

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
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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

REPLY BRIEF OF INTERVENOR FRIENDS OF THE HEADWATERS
IN SUPPORT OF MOTION TO SUSPEND BRIEFING SCHEDULE

I. INTRODUCTION

Under the PUC's pipeline rules, evaluation of potential alternatives to what the applicant has proposed is absolutely central, not just to the route permit under Minn. R. 7852.1900, subd. B, but also to the certificate of need under Minn. R. 7853.0130.B (is there a more reasonable and prudent alternative?) and the Minnesota Environmental Policy Act's (MEPA) substantive requirement that state action avoid pollution, impairment or destruction of our environment if a

feasible and prudent alternative is available. Minn. Stat. § 116D.04, subd. 6. The PUC's order on adequacy of the final environmental impact statement (FEIS) will force significant changes in the record in this case on those issues.

The results—what DOC-EERA comes back with on alternatives like SA-04 or routes in existing corridors vs. greenfield corridors—could potentially be outcome-determinative. The record as it stands today could lead to a recommendation that the PUC reject SA-04 as unreasonable because it runs near karst topography and certain drinking water sources. If DOC-EERA's new analysis concludes, however, that route adjustments and/or best management practices could largely eliminate the karst problem, and that the site-specific impacts on drinking water are insignificant because of groundwater flows or aquifer characteristics, the recommendation might be that the PUC reach the opposite conclusion. The CN/RP process needs to wait until this evidence comes in, the public has had a chance to comment on it, and the parties have had a chance to challenge its adequacy under MEPA.

II. ARGUMENT

A. THE REVISIONS TO THE FEIS NECESSARY TO COMPLY WITH THE PUC'S ORDER WILL SIGNIFICANTLY CHANGE THE RECORD ON POTENTIALLY OUTCOME-DETERMINATIVE ISSUES.

The PUC's order following its hearing on December 7, 2017 requires DOC-EERA to address four issues:

- Are there reasonable route modifications to SA-04 that would avoid karst topography in southeastern Minnesota and northeastern Iowa, and what would be their environmental impact?
- What are the qualitative potential impacts of SA-04 and other route alternatives on drinking water supplies at sites along the different routes, given the FEIS's acknowledgment that actual drinking water risks from a pipeline spill depend on a number of factors other than geographic proximity?

- Would route alternatives not in the existing line 3 corridor create new or additional risks to the environment beyond an alternative that stays in the existing corridor?
- What impact might the ongoing traditional cultural properties survey still have, since it must be completed before any construction commenced?

The outcome of those new analyses from DOC-EERA could easily tip the balance on whether there are reasonable and prudent alternatives to Enbridge's proposed project¹.

1. SA-04 and karst

The SA-04 proposal follows the existing Alliance natural gas pipeline corridor, which is co-owned by Enbridge. That corridor avoids the ceded territories where Anishanabe bands have reserved hunting, fishing, and gathering rights. It avoids the Mississippi Headwaters region, including the La Salle valley area and the wetlands/wild rice stands near Upper and Lower Rice Lake. The Alliance corridor avoids the central sands region near Park Rapids, with its shallow aquifers and existing drinking water problems. And it avoids opening up a brand new pipeline corridor across some of the cleanest lakes, rivers, and wetlands in the state.

The FEIS prepared by DOC-EERA notes that the Alliance corridor used by Enbridge and its partner comes close to karst topography in southeastern Minnesota and northeastern Iowa. It does not, however, evaluate whether route adjustments could avoid the problem, or whether there are other ways to mitigate any potential impacts. The FEIS also indicates that SA-04 has more acres of drinking water sources within 2500 feet of where the pipeline would run than Enbridge's proposed route, but does not analyze the actual drinking water risks at any site, even though it acknowledges that potential drinking water impacts depend on a host of factors other than simply proximity.

¹ Friends of the Headwaters is not, of course, retreating from its positions that Enbridge has established need for this project, even before considering alternatives.

