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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1318**

In the Matter of the Application of Minnesota Pipe Line Company for a  
Certificate of Need for a Crude Oil Pipeline  
and

In the Matter of the Application to the Minnesota Public Utilities Commission for a  
Pipeline Routing Permit for a Crude Oil Pipeline and Associated Aboveground Facilities.

**Filed June 10, 2008  
Affirmed  
Collins, Judge\***

Minnesota Public Utilities Commission  
File Nos. PL-5/CN-06-2;PL-5/PPL-05-2003

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Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and  
Collins, Judge.

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals  
by appointment pursuant to Minn. Const. art. VI, § 10.

## **UNPUBLISHED OPINION**

**COLLINS, Judge**

In this certiorari appeal, relators, landowners along a proposed crude-oil pipeline route, argue that (1) they did not receive adequate notice of the certificate-of-need or routing-permit proceedings, which deprived them of due process of law; (2) notice requirements in certificate-of-need proceedings violated their right to equal protection; and (3) respondent Minnesota Public Utilities Commission's decision to grant respondent Minnesota Pipeline Company LLC's applications for a certificate of need and a routing permit was arbitrary and capricious, unsupported by substantial evidence, and contained errors of law. Because the Minnesota Public Utilities Commission's decision-making process did not violate relators' due-process or equal- protection rights, and the decision to grant the certificate of need and routing permit was neither arbitrary and capricious nor unsupported by substantial evidence and did not contain errors of law, we affirm.

### **FACTS**

In early January 2006, Minnesota Pipe Line Company, LLC (MPL) filed applications with the Minnesota Public Utilities Commission (the PUC) for a Certificate of Need (CON) and a Pipeline Routing Permit (routing permit) for its proposed crude-oil pipeline, which it calls the MinnCan project. The MinnCan project consists of approximately 300 miles of 24-inch diameter pipe that will transport crude oil from Clearbrook, Minnesota, to Rosemount, Minnesota. The PUC accepted the CON and routing-permit applications as substantially complete and referred the matter to the Office of Administrative Hearings for contested-case proceedings before an administrative-law

judge (ALJ). In its orders, the PUC also allowed an additional 30 days beyond the time frame provided by the administrative rules, for a total of 100 days, for submission of alternative pipeline-route proposals.

In response to public comments requesting individual notice to landowners, the PUC directed MPL to work with the Minnesota Department of Commerce (the Department) and the PUC staff to develop a landowner-notification letter. The landowner-notification letter was to include the date, time, and place of the prehearing conference (if known at the time the letter was sent). The PUC also required MPL to publish notice of public and evidentiary hearings in general-circulation newspapers at least ten days prior to the start of the hearings, and the PUC requested that the ALJ schedule public hearings in such a way that members of the public could address both the CON and routing issues.

Landowner-notification letters were sent to landowners on the proposed pipeline route. The notification letters were sent to both “centerline” landowners (those whose land was crossed by the proposed pipeline) and “adjacent” landowners (those whose land was not crossed by the proposed pipeline but still fell within the proposed pipeline corridor.) The Department held 13 public-information meetings in March 2006, one in each county crossed by the MinnCan project. At these meetings, MPL, the Department, and the PUC discussed the process for proposing an alternative route and the May 30, 2006 deadline for such proposals.

The PUC met on June 29, 2006, to consider several alternative route proposals. Three new alternative routes were proposed in the Staples area, MPL proposed an

alternative in the Belle Plaine area, and one proposal included use of MPL's existing right of way for the entirety of the pipeline route. The PUC accepted consideration of the Staples alternatives and the Belle Plaine alternative, but declined to accept the proposal for use of the existing right of way. The PUC found that extensive evidence in the record demonstrated that the existing right of way would significantly disrupt densely-settled areas in the affected counties and would have greater adverse impacts on human settlement, the natural environment, and the economy than would proceeding with the proposed route. Although the PUC did not endorse consideration of the existing right of way as an alternative, it found that matters relating to the existing right of way would be addressed in the contested-case proceedings even if the route was not proposed as a formal alternative.

