

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

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

Nancy Lange	Chair
Dan Lipschultz	Commissioner
Matt Schuerger	Commissioner
John Tuma	Commissioner
Katie Sieben	Commissioner

In the Matter of the Application of
Enbridge Energy, Limited Partnership for a
Certificate of Need for the Line 3
Replacement Project in Minnesota from the
North Dakota Border to the Wisconsin
Border

MPUC PL-9/CN-14-916;
OAH 65-2500-32764

In the Matter of the Application of
Enbridge Energy, Limited Partnership for a
Routing Permit for the Line 3 Replacement
Project in Minnesota from the North
Dakota Border to the Wisconsin Border

MPUC PL-9/PPL-15-137;
OAH 65-2500-33377

**COMMENTS OF FRIENDS OF THE HEADWATERS ON
LINE 3 PROJECT FINAL EIS ADEQUACY**

I. INTRODUCTION

Thank you for the opportunity to comment on the Final Environmental Impact Statement (FEIS) prepared by the Minnesota Department of Commerce (DOC-EERA) for the Line 3 project. Friends of the Headwaters (FOH) is a volunteer, grassroots organization composed of people who live, work, and recreate in the unique and fragile Minnesota geography that is threatened by this proposed crude oil pipeline.

In the very limited time available, FOH has reviewed as much of the FEIS as possible. Our conclusion is that the FEIS still does not meet the “adequacy” standard set forth in the

Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04. The deficiencies are both procedural and substantive:

1. *No DNR and MPCA comments*, fully available to the public, as required by MEPA;
2. *Improperly narrow purpose and need* for the project, unlawfully restricting the range of alternatives analyzed fully;
3. *Improper reliance on Enbridge's false claims about the physical footprint and the life of the project*, skewing the results;
4. *No analysis of possible or probable site-specific impacts from a major oil spill* in the most sensitive areas along the proposed route, compared to alternatives;
5. *No analysis of cumulative impact of routing multiple pipelines* along the same pipeline corridors, or including likely future pipelines in the same corridor;
6. *An improperly slanted and misleading analysis of the SA-04 alternative*, needless analysis of infeasible oil-by-rail alternative, and misleading “no action” alternative;
7. *Inadequate and sometimes nonexistent responses to comments* on the earlier draft environmental impact statement (DEIS); and
8. *Nonexistent analysis of financial assurance for mitigation options.*

Many of the problems with the FEIS are, FOH believes, the inevitable outcome of artificial and unrealistic deadlines for the environmental review of a project of this size and complexity. That leads inevitably to too heavy reliance on data and analysis from the project proponent, it forces shortcuts, e.g. the generic descriptions of potential oil spill impacts, and it fails to give the decision-maker, in this case, the Minnesota Public Utilities Commission (PUC) the information and analysis it needs to make a proper judgment on whether the benefits of this proposed project outweigh the risks.

The PUC, like most state agencies, operates according to its own rules and priorities. Evaluation of environmental impacts is not at the heart of its mission or its expertise. Yet, under

Minnesota law, the PUC owes particular duties to the environment and the public that transcend the narrow rules on large energy facilities.

- The PUC cannot permit a project that threatens to pollute, impair, or destroy Minnesota's natural resources if a feasible and prudent alternative is available. Economic considerations alone cannot be the basis for letting such a project proceed. Minn. Stat. § 116D.04, subd. 6.
- The PUC has a fiduciary duty to protect the public trust in Minnesota's waters.
- The PUC may not transfer eminent domain authority to a private entity unless the project meets the constitutional "public use" standard in the Fifth Amendment.
- The PUC must act consistently with Minnesota's overall policy to reduce greenhouse gas emissions.

That is why it is so critical that the PUC's judgment be informed by a fair and complete analysis of the potential environmental impacts of this project, of alternatives that might do less potential damage, and of mitigation measures that could reduce the environmental risk. Let's be clear. Enbridge's proposed Line 3 will cut through the area with the cleanest lakes, rivers, and streams in the state outside the Boundary Waters Canoe Area. It will pass through areas with extremely high susceptibility to groundwater and drinking water contamination. It will drive through the region of the state with the highest retention of wetlands, and some of the best wild rice habitat in the world. It will skirt extremely sensitive areas like the La Salle Lake Scientific and Natural Area and State Recreation Area, not to mention the iconic headwaters of the Mississippi River in Itasca State Park.

The risk of a major oil spill like the one in Marshall, Michigan in 2010 near the Kalamazoo River that this company poorly managed is quite real, and the PUC needs to know what the impact of such a spill (or larger one) could be to some of Minnesota's most vulnerable landscapes, and whether those impacts can be avoided

This FEIS does not contain that information. We do not know what would happen if a 20,000 barrel “diluted bitumen” spill happened near the wild rice stands north of Itasca State Park. We do not know what would happen if a big spill happened in the central sands region north of Park Rapids, where the sandy soil is porous and the drinking water aquifers are already suffering from contamination. Because of deficiencies like that, this FEIS does not give the members of the PUC the information they need to understand the risks this project poses, or to discharge their statutory and constitutional duties justly and fairly. For reasons explained later in this comment, the entire environmental review process in this case has been unfair, important views have been precluded, and the results have unfortunately been preordained.

