ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

May 17, 2019

Via Online

Minnesota Department of Natural Resources
ATTN: Line 3 Pipeline Replacement Applications
500 Lafayette Road
St. Paul, MN 55155-4025

RE: Comments of Friends of the Headwaters on the various Enbridge applications for DNR permits and licenses for the Line 3 Pipeline Expansion and Relocation Project

Dear Department of Natural Resources:

This comment is submitted on behalf of Friends of the Headwaters who has been participating in this process since Enbridge originally proposed its "Sandpiper" pipeline project along this new proposed corridor several years ago. The organization has members who live, work, and play in the area potentially affected by this project.

We do thank you for the opportunity to provide written comments on the various Enbridge applications for DNR permits and licenses for the Line 3 pipeline expansion and relocation project. The DNR has not afforded this chance to comment on similar previous projects at this stage, and we do value the department's efforts to make this process somewhat more transparent. We are concerned, however, that the DNR has not made information about the last six months of activity on this project public—whether it be application revisions, communications between DNR and Enbridge, communications with other federal or state agencies, or communications within the department.[1] We request that the DNR post that material on its Line 3 website as well, and give the public an opportunity to comment on more current information. If the DNR is not willing to be transparent with this material voluntarily, consider this an ongoing request for disclosure under the Minnesota Government Data Practices Act.

We have had the opportunity to review the application materials as well as the webinars conducted late in the comment period and other materials posted on the Minnesota DNR web page. In our view, the record so far does not provide the DNR with an adequate basis for granting the requested permits. The DNR's own February 21, 2019 comments to the U.S. Army

[1] For example, Enbridge recently proposed a number of route modifications, but there is no information at all available about any DNR role in those proposals. Likewise, there is still little or no site-specific analysis contained in the materials DNR has posted. If that has been developed in the past several months, it should be made available to the public for comment.

Corps of Engineers on Enbridge's section 404 permits identify many of the gaps and weaknesses in all of Enbridge's proposals, and we urge the DNR to hold itself to at least as high a standard as it would hold the Corps.

BROADER LEGAL ISSUES

Before addressing those issues, however, we wish to comment on the law governing these applications. Based on statements made in the webinars, we believe the DNR is taking an unduly restrictive view of its own legal authority and responsibility. We understand the political desirability perhaps of hiding behind a narrow construction of the law, but we believe it places the likely set of outcomes in considerable legal doubt. It also sends the public an unfortunate message that this DNR will seize any opportunity to claim that the law leaves it powerless to take the steps necessary to protect Minnesota's environment, at least when faced with political controversy or well-funded interests in opposition.

Contrary to several statements in the webinars, all of the statutes and rules that apply to these applications provide the DNR with considerable authority and discretion. For example, the rules governing utility licenses to cross state-owned lands direct that the standards are "to provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings." Minn. R. 6135.1000. Consistent with that goal, the rules contain "standards for route design" that direct applicants to avoid streams, avoid lakes, avoid wetlands, avoid soils susceptible to erosion, avoid areas with high water tables, and avoid many other problem areas, unless there is no feasible and prudent alternative. Minn. R. 6135.1100.

Likewise, the rules governing public waters work permits direct the DNR to "minimize encroachment, change or damage to the environment," Minn. R. 6115.0190, subp. 1.A. (filling), to "preserve the natural character of public waters and their shorelands, in order to minimize encroachment, change, or damage to the environment, particularly the ecosystem of the waters," Minn. R. 6115.0200, subp. 1.A (excavation), and to "preserve the natural character of public waters and their shorelands." Minn. R. 6115.0210, subp. 1.A.(structures), and so on.

In addition, as the DNR is well aware, the law governing its permitting responsibilities goes well beyond the specific provisions of Minnesota Rules pts. 6115 or 6135. As are all state agencies, Minnesota DNR is subject to the "general duty" clause of the Minnesota Environmental Policy Act (MEPA):

> No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.

Minn. Stat. § 116D.04, subd. 6. What that section means is that, even if an applicant for a project like a crude oil pipeline meets each of the technical requirements for a particular permit under Minnesota rules, no agency can lawfully grant that permit without adequate assurance that the project will not likely cause pollution, impairment, or destruction of Minnesota's air, water, land or other natural resources, unless there is no feasible and prudent alternative.

Coupled with that broad statutory responsibility under MEPA, the DNR is also uniquely responsible for preserving Minnesota surface waters under the "public trust" doctrine, no matter what the limitations of any specific permit rules might be. Whatever the merits of its split decision that the public trust doctrine does not apply to groundwater, the Minnesota Court of Appeals did recently unanimously reaffirm that the state "owns navigable waters and the lands under them for public use, as trustee for the public," which imposes a common-law duty on the state to maintain and preserve those waters. *White Bear Lake Restoration Ass'n v. Minnesota DNR,* 2019 Wl 1757999 (Minn. Ct. App. April 22, 2019). Like MEPA, the public trust doctrine imposes a "general duty" on the DNR to protect the waters of the state, and granting a permit that will allow a project that poses a significant risk to waters of the state is unlawful, even if the narrow requirements of the permit regulation are met.