Between August 24 and September 14, 2006, the ALJ held 16 public hearings as part of the contested-case proceedings in the counties impacted by the MinnCan project. The hearings were conducted in a manner that permitted the public to address both certificate-of-need and routing issues. Members of the public could speak at these meetings and question the parties. A full-page notice of the public hearings and maps of the proposed alternatives appeared in local newspapers prior to the hearings.

On September 15, 2006, the ALJ held a contested-case hearing. Thereafter, the ALJ issued findings of fact, conclusions, and recommendations to the effect that MPL's applications for a CON and a routing permit should both be granted. The ALJ concluded that MPL had satisfied the criteria for obtaining a CON set forth in Minn. Stat. § 216B.243 (2006) and Minn. R. 7853.0130 (2005), finding that MPL demonstrated the

need for the project and no other party or person demonstrated a more reasonable and prudent alternative by a preponderance of the evidence. The ALJ also concluded that MPL had conducted an appropriate environmental assessment, met the requirements for alternative environmental review in Minn. R. 4415.0145 (2005), and had considered the criteria established in Minn. R. 4415.0100 (2005).<sup>1</sup>

The PUC adopted the ALJ's findings, conclusions and recommendations with some alterations and additions. The PUC issued an order granting MPL the certificate of need and granting MPL's application for a routing permit. The PUC denied relators' request for reconsideration, and this appeal followed.

## DECISION

On certiorari review of an agency decision we must "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." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (quotation omitted). But we review errors of law de novo and need not defer to the agency's expertise. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Permits*, 664 N.W.2d 1, 7 (Minn. 2003); *No Power Line, Inc. v. Minn. Env'tl. Quality Council*, 262 N.W.2d 312, 320 (Minn. 1977).

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<sup>1</sup> Chapter 4415 of the Minnesota Rules was renumbered in chapter 7852 in 2007. Minn. R. 4415.0145 is now numbered 7852.2700, Minn. R. 4415.0100 is now numbered 7852.1900, and Minn. R. 4415.0050 is now numbered 7852.0900. For consistency with the PUC proceedings, we will refer to the 2005 rules.

This court's review of the PUC's decision in a contested-case hearing is governed by Minn. Stat. § 14.69 (2006). *See In re Petition of N. States Power Co.*, 676 N.W.2d 326, 331 (Minn. App. 2004). Upon review of an agency decision, this court may

affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners 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. The party seeking review bears the burden of proving that the agency's conclusions violate one or more provisions of section 14.69. *See Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

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." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977). An arbitrary and capricious agency ruling is evidenced by (1) reliance on factors not intended for consideration; (2) a complete failure "to consider an important aspect of the problem"; (3) "an explanation that runs counter to the evidence"; or (4) a decision that is so implausible it cannot be explained by the agency's expertise or differing views.

*Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817 (Minn. 2006) (“CARD”).

Relators contend that, because the PUC was not granted regulatory authority over pipeline routing until 2005, and the MinnCan project was its first exercise of that authority, the PUC lacks the “expertise” in pipeline-routing matters that justifies a deferential standard of review. But the record indicates that although the PUC gained sole regulatory authority as recently as 2005, the PUC has worked closely with the Environmental Quality Board (EQB) in the past on regulatory matters. Furthermore, the PUC designated Larry Hartman, a former EQB staff member, as project manager of the proceedings in this case. Therefore, the PUC’s expertise does justify the deferential standard; a heightened standard of review is not called for.