The remedy is to send this back to DOC, insist on written public comments from the Minnesota DNR and MPCA, and direct the preparation of a supplemental EIS that meets MEPA’s standards. Until an EIS is prepared that meets that test, the certificate of need and route permit proceedings before the PUC on this project should be suspended.

II. ARGUMENT

A. THE FEIS DOES NOT INCLUDE PUBLIC COMMENTS FROM THE AGENCIES WITH SPECIAL EXPERTISE IN ENVIRONMENTAL EFFECTS. THAT VIOLATES THE MINNESOTA ENVIRONMENTAL POLICY ACT.

The Minnesota Environmental Policy Act (MEPA) requires that:

Prior to the preparation of a final environmental impact statement, the governmental unit responsible for the statement shall consult with and request the comments of every governmental office which has jurisdiction by law or special expertise with respect to any environmental effect involved. *Copies of the drafts of such statements and the comments and views of the appropriate offices shall be made available to the public.* The final detailed environmental impact statement and the comments received thereon shall precede final decisions on the proposed action and shall accompany the proposal through an administrative review process.

Minn. Stat. § 116D.04, subd. 6a (emphasis added). That closely tracks language in the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C) (“Prior to making any detailed statement, the [lead agency] shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality, and to the public . . . and shall accompany the proposal through the existing agency review process.”)

That, of course, imposes an implied duty on those agencies to prepare comments. The Council on Environmental Quality (CEQ), which is responsible for interpreting NEPA for the federal agencies, has made that explicit:

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards *shall* comment on statements within their jurisdiction, expertise, or authority. . . . A federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

40 C.F.R. § 1503.2 [Duty to comment](emphasis added).

In the federal practice, then, it is routine and expected that agencies like the U.S. Forest Service or the U.S. Fish and Wildlife Service will comment on EISs prepared by agencies like the Bureau of Land Management (BLM).¹ Those comments become part of the official record, they are used by members of the public to direct and support their advocacy efforts, and they often play a central role in judicial review of the adequacy of environmental impact statements. *E.g. Western Watershed Project v. Kraalyenbrink*, 632 F.3d 472, 492 (9th Cir. 2010)(BLM EIS

¹ The U.S. Environmental Protection Agency (EPA) has an explicit statutory duty to submit comments. 42 U.S.C. § 7609(a).

inadequate because no reasoned response to adverse comments from U.S. Fish and Wildlife Service, EPA, and state agencies); *Center for Biological Diversity v. US Forest Service*, 349 F.3d 1157, 1169 (9th Cir. 2003)(Forest Service EIS inadequate because of insufficient response to responsible opposing views from agencies); *National Audubon Soc’y v. Dept. of Navy*, 422 F.3d 174 (4th Cir. 2005)(Navy EIS inadequate, focus on adverse comments from fish and wildlife agencies); *see generally* Michael C. Blumm and Maria Nelson, Pluralism and the Environment Revisited: The Role of Comment Agencies in NEPA Litigation, 37 *Vt. L. Rev.* 5 (2012)(review of impact of agency comments in NEPA cases).

Here, that process has been short-circuited. The relevant agencies—the Minnesota DNR and the MPCA—have entered into an agreement with the Department of Commerce that they will *not* submit comments that the public can review and incorporate into their own advocacy efforts. It appears that there has been correspondence between DOC and the environmental agencies, but we have no idea whether the staff at the agencies with the “special expertise” on environmental impacts here are satisfied with the environmental impact statement that has been produced. Anecdotal evidence suggests that many are not.

When many of these same issues came up in the Sandpiper proceedings a couple of years ago, the environmental agencies were quite critical of the environmental analysis that had been done. The MPCA proposed an alternative route which would avoid most of the sensitive areas that Enbridge’s proposed Sandpiper (and Line 3) would run through and still deliver crude oil to Enbridge’s Superior terminal. *See generally* Stine/Landwehr letter to Scott Ek, dated April 28, 2015); MPCA comment letter, dated October 29, 2014; DNR comment letter, dated January 23, 2014. The MPCA also agreed that a route like the proposed SA-04, which would run much more directly from the tar sands region in Alberta to the refineries and terminals in the Chicago

area, mostly through flat farmland where there would be easy access if a spill occurred, would pose even less of an environmental threat, and deserved a thorough analysis.

It is reasonable to infer that that kind of information and analysis provided in Sandpiper would have come from DNR and the MPCA again in this case. The only major difference is that now Enbridge wants to run even more dangerous “diluted bitumen” through the line, which would likely only amplify the concerns of the environmental agencies. Because of the MOU among the agencies, however, that information is not available to the public or to the PUC. That directly violates the requirements of Minn. Stat. § 116D.04, subd. 6a, and is sufficient reason alone to find the FEIS inadequate.

Not only does the PUC need an honest, unfiltered analysis from the DNR and the MPCA to exercise its duties fairly, but the public is entitled to that as well. The public does not have the resources and expertise agencies like the DNR and the MPCA do, and those agencies have an obligation to make sure those resources and that expertise serve the interests of Minnesota’s water, its environment, and the public interest. Those agencies cannot do that if this unlawful MOU binds their hands.