And, of course, DNR permitting is subject to the reserved usufructuary rights of the Minnesota Chippewa tribes under the 1837 and 1854 treaties for sure, and arguably under the 1855 treaty as well. This pipeline would cross those "ceded territories" and to the extent it would interfere with the hunting, fishing, and gathering rights of the tribes, the DNR cannot lawfully grant permits allowing it to be constructed or operated.

The implications of these broader legal responsibilities are significant.

First, they mean that the DNR may not just defer to the pipeline routing decision made by the Public Utilities Commission (PUC). The webinars pretend that the DNR is *obligated* to defer to the PUC on pipeline routing, but that is not the case. Minn. Stat. § 216G.02, subd. 4 says "[t]he issuance of a pipeline routing permit under this section and subsequent purchase and use of the route locations is the only site approval required to be obtained by the person owning or constructing the pipeline" and it provides that a routing permit "supersedes and preempts all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local, and special purpose governments." Conspicuously absent from that preemption provision is any agency of *state* government, or any state permitting or licensing other than "site approvals." The DNR may not have the authority to grant final site approvals, but it does have the authority and responsibility to reject permit applications if the project is likely to cause environmental damage and there are feasible and prudent alternatives. That means that the DNR must independently evaluate whether there are feasible and prudent alternatives to the pipeline route Enbridge has proposed. If there is a less damaging environmental alternative, then the DNR must deny the permits and Enbridge must go back to the PUC for a new "site approval."[2]

[2] Under the DNR's current construction of the law, the outcome depends on the temporal order in which the company files its applications. If Enbridge had filed for its DNR applications first, and the DNR denied the applications on the grounds that there were feasible and prudent route alternatives that would reduce the impact on public lands and waters, then it would be the PUC that would have to defer to the DNR decision, not vice versa. The proper way to construe the law is that each agency has the independent duty to fully consider all feasible and

Throughout the PUC process, going back to the Sandpiper proposal, the DNR has been critical of the PUC's refusal to consider route alternatives that would pose less risk to Minnesota natural resources. The PUC has made no effort to address its obligations under MEPA, never once mentioning that requirement despite repeated efforts by advocates to get them to consider it. It therefore falls to the DNR to be the first agency to genuinely evaluate a range of potential feasible and prudent alternatives, which is what the law requires.

Second, those broader responsibilities mean that the DNR cannot lawfully avoid consideration of pipeline operating risks, including the risk of diluted bitumen or "dilbit" spills, in determining whether to issue these permits. The DNR is well aware of the potential damage from a pipeline spill along the current route, and the DNR also knows that the way to reduce that risk if a pipeline must be built is to route it away from the concentration of fragile and often irreplaceable natural resources. Since the purpose of the pipeline is to move crude oil from the Canadian tar sands region to export markets, there are many feasible and prudent alternatives available. Obviously, Enbridge has a financial interest in using its current pipeline and terminal infrastructure, but that is exactly the kind of "economic consideration alone" that cannot justify selection of a more environmentally damaging alternative under Minnesota law. To the extent this pipeline might increase the risk to resources that the tribes hunt, fish, or gather in the ceded territories, such as wild rice, the DNR has an obligation under federal law to assess that risk and avoid it, again if there is any feasible and prudent alternative.

SPECIFIC STANDARDS

Even within the four walls of the specific standards contained in the rules, Enbridge has not made the case for granting these permits. The DNR's Corps comments were all well-taken,[3] and the gaps in the 404 application remain problematic in the DNR applications. These comments focus on water crossings and wetland impacts.

License to Cross Public Waters

In its February 2, 2019 comment to the Corps, the DNR stated that any decision on water crossings would require detailed data on the hydrology and geomorphology of *each* water crossing, a complete risk analysis, and a detailed explanation for the selection of any particular water crossing method at each crossing.[4] Enbridge's application to the Corps did not contain that information, and its application to the DNR (Revision 1—Nov. 2018) does not contain that

---

prudent alternatives, and the outcome that best protects the environment is the one that prevails. Agencies cannot lawfully delegate their responsibilities to other agencies.

[3] Unfortunately, DNR did not include its "site-specific comments for public water crossings," saying only that they would come only after the Utility Licenses are done, with information only accessible through MPARS, the DNR permitting portal. We request that any site-specific information or discussion be made available to the public for comment.

