

December 11, 2003

TO: Board Members

FROM: Alan Mitchell
EQB Staff

SUBJECT: **HUTCHINSON PIPELINE**

Action Requested:

The staff is recommending that the Board suspend the Amended Pipeline Routing Permit the EQB issued to Hutchinson Utilities Commission on March 20, 2003. The suspension would continue until HUC submits certain information requested by the staff relating to the construction of the pipeline, submits \$25,000 to pay for the EQB's estimated ongoing expenses, and signs a Stipulation Agreement addressing violations of the Agricultural Impact Mitigation Plan, including a commitment to pay landowners for crop losses that will result in the future. The staff also recommends that the Board authorize the commencement of litigation against Hutchinson Utilities Commission and that the Chair be authorized to determine the appropriate time to commence the litigation if HUC fails to comply with the requirements of the suspension order. The staff also recommends that the Board pass a resolution directing Hutchinson Utilities Commission to obtain the permission of the EQB before constructing a tap to the Fairfax pipeline.

Background:

For the past several months the staff has been reporting to the Board about the construction of a 90 mile long natural gas pipeline by the Hutchinson Utilities Commission. From the time construction began in mid-July, the staff has been responding to complaints by landowners about various failures by HUC to comply with the mitigation measures set forth in the Agricultural Impact Mitigation Plan that HUC agreed to and was made an enforceable part of the Permit.

On October 31, 2003, after action at a special Board meeting, the EQB entered into a Stipulation Agreement with HUC addressing violations of the requirements of the Mitigation Plan for repair of drain tile that was cut during construction of the pipeline. During negotiations of the Stipulation Agreement, staff proposed language requiring HUC to reimburse farmers for future crop losses, but HUC was unwilling to agree to such a provision. The Stipulation Agreement recognizes that the EQB may undertake an investigation along the entire pipeline to determine whether other violations of the Permit and the Mitigation Plan had occurred.

At the November Board meeting, the staff reported to the Board on the inspections the staff conducted on November 3 and November 12. The staff reported that on the twelve different sites in four counties the staff inspected, the staff found mixing of subsoil and topsoil, large rocks in the right-of-way, and compaction. The staff showed the Board photographs taken on a parcel in Watonwan County showing large clods of clay on the surface of the right-of-way.

On November 7 and again on December 1, the staff wrote to HUC and requested that HUC provide copies of a number of documents, including notes of the soil scientists and the logs of the various inspectors who told us on November 3 that they kept daily logs of their activities. We also requested that HUC submit a check for \$25,000 to cover our estimated ongoing expenses in conducting our investigation and monitoring HUC's activities.

On December 1 staff heard from a landowner in Sibley County that HUC was cutting a valve site on his property to tap into the pipeline and run a connection to a smaller pipeline running between the City of Fairfax and the City of Winthrop. This was the first time we had heard that HUC intended to make this tap. I talked to the City of New Ulm, which apparently wanted the tap to sell a portion of its gas allotment to the City of Fairfax and had been planning this connection for some time. However, there is nothing in the HUC application, nothing in the Permit, nothing in the documents submitted to the Public Utilities Commission related to the certificate of need, that describe such a tap. Further, HUC has no easement and no condemnation order allowing it to take the farmer's property to build the valve station. According to the farmer, HUC had staked out a 100 foot on a side area and marked locations for a heater, an odorizer, and a monitor.

We also heard on December 1 from the Department of Natural Resources that the pipeline to New Ulm had been moved from the route that New Ulm had proposed for public review and was constructing the pipeline through wetlands that were not originally along the route. We have no additional information on this matter at this time.

The staff has begun to put together a Request for Proposals to send out to geotech firms and soil firms soliciting bids for an investigation of the entire 90 miles of pipeline. The investigation would look at mixing of subsoil and topsoil, loss of fertility, and compaction. We estimate that an investigation of the approximately 250 individual parcels would cost more than \$50,000. The staff could be ready to send out the RFP early next year and commence the work in the spring after the snowmelt.

Status:

To date the only response we have received from HUC regarding our request for documents, which was a request under the Data Practices Act, which requires public bodies like the City of Hutchinson to promptly provide copies of all public documents requested, is a phone call from the HUC attorney stating that they were reluctant to provide the documents because the documents might end up in the hands of the farmers.