To get into compliance with the express requirement of MEPA at Minn. Stat. § 116D.04, subd. 6a, the PUC must request, receive, and make public formal comments from the MPCA and the DNR as part of a supplemental EIS process. The absence of that in this case is reason enough to find the FEIS inadequate.

B. THE ENTIRE FEIS IS COMPROMISED BY ITS FAILURE TO DESCRIBE THE PROPOSED PROJECT’S FOOTPRINT ACCURATELY.

Obviously, an environmental impact statement cannot assess environmental effects adequately without an accurate description of the project’s “footprint.” Guidance from Minnesota’s Environmental Quality Board (EQB) states that:

The project description is the most important item in the EAW. It must be completed thoroughly and accurately. . . . Clear, complete and detailed project descriptions are essential to understanding the potential for environmental effects . . . The detailed description should be focused on aspects of the project that may directly or indirectly manipulate, alter or impact the physical or natural environment.

EQB, EAW Guidelines for Preparing Environmental Assessment Worksheets (2013), <https://www.eqb.state.mn.us/sites/default/files/documents/EAW%20guidelines%202013%20revision.pdf>.

FOH's comments on the DEIS contained a set of recommendations from a pipeline safety consultant on the kind of information needed to provide a useful description of this project: the pipeline elevation profile, a line indicating maximum operating pressure on the elevation profile, a hydraulic profile at the design rate case for the control crude oil case on the elevation profile, location of mainline valves and their type of operation (manual, remote, automatic), the general location/type of critical leak detection monitoring devices by milepost, and identification by milepost of high consequence areas. Accufacts report, FOH comment on DEIS. None of those items has been added to the FEIS, and DOC has offered no rationale for failing to include that information.

In its comments on the draft EIS, FOH also explained why Enbridge's acreage estimates were likely understated by 40% or more. FOH comment, 14, 15, 23-31. The primary reason was that building a pipeline through hilly terrain like that south of Clearbrook to Park Rapids results in a much wider right-of-way than Enbridge claims in its proposal. Side-hill cuts to create 50-foot work pads, deep cuts at the crests of hills, and very wide construction ROWs in terrain steeper than 6 or 7 degrees exponentially increase the amount of land disturbed. The MinnCan pipeline along the same route demonstrated that with the environmental footprint

sometimes exceeding 400 feet. Of course, these are the same areas where the natural resources are the most sensitive.

DOC's only response was to say they "assume[] the requested route and ROW will be adequate and the applicant will comply." The consequence is that the environmental impacts of this project, particularly in the construction phase, are seriously underestimated, and particularly so in some of the most sensitive areas, such as the La Salle Valley area north of Itasca State Park. The FEIS needs to use the experience of other pipeline projects, including the MinnCan pipeline construction, to make accurate estimates about the amount and type of land that will actually be disturbed before making an assessment of environmental impacts. Failure to do so compromises much of the FEIS's analysis.

The FEIS also accepts Enbridge's premise that the life span of the project will be 30 years. Obviously, pipelines like this have been in service much longer than that, including several of Enbridge's pipelines including the old Line 3. By using an implausible assumption about project life span, the FEIS again understates the full environmental impacts of the project. FOH recommends a lifespan assumption of more like 50 years so that the EIS's calculations can be more accurate.

C. THE FEIS'S FAILURE TO ASSESS POTENTIAL SITE-SPECIFIC IMPACTS FROM AN OIL SPILL AT PARTICULARLY FRAGILE ROUTE LOCATIONS DENIES THE PUC AND THE PUBLIC THE INFORMATION AND ANALYSIS THEY NEED TO UNDERSTAND THE POTENTIAL ENVIRONMENTAL EFFECTS OF THIS PROJECT.

Under NEPA, the rule is that "[r]easonable forecasting and speculation is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussions of future environmental effects as 'crystal ball inquiry.' If it is reasonably possible to analyze the environmental consequences in an EIS . . . , the agency is

required to perform that analysis.” *Pacific Rivers Council v. U.S. Forest Service*, 689 F.3d 1012, 1026-27 (9th Cir. 2012)(rejecting forest plan EIS that did not analyze site-specific impacts on fish)(citations omitted). The “reasonably possible” test has been a bedrock principle in the NEPA case law for decades. *E.g. California v. Block*, 690 F.2d 753 (9th Cir. 1982).

The DOC has, however, from the beginning, refused to assess site-specific impacts from an oil spill along Line 3’s route. Their argument has been the one rejected in cases like *Pacific River Council*, that “[t]he specific impacts of large oil releases are highly dependent on incident-specific factors that are impossible to predict with certainty.” Instead, DOC has provided only the following:

1. Projections for how far oil would travel in the first 24 hours after a spill at seven selected locations under several sets of circumstances;
2. Blanks where numbers ought to be, redacted because of Enbridge’s claim that the data on how much oil could spill is non-public; and
3. Generic discussions about environmental impacts oil spills can have.

