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August 20, 2021

Rochester Township Board of Supervisors
c/o Randy Staver, Township Clerk and
Roger Ihrke, TCPA, Township Zoning Administrator
4111 – 11th Avenue SW, Room 10
Rochester, MN 55902

VIA E-MAIL ONLY
roger@tcpamn.org

RE: Friends of Minnesota Scientific and Natural Areas
**Comments to Environmental Assessment Worksheet (EAW) and
Request for Environmental Impact Statement (EIS)**
Pavilion Estates Subdivision, Rochester Township, Olmsted County, MN

Dear Board of Supervisors,

I represent, and serve as Board Chair of, Friends of Minnesota Scientific and Natural Areas (FMSNA), a Minnesota non-profit, tax-exempt [“501(c)(3)”] corporation, established to advocate and support the establishment, management, perpetuation of Minnesota’s Scientific and Natural Areas or “SNAs.”

IMPORTANCE OF ROCHESTER GREAT BLUE HERON ROOKERY

FMSNA, along with other Minnesotans, have worked diligently to protect the “Rochester Great Blue Heron Rookery” (the “Rookery”) - located in Rochester Township, Olmsted County, Minnesota. If the Rookery became a SNA, it would gain the highest level of legal protection of any state land classification.

The Rochester Blue Heron Rookery clearly qualifies as a site of statewide significance.

As explained by Mr. Carrol L. Henderson (attached as “Exhibit 1”) and others, it is a one-of-a-kind great blue heron rookery in Minnesota. Unlike other heron rookeries, this rookery occurs on a slope in an upland hardwood forest - as opposed to the lake regions of the state, on major rivers and or in beaver ponds. Experts in ornithology are of the opinion that rookeries, in the latter situations, have abundant food resources that allow for the attainment of great numbers of nesting birds. This rookery, though smaller, has remained stable, with birds foraging along small streams, meadows and ephemeral forest pools for decades.

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Unlike most other rookeries in Minnesota, this rookery's forest canopy has remained intact. Most other rookeries in Minnesota generally decline or no longer exist, because the tree canopy dies out due to the acidity from the deposition of the birds' fecal material that accumulates over the years - unless subject to regular flooding events that flush the fecal acidity out. The Rochester Blue Heron Rookery, that occurs on a steep slope, has continued to maintain a forest canopy for decades due to the flushing of the acidic fecal material downslope by rainfall events.

Such an example of a stable rookery, still in existence for this many decades - relying almost entirely on a foraging scenario comprised of small streams, meadows, and ephemeral pools - offers significant opportunities for scientific research, education and interpretation for the citizens of not only the Rochester area, but all Minnesotans.

Therefore, it is our opinion the Rochester Great Blue Heron Rookery site warrants protection as a Scientific and Natural Area.

COMMENTS TO ENVIRONMENTAL ASSESSMENT WORKSHEET (EAW)

FMSNA submits the following comments to the Environmental Assessment Worksheet (EAW) for the proposed Pavilion Estates Subdivision, in Rochester Township, Olmsted, County, Minnesota.

But first, FMSNA asserts it is worth reviewing some of the environmental review regulations and procedures outlined in the Minnesota Environmental Policy Act ("MEPA"). Therefore, I have respectfully included background information (please see Sections I – III below), along with other practical benefits of ordering an EIS (please see Section VII below).

In addition, detailed comments are provided that reference specific sections of the EAW for this project. (Please see Section IV below.).

I. THE PURPOSE OF ENVIRONMENTAL REVIEW.

The purposes of the Minnesota Environmental Policy Act ("MEPA"), Minnesota Statute Chapter 116D, are stated in Minn. Stat. 116D.01:

- “(a) to declare a state policy that will encourage the productive use and enjoyable harmony between human beings and their environment;
- “(b) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and
- “(c) **to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.**” [Emphasis added.]

The importance of environmental review is best described in paragraph (c) above.