HUC has refused to make any payments for the ongoing work by the staff. To date HUC is presently more than \$8,000 in arrears. HUC did make the \$10,000 payment required under the Stipulation Agreement relating to the drain tile repair issue.

The staff is uncertain what the status of construction is. We have been asking HUC to advise us of when HUC plans to put natural gas in the pipe and the only answer we have received is “We don’t know.” Construction should be fairly close to being completed.

Issues:

Notice. On December 10 Bruce Hanson, the attorney for Hutchinson Utilities Commission, wrote to Mr. Sullivan and requested that the EQB postpone this matter until the January Board meeting. Mr. Hanson stated that the EQB has failed to give HUC ten days notice of the consideration of the suspension of the Permit. The EQB rule, part 4410.0205, states that the permittee must be given at least ten days notice of the allegations relating to violations of the permit. The rule also provides that the Chair may determine that circumstances exist requiring immediate Board action.

Hutchinson Utilities Commission has been on notice for months regarding allegations of violations of the Permit. The Chair wrote to HUC on August 26 and advised that the Board might consider action and sanctions if violations of the Permit continued. There have been frequent conversations between EQB staff and HUC representatives, including Mr. Hanson and Mr. Spethman, about complaints and alleged violations. There were discussions about violations other than failure to properly repair drain tile when the Stipulation Agreement was negotiated. HUC representatives were present when the staff inspected several sites on November 3 and observed mixing of soils. HUC has been present at EQB Board meetings where alleged violations have been discussed. And finally, Mr. Hanson was told at the Tech Rep meeting on Tuesday morning, Dec. 8, that the staff was considering recommending suspension of the permit. Hutchinson Utilities Commission has had weeks to not only conform its conduct to the requirements of the Mitigation Plan, but to respond in whatever fashion it deemed appropriate to the allegations of violation of the requirements.

Under the rule, the Chair can determine that circumstances exist that require immediate Board action. The combination of all the notice that HUC has been given and the fact that construction is nearly complete is reason to consider suspension at this time.

Suspension. Suspension of a pipeline routing permit is a major decision with significant impacts on Hutchinson and the landowners. The Board has never suspended a pipeline permit before.

There are several reasons why the staff is recommending this action now. First, there have been complaints registered about HUC’s conduct from the time the first permit was issued in December 2002. Landowners who were not even on the route complained that they received letters threatening to condemn their property if they did not sign an

easement. The permit had to be amended to more specifically define the route and to establish the mitigation measures HUC would follow. Indeed, nearly everything in the Mitigation Plan was contested by HUC, and in the end, HUC agreed to comply with the construction practices spelled out in the Plan.

Complaints began within days after construction started in July. At first it was failure to properly determine the amount of topsoil to strip. Then it was failure to notify landowners of pending construction. Then the drain tile repair issue arose. We received numerous complaints about the manner in which the land agents were treating the landowners. Now that the pipe is in the ground, we have complaints about the mixing of topsoil with subsoil and the failure to properly restore the land. We have observed these problems for ourselves. Lately, we have heard about a tap in the line to connect to another pipeline, a project that was never brought to the EQB's attention in any fashion by HUC. The New Ulm spur is going through a wetland, along a route that was not identified initially.

Second, HUC has been given numerous opportunities to change its conduct and to proceed in conformance with its obligations. They have stated orally and in writing that they would comply with the Mitigation Plan. Landowners have been asking the EQB to suspend the Permit since July, and every time the EQB has worked on resolving one complaint, another one would be registered.

Third, the violations are widespread and occur along the entire pipeline, perhaps not on every parcel but in every county. There are some landowners who have registered satisfaction with HUC's conduct. But complaints have been registered from landowners all along the 90 miles of the pipeline, and every where the staff has looked, the complaints have been confirmed.

Fourth, Hutchinson Utilities Commission has increasingly become more intransigent. HUC's failure to even respond to a Data Practices Act request for public documents is telling. Once the pipeline is complete and placed into operation, HUC is likely to become even more intransigent in its position.

Suspension Conditions. The EQB rule requires the Board to establish the route segment to which the suspension applies, the corrective or ameliorative measures the permittee can take to comply with the permit, and the time period necessary for the permittee to comply.

1. Route Segment. The Suspension Order would apply to the entire pipeline. The violations exist all along the pipeline, in every county.