**A. Due process**

Relators argue that they received inadequate notice of the PUC’s proceedings in this case, resulting in a denial of their procedural-due-process rights. “This court reviews de novo the procedural due process afforded a party.” *Zellman ex rel. M.Z. v. Ind. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). “Due process requires that deprivation of property be preceded by notice and an opportunity to be heard.” *Comm’r of Natural Res. v. Nicollet County Pub. Water/Wetlands Hearings Unit*, 633 N.W.2d 25, 29 (Minn. App. 2001) (citation omitted), *review denied* (Minn. Nov. 13, 2001).

The required type of notice does not follow one specific, technical definition but rather varies “with the circumstances and conditions of each case.” *In re Christenson*,

417 N.W.2d 607, 611 (Minn. 1987). Unless the interested party may otherwise lose a protected property right, personal notice is not required. *Id.* at 612. And personal notice is not required if the giving of such notice is not reasonably possible. *Walker v. City of Hutchinson*, 352 U.S. 112, 115-16, 77 S. Ct. 200, 202 (1956).

Minnesota law requires that the PUC's pipeline-routing rules must "provide for notice of proposed pipeline routes to local units of government and to owners and lessees of property along the routes being considered." Minn. Stat. § 216G.02, subd. 3(b)(2) (2006). Accordingly, Minn. R. 4415.0050 (2005) states that within 20 days of the PUC's acceptance of a pipeline-routing-permit application, "the [PUC] shall provide published notice of acceptance of the application in a newspaper in each county in which [the pipeline is proposed]." The rule further specifies the content required in the notice, including the identification of the applicant, procedures for proposing alternate routes, and notice of public-information meetings. *Id.*

Relators argue that the notice provided in this case was insufficient. But due process requires notice and an opportunity to be heard, and the record shows that relators had both. In addition to following the notice requirements specified in the rules, the PUC also required MPL to provide personal notice to affected landowners. MPL submitted a list of approximately 1,200 landowners, local officials, and other interested persons that it served with personal notice of the public hearings. The record also indicates that MPL sent multiple mailings to affected landowners informing them of the status of the pipeline-approval proceedings and MPL agents personally visited landowners to discuss the MinnCan project.

Moreover, most of the relators attended or participated in the public hearings. Nearly all participated in some manner, either through appearances at public hearings or by submitting written comments to the ALJ. Relators contend that due process was not satisfied because some relators initially did not act because, although their land fell within the pipeline corridor but was not initially crossed by the pipeline, subsequent adjustments resulted in the pipeline crossing their property after the time to intervene as a party had passed. However, due-process requirements do not assure an opportunity to intervene as a party, only the opportunity to be heard.

Relators also contend that MPL's personal notice was somehow deficient. But the PUC accepted MPL's testimony regarding its personal notice to landowners. Furthermore, a number of landowners, including several of the relators, testified that they had received notice of the pipeline at the beginning of 2006, which supports the PUC's determination that notice was adequate.

Relators further argue that they were denied due process because they were not permitted to participate in the CON contested-case hearing. Anyone may attend a contested-case hearing, but only the parties may present evidence and argument and cross-examine witnesses. Minn. R. 1400.7800 (B)(1) (2005). Here, relators were allowed ample opportunity to be heard. They were welcome to appear and present testimony at the public hearings, question the Department or MPL witnesses, and submit written comments. The transcripts of the public hearings demonstrate extensive public participation. Relators' argument that they were denied procedural due process is therefore without merit.

Additionally, relators' reliance on *Juster Bros. Inc. v. Christgau*, 214 Minn. 108, 120, 7 N.W.2d 501, 508 (1943), is misplaced. Unlike *Juster*, where an employer was not provided with any notice or hearing prior to an agency decision, relators here had numerous opportunities to present testimony and question witnesses. Similarly, *In re Wilmarth Line of the CU Project*, 299 N.W.2d 731 (Minn. 1980), does not support relators' argument that they were entitled to the opportunity to participate in the contested-case hearing without intervening as a party. In *Wilmarth*, the supreme court concluded that landowners were entitled to notice of a contested-case hearing because they needed to be given an opportunity to present their evidence. 299 N.W.2d at 736. But the supreme court also noted that in a contested case *parties* shall be afforded an opportunity for hearing after reasonable notice, and the landowners could intervene as parties because they were materially affected by the outcome of the proceedings. *Id.* at 734-35. Relators, as interested landowners, could have intervened, become parties to the proceeding, and participated in the contested-case hearing, but did not do so.<sup>2</sup> Therefore, their argument must be dismissed as without merit.