[4] This same lack of site-specific analysis characterizes the water appropriations permit application as well. For example, in Hubbard County, shallow groundwater aquifers within the Straight River Groundwater Management Area are already under considerable pressure as the "first choices" for appropriations. Island and Long Lakes are identified as "second choice" contingency sites, but there is nothing that describes how those decisions will be made. In some cases, surface water drawn for hydrostatic testing could be discharged back to its source, but there is no discussion about whether or under what circumstances, that would be permitted.

information either.[5] All Enbridge provides is a general description of the advantages and disadvantages of different crossing methods, a spreadsheet with its selections, and an assurance that they will make good choices. What are referred to as site-specific plans (SSPs), horizontal directional drilling (HDD) plans, or environmental crossing plans (ECPs) are just drawings without any analysis of whether they comply with the standards or why they do not. One of the results is that horizontal directional drilling (HDD) is proposed for only a small percentage of the crossings, not, for example, for the highly sensitive LaSalle Valley location. HDD is not a panacea—Minnesota has had problems with frac-outs with previous pipeline projects[6]—but HDD can limit the potential permanent damage to water basins and watercourses and their riparian areas. The bottom line is that, until the DNR (and the Corps and the MPCA) get the information they request, there is no basis for granting any utility crossing licenses at all.

The DNR's Corps comment also pointed out that its past experience with Enbridge pipelines left them skeptical that permanent impacts are accurately described in the application. The DNR insisted that there needed to be a long-term monitoring plan to capture permanent impacts, that there needed to be mitigation plans in place for different sets of circumstances, and that Enbridge needed to provide financial assurance to guarantee that funds would be available to mitigate reasonably foreseeable risks. Enbridge's applications contain none of that. All Enbridge does is list a number of possible best management practices, typically in its "Environmental Protection Plan," but provides almost no information about what exactly they propose to do at each crossing. Instead, the application is full of statements like:

- "[C]learing debris will *generally* be removed from the wetland for disposal";
- "Timber construction maps will be installed *if needed";*
- "Grading activities … will be minimized *to the extent practicable";*
- "Cleanup and rough grading will begin *as soon as practical* after the trench is backfilled."

These are all statements from page 28, but they recur throughout the application. If those became permit or license conditions, they would be virtually impossible to enforce. Compare the DNR's recommendation to the Corps that there never be more than three miles of open trench, and that no trench be open more than 72 hours—standards where it is possible to determine whether compliance has occurred.

There is no provision for or analysis of financial assurance either, either to assure that mitigation measures are implemented, monitored, and effective, or to address decommissioning costs when the line is retired. Oil prices remain well below breakeven levels for the oil sands product this line is intended to carry, and most analysts have concluded that a near total phaseout of fossil fuels by mid-century will be necessary to reach climate goals. The likelihood of an early retirement of this pipeline under financial stress is quite high, making financial assurance an even more critical condition for any DNR license or permit.

[5] Of course, neither does the environmental impact statement (EIS) prepared for and approved by the Public Utilities Commission. That issue is, as DNR knows, currently before the court of appeals.
[6] The experience with the MinnCan pipeline in the LaSalle Valley/Rice Lake area is a good example.

Wetlands

The work in public waters permitting process is where the DNR picks up possible negative impacts to "public waters wetlands," which are all type 3, type 4, and type 5 wetlands (as defined in U.S. Fish and Wildlife Circular No. 39, 1971 edition) that are 10 acres or more in size in unincorporated areas or 2.5 acres or more in size in incorporated areas. Minn. Stat. § 103G.005, subd. 17b.[7] The rules, Minn. R. 6115.0150 - .0280, contain specific standards for filling, excavation, structures (including but not limited to bridges, culverts, intakes, and outfalls), water level controls, and restoration, and, again, the goal is to avoid, minimize, and if there are no feasible and prudent alternatives, to replace affected public waters wetlands.

The DNR's expertise on wetland impacts, of course, goes well beyond the bigger, wetter ones that come within the definition of "public waters wetlands" or which appear on the Public Waters Inventory (PWI). Many of the concerns the DNR has previously identified apply to Enbridge's treatment of wetlands generally.

For example, the DNR previously observed, in its comment to the Corps, that Enbridge's delineation of affected wetlands was underinclusive and incomplete. Enbridge's reliance on late summer-fall surveys likely missed several wetland areas altogether, and its inclusion of only wetlands either on or very close to the route likely left other wetland areas out of the equation. Likewise, Enbridge's application largely ignores indirect impacts on wetlands, some a considerable distance from the ROW, from soil compaction, introduction of invasive species, and impacts to hydrology and geomorphology which can negatively affect wetland species composition, hydrology and soil structure, which can permanently damage the structure of wetlands and reduce their functionality. The DNR made many suggestions for avoiding those indirect impacts, including better management of clearings, temporary work spaces, staging areas, and access roads, along with better vegetation management, best management practices to limit aquatic invasive species, monitoring, and wetland recovery planning to address potential wetland damage that Enbridge has not yet acknowledged. At this point, however, all we have is Enbridge's Environmental Protection Plan, which does not incorporate the DNR's recommendations.

