

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East, Suite 350

St. Paul, MN 55101-2147

Katie Sieben
Valerie Means
Matthew Schuerger
John Tuma
Joseph Sullivan

Chair
Commissioner
Commissioner
Commissioner
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

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

**PETITION OF INTERVENOR FRIENDS OF THE HEADWATERS FOR
RECONSIDERATION OF COMMISSION'S MAY 1 ORDERS**

May 21, 2020

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INTRODUCTION

Pursuant to Minn. Stat. § 216B.27 and Minn. R. § 7829.3000, intervenor Friends of the Headwaters (FOH) submits this petition for reconsideration of the Commission’s May 1, 2020 Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need, As Modified, and Granting Routing Permit as Modified for Enbridge’s Line 3 project.

As the Commission is aware, FOH has filed a number of petitions for reconsideration of previous Commission orders in this docket.¹ FOH incorporates all of the arguments from those previous petitions into this document, and preserves its right to raise any argument raised in those previous petitions if this case goes to the court of appeals.

Of course, the elephant in the room at this stage of the proceedings is the collapse of global demand for oil due to the Covid-19 pandemic and government responses to it. As Enbridge has publicly acknowledged, Canadian oil production will drop by 1.1 to 1.7 million barrels per day this year² and the Secretary of Energy estimates that U.S. oil production will drop by 2 to 3 million barrels per day.³ It is not at all clear that either oil demand or North American oil production will rebound any time soon, or even whether they ever will return to pre-pandemic levels. We are now in a different world, and, to perform its obligations under the law, the Commission needs to reevaluate whether, under the changed circumstances, expanding Enbridge

¹ That includes the May 21, 2018 Petition of Intervenor Friends of the Headwaters for Reconsideration and Rehearing of EIS Adequacy Order, the September 25, 2018 Intervenor Friends of the Headwaters’ Petition for Reconsideration of Commission’s September 5 Order [the first certificate of need]; the November 16, 2018 Petition of Intervenor Friends of the Headwaters for Reconsideration and Rehearing of Order Granting Route Permit with Conditions; and the February 12, 2019 Petition of Intervenor Friends of the Headwaters for Reconsideration and Rehearing of Commission’s January 23, 2019 Order Approving Compliance Filings as Modified and Denying Motion. Those petitions are included and incorporated here as Appendices A, B, C, and D.

²“Canada oil cuts set to deepen as Alberta province eyes global deal,” *Reuters* (April 7, 2020), (Appendix E) <https://www.reuters.com/article/us-global-oil-canada/canada-oil-cuts-set-to-deepen-as-alberta-province-eyes-global-deal-idUSKBN21P319>

³ “Remarks As Prepared by Secretary Brouillette G20 Extraordinary Energy Ministers Meeting,” Friday, April 10, 2020, (Appendix F) <https://www.energy.gov/articles/remarks-prepared-secretary-brouillette-g20-extraordinary-energy-ministers-meeting-friday>.

Mainline pipeline system is justified to meet “ever-increasing demand for oil,” and whether it justifies the negative environmental impact the Commission acknowledges the project will have in Minnesota.

FOH believes the current demand shock just amplifies and accelerates the long-term trends—flat or declining North American demand for refined oil products, uncompetitive production costs, particularly in the Canadian tar sands region, prices well below break-even levels—that have belied the claim that this project is needed by anyone other than Enbridge and Canadian tar sands producers who think better access to global markets will save their industry. That said this petition will first explain why the Commission needs to reconsider its determination that Enbridge met its burden of proof on the certificate of need criteria in Minn. R. 7853.0130—whether the project is needed to assure the adequacy or reliability of the energy supply, whether there are reasonable alternatives,⁴ and whether the benefits exceed the costs. Part of that discussion will explore the current oil demand and production situation, and the most likely longer-term demand and production scenarios. And second, the petition will explain why the “second revised” environmental impact statement still does not meet the standards set by the Minnesota Environmental Policy Act (MEPA) and, in particular, why it does not adequately address the concerns the court of appeals outlined when it reversed the Commission’s previous EIS adequacy decision.

For those reasons, and the reasons articulated in its previous reconsideration petitions, FOH submits that the Commission should vacate its May 1 orders, deny Enbridge’s applications, or, in the alternative, send the EIS back to DOC-EERA to address the deficiencies in the EIS,

⁴ The availability of reasonable alternatives that the Commission has not fully considered of course affects the EIS adequacy and routing permit decisions as well.

and then set up a contested case process to reevaluate the need and routing criteria in light of new evidence and changed circumstances.

ARGUMENT

I. THE COMMISSION’S FINDING THAT ENBRIDGE HAS MET ITS BURDEN OF PROVIDING AN ACCURATE FORECAST OF DEMAND FOR THE CRUDE OIL IT WOULD SUPPLY MUST BE RECONSIDERED.

A. The Commission continues to apply the wrong legal standard.

Minn. R. 7853.0130.A requires an applicant for a certificate of need (CON) prove that “the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to . . . applicant’s customers, or to the people of Minnesota and neighboring states.”⁵ Crucial to that is the requirement in Minn. R. 7853.0130.A(1). that the Commission weigh “the accuracy of the applicant’s forecast of demand for the type of energy that would be supplied by the proposed facility.” In other words, an applicant who wants to build a “large energy facility” that is an expansion of capacity—a transmission line, a generating plant, or a pipeline—must show that consumer demand will be there to justify building it. If consumer demand is flat or declining, then, in most cases, the CON application should be denied. Only when there is enough evidence in the record to show that it is more likely than not that consumer demand for the energy supply will be increasing can a CON be justified for any large energy facility that will increase capacity.

That is or should be a threshold requirement. If an applicant cannot meet that test, then there is no reason to go through the alternatives analysis in Minn. R. 7853.0130.B or the balancing analysis in Minn. R. 7853.0130.C. If a project is not needed to meet “the increase in

⁵ Minn. R. 7853.0130.A. also includes “the applicant” as a recipient of “energy supply,” but all agree that category does not apply.

the energy demand” or “future demand,” *see* Minn. R. 7853.0130.A.(3), (4), then it should not be authorized by this Commission.

The reasons for that requirement are straightforward. When a company like Enbridge secures a certificate of need for a project like this they get (1) eminent domain authority to condemn land and infringe on private property rights; (2) a guaranteed return on investment paid in part by Minnesota consumers;⁶ and (3) the right to impose significant environmental risks on Minnesota citizens. Because of those factors, the PUC has the authority and the responsibility to reject a CON if an applicant does not prove that the new facility is truly needed to satisfy increasing demand for energy.

In this docket, Enbridge has never supplied any kind of consumer demand forecast, and, as DOC-DER has consistently argued, that alone is sufficient grounds to reject Enbridge’s CON application.⁷ As Commissioner Schuerger’s dissent points out, during oral arguments on June 26, 2018, both he and then-Commissioner Lipschultz characterized “the absence of a clear, transparent, independent forecast for Canadian crude oil and for its refined product” as “a significant shortcoming in the record.” But it was more than a “shortcoming.” Under a reasonable construction of the applicable legal standard, failure to provide that forecast should have been fatal to Enbridge’s application.