That does not give either the public or the PUC the information it needs. Before approving or rejecting this pipeline proposal, the public and the PUC 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. How far could the oil travel? What would it do to wetlands, rivers, lakes, and groundwater? What would be the impact on drinking water supplies? What would be the fish, wildlife and plant life impacts? Could a spill be cleaned up without doing additional damage? What would a clean-up cost? What would it take to compensate for natural resource losses? None of that is in the FEIS.

Many of the comments on the DEIS, including FOH's, identified particular locations where the potential impact of a spill could be especially severe. FOH focused, not surprisingly, on the Mississippi Headwaters area, but also on the Wild Rice River/Wild Rice Lakes and the wetland complex surrounding the area near the river headwaters, the La Salle Valley, the Straight River, the porous soil areas in the Central Sands region, and the high-amenity and high-value lake country north of Park Rapids. Other intervenors focused on particular places in the ceded territories where the signatory tribes exercise their treaty hunting, fishing, and gathering rights.

With adequate time, the DOC (along with the DNR and the MPCA and tribal resource managers) could have focused on the locations of the greatest concern to natural resource managers and the public. They could have analyzed where the oil from a large spill could possibly go in those locations, used the catalog of natural resources in the area and the literature on oil spill (and especially "dilbit" spill) effects, and projected potential damages to drinking water, fish, wildlife, plants, and cultural/historic resources at those places. They could then have followed up with assessments of clean-up costs (both financially and potential further harm to the environment) and the potential compensation that would be required to cover drinking water problems, natural resource damages, and public and private property damages. That would have given the PUC and the public a much clearer picture of the potential environmental impacts along the proposed route.

Instead the PUC and the public are asked to extrapolate from so-called representative samples, make estimates about "worst case" spill amounts (since that information is not available to the public) and scenarios, and project possible water and resource damages. Although the analysis improved from the DEIS to the FEIS, it still does not meet the requirement the courts

construing NEPA have found—that site-specific impacts be assessed as soon as “reasonably possible.”

D. THE FEIS DOES NOT ADEQUATELY ANALYZE CUMULATIVE IMPACTS OF “CORRIDOR FATIGUE” FROM THIS PROJECT OR LIKELY FUTURE ENBRIDGE PIPELINE PROJECTS

The Environmental Quality Board’s (EQB) rules require that environmental impact statements must contain “for the proposed project and each major alternative, . . . a thorough but succinct discussion of potentially significant adverse or beneficial [environmental, economic, employment, and sociological] effects generated, be they direct, indirect, *or cumulative*.” Minn. R. 4410.2300, subp. H (emphasis added).² A “cumulative impact” is defined in CEQ’s rules as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions.” 40 C.F.R. § 1508.7; *see Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014)(finding environmental assessment of pipeline deficient for failure to evaluate cumulative effects of reasonably foreseeable projects).

The “cumulative impact” discussion in this FEIS is insufficient for at least three reasons:

1. It does not include an analysis of Sandpiper—the pipeline Enbridge has already proposed along the same corridor to carry light crude from the Bakken shale formation in North Dakota.
2. It does not include an analysis of the proposed new Line 66 through the existing pipeline corridor through Wisconsin, which is even more likely with the retirement of

² In *Citizens Advocating for Responsible Dev. (CARD) v. Kandiyohi County Bd. of Comm’rs*, 713 N.W.2d 817 (Minn. 2006), the Court found a distinction in the EQB rules between “cumulative impacts,” to be considered in deciding whether a generic EIS should be prepared under Minn. R. 4410.3800, and “cumulative potential effects,” to be considered in deciding whether a project-specific EIS is needed under Minn. R. 4410.1700, subp. 7. Minn. R. 4410.2300, subp. H, the relevant rule provision in this case, adds a third phrase—“cumulative effects”—to which the Minnesota courts have not yet decided whether a third definition might apply.

Enbridge Line 5 under the Straits of Mackinac a strong possibility.³

3. It does not analyze the combined impact of running multiple pipelines in the same corridors in Minnesota, a key element of Minnesota pipeline policy to date.

First, refusing to analyze the impact of the proposed Sandpiper pipeline is inexcusable.

Sandpiper was proposed to be located within a few feet of the Line 3 project. Enbridge withdrew its application for Sandpiper, but has since described that project as “on hold” (as does the supplemental EIS for the Line 67 project, U.S. Department of State, Supplemental Environmental Impact Statement, <https://www.state.gov/e/enr/applicant/applicants/environmentalreview/>). Enbridge of course denies that it will go forward with Sandpiper, but that is a classic “segmentation” strategy, designed to forestall the evaluation of the environmental impacts of all the likely projects in a defined geographic area. *See generally Delaware Riverkeeper*, 753 F.3d at 1314-15.

Similarly, a new Line 66 along Enbridge’s Wisconsin corridor, twinning the existing Line 61, also easily meets the “reasonable foreseeability” test. It is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Northwest Bypass Group v. U.S. Army Corps of Engineers*, 552 F. Supp. 2d 97 (D.N.H. 2008)(collecting cases). These are projects for which Enbridge has done extensive planning—the route is clear, the likely desired transport capacity of the proposed 42 inch pipeline is highly predictable, and the environmental impact issue is the same. What would be the impact of an additional pipeline in the same corridor as Line 3 in Minnesota, feeding into the Line 61 corridor through Wisconsin? FOH acknowledges that DOC added some general discussion of possible future projects in the FEIS, but the FEIS clearly does not have the detailed environmental impact of the

³ Line 66 comes close to being a “connected” action that needs to be analyzed

cumulative impact of Line 3 plus these reasonably foreseeable projects that it needs to meet MEPA's standards.