## **B. Equal protection**

Relators contend that the PUC has denied their right to equal protection because of the differing rules addressing notice for potential landowners in pipeline routing and

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<sup>2</sup> At oral argument, counsel for relators asserted that a few relators are owners of land that is crossed by the Belle Plaine and the Staples alternative routes, and those relators received notice of the placement of the pipeline on their property after the time to intervene had passed. Relators' attorney provided no evidence of which relators, if any, are landowners along these routes. Therefore we are unable to conclude that any relator was denied the opportunity to intervene as a party following the alteration of the route.

potential landowners in high-voltage transmission-line (HVTL) routing. See Minn. R. 7829.2550 (requiring direct mail notice “to landowners reasonably likely to be affected by the proposed [high-voltage] transmission line”), .2500, subp. 4, 5 (requiring published notice for certificate-of-need filings) (2005). To successfully challenge the constitutionality of the rule at issue, relators must demonstrate “not only that the [rule] is invalid but that [they] sustained or [are] in immediate danger of sustaining some direct injury resulting from its enforcement.” *Paulson v. Lapa, Inc.*, 450 N.W.2d 374, 380 (Minn. App. 1990), *review denied* (Minn. Mar. 22, 1990). Relators have not shown that they have sustained or are in danger of sustaining a direct injury as a result of the rule directing notice in CON proceedings because the PUC ordered, and MPL provided, the same notice to landowners in these proceedings as that provided to HVTL landowners pursuant to Minn. R. 7829.2550. Relators’ equal-protection claim is without merit.

**C. Arbitrary and capricious or unsupported by substantial evidence**

**1. Consideration of the Existing Route**

Relators argue that the PUC’s decision must be reversed because its decision violated the nonproliferation mandate outlined in *People for Env’tl. Enlightenment and Responsibility (PEER) v. Minn. Env’tl. Quality Counsel*, 266 N.W.2d 858 (Minn. 1978). In *PEER*, the Minnesota Supreme Court determined that the Minnesota Environmental Quality Council (MEQC) erred by selecting a new route for an HVTL instead of approving the existing route. 266 N.W.2d at 864. The supreme court concluded that “in order to make the route-selection process comport with Minnesota’s commitment to the principle of nonproliferation, the MEQC must, as a matter of law, choose a pre-existing

route unless there are extremely strong reasons not to do so.” *Id.* at 868. The supreme court determined that there was no evidence that use of the existing route would impair or destroy the environment; or that the alternative route was preferable because it would result in the condemnation of fewer homes. *Id.* at 869. The supreme court held that cost cannot override the nonproliferation policy, concluding that

[C]ondemnation of a number of homes does not, without more, overcome the law’s preference for containment of powerlines as expressed in the policy of nonproliferation. Persons who lose their homes can be fully compensated in damages. The destruction of protectable environmental resources, however, is noncompensable to all present and future residents of Minnesota.

*Id.*

In this case, substantial evidence supports the PUC’s decision that the existing route was not a viable alternative. Testimony in the record established that use of the existing route would be far more harmful than use of the new route. In addition to significant negative economic, residential, commercial, and industrial developmental impact, using the existing right of way would require two additional Mississippi River crossings; affect an additional 5.2 miles of “significant biological[-]diversity areas,” 7.9 miles of public lands, three miles of forest lands, and five miles of wetlands; and cross the Sherburne County Wildlife Refuge.