The Commission has never been entirely clear in how it interprets this requirement in the pipeline context. At times, the Commission seems to confuse “shipper support” from Canadian oil sands producers with consumer demand. The financial interests of Canadian oil producers

⁶ Oil pipeline rates are regulated by the Federal Energy Regulatory Commission (FERC), which puts a floor of cost recovery and a reasonable return under the prices pipeline companies can charge.

⁷ Or any CON application for a large energy facility. If Xcel Energy wanted to replace an old coal-fired power plant with a new one that was twice as big, they would need to have pretty compelling evidence of future load growth to justify putting that expansion of capacity into their rate base.

are not the interests the rule is intended to protect. Canadian producers and their trade association have freely acknowledged that demand for energy and demand for oil in particular is likely to decline in the U.S. and other developed countries. The purpose of building a new pipeline, or any of the other proposed tar sands pipelines is to get greater access to global markets and developing countries, where they believe the demand for oil will continue to increase. Minnesota law does not oblige this Commission to put Minnesota consumers and citizens at risk so financially challenged Canadian oil producers can get cheaper access to foreign markets.

At other times, the Commission equates Canadian trade association supply forecasts with the demand forecasts required by the law. But trade association production forecasts and customer/consumer demand forecasts are not the same thing. “Supply” simply does not create its own demand, even in the oil business. Supply projections cannot be used as a proxy for the demand projections the law requires. A trade association’s compilation of its members’ rosy production forecasts, especially with no disclosure of any demand assumptions, says nothing about consumer demand.

The Commission has also treated the occurrence of “apportionment” on Enbridge’s Mainline System as a proxy for the required consumer demand forecast. That argument, of course, cuts both ways, and FOH could argue that now, with Canadian production cuts leaving Enbridge’s Mainline system with excess capacity and no reason to “apportion,” that is evidence that there is *not* enough demand to justify the project. But, as a matter of law, the existence or nonexistence of apportionment is no more a consumer demand forecast than assertions of

“shipper support” are. Whether or not there is apportionment on the Mainline tells us nothing about consumer demand in this region.⁸

Evidence that refiners serving Minnesota and the neighboring states needed additional crude oil to meet consumer demand would be relevant under a correct interpretation of the legal standard, and there has been such evidence in previous Commission pipeline dockets. There has never been such evidence in this case—the refiners in this region have been able to secure all the crude oil feedstock they need. Under current circumstances, when refiners are operating at perhaps two-thirds capacity, there is no risk that Minnesota consumers will not have access to all the refined petroleum products they need.

Presumably, no one applies for a certificate of need without an expectation that someone will want to use the new facility. And perhaps the Commission is just assuming that if there is an application, there must be some “demand” out there to justify it. Jumping to that conclusion, however, would effectively read Minn. R. 7853.0130.A right out of the rule book. There can be many reasons why a pipeline company would want to build a pipeline that have nothing to do with securing the “future adequacy, reliability and efficiency of energy supply to applicant’s customers, or to the people of Minnesota and neighboring states,” *id.*, like having Canadian oil producers improve their access to global markets. It is the Commission’s responsibility to insist that applicants for a certificate of need provide a forecast that shows increasing consumer

⁸ Enbridge still plans to switch from its “open source” system to long-term take-or-pay contracts, which will eliminate any apportionment issues. “‘Swing pipeline’: Enbridge eyes long-term contracts while competing projects are under construction,” *Financial Post* (May 4, 2020), (Appendix G) <https://business.financialpost.com/commodities/swing-pipeline-enbridge-eyes-long-term-contracts-while-competing-projects-are-under-construction>

demand for the energy supply adequate to justify the extra capacity.⁹ Any interpretation of Minn. R. 7853.0130.A that eliminates that requirement is contrary to the applicable law.

B. Current long-range forecasts for crude oil demand and production do not support the Commission’s conclusion that there will be demand for an ever-increasing supply of crude oil from Canada moving through Enbridge’s Mainline system.

In its previous reconsideration petitions and argument to the Commission, FOH has presented a considerable amount of evidence showing how, even before the Covid-19 pandemic, there was no basis for concluding that there would be ever-increasing demand for heavy crude oil from Canada justifying expansion of Enbridge’s Mainline system:

- The ongoing domestic and global oil glut, which continued to depress crude oil prices, especially for Canadian tar sands oil below break-even prices;¹⁰
- The continuing divestment from and refusal to insure tar sands facilities;¹¹
- Alberta’s decision to cap production to try to prop up oil prices;¹²
- The superior cost-competitiveness of U.S. crude oil production, with its higher quality oil and its lower costs of production;
- The likely rapid electrification of the transportation system, as renewable energy sources become cheaper than oil, and petroleum becomes uncompetitive;¹³

⁹ See generally *Lakehead Pipeline Co. v. Illinois Commerce Comm’n*, 296 Ill. App. 2d 942, 696 N.E.2d 345 (Ill. App. 1998)(affirming commission’s decision to deny a “certificate of public convenience and necessity,” the Illinois analogue to Minnesota’s “certificate of need,” to a pipeline project because the pipeline company’s private financial interest alone was insufficient to establish need). The Illinois Commerce Commission decision is at 1997 WL 33771802 (Ill. C.C. 1997).

¹⁰ “Why Canadian Tar Sands Oil May Be Doomed,” *Desmog* (October 25, 2019), (Appendix H) desmogblog.com/2018/10/25/Canadian-tar-sands-oil-financial-losses

¹¹ “The Hartford Announces Its Policy on Insuring, Investing in Coal, Tar Sands,” *Business Wire* (Dec. 20, 2019), (Appendix I) <https://www.businesswire.com/news/home/20191220005515/en/Hartford-Announces-Policy-Insuring-Investing-Coal-Tar>

¹² Oil Production Limit: A temporary limit of oil production to defend Alberta jobs and protect the value of Alberta’s resources, (Appendix J) alberta.ca/oil-production-limit.aspx

¹³ “Wells, Wires, and Wheels—EROCI and the Tough Road Ahead for Oil,” *BNP Paribas Asset Management* (Aug. 2, 2019), (Appendix K) <https://investors-corner.bnpparibas-am.com/investing/petrol-eroci-petroleum-age/>

- The inevitability of new government policies to address climate change, and to facilitate the transition away from fossil fuels.

Commissioner Schuerger’s dissent also outlines in detail the new information and new policy changes to address climate change and Minnesota’s new commitment to transportation electrification since the Commission’s first CON order, and the impact those changes will likely have on demand for oil.