The EQB definition of "cumulative potential effects" is consistent with that conclusion.

As the EQB rule explains:

"Cumulative potential effects" (CPE) means the effect on the environment that results from the incremental effect 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. The definition goes on to list the factors a responsible government unit should evaluate to determine if "a basis of expectation has been laid," "whether a project is reasonably likely to occur," or "whether sufficiently detailed information is available about the project to contribute to the understanding of cumulative potential effects."

[W]hether 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 of 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. For Sandpiper, there is no question those criteria have all been met. Enbridge has not formally filed for permits for Line 66, but it has surveyed the route, and, if Enbridge ends up with an extra 300 to 400 thousand barrel per day of tar sands oil through Line 67, and the new tar sands crude capacity of a new Line 3, it will have no choice but to add to the pipeline capacity going south from Superior through Wisconsin. As Enbridge acknowledges, It cannot move diluted bitumen from the tar sands through Line 5, and so its only option to bring it south will be an additional Line 66. That means it should be included in the necessary cumulative impacts analysis for this environmental impact statement.

The FEIS also must evaluate the cumulative environmental impact of continuing the policy of routing pipelines in existing corridors, many of which were established before modern environmental laws were enacted. Understanding the cumulative potential effects of cumulatively adding more and more pipelines to existing corridors in poor locations should be a central focus of this environmental review. Cumulative impacts of projects in the same geographical area are the ones where the law clearly requires an analysis in what is otherwise a project-specific EIS.

To avoid doing this analysis, the DOC relies on language in Minn. R. 4410.0200, subp. 11a which says RGUs may “consider the current aggregate effect of past actions. It is not required to list or analyze the impacts of individual past actions, unless such information is necessary to describe the cumulative potential effects.” That tracks the language in a CEQ guidance. CEQ, Guidance on the Consideration of Past Actions in Cumulative Impacts Analysis (2005), <http://energy.gov/nepa/downloads/guidance-consideration-past-actions-cumulative-effects-analysis>. No one has demanded a detailed analysis of individual past actions, but both Minnesota and Enbridge have for years followed a policy of putting new pipelines in existing corridors, even when those corridors have been placed in environmentally sensitive areas. There are at least 7 pipelines in the corridors west of Clearbrook and six east on to Superior. The proposed loop south from Clearbrook to Park Rapids is already occupied by the MinnCan pipeline. Grouping pipelines together creates greater risks—working on one pipeline can damage another, a breach of one pipeline can trigger problems in others, environmental damages can multiply—and there is no analysis of those risks in this FEIS. One-by-one assessments of single projects, when there are past and future projects in the same geographical area and with

the same likely environmental consequences, takes away much of the value of environmental review, and violates the requirements of MEPA.

E. THE FEIS ANALYSIS OF ALTERNATIVES TO ENBRIDGE’S PROPOSED PROJECT IS FATALLY FLAWED.

The Environmental Quality Board’s (EQB) environmental review rules require that EISs “compare the potentially significant impacts of the proposal with those of reasonable alternatives to the proposed project.” Minn. R. 4410.2300, subp. G. The rule provides that:

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.

Id. The CEQ describes the alternatives requirement as the “heart” of environmental review, 40 C.F.R. § 1502.14, and courts have described it as environmental review’s “linchpin.” *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2nd Cir. 1972). According to an early landmark case under NEPA, the purpose of the alternatives requirement is:

To ensure that each agency decision maker has before him [sic] and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit analysis. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.

Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

The FEIS in this case does not contain an adequate consideration of alternatives. The major deficiencies are that:

1. DOC has accepted as a given Enbridge’s statement that the purpose and need for this project is to move crude oil to Superior, Wisconsin, when it is obvious that the purpose and (alleged) need of the project is to get crude oil to refineries in the Chicago area, the Gulf Coast, and conceivably overseas. That restricted purpose and

need has inappropriately reduced the scope of alternatives to which the DOC has given full consideration.

2. DOC's consideration of the "no action" alternative assumes Enbridge will continue to use its old Line 3, when it will now most likely replace the old Line 3 with the expanded capacity of Line 67 the PUC has already approved. The description of the impact of the "no action" alternative is therefore wholly off-base.
3. The consideration of the "all trains" alternative is essentially useless, because there is no chance of that alternative ever being seriously considered.
4. DOC's analysis of the SA-04 alternative is highly misleading and unfair, and requires a much more thorough review.

Purpose and Effect

The DOC appears to believe that it must accept Enbridge's definition of its proposal's purpose and need that the goal is to get crude oil to its Superior terminal in Wisconsin, which of course limits the range of alternatives that need full consideration. If that is their position, it is inconsistent with the case law on the subject.

The basic principle was articulated in *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986), where the court declared that "the evaluation of 'alternatives' . . . 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." *Id.* at 638. As that same court recognized a decade later:

The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.

