

THE MINNESOTA PUBLIC UTILITIES COMMISSION
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STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

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Daniel Wolf	Executive Director
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In the Matters of the Applications of
Enbridge Energy, Limited Partnership
for a Certificate of Need
And Routing Permit for the
Line 3 Replacement Project

PUC Docket Nos. PL-9/PPL-15-137
PL-9/CN-14-916
OAH Docket Nos. 65-2500-32764
65-2500-33377

FRIENDS OF THE HEADWATERS
Response to Notice Requesting Comments from Parties
Regarding Timely Consideration of FEIS Adequacy

June 20, 2017

Dear Mr. Wolf and Commissioners,

Friends of the Headwaters (FOH) understands why the PUC wants to work through the next steps in this process in a timely manner. However, until the Commission can examine the public's comments on the draft EIS, it cannot accurately judge what the next steps should be or the timeline to follow. FOH, along with many others, will be submitting extensive comments on this flawed DEIS. Given the number and scope of the deficiencies FOH has identified thus far, an adequacy finding by September 11 is remote. The DOC, its MOU partners, and the PUC will have to make a substantial new effort before it will have completed a legally adequate FEIS.

The Commission's request has come at an important juncture in this process. It might appear at first to be a simple request for opinions on scheduling, but as the past three years have shown, "process questions" for this project do not have simple answers. The Minnesota Appellate Court's order for the first and only EIS on a Minnesota oil pipeline and its Certificate of Need (CN) makes each decision in this process unique. Each situation must be considered from the perspective of the whole project, and these deliberations will aid the PUC in reaching the required EIS adequacy decision, as well as being helpful to the public and state agencies.

When the Commission ordered the EIS for this project, the PUC's previous Chair, Commissioner Heydinger, indicated that the PUC wanted a robust, competent, comprehensive and independent EIS. Only then could the Commission, as the acting RGU, make an informed and credible decision on the adequacy of the EIS. FOH does not believe the DEIS as currently prepared meets those standards. And an incomplete FEIS will, of course, make it impossible for the Commission to conclude that the EIS is adequate.

FOH raises this point for a number of reasons, which have now become clearer with the release of the draft EIS. These are three of many critical issues we have identified thus far that will require a process that will have to extend beyond September 11:

1. Full evaluation of SA-04 as one of the reasonable alternatives.

Although DOC EERA, in keeping with its responsibilities under MEPA, included SA-04 as a possible alternative, it gave short shrift to this possibility in its data collection, analysis and conclusion, compared to the Applicant's designated favorite. This cavalier approach to a serious alternative continues a pattern that stretches back to the beginning of the Sandpiper application in 2014. Since the time FOH proposed this alternative, no party, including Enbridge, has ever offered any substantive reason why it is not the best one— if we are, all of us, serious about protecting the Minnesota's water rich environment. The DNR and the PCA have both pointed out the advantages of SA-04 over other routes. It must, therefore, be fully and fairly analyzed in the EIS. Our review of the DEIS indicates that the SA-04 method of analysis is legally inadequate and needs to be corrected by the PUC as the RGU.

2. The Sandpiper record.

It appears that the DEIS did not address or review the record of the Sandpiper project which included important and highly authoritative technical information supplied by FOH, other parties, and commentators. This technical information is just as relevant and applicable to Line 3 as it was to Sandpiper. The DEIS suffers in quality by the failure to include and address the parties' previously submitted evidence, evidence submitted under oath and subjected to cross-examination by all parties, including the applicant.

3. Oil release data.

Much of the information about oil releases was prepared by the applicant. Enbridge is withholding key information as "protected." The amounts of oil that could be released and the method of calculating this amount is excluded from the public version of the DEIS and the supporting Stantec studies. Enbridge is claiming these amounts are "non-public data." However, the consequences of this method must be corrected by the PUC in order for it to reach an adequacy determination.

As of this writing, ALJ O'Reilly has held a hearing to receive objections to this, and has taken the issue under advisement. But this is clearly an RGU decision, rather than a decision left to post-EIS deliberations. Citizens are not being allowed to review a draft EIS that includes information which is crucial for understanding impacts as well as comparing alternatives. Public access to and analysis of this information is essential to a legally adequate EIS. Until the information is made available, and the public has time to review, analyze and comment on it, the process cannot go forward.

Enbridge's proposed Line 3 Expansion and Relocation pipeline is a large and very controversial project. As planned, it will transport 760,000 BPD of mostly Canadian heavy crude, ie diluted bitumen, through Minnesota's most valuable, pristine lake and river country for 50 or more years into the future. And, as you know, the National Academy of Science Report on Dilbit recommends avoiding water-rich regions with dilbit pipelines.

Over 1300 pages of the DEIS covering accidental oil releases were prepared by private contractors, contractors who have employment histories with Enbridge. Friends of the Headwaters assumes the Commissioners would want to avoid any appearance of conflict of interest, preferring a competent, complete and independent analysis and report on the oil leaks and spills, with a full review of this information made available to the public and parties engaged in these proceedings.

Conclusions and Recommendations

Since key information on oil releases has been kept from the public, the DEIS comment deadline must be extended or suspended until resolution with respect to comments on oil releases.

Alternative SA-04 must be treated the same as any other alternative in order to meet the requirements of MEPA.

The complete record from the Sandpiper proceedings must be brought forward into the Line 3 EIS.

In the past when reviewing oil pipelines without the EIS process, the PUC and both DOC EERA and DOC DER put great reliance on the administrative hearings and the report of the ALJ. Doing so now, when there is an EIS ordered for a CN, essentially shifts the required adequacy determination for the EIS to the ALJ and administrative hearings. This is not acceptable under MEPA.

The PUC, as RGU and project manager of the EIS, must realize that key problems in the DEIS will affect scheduling and the adequacy decision as required by MS 116D.04, subd. 2A(h) and corresponding MN regulation 4410.2800, subp. 3.

The PUC, as the RGU, should hear directly from the DNR and PCA, as cooperating agencies in the preparation of the DEIS. Their comments on the DEIS, their responses to major criticisms of the DEIS content, and their suggestions as to how to fix the DEIS in order to prepare an FEIS for which an adequacy determination can be made should be part of a transparent and public process for the EIS. Such a process is typically used in federal agencies when there are major EIS deficiencies, and, we understand, was used on the Polymet EIS. Given the unique procedural and substantive circumstances raised by this first oil pipeline EIS, the PUC should be able to supervise the EIS in the normal manner of other RGUs without being burdened by past formal administrative procedures.

After their careful consideration of the public commentary, the Commission should renew its request for suggestions about the process to be adopted. At that time, the DOC, the PUC, and the public should have the information that is necessary to make an educated estimate of work that remains to be done and can suggest a timeline under which it can be accomplished..

This oil pipeline is proposed to be in the ground indefinitely, certainly for 50 or 60 years. Potential oil releases over this time period are central to the analysis of impacts and alternatives in this EIS. Yet the oil release amounts have been withheld for more than a month from the public, preventing a reasonable, timely and thorough review of the draft EIS. Clearly, until this critical issue is addressed, it is impossible to envision a schedule for a final EIS and an adequacy determination. At this point, to assume it will happen by September 11 places an arbitrary requirement on the work that will result in an inadequate EIS.

All of these steps must be taken before the EIS becomes part of the formal administrative proceeding, in order to satisfy the PUC's legal responsibilities as the RGU.

/s/Richard Smith

Richard Smith
President, Friends of the Headwaters