Relators argue that the PUC’s failure to refer the existing route to the ALJ for formal consideration as a route alternative at the contested-case hearing precluded proper consideration of the existing right of way. But the PUC’s decision not to include the existing right of way as a formal route alternative did not relieve MPL of its burden to

prove that its proposed route minimized human and environmental impacts compared to all other proposed routes. Minn. R. 4415.0100, subp. 3, lists the criteria for pipeline-route selection, including:

- A. human settlement, existence and density of populated areas, existing and planned future land use, and management plans;
- B. the natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands;
- C. lands of historical, archaeological, and cultural significance;
- D. economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations;
- E. pipeline cost and accessibility;
- F. use of existing rights-of-way and right-of-way sharing or paralleling;
- G. natural resources and features.

In choosing not to include the existing right of way as a formal alternative here, the PUC stated that “MPL continues to bear the burden of proof and persuasion that its proposed route minimizes human and environmental impact when compared to all other proposed routes and has specifically undertaken to do that with respect to the existing route.”

The ALJ’s findings, adopted by the PUC, indicate that the ALJ exhaustively reviewed the evidence in the record to determine if MPL met its burden of proving that the existing route was not a viable alternative. The ALJ found that the record supported the PUC’s determination not to forward the existing right of way as a formal alternative for contested-case proceedings. The ALJ weighed the evidence in her memorandum in support of her findings, stating:

Neither MPL nor the Department attempted to assess the significance of placing more land and people at risk by following a new route rather than widening the existing MPL right-of-way. In addition, there was no attempt to assess the possible loss of prime agricultural land or family farms. Despite these shortcomings, it is clear that adding or replacing a pipeline along the existing route will have a significantly greater human impact because of the level of current development along that route. Following the existing pipeline for the full length of the route would not be a more reasonable and prudent alternative.

Given the findings by the ALJ regarding the greater economic, environmental, and safety impacts, and given the extent of our deference to the PUC within its area of expertise, the PUC's decision not to forward the existing pipeline route as a formal alternative for contested-case proceedings was supported by substantial evidence and was not arbitrary or capricious. The PUC and the ALJ considered the potential effects of use of the existing right of way and use of the proposed route, and found that the proposed route would have a less-significant impact.

## ***2. Certificate of Need requirements***

The PUC's decision on this issue was supported by substantial evidence and was not arbitrary and capricious. The governing regulations state that "[a] certificate of need shall be granted to the applicant if it is determined that . . . a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant." Minn. R. 7853.0130 (B) (2005). Relators argue that the CON proceeding essentially became an "uncontested default matter" after interested property owners were "intentionally excluded" from participating in the contested-case hearing. But the ALJ's findings

clearly demonstrate that she considered evidence presented at all of the public hearings, in addition to the evidence presented at the contested-case hearing, in reaching her determinations. Therefore, relators' contention that the contested-case hearing was essentially an uncontested-default matter is not persuasive.

Relators argue that the PUC's decision to grant the CON and the routing permit did not properly evaluate the need for the pipeline or other alternatives as required by the CON regulations. Relators have the burden of showing that the PUC's findings, conclusions or decision "are not supported by the evidence in the record, considered in its entirety." *In re Proposal by Lakedale Tel. Co.*, 561 N.W.2d 550, 554 (Minn. App. 1997). Unless there is manifest injustice, this court must refrain from substituting its judgment concerning inferences to be drawn from the evidence for that of the agency, even when it might appear that contrary inferences could be drawn. *Quinn Distrib. Co., Inc. v. Quast Transfer, Inc.*, 288 Minn. 442, 448, 181 N.W.2d 696, 700 (1970).

Relators contend that there was insufficient evidence for the PUC to find that the probable result of the denial of the CON would have an adverse effect on the future energy supply. The CON requirements prohibit the PUC from granting a CON unless "the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states." Minn. R. 7853.0130(A) (2005). Relators contend that MPL has shielded much of its need analysis from public disclosure by improperly designating it as "trade secrets." But requiring confidentiality of its alleged trade secrets

does not mean that MPL failed to provide evidence from which the PUC could determine that a failure to grant the CON would have a future adverse effect on Minnesota utilities.