Simmons v. U.S. Army Corps of Eng'rs, 120 F.3d 664, 669 (7th Cir. 1997); accord *National Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010).

Enbridge of course wants to segment its effort into discrete elements to make it more likely that individual segments can get approved. By permitting Enbridge to pretend that its goal is just to get oil to the terminal in Superior, however, DOC limits the range of alternatives to be fully considered. The SA-04 alternative, which does not route the oil to Superior but instead takes a more direct route from the tar sands to the refineries in the Chicago area, in *Ontario*, and perhaps to the Gulf Coast or overseas, is included only because of the PUC's order. It gets less than full consideration because it is not consistent with Enbridge's claimed purpose and need. That is a mistake, and is inconsistent with MEPA.

"No action" Alternative

The FEIS accepts Enbridge's argument that the "no action" alternative is to leave the old Line 3 in service, with the costs and environmental risks involved. But the courts have made it clear that "no action" refers to the *agency* action, not that the project proponent will do nothing if its proposal is rejected. The discussion of a "no action" alternative must include a discussion of reasonably foreseeable actions that would result from an agency not to allow the proposed project. *E.g. Young v. General Services Admin.*, 99 F.Supp.2d 59 (D.D.C. 2000), *aff'd* 11 Fed. Appx. 3 (D.C. Cir. 2000). And CEQ agrees:

Where 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. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026 (1981).

If the PUC denies Enbridge's applications for a certificate of need and a route permit for its proposed new Line 3, the status quo will not require continued operation of the old Line 3. As the DOC testimony in the certificate of need proceedings acknowledges, it will be the expanded Line 67 the PUC has already approved that will replace the old Line 3. There will be environmental consequences, analyzed in the environmental review for the Line 67 expansions, but they will not be as severe as the potential consequences of keeping the old Line 3 going beyond its useful life.

The proposed new Line 3, no matter how often Enbridge protests, is *not* a replacement of the old Line 3. It is an *expansion* of Enbridge's current oil transport capacity through its Mainline system, and in particular an expansion of its capacity to move tar sands crude—"diluted bitumen"—to refineries. The "no action" alternative, properly framed, will significantly reduce the potential environmental impacts, and the FEIS needs to complete that analysis.

Train Alternatives

DOC has also apparently accepted Enbridge's contention that, if it cannot build a new Line 3, it will have no choice but to move the oil through Minnesota by train, and so the FEIS has a discussion of the potential environmental impacts of moving hundreds of thousands of barrels of diluted bitumen per day by rail.

That is not a reasonable alternative, it is a straw man, and it skews the environmental analysis in favor of Enbridge's proposal. For tar sands, which Enbridge acknowledges will be 100% of what goes through Line 3 in two or three years, rail cars have to be specially made, they need heating capacity, they come up against weight restrictions, the loading process is time intensive, and fewer barrels can be carried in a tank car. When the cost of tar sands production

clearly exceeds the market price, the extra costs of rail transportation are prohibitive. Rail is a niche market, constituting less than 3 % of overall tar sands shipments, and there is no possibility that that can or will be expanded to absorb the amount of oil Enbridge wants to transport through its new Line 3 project.

Canada ships almost no oil by rail, and it never has. The highest amount ever exported by rail was 178,000 barrels per day. In July 2017, Canadian crude oil exports by rail totaled 92,551 bpd, according to the National Energy Board. <https://www.nerb-one.gc.ca/nrg/sttstc/crdlndptrlmprdct/stt/cndncrdlxprtssl-eng.html>. That is less than one-fourth of the capacity of just one of the pipeline projects currently proposed.

The FEIS therefore contributes to the dishonest argument and empty threat that “if you don’t let us build our pipeline, we will put more oil-by-rail traffic through your community.” The purpose of an EIS is to provide the decision-maker and the public with an objective analysis of reasonable alternatives. By crediting the threat of oil trains as an alternative to the proposed new pipeline, the FEIS instead misleads the public and the PUC into concluding that Enbridge’s proposal is more reasonable. That cannot be reconciled with MEPA’s purpose.

SA-04

As required by the PUC, DOC did some evaluation of the SA-04 alternative in the DEIS and FEIS. That evaluation has been, however, not just insufficient, but seriously misleading for several reasons:

1. The FEIS continues to insist that SA-04 is “longer” than Enbridge’s proposal, and therefore, since shorter is better than longer when it comes to oil pipelines, the FEIS strongly suggests that Enbridge’s proposal is superior. SA-04 is, of course, “shorter” than Enbridge’s proposal because it follows a direct route from the tar sands in Alberta to the refineries in the Chicago area where the oil will actually go. Enbridge’s proposal, in contrast, follows a convoluted route from the North Dakota border to Superior, where none or virtually none of the oil will be used, and then sends the oil down through Wisconsin, again through environmentally sensitive

landscapes, to arrive at the potential refinery destinations. If the FEIS instead compares apples to apples, then its “shorter is better than longer” maxim will rebound in SA-04’s favor.

