encyclopedic report on the impact of every conceivable oil spill that could occur. Instead, it “provides a general assessment of the probability of a spill occurring, a general evaluation of the behavior of crude oil in the environment, a general evaluation of how spilled oil affects the environment, and an assessment of the type and quantity of resources that are exposed along each alternative.” (Emphasis omitted.)

During oral argument, when asked how the FEIS was inadequate in addressing the Lake Superior watershed, relator Friends of the Headwaters (FOH) responded that there was no information projecting the quantity of oil that could reach Lake Superior or the specific impact on the natural resources. The fact remains that it is impossible to model every possible impact.

As the DOC-EERA explained:

The specific impacts of large oil releases are highly dependent on incident-specific factors that are impossible to predict with certainty. For example, as the commenter notes, the largest ever inland spill in Grand Rapids did not produce the damages a model may have suggested from a spill of its magnitude because incident-specific conditions happened to include ice cover on the Prairie River.

One purpose of the EIS is to provide decision makers with relevant information for their decision. Detailed modeling of site/situation specific environmental damages is so incident-specific, it does not provide decision makers with

particularly actionable information about which alternative is environmentally preferable.

In fact, this sort of impact modeling is likely to provide a false level of precision that is counterproductive. The modeling approach used in the EIS is intended to provide information relevant to a reasoned choice among the alternatives by focusing on several components of spill risk that can be considered to develop a broader understanding of the risks and tradeoffs of different routes.

Forecasting impacts at any particular location would require the FEIS to predict each of these unpredictable variables, or to analyze all of the potential permutations. I would conclude, and the record supports, that the FEIS reasonably took another approach. *See* Minn. Stat. § 116D.04, subd. 2a(a) (“The environmental impact statement shall be an analytical rather than an encyclopedic document . . . .”); Minn. R. 4410.2300(H) (2017) (providing that the responsible government unit “shall consider the relationship between the cost of data and analyses and the relevance and importance of the information in determining the level of detail of information to be prepared for the EIS”).

During the administrative proceedings, HTE and FOH both challenged the representative-modeling approach arguing that additional or different sites should have been modeled. The ALJ stated,

Enbridge commissioned a modeling analysis of hypothetical crude oil releases on behalf of, and with input from, DOC-EERA, DNR, and MPCA. The analysis modeled the impacts following seven different hypothetical crude oil releases. The computer modeling involved “simulating the chemical and physical behavior of hypothetical oil spills in the selected environments under specified conditions, including weathering processes.”<sup>1</sup>

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<sup>1</sup> This specific finding was modified by the commission. The modified finding states:

. . . The oil spill scenarios were set at different locations along the Applicant's Preferred Route and route alternatives. This study later informed both agency and independent analyses of the behavior of crude oil after a release and the assessment of likely impacts following a release. All of these items are detailed in the FEIS.

. . . Further the DOC-EERA commissioned a study from a private consulting firm, Ecology and Environment, Inc., to conduct an analysis of previous oil spills. In an effort to "quantify the incremental risk for the Line 3 Project," the report provided "an overview of pipeline spill rates and trends in the inland [United States] as a whole, as well as an analysis of historical data for existing crude oil pipelines in Minnesota."

. . . Drawing upon these materials, and other items, the FEIS analyzed the relationship between the volume of oil that would be transported by the project in relation to the risk of later spills and still broader "cumulative potential effects."

. . . Among the findings made in the FEIS were:

(a) The average volume of pipeline spills has decreased significantly since the late 1960s, and particularly in the last dozen years. The average spill volume (all oil types) is now less than 50 percent of the average volume 10 years ago, and 12 percent of the volume in the late 1960s.

(b) Overall, half of the pipeline spills that do occur would be expected to involve 1 barrel of oil or less. About 90 percent would

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Enbridge commissioned a modeling analysis of hypothetical crude oil releases on behalf of, and with input from state and federal agency staff, including DOC-EERA, Minnesota Department of Health, and the DNR and MPCA. Staff from the U.S. Army Corps of Engineers were also involved. The analysis modeled the impacts following seven different hypothetical crude oil releases. The computer modeling involved "simulating the chemical and physical behavior of hypothetical oil spills in the selected environments under specified conditions, including weathering processes."

involve 100 barrels or less. Only 5 percent would be expected to be 400 barrels or more, and only 1 percent would be expected to be 2,500 barrels or more.

(c) The rate of spillage in Minnesota has been lower than that in the U.S. as a whole, accounting for pipeline mileage and amount transmitted.

(d) DOC-EERA estimated that the volumes of spillage in the seven hypothetical Line 3 spill scenarios—ranging from 8,625 barrels to 16,239 barrels—might be expected once in 26 to 99 years somewhere in the state of Minnesota.

... [FOH] maintains that the FEIS is inadequate because the spill analyses did not include an assessment of a hypothetical discharge of oil into the headwaters of the Mississippi, or other [High Consequence Areas] in Itasca and Hubbard counties. It argues:

Before approving or rejecting this pipeline proposal, the public and the [commission] reasonably want to know what would happen if a Kalamazoo-type spill occurred near the Mississippi headwaters, in the wetlands and wild rice habitat north of Itasca State Park, in the central sands area with its vulnerable aquifers and already-compromised drinking water supplies, into the Straight River, a nationally recognized trout stream, and in other sensitive areas along the route.