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The Minnesota Environmental Quality Board (in Minn. Rule 4410.0300, Subp. 3) elaborates on the purposes of environmental review:

“The Minnesota Environmental Policy Act recognizes that the restoration and maintenance of environmental quality is critically important to our welfare. The act also recognizes that **human activity has a profound and often adverse impact on the environment.**

“**A first step** in achieving a more harmonious relationship between human activity and the environment **is understanding the impact which a proposed project will have on the environment.** The purpose of ... [the EQB rules] ... is to aid in providing that understanding through the preparation and public review of environmental documents.” [Emphasis added.]

Minn. Rule 4410.0300, Subp. 4, outlines the objectives of environmental review:

- “A. provide usable information to the project proposer, governmental decision makers and the public concerning the primary environmental effects of a proposed project;
- “B. provide the public with systematic access to decision makers, which will help to maintain public awareness of environmental concerns and encourage accountability on public and private decision making; ...”

“MEPA’s procedures require government bodies to consider the significant environmental consequences of a project **‘to the fullest extent practicable.’** Minn. Stat. 116D.03, subd. 1.” Iron Rangers For Responsible Ridge Action v. Iron Range Resources, Inc. 531 N.W.2d 874, 880 (Minn. App. 1995), review denied.

II. THE PURPOSES OF AN EAW AND AN EIS ARE CLEARLY DIFFERENT.

A. PURPOSE OF AN EAW.

Minnesota Statute 116D.04, Subd. 1a (3), defines an Environmental Worksheet as “... a **brief document** which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action.” (Emphasis added.) See also Bolander v. City of Minneapolis 502 N.W. 2d 203, 206 (Minn. 1993); and Trout Unlimited v. Minnesota Dept. of Agriculture 528 N.W.2d 903, 909 (Minn. App. 1995).

“Whereas the **EAW is not intended to be a detailed analysis** of potential environmental impacts of a proposed project, the EIS is a much more detailed study of all factors contributing to a significant impact on the environment.” (Emphasis added.) Iron Rangers For Responsible Ridge Action v. Iron Range Resources, Inc. 531 N.W.2d 874, 880 (Minn. App. 1995), review denied.

Minnesota Rule 4410.1000, Subpart 1, states:

“The EAW is a **brief document** prepared in worksheet format which is designed to rapidly assess the environmental effect which may be associated with a proposed project. The EAW serves primarily to:

- A. aid in the determination of whether an EIS is needed for the proposed project; and
- B. serve as a basis to being the scoping process for an EIS.” (Emphasis added.)

B. PURPOSE OF AN EIS. (THE RGU CANNOT ABANDON ITS DUTY TO ORDER AN EIS BY DEFERRING ISSUES TO PERMIT PROCESSES.)

“The purpose of an EIS is to provide information to evaluate proposed actions that have the potential for significant environmental effects, to consider alternatives to the proposed actions, and to explore methods for reducing adverse environmental effects. Minn. Rule 4410.2000, Subp. 1.” MCEA v. MPCA 644 N.W. 2d 457, 462 (Minn. 2002).

“The very purpose of an EIS ... is to determine the potential for significant environmental effects *before they occur*. **By deferring this issue to later permitting and monitoring decisions, the [RGU] abandoned [its] duty** to require an EIS where there exists a potential for significant environmental effects.” (Emphasis added.) See Trout Unlimited v. Minnesota Dept. of Agriculture 528 N.W.2d 903, 909 (Minn. App. 1995). See also Pope County Mothers v. MPCA 594 N.W.2d 233, 237-238 (Minn. App. 1999).

C. AN EAW CANNOT SUBSTITUTE FOR AN EIS.

Even though some governmental units have treated an EAW in practice as a substitute EIS, that is not the legal function of an EAW. “From my discussions with various administrators working on environmental review, the consensus seems to be that the content of EAWs tends to be more intensive than perhaps the statute intended.” [Bettison, Stacy L., “The Silencing of the Minnesota Environmental Policy Act: The Minnesota Court of Appeals and the Need for Meaningful Judicial Review.” 26 William Mitchell Law Review, 967, 976 (2000).]

As the Court of Appeals has stated, “The record in this case exemplifies the need for careful evaluation and differentiation between the purpose served by an EAW and that served by an EIS.” See Trout Unlimited v. Minnesota Dept. of Agriculture 528 N.W.2d 903, 909 (Minn. App. 1995).