There are at least two route adjustments that would avoid the karst regions altogether. *See* Exhibits A, B, C, and D. First, in northern Freeborn County, north of the karst area, a pipeline could be routed east and then south, avoiding the karst topography, and then picking up the Alliance corridor again in northeastern Iowa. Second, to avoid both the karst areas and to avoid opening up any new pipeline corridor, a pipeline following the Alliance corridor could join the Koch/Williams corridor north of Albert Lea, follow that south to the intersection with the Northern Border natural gas pipeline corridor, follow that corridor southeast to the large pipeline corridor that cuts east and west across Iowa, and then take that to the Quad Cities and across to the Illinois routes. DOC-EERA will need to evaluate those, and perhaps other, route adjustments to comply with the PUC's order.

In addition, of course, there are best management practices for pipelines that run through karst topography, that DOC-EERA also needs to evaluate. Examples include karst BMPs developed by the U.S. Fish and Wildlife Service for a pipeline project in the Ozarks, https://www.fws.gov/southwest/es/oklahoma/documents/te_species/best_mgmt/bmp%20for%20karst%20features%201.23.2007%20dbf.pdf, and more recent karst mitigation plans prepared for the Mountain Valley natural gas pipeline, <https://www.ferc.gov/industries/gas/enviro/eis/2017/06-23-17-FEIS/Appendix-L.pdf>, the Atlantic Coast pipeline, <https://atlanticcoastpipeline.com/filings/4/appendix-c-attachment-h-karst-plan.pdf>, and the Rover pipeline, http://www.roverpipelinefacts.com/documents/Volume-II-A-Public/VIIA_RR1_APP1Bh.pdf. Different kinds of karst features pose different environmental risks and require different forms of mitigation, and the DOC-EERA needs to do that site-specific analysis along the Alliance SA-04 route and along possible route alternatives.

Then, of course, DOC-EERA must analyze any other potential significant environmental impacts from these or other alternatives.

2. Drinking water and the route alternatives

Likewise, the PUC determined that it needs more information about potential drinking water effects. The FEIS features simplistic charts with Enbridge's data showing, for example, the number of acres of land within 2500 feet of the proposed routes that contain drinking water sources. FEIS, chap. 10 at 10-84. At the same time, however, the FEIS acknowledges that the actual risk of drinking water contamination from an oil spill depends on many factors, including groundwater flow rates, aquifer properties, and the kind of oil in the pipe. *Id.* at 10-85.

What the PUC was looking for is site-specific analyses of potential drinking water issues involving SA-04 and the other route alternatives that incorporates those factors. The FEIS might, for example, contain a map showing that SA-04, with Enbridge's co-owned Alliance pipeline already in place, travels near St. Peter. It does not, however, describe what would or could happen to St. Peter's drinking water if a spill occurred. That would require understanding where St. Peter gets its drinking water (deep wells), what the groundwater flow rates are in the area, how vulnerable the aquifers are to a spill (what would be between the pipeline and the groundwater), what would be the difference if the pipeline were carrying heavier "dilbit" as compared to lighter crude. That is the information the PUC wants for SA-04 and the other route alternatives, and it is information the administrative law judge needs to make a useful recommendation.

3. Existing corridors vs. new corridors

Throughout the environmental review process, commenters (including Friends of the Headwaters) have asked for an analysis of the potential environmental risks from running new

pipelines in existing corridors as compared to opening up new corridors. Now, the PUC has ordered DOC-EERA, finally, to do that analysis. Minnesota's rules presume that routing in existing corridors is preferable, but we do not know how much that reduces environmental risks, or even whether it is always true. What factors affect the size of the difference? How do those factors apply in the factual circumstances presented by Enbridge's proposal and the alternatives that have been proposed? That is a complex question, and ultimately PUC needs a thorough answer before it can decide the central issues in this case.

4. Traditional cultural properties survey

The PUC properly decided that it would not allow construction of this pipeline to go forward until the traditional cultural properties survey has been completed. Of course, it is not enough just to get the survey "completed," but its results must effectively inform the PUC's decision making. If the survey concludes that the applicant's proposed project poses a significant threat to these properties that cannot effectively be mitigated, then a certificate of need and a route permit should not be granted. It is hardly inconceivable that the results of that survey might drive different outcomes in this case.

The proper course is to incorporate the traditional cultural properties survey into the FEIS, include any necessary alternatives and mitigation analysis, give the public an opportunity to comment, and thereby ensure that the PUC is fully informed and the goal of public participation is preserved.