... The Administrative Law Judge does not agree that the FEIS is inadequate without the specific modeling sought by [FOH]. The regulatory guidance in this area suggests that if the agency's assessments are broadly representative of the spill impacts likely to be encountered along the pipeline route those evaluations are adequate; even if interested persons would have preferred other, particular areas to have been studied by the government. Measured by this standard, the pyramiding analyses undertaken by the DOC-EERA and its consultants are

adequate to inform the [c]ommission of the potential impacts from an accidental discharge of crude oil.

(Emphasis added.)

Specifically, the FEIS devotes significant attention to analyzing the potential resource impacts of a spill at locations along the Applicant's Preferred Route (APR) and alternatives. Section 10.3.4 explains:

The representative sites were selected to favor circumstances that would tend to exacerbate potential impacts and effects of the hypothetical spills along the Line 3 pipeline. In all likelihood, a spill of equivalent volume as the hypothetical scenarios that occurred at another location and time would have an outcome that would be of lesser consequences, or, at most similar consequences to one of the representative scenarios.

Section 10.4.2 of the FEIS discusses resources subject to exposure for the APR and alternatives. The FEIS states that, "For this analysis, ROIs [regions of interest] for potential releases were identified . . . to reflect the potential extent of a large-volume incident that could occur *at any point along each route.*" (Emphasis added.) Thus, although the FEIS does not model the expected spread of a spill at all locations, it does assess the resources that potentially would be impacted by a spill along the entire APR and alternatives. This discussion encompasses the Lake Superior watershed because the Superior terminal is the endpoint for existing Line 3 and all but one of the alternatives.

Additionally, during the commission hearing, there was discussion about why Lake Superior was not modeled. When asked by a commissioner why the modeling did not include the Lake Superior watershed as one of the representative sites, a representative for DOC-EERA, which drafted the FEIS, explained that the interagency team chose those



seven sites to get a “full range of different kinds of conditions.” These seven sites were selected to encompass “things like stream morphology and eco region and flow” so that they could be “vignettes” for what a spill may look like at other locations including Lake Superior. DOC-EERA also explained that conducting a model in Duluth would not provide much information “in terms of informing a decision about what the commission can effect” or how the decision would “change the risk profile” because of the six pipelines that currently cross there. Although this explanation did not appear in the FEIS, it is in the record, which we must review in its entirety. *See* Minn. Stat. § 14.69(e) (requiring review of “the entire record as submitted”); *see also Reserve Mining Co.*, 256 N.W.2d at 824 (noting the function of an appellate court is “to make an independent examination of an administrative agency’s record and decision”); *Builders Ass’n of Twin Cities*, 872 N.W.2d at 268 (stating that under the arbitrary and capricious standard, “appellate courts make a searching and careful inquiry of the record to ensure that the agency action has a rational basis” (quotation omitted)).

Furthermore, the majority even concluded that the commission’s decision to approve the representative-model approach employed in the FEIS—opposed to a site-specific approach—was reasonable. Specifically, in section II.B., the majority concluded that it was reasonable for the FEIS to focus “on analyzing the potential resource impacts of a spill *at all locations along the APR and alternatives*”, “[r]ather than attempting to predict the consequences of an oil spill at a particular location” because “the impact of any particular spill will depend on multiple variables, many of which are subject to chance.” (Emphasis added.) Nevertheless, in section II.A., the majority still concluded that the FEIS

needed to “address[] the impact of an oil spill *on the Lake Superior watershed*” because the scoping document committed the EIS to “consider potential impacts to the Lake Superior watershed.” (Emphasis added.) I am at a loss to understand this distinction.

But as the majority concedes, the modeling approach used in the FEIS considered the impact of a spill at all locations along the APR and alternatives, and the Lake Superior watershed *is* a location along the APR. And yet still the majority holds it was arbitrary and capricious for the commission to approve the FEIS because it does not specifically analyze issues raised in scoping and does not respond to comments received. But Minn. R. 4410.2800 does not state that issues must be addressed “specifically” and the FEIS did address the concerns about the Lake Superior watershed. The FEIS simply addressed it in a manner different from how HTE wanted. But as an appellate court, we cannot substitute our own judgment for the judgment of the DOC-EERA, DNR, MPCA, the experts tasked with drafting the FEIS, and finally the commission when that judgment is reasonable and supported by the record. This is not was our standard of review dictates.

I also have concerns that our decision today will have the further unintended consequence of delaying the replacement of Line 3, which could pose a serious threat to our environment including Lake Superior. Existing Line 3 has been in operation since the 1960s, has suffered a high amount of corrosion and long-seam cracking, and must be replaced under a consent decree between Enbridge and the Environmental Protection Agency and Coast Guard.

In conclusion, by according substantial deference to the commission’s decision as required by precedent, I would affirm the commission’s decision that the FEIS is adequate

because the representative-modeling approach sufficiently considers “potential impacts to the Lake Superior watershed” as required by the FSDD and the record reflects a reasoned determination of why that approach was used. Therefore, the commission’s decision is not arbitrary or capricious and is supported by the record. Consequently, I must dissent.