2. The FEIS refuses to draw the qualitative distinction between irreplaceable wetlands, lakes, rivers, and vulnerable groundwater that is difficult to access with flat farmland with easy access if a spill were to occur. DOC asserts that is “not its role” to make that distinction, and so they rely to a considerable extent on simplistic acreage impacts. That is also misleading. All parties, including Enbridge, have acknowledged that building pipelines on flat open farmland is the first choice. Enbridge does not want to do that, however, because it will cost them more. Rather than simply cataloging natural resource features in the different corridors, the FEIS needs to draw qualitative distinctions that recognize that polluting irreplaceable wetlands, lakes, streams, or wild rice stands imposes greater costs than a spill in flat farmland, with plenty of roads, and few natural resources.
3. The FEIS also makes much of potential impacts of SA-04 in Karst topography in southeast Minnesota and in wellhead protection areas. No one—least of all FOH—suggests that oil pipelines can be safely routed through Karst topography like that in the Driftless Area in southeastern Minnesota, southwestern Wisconsin, or northeastern Iowa. What the FEIS does not acknowledge, however, is that moving SA-04 approximately 25 miles to the west in Minnesota eliminates those potential problems. The FEIS should evaluate the environmental impact of that route with that modification, or with other mitigation alternatives, in exactly the same way it makes adjustments in Enbridge’s proposed route.

Without an adequate analysis of alternatives, no EIS can pass the statutory standard in MEPA. The FEIS falls far short.

F. THE FEIS DOES NOT ADEQUATELY RESPOND TO COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT

The Environmental Quality Board (EQB) rules governing environmental review require the responsible government unit (RGU) to “respond to the timely substantive comments received on the draft EIS and prepare the EIS.” Minn. R. 4410.2600, subp. 10. The CEQ regulations on responses to comments require that:

An agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond by one or more of the means listed below, stating its response in the final statement. Possible responses are to:

- (1) Modify alternatives including the proposed action;
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency;
- (3) Supplement, improve, or modify its analysis;
- (4) Make factual corrections; and
- (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

40 C.F.R. § 1503.4(a). The CEQ's "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," its general guidance for NEPA liaisons, states that:

Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

<https://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf> (Question #29). The leading court decision on responses to comments under NEPA emphasizes how critical public comments and agency responses are to the process:

NEPA's public comment procedures are at the heart of the NEPA review process. NEPA requires responsible opposing viewpoints to be included in the final EIS. This reflects the paramount Congressional desire to internalize opposing viewpoints into the decision-making process to ensure that an agency is cognizant of all the environmental trade-offs that are implicit in a decision. To effectuate this aim, NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action.

California v. Block, 690 F.2d 753, 770-71 (9th Cir. 1982). Based on that principle, then, the court found that, under NEPA:

Agencies are . . . obliged to provide a "meaningful reference" to all responsible opposing viewpoints concerning the agency's proposed decision. This standard requires the agency to identify opposing views found in the comments such that

“differences in opinion are readily apparent.” Moreover, “there must be good faith, reasoned analysis in response.”

Id. at 773 (citations omitted).

This FEIS does not meet that standard. Again, because of the artificial deadlines imposed on the process, most of the “possible responses” in the CEQ rules were precluded from the start. There simply was no time to “modify the alternatives, including the proposed action” or “develop and evaluate [new] alternatives” or even “supplement, improve, or modify its analysis.” All DOC could do is make minor corrections, add some additional data points to the mix, and, for the most part, “explain why comments did not warrant further agency response.” The time limits alone made it impossible for DOC to respond to comments at the level required by the statute.

In addition, though, DOC simply ignored many of the substantive comments it received. For example, the pipeline safety consultant hired by Friends of the Headwaters pointed out that critical pipeline route information was missing for the proposed route and the alternatives:

1. The pipeline elevation profile (approximate elevation at each milepost);
2. A line indicating the maximum operating pressure (MOP) on the elevation profile;
3. A hydraulic profile at the design rate case for the control crude oil case on the elevation profile;
4. The location of mainline valves and their type of operation, e.g. manual, remote, automatic) as well as specific safety design if warranted;
5. General location and type of critical leak detection monitoring devices by milepost; and
6. Identification by milepost range of high consequence areas (HCAs).

Accufacts report, FOH comment on DEIS. The response was “Thank you for your comments on the Draft EIS. Available design details are provided in chapter 4 of the FEIS.” App. T-1 at page 96. Chapter 4 contains none of that suggested information.

Likewise, FOH’s consultant pointed out that the DEIS’s risk probability analyses were likely based on questionable, inaccurate, and misleading data, and, even when accurate, historic pipeline data was a poor predictor of future risk probabilities. That also got a “Thank you for your comments on the Draft EIS. Your comment has been considered in the development of the FEIS.” *Id.*

FOH of course included and referred to its commentary on the proposed Sandpiper pipeline in its comments on the Line 3 DEIS. DOC simply declined to consider or respond to any of that unless it “provid[ed] specific reference to the DEIS.” FEIS at 89. That apparently excluded anything in those materials that did not contain a page reference, even though all of those comments referred to specific topical sections in the DEIS. For that material, DOC did not provide any response at all, not even the perfunctory “thank you” that other comments received.