All of those arguments are still sound, but now the evidence that there will not be sufficient demand to justify approving any expansion of Enbridge’s Mainline system is overwhelming. Now, because of the Covid-19 pandemic and government responses to it:

- Global demand for oil is down 29 million barrels per day in April, down from a previous level around 100 million.¹⁴
- U.S. refineries are operating at 67.9% of their operable capacity.¹⁵ Canadian refinery utilization rates are down more than 30% since the beginning of March, 35% since the beginning of the year.¹⁶
- The US commercial crude oil inventory—the crude oil in storage—is at or near its all-time high—532.2 million barrels as of May 8, including 153.3 million barrels in the PADD 2 (Midwest) region, including 62.4 million barrels in Cushing, Oklahoma alone.¹⁷

¹⁴ International Energy Agency (IEA), *Oil Market Report – April 2020*, (Appendix L) <https://www.iea.org/reports/oil-market-report-april-2020>

¹⁵ Energy Information Administration (EIA), *Summary of Weekly Petroleum Data for the week ending May 8, 2020*, (Appendix M) <http://ir.eia.gov/wpsr/wpsrsummary.pdf>

¹⁶ Canadian Energy Regulator, *Market Snapshot: Refineries are reducing production due to lower oil demand during the COVID-19 pandemic* (May 13, 2020), (Appendix N) <https://www.cer-rec.gc.ca/nrg/ntgrtd/mrkt/snpst/2020/05-02rfnrsrdcngprdctn-eng.html>

¹⁷ EIA, “U.S. crude oil inventories are approaching record high levels,” *Today in Energy* (April 30, 2020), (Appendix O) <https://www.eia.gov/todayinenergy/detail.php?id=43555>

- U.S. oil production will decrease by 2 to 3 million barrels per day in 2020, with the drilling rig count in the Bakken shale region down as much as 75% through June.¹⁸
- Canadian oil production will decrease by between 1.1 and 1.7 million barrels per day in the same period, according to Enbridge CEO Al Monaco.
- When fracking wells or thermal *in-situ* facilities for the extraction of oil are “shut in” or closed down, the facilities are often damaged. Restarting can be very expensive, even technologically impossible.¹⁹
- Oil prices—both the West Texas Intermediate and Western Canada Select benchmarks—have stayed below break-even levels, and have even dropped to zero or below during this period.²⁰
- Some Canadian tar sands producers had had some success before the pandemic in reducing costs, but their costs of production were still among the highest in the industry.²¹

The Commission’s May 1 order somehow does not even acknowledge that the pandemic and the collapse in oil demand is occurring. To the extent one can read between the lines, it appears the Commission believes this is just a “short-term fluctuation in oil markets,” Order at 14, and not particularly relevant. There is apparently an assumption that a “V-shaped” recovery in oil demand will occur, and there will be no long-term impacts on oil markets.

¹⁸ “ND regulators launch Bakken recovery task force,” *Argus* (May 6, 2020), (Appendix P)

<https://www.argusmedia.com/en/news/2103085-nd-regulators-launch-bakken-recovery-task-force>

¹⁹ “Covid-19 is closing Canada’s carbon-intensive oil sands for business,” *Quartz Daily Brief* (April 29, 2020), (Appendix Q) qz.com/1846830/covid-19-is-closing-canadas-carbon-intensive-oil-sands/

²⁰ Oilprice.com, *Oil Price Charts*, <https://oilprice.com/oil-price-charts>.

²¹ “This Energy Analyst Says the Oilsands Are ‘Done’.” *The Tyee* (May 11, 2020), (Appendix R) <https://thetyee.ca/News/2020/05/11/The-Oil-Sands-Are-Done/>

Few, if any, analysts believe that. First, that would require a “V-shaped” economic recovery, and that is highly unlikely. Just this week, IHS Markit concluded that the post-crisis recovery will be “unusually slow.”

A tidal wave of bankruptcies among small and large industries will make restarting the manufacturing sector more challenging than in typical recoveries. Moreover, the damage to the finances of households and businesses will substantially delay any return to old spending levels. Last, but by no means least, the fear of crowds will postpone any return to “normal” in the travel and leisure industries. Even massive stimulus will only offset a small part of plunging growth (roughly 0.4 percentage point for the US economy). Crucially, any resurgence in the number of infections will only worsen these trends. The recent flare up of cases and re-imposition of restrictions in South Korea and parts of China are worrisome. Bottom line: The fastest we can expect output in key economies to return to pre-pandemic levels is early 2022.²²

Likewise, a 2020 outlook update from Deutsche Bank Wealth Management this week concluded that any “initial recovery from the pandemic will be only partial, with global output not returning to pre-crisis levels before 2022, and again only if there is no second wave of infections.”²³

The epidemiologists and the health officials are virtually certain that there will be a resurgence in infections in the fall, and that the economy will again be subject to lockdowns and travel restrictions that will again push demand for oil down.²⁴ That pattern is likely to continue until either a safe and effective vaccine is administered to billions of people worldwide or the infection rate gets to 65 or 70% and herd immunity develops. Those same health officials expect premature “reopenings” before cases have declined for a sufficient period of time to make flare-ups even more likely. That makes it far more likely that any recovery will be slow and unsteady--

²² “Global recovery to take years,” *IHS Markit* (May 18, 2020), (Appendix S) <https://ihsmarkit.com/research-analysis/global-recovery-to-take-years.html>

²³ Deutsche Bank Wealth Management, *Through difficult waters* (May 18, 2020), (Appendix T) <https://deutschebank.com/content/dam/deutschebank/cio-perspectives/cio-insights-assets/q2-2020-through-difficult-waters/CIO-Insights-Through-difficult-waters.pdf>

²⁴ “Coronavirus: When Will the Second Wave Hit?”, *EcoWatch* (May 17, 2020)(“A second wave is more or less inevitable.”), (Appendix U) <https://www.ecowatch.com/coronavirus-second-wave-2646019222.html?rebellitem=3#rebellitem3>

more like an “L-shaped” or “reverse square root” recovery, with troughs occurring when the virus flares up and new lockdowns occur.

Second, even if the general economy recovers, oil demand is likely to stay below pre-pandemic levels for a considerable amount of time. A report from Wood Mackenzie released on May 12, 2020 entitled “The world after Covid-19: Scenarios for the future of energy,”

<https://theworldaftercovid19.think.woodmac.com/>, attached as Appendix V, concluded that demand for oil “will not recover quickly, if ever, to the path it was on before the pandemic hit.”

The report outlines three plausible recovery scenarios:

- “Full recovery”—a short recession, an effective vaccine available in a year, massive government intervention to help economies rebound
- “Go it alone”---a longer recession and slower subsequent growth, the coronavirus proves more difficult to defeat, a backlash against international trade and immigration, and pressure for shorter and more secure supply chains
- “Greener growth”—again, a short recession and strong rebound, but with government intervention supporting the transition to renewable energy, electric vehicles, storage, and low-carbon technologies.

In none of those scenarios, even “full recovery,” does demand for oil return to pre-pandemic levels before mid-decade. In the more plausible scenarios, demand for oil might return to pre-pandemic levels by 2030, but then will level off or begin to drop precipitously. And all of these scenarios assume that a harsh second wave of pandemic infections will *not* take place this fall to set back economic recovery further.

The reason is that transportation consumes 70% of the oil, and changes in transportation patterns due to the pandemic and government responses and individual safety concerns will

likely be long-term. The expectation is that non-essential business travel will be cut, that long-term work-from-home-if-you-can guidelines will cut down or even eliminate commuting for many businesses and government offices, and that all discretionary air travel will be reduced.

If the coronavirus proves difficult to defeat and we suffer a longer recession, there will likely be a backlash against globalization and international trade. Businesses and governments will look for shorter and more secure supply chains, and tighter controls on travel and immigration are likely. If governments in the US, China, Europe and elsewhere focus stimulus programs on supporting the energy transition to renewables, electric vehicles, storage and other low-carbon technology, that will reduce demand for oil further. With the need to cut fossil fuel utilization to essentially zero by mid-century to avoid the worst climate consequences, it is not unreasonable to expect governments to target more sustainable industries as they try to pull out of the recession.