In other words, an **EAW, even with appendices, is not a substitute for an EIS.**

III. THE PURPOSE AND CONTENT OF PUBLIC COMMENTS TO THE EAW.

Minnesota Rule 4410.1600 states in part, “The comments shall address the accuracy and completeness of the material contained in the EAW, potential impacts that may warrant further investigation, and the need for an EIS ...” [Emphasis added.]

As described below, the Pavilion Estates Subdivision EAW **is inaccurate and incomplete**. In that event, Minn. Rule 4410.1700, Subpart 2a, states that if information is lacking, but could be reasonably obtained, the RGU shall either: (1) make a positive declaration for an EIS and include the lacking information as part of the EIS scope; or (2) postpone the decision on the need for an EIS up to 30 days to obtain the lacking information.

For the reasons stated below, the “lacking” information must be part of the EIS scoping document.

However, even if the EAW is inaccurate or incomplete in its present form, the presently known facts in this case satisfy the criteria for an EIS. The itemized comments in Section IV below describe what information is “lacking” and explain why an EIS must be ordered.

IV. ITEMIZED COMMENTS TO EAW – MR. CARROL L. HENDERSON

FMSNA incorporates by reference, as part of its comments to the EAW, the letter from Mr. Carrol L. Henderson, attached as **Exhibit 1**, and his Vita, attached as **Exhibit 1A**.

As Mr. Henderson explains, the EAW is inaccurate and incomplete. Furthermore, the BlueLine – Xenops Report (July 14, 2021), the basis for the statements in the EAW, is also inaccurate and incomplete. Mr. Henderson states, the Rochester Great Blue Heron Rookery is “**unique in Minnesota**” – not one of the “ubiquitous” great blue heron rookeries that the EAW alleges.

Furthermore, Mr. Henderson states:

“The Rochester Rookery is seriously threatened with disruption and eventual destruction by this development project. By cutting existing nesting trees and adjacent forest on the Connelly property, it will destroy the portion of the Rookery on the Connelly property and expose nesting trees on the adjacent properties of the other two Rookery landowners to windthrow damage and further destruction of the Rookery.”

“The project, if allowed, will have significant environmental impacts.” [Exhibit 1, page 9.]

CAVEAT: The absence or omission of my client’s comment on any statement in the EAW shall **not** be deemed an agreement with, or admission of, the draft EAW statement.

V. THE PROPOSED DEVELOPMENT SATISFIES THE GENERAL STANDARD AND THE FOUR SPECIFIC FACTORS THAT MUST BE CONSIDERED TO ORDER AN EIS.

A. GENERAL STANDARD. Minn. Rule 4410.1700, Subp. 1 provides the general standard which the Responsible Government Unit (“RGU”) must apply to its decision on the need for an Environmental Impact Statement (EIS):

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“An EIS **shall** be ordered for projects that have the potential for significant environmental effects.” [Emphasis added.]

See also: Trout Unlimited v. Minnesota Dept. of Agriculture 528 N.W.2d 903, 909 (Minn. App. 1995): “An EIS must be prepared for projects that have a ‘potential for significant environmental effects.’” [See also Pope County Mothers v. MPCA 594 N.W.2d 233, 236 (Minn. App. 1999).]

In other words, the RGU has **no choice** other than to order an EIS if the four factors below are satisfied.

B. FOUR SPECIFIC FACTORS. Minnesota Rule 4410.1700, Subp. 7, contains the **four specific factors that must be** considered in determining “whether a project has the potential for significant environmental effects.” [See: Iron Rangers For Responsible Ridge Action v. Iron Range Resources, Inc. 531 N.W.2d 874, 880 (Minn. App. 1995), review denied: “The EQB has identified four factors the RGU must evaluate in determining whether a project has potential for significant environmental effects.” See also: Pope County Mothers v. MPCA 594 N.W.2d 233, 236 (Minn. App. 1999) and MCEA v. MPCA 644 N.W. 2d 457, 462-463 (Minn. 2002).]

[Note: The assessment of litigation risks is NOT one of the factors. See Prior Lake American v. Mader 642 N.W.2d 729, 739 (Minn. 2002).]