B. PARTICULARLY BECAUSE THE NEW INFORMATION COULD AFFECT THE OUTCOME OF THE CASE, THE PARTIES AND THE PUBLIC ARE ENTITLED TO HAVE THAT INFORMATION AVAILABLE AND HAVE A REAL OPPORTUNITY TO USE IT IN THEIR ADVOCACY EFFORTS.

Enbridge and its supporters argue that the purpose of environmental review is *solely* to provide information to agencies, not to help members of the public with their advocacy. That is simply wrong. As the U.S. Supreme Court recognized in perhaps the leading NEPA case:

The statutory requirement that a federal agency contemplating a major action prepare an environmental impact statement serves NEPA's "action-forcing" purpose in *two* important respects. It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts. *It also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1985)(emphasis added). The Court went on to emphasize that publication of an EIS has a larger informational role, to assure the public that the agency has considered environmental concerns "*and, perhaps most significantly, provides a springboard for public comment.*" *Id.*

MEPA and the Environmental Quality Board's (EQB) environmental review rules all make it clear that the purpose of an EIS is not just to assist agencies, but to benefit "individuals," "citizens," "other persons," "institutions," and "the public." *See generally* Minn. Stat. § 116D.03, subd. 2(6); Minn. R. 4410.0300, subps. 3 & 4; Minn. R. 4410.2000, subp. 1. Before NEPA and MEPA were enacted in the early 1970's, the burden did fall on citizens to do all the analysis necessary to challenge environmentally risky projects. Once those statutes passed, however, citizens were empowered to be more effective advocates precisely because the government was now required to do intensive environmental review of all major actions and to make the results public.

Enbridge and its supporters would take us back to the pre-NEPA pre-MEPA situation. Under their theory, there would be no reason for environmental review to have a public participation component at all. Agencies could do the work in-house, hire consultants, prepare confidential reports, and environmental review would aid the agencies. That is not what the law says. Public participation is a core value in environmental review, and that does not mean just getting notice. That means giving the public “early in the decisionmaking process” the opportunity to engage with the information generated by the government.

That is especially critical when the information being developed may make a difference in the eventual outcome. Making this new information available only after public comments are over, after the evidentiary hearing is over, and after parties have filed their post-hearing briefs, simply defeats the goal of effective public participation enshrined in MEPA and its federal analogue.

C. THE RELIEF THE MOVING PARTIES SEEK IS CONSISTENT WITH THE GOALS OF JUDICIAL ECONOMY AND MOVING THIS CASE ALONG.

If the briefing on the certificate of need and route permit in this case follows the revisions to the FEIS, public comment, and evaluation of its adequacy by the PUC, then the ALJ will only need to deal with one set of briefs. On the other hand, if the briefing on the CN/RP proceedings goes first, then it is likely parties will request and have good reason to obtain an opportunity to file additional briefs to address what will be substantive changes in the administrative record once the revisions to the FEIS are made public. There is no reason to impose the burden of additional briefing on either the ALJ or the PUC, or, for that matter, the parties. If there is any delay at all in DOC-EERA’s work, then the ALJ will be in the position of preparing one report and recommendations with an incomplete record, and then perhaps having to prepare a second

one, or make significant revisions, to incorporate the new EIS analysis and the parties' reactions. That is not a recipe for judicial economy.

Now that problems with the FEIS are real and not just theoretical, the fairest and most efficient course is to grant the relief movants seek. That will give the parties the opportunity to absorb the new information and complete their post-hearing briefs with a complete record. If the movants' request is granted, the ALJ will only have to prepare one report and recommendations, based on a complete record, which will only maximize its value to the PUC.

It is not disingenuous to assert that the need to deal with problems with an FEIS the responsible government unit finds inadequate means that the process may take some additional time. If DOC-EERA can meet its 60-day deadline, there will be no delay that is not worth the added fairness, rationality, and efficiency granting movants' request will provide.

III. CONCLUSION

For the reasons stated above, and in the submissions of the other moving parties, intervenor Friends of the Headwaters respectfully requests that briefing on the certificate of need and route permit be suspended until DOC-EERA completes its work revising the FEIS, the public has had an opportunity to comment, and the PUC has deemed it adequate.

Respectfully Submitted,

DATED: December 19, 2017

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