As the global head of sustainability research at BNP Paribas Asset Management put it, all of these likely longer-term changes mean that “what we are seeing may be something more serious than some sand in the wheels of the juggernaut of rising oil demand, easily fixed via a historic supply cut and a V-shaped recovery. Instead, it may be the juggernaut’s engine finally flooding, no longer able to process the volume of liquid being pumped into its cylinders.”²⁵

With the prospects for future growth in oil demand in so much doubt, even if the health crisis is averted quickly and the economy rapidly rebounds, there is no defensible way to conclude today that Enbridge has met its burden of proving that increasing demand for oil justifies adding this much more capacity to its Mainline system. If, at the time Enbridge filed its application, Canadian oil production had just decreased by a third, global and domestic demand

²⁵ “Why we may have already seen the peak in oil demand,” *Financial Times* (April 16, 2020). (Attached as Appendix W) <https://www.ft.com/content/bea183be-779c-491b-8ec6-f05da9fa5337>

for oil had just decreased by a third, and the experts, even the ones fairly bullish on the industry, were concluding that it will, in the best case, be a long time before oil demand even just returns to its pre-pandemic levels, it is difficult to fathom how Enbridge could prove its case.

The fact that these triggering events have occurred after the Commission's initial evaluation of the record does not make any difference. The Commission still has jurisdiction over this docket, and new evidence, new issues, and changed circumstances are precisely what justify granting petitions for reconsideration.

As the Commission recently reaffirmed, it reviews petitions for rehearing and reconsideration to “determine whether the petition (i) raises new issues, (ii) points to new and relevant evidence, (iii) exposes errors or ambiguities in the underlying order, or (iv) otherwise persuades the Commission that it should rethink its decision.” *In re Xcel Energy's Petition for Approval of Elec. Vehicle Pilot Programs*, No. E-002/M-18-643, 2019 WL 5102553, at 3 (Oct. 7, 2019), The PUC can and does consider “new and relevant evidence,” *id.*, and is not limited to the record in place before its original decision. *In re Minnesota Power*, No. E-015/D-17-118, 2018 WL 2445521, at *1 (May 29, 2018) (ordering reconsideration to assess impact of new tax reform law and new facts about tax savings); *see generally Henry v. Minnesota Pub. Utilities Comm'n*, 392 N.W.2d 209, 214 (Minn. 1986)(upholding PUC decision to order rehearing, even after its final determination, to consider new corporate reorganization). When the relevant circumstances have changed as much as they have in this case, then, the appropriate response for the Commission is either to deny the application or to order a rehearing, and likely a new contested case proceeding, to take and consider the new evidence.

II. THERE REMAIN REASONABLE ALTERNATIVES TO THE PROPOSED PROJECT THAT POSE FAR LESS RISK TO MINNESOTA’S ENVIRONMENT, RENDERING THE REVISED EIS INADEQUATE AND THE NEW CERTIFICATE OF NEED AND ROUTING PERMIT UNLAWFUL.

The collapse in oil demand due to the pandemic has made it clearer that the rationale for the proposed project has nothing to do with demand for oil in Minnesota and the Midwest. The crude oil inventory in the PADD 2 (Midwest) region is at or very near maximum storage capacity, with over 150 million barrels of oil available to meet demand. The Canadian tar sands industry understands full well that, if it remains dependent on Midwest refiners, it has very little future. Even before the pandemic, the Canadian Association of Petroleum Producers acknowledged that U.S. demand for Canadian oil was only going to decrease, and that the industry had to find a way to tap into Asian markets if it was to survive. The goal of the proposed project then is even more clearly today to get Canadian oil to Gulf Coast refiners and exporters to gain access to global markets. But whether the customers are Midwest refiners or imagined markets in China and India, there remain numerous reasonable alternatives, and that should also be fatal to Enbridge’s CON application under Minn. R. 7853.0130.B.

FOH has identified those alternatives before: Enbridge’s own “Mainline optimizations” expansion of the current Mainline’s capacity (350,000 bpd),²⁶ the likely doubling of the capacity of the Dakota Access Pipeline (DAPL), which Enbridge co-owns, to carry light oil from the Bakken shale (530,000 bpd), the Trans Mountain Expansion Project (TMEP) now owned by the Canadian government (590,000 bpd),²⁷ and the KeystoneXL pipeline, with the province of

²⁶ Enbridge, The Enbridge Mainline: Mainline System Capacity, (Appendix X)

<https://www.enbridge.com/reports/2020-liquids-pipelines-customer-handbook/mainline>

²⁷ “Dakota Access Pipeline operator plans large capacity expansion,” *Bismarck Tribune* (June 20, 2019), (Appendix Y) https://bismarcktribune.com/business/dakota-access-pipeline-operator-plans-large-capacity-expansion/article_a3de339a-3dc1-5f55-97fa-0dc200874502.html

Alberta now either paying or guaranteeing all of its construction costs, to carry heavy oil to tidewater (830,000 bpd),²⁸ the development of safer rail alternatives carrying tar sands oil in solid form,²⁹ new planned rail access to deepwater ports in Alaska,³⁰ and finally even new pipeline alternatives like SA-04, which would carry oil to Enbridge's Flanagan terminal in Illinois by a less circuitous, and much safer, route.

The Commission's position has been that only alternatives that transport oil from Enbridge's Clearbrook terminal to its Superior terminal can be considered, because that is how Enbridge defines the purpose and need for its project. But, as the recent collapse in oil demand has clarified even further, the purpose and need of any pipeline project is to deliver oil from producers to refiners, not to move oil between terminals. And, if there are better alternatives for delivering heavy Canadian oil from producers in Alberta to refiners in the Midwest, and to refiners or export facilities on the coasts where the crude oil or refined petroleum products can get to global markets, it remains the obligation of the Commission to fully evaluate those alternatives and deny the application if those alternatives are preferable. Minn. R. 7853.0130.B.

The risk of a catastrophic oil spill from the proposed project is well-documented in the record, and, of course, the administrative law judge (ALJ) found that the negative effect of the project on Minnesota's natural resources and Native American people weighed heavily against granting a certificate of need. And, since it is reasonably foreseeable that Enbridge will seek to

²⁸ TC Energy, Keystone XL Pipeline, (Appendix Z) [tcenergy.com/operations/oil-and-liquids/keystone-xl/](https://www.tcenergy.com/operations/oil-and-liquids/keystone-xl/). Alberta is investing \$1.5 billion, plus a \$6 billion loan guarantee, to get KeystoneXL built, acknowledging that private investors had disappeared. "Why Alberta is throwing billions behind the KeystoneXL pipeline," *CBC News* (April 1, 2020), (Appendix AA) <https://www.cbc.ca/news/business/analysis-alberta-invests-in-keystone-1.5516144>

²⁹ "First shipment of semi-solid bitumen on its way to China," *JWN Energy* (Sept. 26, 2019), (Appendix BB) <https://www.jwnenergy.com/article/2019/9/first-shipment-solid-bitumen-its-way-china/>

³⁰ "Will Rail Be Key to Exporting Canada's Tar Sands Oil to the World?," *Desmog* (October 2, 2019), (Appendix CC) desmogblog.com/2019/10/02/rail-exporting-canadian-tar-sands-oil

move more pipelines to the new corridor through Minnesota lake country, to avoid encroachment on the Leech Lake Reservation, only adds to the risk.