As explained below, **all four of the factors, necessary to order an EIS for the proposed Pavilion Estates Subdivision, are satisfied**:

1. “... type, extent, and irreversibility of environmental effects.”

Again, as stated in the letter from Mr. Carrol L. Henderson (Exhibit 1): “The Rochester Rookery is seriously threatened with disruption and eventual destruction by this development project. By cutting existing nesting trees and adjacent forest on the Connelly property, it will **destroy the portion of the Rookery on the Connelly property** and **expose nesting trees on the adjacent properties of the other two Rookery landowners to windthrow damage and further destruction** of the Rookery.”

Once the trees are cut, the damage is irreversible.

2. “... cumulative potential effects of related or anticipated future projects.”

The cumulative potential effects of related or future projects are moot because, again, virtually the entire ecological value and aesthetic value of Rochester Great Blue Heron Rookery will be irreversibly lost if the proposed development is approved.

Furthermore, approval of this project can only stimulate further development of the area, along with accompanying environmental degradation.

3. "... the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority."

Minn. Rule 4410.0200, Subp. 51, defines "mitigation" as:

- A. avoiding impacts altogether by not undertaking a certain project
- B. minimizing impacts by limiting the degree of magnitude of a project;
- C. rectifying impacts by repairing, rehabilitating, or restoring the affected environment;
- D. reducing or eliminating impacts over time by preservation and maintenance operations during the life of the project;
- E. compensating for impacts by replacing or providing substitute resources or environments; or
- F. reducing or avoiding impacts by implementation of pollution prevention measures."

"'Mitigation' includes avoiding or limiting the size of a project, repairing or restoring the environment, working to preserve or maintain the environment during the life of the project, or replacing or substituting resources. Minn. Rule 4410.0200, subp. 51." [Trout Unlimited v. Minnesota Dept. of Agriculture 528 N.W.2d 903, 909 (Minn. App. 1995).]

The EAW has not demonstrated – nor is there any other evidence - that any regulatory authority has the power to mitigate damages to the Rochester Great Blue Heron Rookery.

In summary, any statements in the EAW, regarding mitigation of the adverse impacts to Rookery are **"merely vague statements of good intentions" and, therefore, are not adequate mitigation efforts.** See National Audubon Society v. MPCA 569 N.W. 2d 211, 217, quoting Iron Rangers, 531 N.W.2d at 881, which quotes from Audubon Society v. Dailey 977 F2d 428, 436 (8th Cir. 1992).

Most importantly, adequate mitigation (through any permit process) can only be accomplished after ALL OF THE FACTS are gathered. An EIS is the best way to gather the facts.

4. "... the extent to which the environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs."

No other environmental studies on the environmental impacts of the proposed project presently exist or are currently planned by a public agency or the developer.

VI. INSUFFICIENT INFORMATION DOES NOT ALLEVIATE THE NEED FOR AN EIS.

As described in this memo and the attached exhibits, the EAW does not accurately and completely address certain environmental impacts. However, as stated above, the RGU has only

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two choices if there is insufficient information: (1) make a positive declaration for an EIS and include the lacking information as part of the EIS scope; or (2) postpone the decision on the need for an EIS up to 30 days to obtain the lacking information. [See Minnesota Rule 4410.1700, Subpart 2a.]

In fact, Rochester Township has only 30+ days to gather additional information before it is required to make an EIS determination. This is not enough time to gather appropriate information.

In addition, the EAW is incomplete without stating the best date and methodology to adequately survey for the rusty patched bumble bees (RPBB), the first bee in the continental United States to be listed as “endangered” under the federal Endangered Species Act. Certainly, an adequate survey for RPBB cannot occur within the next 30 days for areas directly or indirectly impacted by this project. Thus, an EIS is the only option.

Nevertheless, this letter, the attached exhibits, and the record in general provide sufficient legal and factual basis to require an EIS without gathering any more information beforehand.

VII. OTHER BENEFITS OF AN EIS.

A. ECONOMIC AND OTHER IMPACTS CAN ALSO BE STUDIED. The wisdom of ordering an EIS is not just to clearly determine the nature and extent of the environmental impacts of the proposed project. Minnesota Statute 116D.04, Subd. 2a, states in part,

“The environmental impact statement ... discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement shall also analyze those **economic, employment and sociological effects** that cannot be avoided should the action be implemented.” (Emphasis added.)