The DNR also emphasized the desirability of interagency cooperation when it comes to the issue of wetlands. We agree. The DNR's specific regulatory jurisdiction may focus on "public waters wetlands" and ancillary wetland impacts from public land crossings, but the DNR has wetlands expertise that could be of enormous value, not only to the Corps, but to the MPCA as well. Too often we hear statements that pipelines are somehow "exempt" from state wetland regulation. As DNR knows, that is misleading at best. Pipelines can get around *local* government wetland permitting under Minnesota's wetland conservation act, but they are not exempt either from DNR's public waters wetland regulations or from MPCA's wetland protection water quality standard. Minn. R. 7050.0186.

[7] There is a "pipeline exemption" for requiring wetland replacement plans in Minn. Stat. § 103G.2241, subd. 6, but it only applies if (1) the direct and indirect impacts of the proposed project have been avoided and minimized to the extent possible; and (2) the proposed project significantly modifies or alters less than one-half acre of wetlands. That clearly does not apply here.

Minn. R. 7050.0186 is not limited to "public waters wetlands," nor is it limited to "waters of the United States," however that ultimately may be defined. Instead it covers any areas with the following attributes: (1) a predominance of hydric soils; (2) inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in a saturated soil condition; and (3) under normal circumstances, support a prevalence of such vegetation. *Id.,* subp 1a.B. The substantive standard is strict:

> No person may cause or allow a physical alteration which has the potential for a significant adverse impact on one or more designated uses of a wetland, unless there is not a prudent and feasible alternative that would avoid impacts to the designated uses of the wetland.

Id., subp. 4. Moreover, the wetland standard squarely places the burden of proving the absence of prudent and feasible alternatives on the applicant:

> Prudent and feasible alternatives that do not involve wetlands are *presumed* to be available unless *clearly* demonstrated otherwise by the permit or certification applicant.

Id., subp. 4.A.(emphasis added). And the standard is explicit that the general antidegradation rule fully applies to wetlands.

That means that, in the usual avoid—minimize—mitigate hierarchy, the presumption is that wetland impacts are to be *avoided* whenever possible. And the way to avoid wetland impacts is to change the site or route of the project. There are few, if any, "best management practices" that will truly avoid impacts, and therefore those measures are clearly weak second choices. Enbridge's approach, which is to claim minimum wetland impacts (only ten acres of permanent impacts) and then tentatively offer to mitigate with wetland credits, is not consistent with the law. To the extent that wetland restoration is required, again financial assurance is a critical condition.

Enforcing Minn. R. 7050.0186 and the antidegradation rule as applied to wetlands is the MPCA's responsibility, but the DNR should be an active participant in that process and should not defer to the Corps or MPCA to ensure that that standard is fully enforced.

CONCLUSION

At this stage in the proceedings, from the public's perspective, all we have is an incomplete application from Enbridge, and no indication whether any of the DNR's recommendations are going to be implemented or even considered. The DNR has also strongly signaled that its intent is to follow past practice, which is to treat pipeline routing questions and pipeline operation risks such as spills as off-limits, and to limit its role to attempting to negotiate permit conditions with Enbridge that may limit the damage likely to arise from the construction and maintenance of the project.

We urge the DNR to take a different course, to take the authority and responsibility it has under the DNR statutes and rules, under MEPA, and under the public trust doctrine and use it to better protect Minnesota's waters and natural resources. That means evaluating route alternatives that could avoid impacts, that means assessing the risks of spills and the costs of additional greenhouse gas emissions, and that means denying permits even with conditions if needed to prevent unnecessary damage.

We applaud DNR's decision to open up this process somewhat, at least at the front end. We hope that the DNR will not treat public participation as a box to check, and then go back to closed-door negotiations with the applicant as the heart of these permit proceedings. We encourage the DNR to make application revisions, site-specific proposals and analysis, and internal and external communications available to the public as well, and not wait until the permits and licenses are already out and the key decisions have already been made. Failure to involve the public further only increases the risk that all of these issues will end up in litigation, and that the public's faith in the process will further erode.

If you have questions, please contact us at your convenience.

Sincerely,

Scott Strand
Senior Attorney
Environmental Law & Policy Center
60 S. 6th Street, Suite 2800
Minneapolis, MN 55402
(612) 386-6409
sstrand@elpc.org

Attorney for Friends of the Headwaters