The evidence that a new line 3 and a new pipeline corridor through Minnesota lake country pose a significant spill risk, and a significant financial risk to Minnesota taxpayers, has only continued to grow since the Commission’s original decision in 2018:

- The late 2018 study showing a greater incidence of pipeline incidents in pipelines less than ten years old;
- The three spills in less than three years from TC Energy’s Keystone pipeline, constructed less than ten years ago, the most recent spill in late October 2019.

And now, Enbridge’s corporate reorganization, where it has consolidated its assets in the parent corporation, only increases the financial risk.³¹ Now the “parental guarantee” that comprises the Commission’s financial assurance package is essentially meaningless, and Minnesota is left dependent on the ability and willingness of Enbridge, Inc. to respond to and clean up a spill. Yet, the Commission has not insisted on any financial capability test, or third-party financial assurance mechanism, to assess Enbridge’s ability to pay and to provide another reliable source of payment and resources if Enbridge should default.

All of the suggested alternatives would reduce or eliminate the spill risk for Minnesota. Of course, the only way to eliminate the spill risk anywhere—and to eliminate the climate risk from potentially expanded Canadian tar sands production—is to choose not to build any of these

³¹ “Enbridge Inc Proposed Restructuring – Business Update Call,” *Thomson Reuters StreetEvents* (May 17, 2018), (Appendix DD)
https://www.enbridge.com/~media/Enb/Documents/Investor%20Relations/2018/SimplificationofCorporateStructure_May172018_Transcript.pdf

projects. Those decisions are not all in the Commission's control, but it is in the Commission's control to decide that there are reasonable alternatives to this proposed project and deny the CON application on that basis.

III. THE NEGATIVE CONSEQUENCES TO SOCIETY OF GRANTING ENBRIDGE'S APPLICATION FOR A CERTIFICATE OF NEED OUTWEIGH ANY PUTATIVE BENEFITS EVEN MORE GREATLY NOW.

To grant an application for a certificate of need, the Commission must not only find that the project is needed to secure "the future adequacy, reliability, or efficiency of energy supply" for consumers in Minnesota and neighboring states," Minn. R. 7853.0130.A, and that there is not "a more reasonable and prudent alternative," Minn. R. 7853.0130.B, but must also find that "the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate." Minn. R. 7853.0130.C. And the rule specifically requires the Commission to consider "the effect of the proposed facility . . . upon the natural and socioeconomic environments compared to the effect of not building the facility." *Id.*, subd. (2).

The Commission's balancing of "consequences" needs to be reconsidered for two reasons: (1) the Commission does not acknowledge or honor its independent statutory and common-law obligations to protect the environment, the climate, and Minnesota's water and (2) the dangers from this project have become greater, and the putative benefits have become even more suspect since the Commission's 2018 order, which it adopted again this year.

A. Minn. R. 7853.0130.C. must be read in light of the Commission's independent obligations under the Minnesota Environmental Policy Act, the Minnesota Environmental Rights Act, the public trust doctrine, and the Next Generation Energy Act.

Contrary to the Commission's apparent assumption, the balancing test in Minn. R. 7853.0130.C is not neutral. When in doubt, Minnesota law requires that the concerns about the environment must prevail. The Minnesota Environmental Policy Act (MEPA) requires that all

laws, rules, and policies be construed in the direction of preserving and protecting the natural environment. Minn. Stat. § 116D.03, subd. 1 provides that “[t]he legislature authorizes and directs that, to the fullest extent practicable, the policies, rules, and public laws of the state shall be interpreted and administered in accordance with the policies set forth in [the Minnesota Environmental Policy Act].” That pro-environment canon of construction, which has been on the books since the 1970’s, effectively puts a thumb on the scale in favor of the environment whenever a state agency like the Commission is charged with applying a balancing test like the one in Minn. R. 7853.0130.C. Put another way, state agencies like the Commission cannot look only at the language in their own rules, but must interpret those rules consistently with their “additional” statutory duty under MEPA to protect Minnesota natural resources. In *re NorthMet Project Permit to Mine Application*, 940 N.W.2d 216, 226 (Minn. Ct. App. Jan. 13, 2020), *review granted* (Minn. Mar. 25, 2020).

Of course, as FOH has reminded the Commission in nearly every substantive filing, MEPA also independently prohibits any Minnesota state agency from taking any action or granting a permit for development if the action or permit “is likely to cause pollution, impairment or destruction of Minnesota natural resources, and there is a “feasible and prudent alternative,” even if the alternative might be more expensive. Minn. Stat. § 116D.04, subd. 6. the Minnesota Environmental Rights Act (MERA) contains a similar prohibition. MERA mandates that an agency, such as the Commission, “shall consider the alleged impairment, pollution, or destruction of” natural resources and that “no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a reasonable and prudent alternative.” Minn. Stat. Ann. § 116B.09, subd. 2. Again, “[e]conomic considerations alone shall not justify” such a project. *Id.*

When it comes to water resources, the Commission's obligations are even greater. Independent of the Commission's statutory obligations, the public trust doctrine imposes a responsibility on the Commission to maintain Minnesota's waters for public uses. Under the public trust doctrine, the Commission has a fiduciary duty to preserve and protect the state's waters on behalf of all of its citizens. *Pratt v. State, Dep't of Nat. Res.*, 309 N.W.2d 767, 771 (Minn. 1981). The Commission's interpretation of its rules must take the agency's independent public trust obligations into account.

Likewise, when it comes to climate and greenhouse gases, all Commission actions must be consistent to the extent possible with the goals in Minnesota's Next Generation Energy Act (NGEA), Minn. Stat. § 216C.05, subd. 2; 216H.02, subd. 1. In the NGEA, the Minnesota legislature expressly recognized that "the state has a vital interest in providing for: increased efficiency in energy consumption, the development and use of renewable energy resources wherever possible, and the creation of an effective energy forecasting, planning, and education program." Minn. Stat. Ann. § 216C.05, subp. 1. It is "in the public interest" to encourage programs "that will minimize . . . fossil fuel consumption." *Id.*

The presumption, then, in any Commission balancing exercise, including the one called for in Minn. R. 7853.0130.C, should be against permitting any project that poses a threat to Minnesota natural resources, to Minnesota waters, or to Minnesota's energy efficiency and renewable energy goals. Unless a project is truly needed to assure energy availability and reliability, and unless the benefits of a project are truly compelling, applications for a CON should be generally be denied.

B. Under a correct interpretation of the rule, the risks and costs of this proposed project clearly exceed any putative benefits. That is even more clear today than it was in 2018.