Minn. Rule 4410.2300 elaborates on the EIS requirements. Paragraph G requires an analysis of alternatives to the proposed project, including no action. Paragraph H requires a “thorough, but succinct discussion” of sociological and economic impacts.

The economic and environmental impacts of the proposed subdivision on Minnesotan citizens - and Friends of Minnesota Scientific and Natural Areas - are of great concern. to the Friends of Minnesota Scientific and Natural Areas Board of Supervisors.

B. IT IS MORE DIFFICULT TO OBTAIN INFORMATION DURING THE PERMIT PROCESS. The regulations governing permits needed from any other government unit may not have the same ability to obtain the necessary information than an EIS.

C. FMSNA’s “PREFERRED ALTERNATIVE” WOULD BE STUDIED. Missing from the EAW is Friends of Minnesota Scientific and Natural Areas’s preferred alternative,

which is to establish the Rochester Great Blue Heron Rookery as a Scientific and Natural Area.”
This is a reasonable alternative.

VIII. THE RIGHT TO PROCEDURAL DUE PROCESS; AND GOVERNMENT DATA PRACTICES ACT REQUEST.

It is known that Rochester Township may be asking for additional information after the public comment period closes. This presents an unfair advantage unless “procedural due process” is ensured.

To ensure “procedural due process,” Friends of Minnesota Scientific and Natural Areas, pursuant to the Minnesota Government Data Practices Act, requests a copy of all documents and correspondence (including electronic) generated by or received by the Rochester Township – regarding the EAW - after the close of the public period.

In addition, Friends of Minnesota Scientific and Natural Areas requests an adequate opportunity to rebut any new information provided and to provide comments to Rochester Township before the EIS decision is made.

IX. DISTRICT COURT ORDER SUPPORTS NEED FOR EIS.

In the Minnesota District Court case entitled: “Leal G. Segura and Patrick Adamson v. International Properties LLC, et al.,” Judge King issued an Order dated June 25, 2021. (See attached **Exhibit 2.**) Although denying the motion for temporary injunction, the Order states:

Page 4, paragraph 28:

“Adamson testified that on March 19, 2021, Rick Cordie from Hathaway Tree Service called Adamson and told him that the proposed road was staked on the Connelly Property and that he would be coming to remove trees on March 22, 2021. That same day, Adamson walked out to the property and saw the stakes directly under trees with nests.”

In other words, this language acknowledges the immediate threat to the Rochester Great Blue Heron Rookery.

Pages 6-7, paragraph 52:

“If Defendants are able to secure the appropriate permits and other administrative relief, and begin to develop the road or subdivision prior to the court hearing regarding the Relator’s Complaint under the MERA act, and after the nest [sic] are no longer active, destruction of the trees and construction of the road could result in abandonment of the Rookery when the birds return.”

In other words, Judge King acknowledges the significant environmental impact of the proposed development.

Page 7, paragraph 56:

“Dr. Ploger testified that the proposed development of the Connelly Property would materially impair the Rookery and likely would lead to permanent Colony abandonment during the next mating season because the birds would be more vulnerable to predators and disturbances while nesting.”

Again, this language acknowledges the immediate threat to the Rookery.

CONCLUSION ENVIRONMENTAL IMPACT STATEMENT (EIS) IS LEGALLY REQUIRED

The EAW is inaccurate. Mr. Carrol L. Henderson states, “**This EAW misconstrues biological data ... to create a false image of the status of Great Blue Herons in Minnesota.**” In fact, the Rochester Great Blue Heron Rookery is “unique in Minnesota”; it is “... the only verified disjunct great blue heron colony in Minnesota ...”