Evidence from the Canadian Association of Petroleum Producers was presented, which indicated that growth in crude-oil production would increase in the future. The U.S. Department of Energy's Energy Information Administration (EIA) indicated that demand would increase. A Department witness testified that "The [EIA] publication is frequently used as a reference because the EIA is seen as an independent source." The ALJ found that Minnesota refineries asked MPL to expand the capacity of its system to allow for more crude oil to be shipped from Canada. The ALJ also found that the existing supply of crude oil that was transported from the Gulf Coast was subject to foreign crude-oil supply disruptions and unreliability due to weather conditions and changes in demand from other regions. The ALJ ultimately agreed with the Department's conclusion that the adequacy of Minnesota's future energy supply could be threatened if the CON was denied.

In support of their argument that MPL failed to prove the future adverse-effect requirement for a CON, relators draw attention to the ALJ's observations indicating her discomfort with the lack of comprehensive information. Relators highlight the ALJ's finding that "[n]either MPL nor the Department fully explored whether a combination of increased capacity on the Wood River Pipe Line and available capacity in the refineries in Superior, Wisconsin and North Dakota would be adequate to meet the demand for refined petroleum products." The ALJ also noted that "[b]ecause of the close connection

between Flint Hills Resources and MPL, a more careful analysis would have assured that the determination of need could be made with greater confidence.”

But ultimately, the ALJ and the PUC concluded that the evidence of potential future adverse effect was sufficient, and “[this court’s] judgment concerning inferences to be drawn from the evidence should not be substituted for that of the agency.” *Red Owl Stores, Inc. v. Comm’r of Agric.*, 310 N.W.2d 99, 104 (Minn. 1981). The ALJ stated at the evidentiary hearing that MPL’s reliance on the Flint Hills press release was “curious,” and requested that the Department further explain the basis for the determination of need. The Department witness then testified about the supporting information and the relationship of the Flint Hills press release to the determination of need, including the evidence from the EIA. The testimony at hearings, together with the previously submitted testimony of Department witnesses, sustains the PUC’s finding of need.

Relators next argue that the PUC’s decision to grant the CON was in error because there are more reasonable and prudent alternatives to the MinnCan project. Minn. R. 7853.0130(B) provides that the PUC analysis of the CON must consider whether parties or persons other than the applicant have demonstrated a more reasonable and prudent alternative by a preponderance of the evidence, considering:

- (1) the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;
- (2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;

(3) the effect of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and

(4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives.

MPL presented and rejected three alternatives to the MinnCan project: (1) expansion of existing facilities; (2) trucking; and (3) reliance on existing pipelines without expansion. Relators argue that the PUC failed to consider other alternatives, including whether other refineries could increase their capacity, whether other proposed pipelines bringing crude oil to the Midwest could satisfy increasing need, and whether MPC could expand its existing pipeline. But the ALJ did consider and reject each of those alternatives.

Increased capacity of other refineries was considered. A Department witness, Jeff Haase, testified about the possibility of increased capacity at other refineries meeting the demand. Haase concluded that, currently, facilities in other states did not have plans for expansion that would increase the crude-oil supply in Minnesota. To the extent that the ALJ concluded that the Department failed to consider refineries in other states, the ALJ was in error.

Relators also contend that MPL failed to present and the PUC failed to consider expansion of existing facilities, alternative modes of transportation, or construction of a different pipeline. But the record indicates that MPL presented these alternatives and they were rejected. The ALJ considered the evidence presented regarding expansion of the existing facilities and determined that this alternative was not more reasonable and

prudent than the proposed pipeline. The ALJ's findings also reflect that the Department agreed with MPL that rail transportation was not a reasonable and prudent alternative for crude-oil transport, and no evidence was presented to the contrary. Relators further argue that the PUC should have considered other transport options. But no person or party presented any such options; therefore, the PUC's failure to consider options that were not presented does not constitute error.