The negative consequences of granting the CON are grave and indefensible, particularly in light of MEPA, the public trust doctrine, and the NGEA. The environmental costs and risks of the proposed project are well documented in the record:

- *Climate impacts* in the billions of dollars even if only a small percentage of the oil flowing through the pipeline is new tar sands production.³²
- *Oil spill risks* over the 40-year life of the project, instead of only the limited time before old line 3 becomes uneconomical or Enbridge's easements over the Leech Lake Reservation expire. Those risks are magnified by the increased volume of oil the line would be able to carry, the likelihood that virtually all of it would be "diluted bitumen" from Canada, the routing of the pipeline through a new corridor involving sensitive water resources in Minnesota lake country, and the proximity of the route to unique, irreplaceable resources like Lake Superior and the St. Louis River estuary.³³
- *Infringement on tribal hunting, fishing, and gathering rights* reserved in the 1837 and 1854 treaties, again for the entire 40-year lifetime of the project.³⁴

On the other hand, the alleged positive consequences of granting the CON for anyone other than Enbridge and Canadian tar sands producers are both speculative and insufficient. The

³² ALJ Report, Findings 675-76, 858, 861. If 100% of the oil running through the proposed project were new production, the social cost would be \$287 billion. If it were 10%, it would be \$29 billion; if it were 1%, it would be \$3 billion. The Canadian oil producers want pipelines so they can gain access to global markets and increase their production, and they would be disappointed if those production levels did not increase more than a tiny percentage. Any increase leads to enormous climate costs, not just from eventual consumption, but from the methods of extraction used by tar sands producers, which are the most carbon-intensive in the entire world.

³³ The proposed project would carry twice as much oil as the existing line 3, it would carry heavy tar sands bitumen not light oil, and unlike an in-trench replacement or following an existing pipeline corridor, it will open up a whole new part of Minnesota to the risks of a spill. See ALJ Report, Findings 1082-89.

³⁴ ALJ Report, Findings 876, 889. Compare 40 years of potential negative impacts on wild rice and other habitat in the tribes' ceded territories with the less than ten years Leech Lake has until Enbridge's easement expires.

Commission's May 1 Order mentions jobs, but of course these jobs would be temporary, and it has never been established that there will be any net gain in Minnesota employment in either the short-term or the long-term. The Order also mentions property taxes, and FOH does not dispute that Enbridge pays property taxes in the counties and school district through which its pipelines travel. But again, the calculations of potential tax benefit have never been netted out against either the prospect of additional state aid if property tax revenues fall, or the additional local government and school district expenses that might be incurred if this project goes forward. In any event, those kinds of "economic consequences" have to be discounted under MEPA.

The major benefit the Commission perceived in 2018, and again in 2020, was Enbridge's promise to retire the old line 3 more quickly if the Commission granted Enbridge's application. Enbridge has contended throughout that, if they are not permitted to build their proposed project, they will have no choice but to continue operation of old, deteriorating line 3. During deliberations, Commissioners said they thought Enbridge had "put a gun to their head" that was "locked and loaded."³⁵

That was a false choice then, and it is even more clearly a false choice now. Since 2018, Enbridge has replaced almost the entire capacity of old line 3 with "system improvements" that expand the Mainline system's capacity by 350,000 barrels per day. In the meantime, Canadian oil production has dropped by 25%, and Enbridge's pipeline system is now running with excess capacity. Enbridge certainly does not need a concession from Minnesota, either now or in the reasonably foreseeable future, to take old line 3 out of service if its maintenance costs are making it uneconomical. Under the Oil Pollution Act of 1990 (OPA-90), Enbridge is absolutely

³⁵ Oral Argument/Deliberation Items at 1:12:38, (June 28, 2018), http://minnesotapuc.granicus.com/MediaPlayer.php?view_id=2&clip_id=750

liable for the costs of a spill, and there is no reason to assume that Enbridge will deliberately risk taking on that potential liability.

Moreover, it just is not true there is nothing either government or private citizens can do if old line 3 proves to be too risky. Enbridge has a duty to prevent spills and leaks from its pipeline, Minn. Stat. 115E.02, and that duty is enforceable. The federal government, PHMSA and the EPA, has the power under federal law to intervene. The attorney general of Minnesota and private citizens can seek relief under the Minnesota Environmental Rights Act (MERA), Minn. Stat. 116B.03, and the public trust doctrine, *State v. Kuluvar*, 266 Minn. 408, 418 (1963).

In addition, the assumption that a new pipeline is safer than an old pipeline is also highly questionable, and has become even more questionable since the Commission's 2018 order. PHMSA data shows that newer (less than 10 years old) pipelines have had a greater number of reported spill and leak incidents than older pipelines have had. The multiple serious spills in the last three years from the Keystone pipeline, put into service less than 10 years ago, are a prominent nearby example.³⁶ The highly touted high-tech control systems now in place are not particularly reliable. Modern leak detection systems only detect 20 to 30 percent of spills, meaning a failure rate as high as 80%, worst-case leak detection times can be "hours and sometimes weeks," automatic valve-closure systems do not always work, and human error is a constant, no matter how new or old the steel is in a pipeline. *See generally Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 2020 WL 1441923 at *8-16 (D.D.C. March 25, 2020) (summarizing new expert testimony in latest round of DAPL litigation).

And finally, almost no matter what happens, old line 3 and likely other older pipelines will have to be retired, at least in the Minnesota lake country areas that are of greatest concern,

³⁶ "Keystone Pipeline Spill History," *BOLD Nebraska* (Nov. 7, 2019), (Appendix EE) <http://boldnebraska.org/keystone-pipeline-spill-history/>.

no later than 2029, when the easements to cross the Leech Lake Reservation expire. But, in stark contrast, any new pipeline would likely be in service for decades, and the impact on climate, the risk of oil spills, and the infringement on treaty rights will continue as the new pipeline turns into an old pipeline over its 20, 40, or 60-year lifetime.³⁷ This timeline is not on the side of the proposed project.

Under a proper interpretation of the Minn. R. 7853.0130.C and related environmental laws, then, the “balance of consequences” weighs heavily against granting Enbridge’s application. Enbridge’s desire to construct a larger pipeline that travels through a different part of the state does not obviate its need to maintain its existing pipeline in good condition or remove the pipeline if it cannot. There is no justification for letting fear about what Enbridge might do or not do with its existing pipelines take the Commission away from the careful weighing of consequences the rule requires. The Commission should reconsider its decision to do grant Enbridge a CON for the proposed project.

IV. THE SECOND REVISED ENVIRONMENTAL IMPACT STATEMENT STILL DOES NOT SATISFY MEPA’S REQUIREMENTS AND IT DOES NOT ADEQUATELY ADDRESS THE COURT OF APPEALS’ CONCERNS.

A. The second revised EIS did not correct the fundamental flaws in the earlier versions.

From the beginning, the environmental impact statement (EIS) for this project has suffered from a number of fundamental flaws:

- The EIS defines the purpose and need for the project too narrowly, and thereby fails to evaluate a reasonable range of alternatives. The EIS considers alternatives that do not

³⁷ Of course, if a new pipeline operates for much more than twenty years, we will almost certainly have failed to meet the climate change challenge. As more states recognize all the time, fossil fuels need to be largely phased out by 2045 to have any chance of meeting the goals of the Paris agreement. Now is not the time to be adding new fossil fuel infrastructure to our economy.

carry crude oil to Enbridge's Superior terminal off the table, for no reason other than that is Enbridge's preference. The true purpose and need of this and any pipeline project is to deliver crude oil from producers to refiners who can use it, and an EIS must consider any reasonable alternatives that would accomplish that purpose, whether or not they serve Enbridge's interest.