The proposed development has “the potential for significant environmental effects” - the legal standard for which an Environmental Impact Statement (EIS) must be ordered. The Rochester Great Blue Heron Rookery - “unique in Minnesota” - is a significant natural resource. Mr. Carrol L. Henderson states: “**The Rochester Rookery is seriously threatened with disruption and eventual destruction by this development project. By cutting existing nesting trees and adjacent forest on the Connelly property, it will destroy the portion of the Rookery on the Connelly property and expose nesting trees on the adjacent properties of the other two Rookery landowners to windthrow damage and further destruction of the Rookery. The project, if allowed, will have significant environmental impacts.**”

The proposed development satisfies the four factors that must be considered in determining whether or not to order an Environmental Impact Statement (EIS):

1. “... type, extent, and irreversibility of environmental effects.”

Again, as Mr. Carrol L. Henderson states: “The Rochester Rookery is seriously threatened with disruption and eventual destruction by this development project. By cutting existing nesting trees and adjacent forest on the Connelly property, it will destroy the portion of the Rookery on the Connelly property and expose nesting trees on the adjacent properties of the other two Rookery landowners to windthrow damage and further destruction of the Rookery.” [Exhibit 1.]

“Dr. Ploger testified that the proposed development of the Connelly Property would

materially impair the Rookery and likely would lead to permanent Colony abandonment during the next mating season because the birds would be more vulnerable to predators and disturbances while nesting.” [Exhibit 2.]

2. “... cumulative potential effects of related or anticipated future projects.”

The cumulative potential effects of related or future projects are virtually moot because, of the impacts of the Pavilion Estates Subdivision on the Rochester Great Blue Heron Rookery. [Exhibit 1 and 2.]

3. “... the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority.”

The EAW has not demonstrated – nor is there any other evidence - that any regulatory authority has the power to mitigate damages to the Rochester Great Blue Heron Rookery.

4. “... the extent to which the environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.”

No other environmental studies on the environmental impacts of the proposed project presently exist or are currently planned by a public agency or the developer.

As stated in Section II.B. above, “The very purpose of an EIS ... is to determine the potential for significant environmental effects *before they occur*. **By deferring this issue to later permitting and monitoring decisions, the [RGU] abandoned [its] duty** to require an EIS where there exists a potential for significant environmental effects.” (Emphasis added.) See Trout Unlimited v. Minnesota Dept. of Agriculture 528 N.W.2d 903, 909 (Minn. App. 1995). See also Pope County Mothers v. MPCA 594 N.W.2d 233, 237-238 (Minn. App. 1999).

In other words, legally, the Rochester Township Board of Supervisors must “GET THE FACTS” before Rochester Township can decide what to do. The information contained in the EAW is inadequate to support a conclusion that there will be no “... potential for significant environmental effects.” An EIS is the best way to “GET THE FACTS.”

Therefore, **FMSNA respectfully states Rochester Township is legally required to order an EIS**, which will contain a thorough analysis of the issues raised in this letter, and by other commenters, including but not limited to:

- (1) precise impact on the Rochester Great Blue Heron Rookery;
- (2) cost comparison of alternatives, confirmed by an independent consultant;
- (3) mitigation measures; and
- (4) a thorough on-site survey for the existence of the federally endangered rusty-patched bumble bee.

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To paraphrase Aldo Leopold, an environmental dispute arises "... from which the sharpest pen gains much glory, but the [resource] gains nothing but a chance to disappear." (Curt Meine, Aldo Leopold: His Life and Work. Madison: University of Wisconsin Press, 1988. Page 289.) Let not the sharpest pen supplant the necessity for making sound decisions, based on the best information available. A thoroughly researched EIS will help all parties make the best decision possible.

On behalf of the Friends of Minnesota Scientific and Natural Areas, I thank you in advance for your decision to order an Environmental Impact Statement (EIS).

Sincerely yours,

Thomas E. Casey

Thomas E. Casey

TEC/rf

cc: Friends of Minnesota Scientific and Natural Areas – Board of Directors
file

Enclosures:

- Exhibit 1: Mr. Carrol L. Henderson – Comments to EAW (9 pages)
- Exhibit 1A: Mr. Carrol L. Henderson - Vita (9 pages)
- Exhibit 2: District Court Order - June 25, 2021 (10 pages)

P.S. - PLEASE TAKE NOTICE that FMSNA will be filing a Notice of Intervention as an intervening party in the proceeding, pursuant to the Minnesota Environmental Rights Act (Minnesota Statute 116B.09).