On several significant material issues FOH raised, again DOC’s response was nonexistent or perfunctory. Again, as discussed in the section on site-specific impacts, FOH has expressed concern from the beginning about the upper reaches of the Wild Rice River, the two Wild Rice Lakes (Upper and Lower), and the La Salle lakes and valley area, north of Itasca State Park, and urged DOC to analyze the potential impact of a major spill in those areas. These are large and fragile wetland areas, saturated combinations of gyttja and peat with upwelling groundwater where, FOH believes, mitigation of an oil spill would mean the wetlands’ destruction. Access would be very difficult. The likelihood of downstream contamination into the Wild Rice River and Lower Rice Lake could devastate major wild rice stands. A spill into the La Salle valley, the

trout stream, and lakes, and the downstream scientific and natural area (SNA), not to mention the Mississippi River itself, would likely cause significant environmental damage. The PUC, and the public, need to know what the consequences would be in an area like that. But there has been no response from DOC, other than its continued reliance on the seven sites it picked.

Perhaps the most egregious omission, at least with respect to FOH's comments, is DOC's failure to respond at all to the alternative methodology FOH proposed to evaluate possible oil spill impacts if Enbridge's "worst case" spill data remained non-public.⁴ For years, FOH has proposed using the methodology developed by the Oak Ridge National Laboratory in "Studies for the Requirements of Automatic and Remotely Controlled Shutoff Valves on Hazardous Liquids and Natural Gas Pipelines with Respect to Public and Environmental Safety," ORNL/TM-2012/411 (Oct. 31, 2012). That study uses the historical results from spills like Enbridge's 2010 spill in Marshall, Michigan to allow for predicting the results of a spill with different quantities, different time frames, different response times, and different on-the-ground conditions. DOC could have constructed a range of possible scenarios with the Oak Ridge model that would have greatly enhanced the PUC's and the public's understanding of potential spill impacts, without the data Enbridge does not want to release. Even if that data is released someday, the public will obviously be denied any opportunity to comment, and get a reasoned response from the agency. To refuse to respond to what FOH believes is a useful suggestion to address a major flaw in the DOC's analysis is precisely the kind of failure to respond that violates MEPA and the EQB rules.

⁴ The data practices issue with respect to that data is currently pending at the PUC.

G. THE FEIS'S DESCRIPTION OF MITIGATION OPTIONS IS INADEQUATE BECAUSE IT DOES NOT ASSESS WHETHER THERE WILL BE ADEQUATE FUNDING AVAILABLE TO DO THE WORK.

The FEIS contains long descriptions of how Enbridge would intend to manage an oil spill. What is missing, however, is any analysis of how Enbridge would pay for any of those mitigation measures. Without that, there is no way to assess whether they might be effective.

Enbridge's spill in Marshall, Michigan has so far cost more than \$1.2 billion to remediate. A major spill along the proposed route in Minnesota could have even greater impacts, and involve even more significant expenses. Those expenses could easily exceed the entire balance in the federal Oil Spill Liability Trust Fund, there is no assurance that private insurers would cover the cost (the costs could easily exceed liability limits), and there is no additional mechanism proposed in Enbridge's application to guarantee that funds would be available for spill response.

The DOC's testimony in the certificate of need and route permit proceedings recommended a separate financial assurance package of at least \$200 million, assuming that, in a bad case, there would be no other eligible spills Enbridge would be able to tap the entire balance of the trust fund. Beyond that, however, there is nothing in place to cover what it would cost the government to remediate a spill if Enbridge were unwilling or unable to cover the costs. It would, of course, cost the government much more than it would cost Enbridge.

With oil industry dislocations likely coming, as electric vehicles penetrate the market, efficiency gains continue, and oil demand begins to drop, the prospect of a company like Enbridge being unable to meet its statutory obligations at some point in the likely 50-year life span of a new pipeline is quite real. All the descriptions of mitigation in the world are meaningless if the financial issue is not evaluated up front.

To meet MEPA's adequacy standard, the FEIS should assess how much financial assurance for spill remediation will be needed, which instruments are available to cover that cost, how accessible the funds will be to government officials in case of a default, and how protected those funds are from bankruptcies or insolvencies, or other creditors. At this point, that analysis is completely missing. With the alternative being that the responsibility will fall on Minnesota taxpayers, this is exactly the kind of information both the public and the PUC need, and the EIS is the appropriate place for that.

III. CONCLUSION

For the reasons stated above, Friends of the Headwaters (FOH) requests that the FEIS for the Line 3 project be declared not yet adequate under the Minnesota Environmental Policy Act (MEPA). FOH further requests that the Department of Commerce be directed to complete a supplementary environmental impact statement that addresses the deficiencies in this comment, that full written comments from the Department of Natural Resources and the Minnesota Pollution Control Agency be requested and made available to the public, and that the public be given an additional opportunity to respond. The certificate of need and route permit proceedings should be suspended until after the SEIS is completed and determined to be adequate under MEPA.

Respectfully Submitted,

DATED: October 2, 2017

/s/ Scott Strand
Scott Strand
Environmental Law & Policy Center
15 South 5th Street, Suite 500
Minneapolis, MN 55402
(612) 386-6409