- The EIS's analysis of potential oil spills provides a "fate analysis," estimating how far an oil spill could travel under certain assumptions, but it never takes the next step of describing the potential environmental impacts of any such spill—what resources could be damaged, what ecosystem value those resources might provide, what it would cost to clean up and remediate a spill and restore those ecosystem services.
- The EIS's estimation of climate impacts is next to useless, because it does not provide any kind of estimate about how much more tar sands production will be facilitated if the pipeline is constructed. Instead, it simply says that if no more oil is produced, the additional climate impact will be zero, and if all of the oil in the pipeline is new production, the climate impact will be hundreds of billions of dollars. That does not give either decisionmakers or the public the information they need to make a reasoned decision about whether the putative benefits of the pipeline are worth the climate costs.
- The EIS never assesses the potential environmental impact if Enbridge moves the entire Mainline system to the new corridor opened up by this project. All of those pipelines encroach on the Leech Lake reservation, all of them are subject to easements that expire in 2029, and yet the EIS does not see moving more pipelines as reasonably foreseeable. FOH understands that the court of appeals did not base its decision on those arguments.

Nevertheless, these concerns remain valid, FOH does not waive them, and FOH urges the

Commission to reconsider its decision that the EIS is adequate despite those ongoing serious deficiencies.

B. The second revised EIS does not adequately address the court of appeals' concern that it does not assess the potential impact of a significant oil spill in the Lake Superior watershed.

When the Minnesota court of appeals reversed the Commission's prior EIS adequacy finding, its primary concern was that, even though the line 3 project would travel directly through the Lake Superior watershed to Enbridge's Superior terminal near the Lake itself, the EIS did not evaluate the impact of a major oil spill in the Lake Superior watershed. The court sent it back to the Commission to fill that gap, so that the Commission, the public, and ultimately a reviewing court would have an accurate appreciation of the risks to Lake Superior, the St. Louis River estuary, and the rest of the Lake Superior watershed.

The Commission again delegated the responsibility for fixing the EIS to DOC-EERA. DOC-EERA, its consultant, and presumably Enbridge decided that they would attempt to address the court's concerns by picking one water crossing site in the Lake Superior watershed and do a "fate analysis," a hydrological study of how far a 13-minute oil spill would travel in 24 hours. They picked a site—the Little Otter Creek crossing—which is about 32 miles from Lake Superior, and, as the revised EIS describes, a spill at that location could easily reach the St. Louis River and the potential amount of oiled shoreline and oil in the water could well do considerable damage.

FOH and others commented, and said that, to provide a fair picture, DOC-EERA should have included at least one alternative closer to the Lake and closer to the St. Louis River estuary, where a spill would be more likely to reach the estuary, Duluth-Superior Harbor, and the Lake itself. No one contended that the Little Otter Creek study was useless, just that it could not

provide the Commission, the public, or any reviewing court with a fair assessment of the potential risk to the Lake itself. Instead, FOH and others suggested that an analysis of the potential impact of a major oil spill where the proposed pipeline crosses watercourses that are much closer to the Lake, such as the Pokegama or Little Pokegama Rivers, which flow directly into the St. Louis estuary, would provide a more representative assessment.

As FOH stated in its comment, distance matters. A major oil spill thirty miles away from a protected resource poses a smaller risk than one five miles away. The longer the distance, the more likely it is that a spill will either dissipate or be controlled before it reaches the waterbodies of greatest concern. Nothing in the second revised EIS or the consultant's report suggests that a spill closer to the Lake or closer to the estuary would not pose a greater risk to the Lake or the estuary. As a result, limiting its analysis to the Little Otter Creek crossing pre-determined the conclusion that a major oil spill on Line 3 would not threaten Lake Superior, a conclusion that is simply not accurate.

The revised EIS makes three essentially legal arguments about why closer sites like the Pokegama or Little Pokegama crossings were not considered. First, the revised EIS says that it could not lawfully consider a spill from a line 3 segment in Wisconsin, even though much of the impact would be felt in Minnesota. That reflected the Commission's position at the time that it did not have jurisdiction, or could not constitutionally exercise jurisdiction, to conduct an environmental review for a facility outside of Minnesota. As the Commission well knows, the court of appeals rejected that position in *In re Minnesota Power's Petition for Approval of the EnergyForward Resource Package*, 938 N.W.2d 843 (Minn. Ct. App. 2019), *review granted* (Minn. March 17, 2020). There, the court held that if an out-of-state project need Minnesota

agency approval to proceed and could have significant environmental effects in Minnesota, an agency not only can but must do an environmental review that meets MEPA's requirements.

That holding fully applies here. The Commission may not have had authority to determine whether the Wisconsin segment of line 3 would be constructed, but it has always had the authority to determine whether any oil would run through it. And, as in *Minnesota Power*, which also involved a Wisconsin facility near Lake Superior quite close to Enbridge's Superior terminal, no one disputes that a major oil spill where the proposed line 3 crosses watercourses in Wisconsin could have a significant effect on Minnesota's environment. Clearly then, those crossings could have lawfully been review in this second revised EIS.

The second legal argument in the revised EIS for refusing to consider sites closer to the Lake was that DOC-EERA and the PUC had an obligation to defer to the environmental impact statement prepared for the Wisconsin DNR (WDNR) when they evaluated the Wisconsin segment of the Sandpiper pipeline proposal. The fact is that the WDNR Sandpiper EIS did *not* assess the impacts of a spill into the Lake or the watershed, and indeed expressly acknowledged that it made *no* attempt to assess "[t]he specific impacts of an oil spill into the St. Louis estuary and Duluth Harbor." WDNR EIS, § 8.4-2. Instead, it expressed the hope that *Minnesota* would do the kind of site-specific spill modeling for the project that would be helpful to Wisconsin, but determined that they could not wait for that to be completed before issuing their EIS. So, as FOH pointed out before, we have WDNR hoping Minnesota will do the job, and Minnesota claiming it has to defer to an analysis WDNR never did, and the result is that no one has done the assessment that would help decision-makers and the public understand the potential risk to the estuary, the harbor, and the Lake.

The third legal argument in the second revised EIS is that, since the Wisconsin portion of the new line 3 has already been constructed, any review of potential spill consequences from those segments is now moot. That makes no sense. If the Commission or any Minnesota state agency denies Enbridge's applications, and no new line 3 is built across Minnesota to Superior, then there will not be oil running through the Wisconsin segment and therefore no additional risk to the St. Louis Estuary, the Duluth Harbor, or Lake Superior itself. That is more than enough to maintain a live controversy.

The Commission's May 1 order neither acknowledges nor addresses any of these arguments. Instead, the Commission adopts a *post hoc* rationalization somewhat surprisingly emphasizing how unique and essentially non-representative the Little Otter Creek crossing is—that it includes “rapids and waterfalls with the potential for sinking oil” “large regions of environmentally susceptible receptors” and “a range of physical characteristics that add depth” to their previous modeling exercises. May 1 Order at 8.