Finally, relators argue that the PUC did not duly evaluate the option of constructing an alternative pipeline from St. Louis to the Twin Cities. But the record suggests that the alternative as proposed was reliance on existing pipelines, not the construction of an additional pipeline in that location. Because the construction of an alternative pipeline was not presented to the PUC, relators' argument that it failed to consider such alternative is without merit.

#### **D. Minnesota Environmental Policy Act**

Relators argue that the PUC's decision does not comply with the Minnesota Environmental Policy Act (MEPA). MEPA requires the PUC to conduct an environmental analysis before engaging in any major governmental action when that action creates "potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a (2006). The Environmental Quality Board (EQB) "shall by rule identify alternative forms of environmental review which will address the same issues and utilize similar procedures as an environmental impact statement in a more timely or more efficient manner to be utilized in lieu of an environmental impact statement." Minn. Stat. § 116D.04, subd. 4a (2006).

Pursuant to section 116D.04, subd. 4a, chapter 4415 (2005) of the Minnesota Rules contains the alternative form of environmental review for proposed pipelines. Minn. R. 4415.0145 requires that the applicant submit to the PUC with its application “an analysis of the potential human and environmental impacts that may be expected from pipeline right-of-way preparation and construction practices and operation and maintenance procedures.” These impacts include, but are not limited to, the impacts for which criteria are specified in Minn. R. 4415.0100.<sup>3</sup> *Id.*

The PUC found that the ALJ’s conclusions regarding the adequacy of the environmental assessment were “based on extensive findings of fact in the record,” and that the environmental assessment was consistent with the rules and the criteria under Minn. R. 4415.0100. We defer to the fact-finding process of an agency. *See Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 465 (Minn. 2002) (“MCEA”) (stating that we defer to agency’s expertise in interpreting and applying its own regulations).

Relators first argue that the PUC’s decision violates MEPA because it failed to consider the existing right of way. Relators’ arguments addressing whether substantial evidence supports the PUC’s rejection of formal consideration of the existing right of way were addressed above, and that discussion need not be repeated.

Relators next argue that the PUC failed to discuss mitigation in sufficient detail to ensure that the environmental consequences had been fairly evaluated. Minn. R.

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<sup>3</sup> Minn. R. 4415.0100 includes criteria such as human settlement, the existence and density of populated areas, natural areas, wildlife habitat, water and recreational lands, and land of historical, agricultural, and cultural significance.

4415.0100, subp. 3(H), requires, in part, that the PUC consider “the extent to which human or environmental effects are subject to mitigation by regulatory control.” A Responsible Government Unit (RGU) may consider mitigation measures as offsetting potential for significant environmental effects “if those measures are specific, targeted, and are certain to be able to mitigate the environmental effects.” *CARD*, 713 N.W.2d at 835. “There is a definite difference between an RGU review that approves a project with vague promises of future mitigation and an RGU review that has properly examined a project and determined that specific measures can be reasonably expected to deal with the identifiable problems the project may cause.” *Id.*

The proper approach to relators’ mitigation issue is explicitly identified in *MCEA*: whether there is relevant evidence in the record that “a reasonable mind might accept as adequate to support the conclusion that the [PUC] *did* consider, in sufficient detail, adequate mitigation to ensure that the environmental consequences have been fairly evaluated.” 644 N.W.2d at 466. Here, there is substantial evidence that the PUC adequately considered mitigation to ensure the fair evaluation of the environmental consequences of the MinnCan project. Specifically, the PUC found that routing-permit conditions reasonably minimized the human and environmental effects of the selected route, and the record does not demonstrate that the selected route was any less subject to regulatory control than the route segments not chosen.