2. Corrective Measures. There are three conditions the staff recommends the Board attach to its Suspension Order. These conditions must be met in order for the Suspension Order to be lifted. Staff believes the conditions are appropriate and reasonable and ones that HUC can quickly comply with so it can go about the task of completing this pipeline.

a. Provide the Information Requested. There are a number of documents and other information the EQB staff has requested to help it understand what HUC did during construction. These include such documents as inspector field notes and the records of the soil scientists. The information we have asked for includes such issues as where did HUC go with the rocks and how did HUC alleviate compaction when it filled in the trench. If certain documents are not public documents, HUC can identify those and explain why the documents are not public, and the matter can be discussed with the EQB staff. It is not unreasonable to expect HUC to provide the EQB with copies of all public documents.

b. Pay EQB Expenses. We have asked HUC for \$25,000. We have already incurred expenses for staff time in excess of \$8,000 that HUC has not paid. If the EQB has to investigate most of the parcels along the pipeline route, the costs will go up significantly. These are all costs that will be charged to HUC, and the Stipulation Agreement recognizes that these charges will be assessed.

c. Commit to Pay for Future Crop Losses. This is the biggest issue. If this one can be resolved, this matter should be able to be put to rest. The costs will be minimized and the information the staff has requested may not be necessary. Staff wanted to include a commitment to pay for future crop losses in the Stipulation Agreement regarding the drain tile, but HUC would not agree. That is why the Stipulation Agreement recognizes that the EQB might have to conduct an extensive investigation.

It is apparent that the land is never going to be restored to its natural condition. Rocks could be removed perhaps, and compaction might be alleviated to some extent, but to go back out to a 90 mile pipeline and perform such tasks will be expensive and probably not completed to the extent it should have been initially. And there is not really anything that can be done about the mixing of subsoil and topsoil that has occurred.

The only way to address this problem is to pay the farmer for the lost productivity in the future. This is an inherently fair method to address this problem. Each year the amount of the crop loss can be determined, and HUC can pay the farmer for the loss. If HUC has followed the mitigation techniques more closely on some parcels than on others, this should be reflected in the crop loss that occurs. If crop losses fluctuate because of weather or other factors, this should be taken into account by comparing productivity along the right-of-way with productivity off the right-of-way. The farmer does not get a windfall; Hutchinson only compensates the farmer for losses resulting from the pipeline.

3. Time Period. The Suspension Order will remain in effect until the Board determines that HUC has complied with the three measures described above. Each of these measures is entirely in the hands of HUC. The sooner HUC can complete these tasks the sooner the pipeline will be completed and gas can begin to flow.

Litigation. The staff is not sure whether HUC is prepared to make the kind of commitment the staff believes is necessary to resolve this matter. Therefore, the staff recommends that the Board authorize the filing of a lawsuit against HUC (and any other defendants deemed appropriate at the time the lawsuit is commenced) to seek a court order imposing appropriate sanctions for the violations that have occurred. The lawsuit would not be filed immediately. The staff has indicated to HUC that it is prepared to meet and attempt to work out the details of a second Stipulation Agreement. Mr. Hanson, in his letter, recognized that a settlement of this matter is the preferred course of action. The Board could authorize the Chair to determine the appropriate time to commence litigation if that should become necessary.

Fairfax Tap. The staff first heard on December 1 that HUC was planning to construct a valve station in Sibley County that would allow for a connection to a pipeline running between Fairfax and Winthrop. This may be an appropriate thing to do. But HUC has provided the EQB with no information about this project and there is nothing in the Permit that authorizes it. The Board should direct HUC to obtain EQB approval before proceeding with such construction.

Staff Recommendation:

The staff recommends that the Board approve a resolution adopting Findings of Fact and Conclusions and issuing an Order suspending the Amended Pipeline Routing Permit and authorizing the Chair to commence litigation against HUC and any other appropriate defendant. The Order provides that the Amended Permit issued to Hutchinson Utilities Commission is suspended immediately for the entire length of the pipeline and that HUC can restore the Permit upon a determination by the EQB that HUC has submitted the requested information, paid the requested fees, and signed a Stipulation Agreement making a commitment to compensate farmers for future crop losses.

The staff recommends that the Board pass a second resolution directing HUC to obtain EQB approval before installing a tap to the Fairfax pipeline.