All that may be true, and even interesting, but it is beside the point. The major potential threats to Lake Superior, the St. Louis estuary, and the Lake Superior watershed—the resources the court of appeals was concerned about—come from spills into relatively slow-moving water that flows into the St. Louis river estuary near the Lake. The Kalamazoo River, where Enbridge's massive 2010 spill occurred, is very slow-moving, with an average gradient in the lowest gradient class (less than 3 feet per mile) down to about 1 foot per mile where the spill occurred.³⁸ Yet, even with the Kalamazoo's “flat water,” that spill contaminated a 30-mile stretch of the river that had been in excellent ecological condition. Heavy rains may have exacerbated that situation, but the point is that a major oil spill into the Pokegama or Little

³⁸ Michigan DNR, *Kalamazoo River Assessment* at 21 (Sept. 2005), <http://www.michigandnr.com/PUBLICATIONS/PDFS/ifr/ifrilibra/Special/Reports/sr35/SR35.pdf>

Pokegama rivers, less than five miles from the St. Louis River in the estuary, could certainly reach Duluth Harbor and Lake Superior.³⁹

By limiting its analysis to the Little Otter Creek crossing, and not including one of the water crossings much closer to the Lake, the second revised EIS understates the risks. A spill at Little Otter Creek could be disastrous, no doubt, but a major spill into a watercourse close to Lake Superior could be catastrophic. Because the second revised EIS—whether deliberately or inadvertently does not matter—fails to acknowledge and analyze that risk, it does not address the court of appeals’ concerns and it is still not “adequate” under the Minnesota Environmental Policy Act (MEPA).

C. The assumptions in the second revised EIS about how long it may take to discover a spill and stop the flow of oil if a spill occurs, and then how long a spill might continue to spread, are not “conservative” and seriously understate the potential risk.

As the Commission’s May 1 Order acknowledges, the second revised EIS calculates the maximum volume of oil that could be spilled by assuming (1) that the spill would be discovered immediately; (2) that the line would continue to pump oil for no more than ten minutes after the initial release; and (3) that it would take no more than three minutes to close all the necessary valves and shut down the line. FOH and others have challenged those assumptions as overly optimistic for two key reasons:

- They assume that Enbridge’s automated systems—its Computational Pipeline Monitoring (CPM) system, its Supervisory Control and Data Acquisition (SCADA) system, and its automated valve-closing systems—will always work as intended. The

³⁹ Like the second revised EIS, the Commission’s May 1 Order also dismisses the risk if a major oil spill reached Duluth Harbor by characterizing the area as “industrialized,” with “docks and manmade banks.” May 1 Order at 8. As the Commission is well aware, however, the harbor itself is a significant tourist attraction with considerable recreational boat traffic and people enjoying its “manmade” banks, and of course it is directly connected to Lake Superior itself.

record shows that automated systems fail—they do not discover leaks, they are susceptible to breakdowns, and human error often defeats the technology.

- The legal standards for oil spill risk planning at the federal level do not allow companies to assume that automated systems will work. EPA requires operators to assume “complete failure in which no safety equipment works except for passive measures such as drains, dikes, and dams, with weather conditions assumed to be the worst possible.” PHMSA’s rules governing “worst case discharges” require that a pipeline’s maximum release time in hours, plus the maximum shutdown response time in hours”==”hours” not “minutes”—be “based on historic discharge data.” For Enbridge’s Kalamazoo spill, detection and shutoff took 17 hours, not 13 minutes. The Michigan line 5 study⁴⁰ used two hours, based on Enbridge’s assessment of how long it might take to get to a site and manually shut off the valves if the automated systems failed. Two hours means 32,000 barrels of oil.

Likewise, FOH and others challenged the assumption in the second revised EIS will be controlled in 24 hours. Again, control of the Kalamazoo spill took way more than 24 hours. Moreover, the Coast Guard has conceded that it may not be able to control a major oil spill into the Great Lakes at all. The far better approach is the one used by the Michigan study, which calculated likely oiled shoreline distances and oiled surfaces at a series of time intervals, ranging from one day to 60 days to assess the damage an oil spill could do.

The Commission’s May 1 Order addresses none of these issues. Its only response is to characterize these assumptions as “conservative,” based on what DOC-EERA and Enbridge have

⁴⁰ *Independent Risk Analysis for the Straits Pipelines* (Sept. 2018), <https://mipetroleumpipelines.com/resources-reports>

said, when clearly the assumptions understate the risk. We can hope that the automated systems will work, that human operators up in Canada will not misinterpret the data as they did with the Kalamazoo spill, that it will not be necessary to manually shut off valves, and that response teams can get to a spill site quickly and with all the necessary equipment and succeed in controlling a spill before it spreads. But our actual experience with pipeline spills, the requirements of federal legal standards, and the judgment of independent analysts like the Michigan team all lead to the conclusion that an EIS's working assumptions cannot be this optimistic.

D. The failure of the second revised EIS to assess the public health and safety impacts or ecological effects of major oil spill in the Lake Superior watershed, to evaluate the likely effectiveness of potential measures to restore damaged natural resources, including what they might cost, and to make quantitative estimates of potential natural resource and economic damages means that neither the Commission, the public, nor any reviewing court can have a reasonable understanding of the potential scope of a major oil spill in the Lake Superior watershed.

As explained above, the value of the new “fate modeling” exercise in the second revised EIS for understanding the potential impact of a major oil spill from this proposed pipeline in the Lake Superior watershed is very limited. Sites closer to the St. Louis estuary and the Lake are not analyzed at all, the assumptions about the maximum volume of oil that can be spilled are unduly optimistic, and the potential public health and safety and ecological effects of a spill from a site near the Lake are not evaluated.

As FOH previously commented, an appropriate approach for the second revised EIS would have been to evaluate a potential 32,000 barrel spill at the Pokegama River crossing. That process could start by tracing where that much oil might go in different circumstances and conditions if the spill is not controlled. Then, in the worst case, step two would be to assess the potential negative impacts on drinking water, on fish and wildlife, on forest resources, on

recreation and tourism. Step three would be to estimate the economic costs, and the price of remediation and restoration, considering various alternatives. That kind of analysis—precisely the analysis conducted by the Michigan Line 5 team—is what it will take to provide what the court of appeals found lacking in the EIS they reviewed.

It is understandable why Enbridge or those trying to defend the Commission’s previous decisions would want to avoid that. The EIS as it stands demonstrates that a much smaller spill, quickly brought under control, further away from the estuary and the Lake, could still have devastating consequences. Apparently the goal was to get a headline that a Line 3 spill would not threaten Lake Superior, when that outcome depends entirely on a specific selection of sites and an optimistic set of assumptions. That does not meet MEPA’s standards, and it should not be sufficient to assuage the court of appeals.

CONCLUSION

For the reasons stated above, and in all of intervenor FOH’s previous submissions in this docket, FOH respectfully requests that the Commission vacate its May 1 Order, deny Enbridge’s application for a certificate of need and a routing permit, or, in the alternative, order that DOC-EERA fill the gaps in the second revised EIS, determine whether a new revised EIS meets MEPA’s standards, and, if so, order a new contested case to take new evidence focused on the changed circumstances since the Commission’s previous orders in 2018.

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

ATTORNEY FOR INTERVENOR FRIENDS
OF THE HEADWATERS