Moreover, the ALJ and the PUC made compliance with MPL’s proposed mitigation plans and other government permits a condition of granting the routing permit, thereby exposing MPL to penalties or revocation of its routing permit if it fails to comply.

Therefore, although MPL bears the initial responsibility of mitigation, the PUC can still enforce mitigation measures through its permitting function. *See MCEA*, 644 N.W.2d at 467 (finding it irrelevant whether a regulatory authority is responsible for enforcing mitigation efforts when an agency can enforce mitigation through its permitting function).

Relators appear to argue, however, that reliance on future regulatory efforts is error, citing *Trout Unlimited, Inc. v. Minn. Dept. of Agric.*, 528 N.W.2d 903 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995). Relators' reliance on this case is misplaced. *Trout Unlimited* held that reliance on future regulatory efforts *in lieu* of conducting an environmental assessment constituted error. 528 N.W.2d at 909. Relators' example of the Stormwater Pollution Prevention Plan as evidence of how the PUC inadequately addressed mitigation, in actuality presents a textbook mitigation finding because it identifies the potential problem (pollution from oil spills during construction) and then determines specific mitigation measure to address the potential problem (Stormwater Pollution Prevention Plan or equivalent that is reviewed and approved by the Minnesota Pollution Control Agency). *See CARD*, 713 N.W.2d at 835 (identifying proper method of mitigation as examining a project and determining the specific measures that can be reasonably expected to deal with the identifiable problems the project may cause).

Relators also argue that the PUC failed to adequately analyze the cumulative effects of the MinnCan project. Minn. R. 4415.0100, subp. 3(I.) (2005), requires the PUC to consider "the cumulative potential effects of related or anticipated future pipeline construction." The criterion aims to determine whether the project, which may not have

the potential to cause significant environmental effects in isolation, could have a significant effect when other planned or existing state projects are considered. *CARD*, 713 N.W.2d at 829. “[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 . . . as the proposed project.” *Id.* at 830.

Unlike the record in *Trout Unlimited*, 528 N.W.2d at 908, in which the evidence indicated that future irrigation projects in the area were “planned or likely,” here, the evidence in the record indicates that neither MPL nor any other entity had plans to add another pipeline. Relators seem to argue that the PUC erred because it relied on MPL’s statement that it had no plans to expand. But the record contains no evidence that there are any related or anticipated projects in the same area that would contribute to the environmental effects. The PUC found that MPL had no plans to run a second pipeline in the future, and the evidence suggested that MPL could get greatly increased capacity (from the project design range of 60,000–165,000 barrels per day to 350,000 barrels per day) by adding additional pumping stations to the MinnCan pipeline. Relators fail to identify how any additional proof could be presented on the issue of cumulative effects other than MPL’s testimony that it has no plans for future pipeline addition. The PUC’s findings on cumulative effects were therefore not lacking.

Finally, relators argue that the PUC’s decision is unsupported by substantial evidence, and is thus arbitrary and capricious, because the PUC failed to take a “hard look” at the environmental consequences of the pipeline route. *See CARD*, 713 N.W.2d at 832 (stating that a reviewing court’s role when reviewing an agency decision “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.” (quotation omitted)). Relators contend that the PUC failed to address public concerns that the PUC was relying solely on MPL’s environmental-assessment supplement (EAS) and the environmental analysis was not conducted by an independent entity. But Minn. R. 4415.0145 (2005) states that the *applicant*, not an independent entity, must submit the EAS. Furthermore, the ALJ found that “[n]o state agency ha[d] objected to the [EAS].” The Metropolitan Council submitted a letter to the Department stating that the EAS was “complete and accurate with respect to regional concerns,” and the Department of Commerce Energy Facility Permitting Staff determined that the EAS provided the required information. We therefore conclude that the PUC took the required “hard look” at the environmental consequences of proposed MinnCan project, and its decision to approve the CON and routing permit was supported by substantial evidence.

**Affirmed.**

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