



October 28, 2020

Commissioner Laura Bishop
Minnesota Pollution Control Agency

Via email: laura.bishop@state.mn.us

Dear Commissioner Bishop and Team,

We are grateful to you and your team for your time and the sincerity of your questions last Friday.

We believe you wish to do what is best for Minnesota, and that you and Governor Walz both wish to follow the law, the right processes, and uphold scientific integrity with your decision on Line 3.

With this memo we hope to provide our perspectives on a couple of topics that came up in Friday's discussion:

- I. The legal basis for denying this water quality certification
- II. What might happen after the PCA denies this water quality certification

I. The Legal basis for denying the Line 3 Water Quality Certification application.

There are three clear legal paths for denying this water quality certification application according to Minnesota law.

Path 1: **Denial because the project “endangers human health or the environment and that the danger cannot be removed by a modification of conditions of the permit.”**
See [MN Administrative Rules 7001.0140 Final Determination, Subp. 2, \(D\)](#).

Path 2: **Denial because the project’s degradation to Tier 2 high quality waters is “unavoidable.”**

Path 3: **Denial based on application of the balancing test** required for finding the project’s unavoidable degradation of high quality waters necessary to accommodate important economic and social changes.
See [MN Administrative Rules 7050.0265 \(Antidegradation Standards\), Subp. 5](#)

Since the PCA’s Preliminary Anti-Degradation Assessment takes the third path this memo will primarily address this path.

Denial based on application of the balancing test.

- The PCA Commissioner has the power to do the balancing test – it is actually required by the administrative rules if the PCA wishes to pursue a permit that causes “unavoidable” degradation of high quality waters, which this project does. ([7050.0265, Subpart 5, B.](#))
- That balancing test, which should be independent, includes taking into consideration 6 factors, many of which are relevant here, but especially the 6th: “Other relevant environmental, social, and economic impacts of the proposed activity.” ([7050.0265, Subpart 5, B. \(6\)](#))
- The PCA, instead of doing its own balancing test, which it should do, relied on a review of the PUC analysis and Enbridge’s own assessment. ([Enbridge Line 3 – Preliminary Antidegradation Determination for 401 Certification, p. 9, last paragraph](#))

Please note: Nothing in Minnesota law compels the PCA to follow the findings of the PUC, regardless of whether that body made its findings first. The DOC, PCA, and PUC all have different roles to play in the evaluation of a project of this magnitude.

- **The PUC analysis on which the PCA has thus far relied is critically flawed.**
 - **ON CLIMATE:** The PUC decided that, because different emissions models have different assumptions about the project’s life-cycle carbon emissions, the life-cycle emissions from Line 3 are unknowable, and therefore **the PUC put these climate impacts at ZERO** instead of the \$287 billion of social cost the ALJ had affirmed (from the Department of Commerce EIS of 2017).

The PUC order from Sept. 5 2018¹ says at p. 28-29, footnote 147:

But the FEIS acknowledged the limitations of the lifecycle greenhouse gas analysis: "Note that there are assumptions and data limitations in the characterization of life-cycle [greenhouse gas] emissions that vary between studies. As a result, the [greenhouse gas] emissions can differ substantially from one study to the next. Since the studies reviewed do not consistently disclose the details of their analysis, and often rely on proprietary models and data, a thorough assessment of the reasons for this variability is not possible." FEIS at 5-466. The Commission therefore does not adopt the ALJ Report at finding 676 and those findings that rely on finding 676.

The ALJ finding 676 is the one that affirms the project would have a social cost of carbon of \$287 billion. The PUC ignoring \$287 billion of impacts seems to align the Commission with the ever-shrinking minority who do not believe in climate science or climate models.

¹ The PUC’s Sept. 5, 2018 order is the approval of the Certificate of Need and has been "reissued" whenever the PUC has reapproved the Certificate of Need.

This position is inconsistent both with the intellectual standards our Commission should hold, and its own statements in this and previous cases. This certainly shouldn't be the position taken by the PCA.

- **ON TREATIES:** The Commission omitted all discussion of treaties from their order, determining that while the ALJ report included them, they did not need to. Footnote 18 of their September 2018 order states:

“For example, the ALJ Report included a section discussing the treaties between the federal government and the Native American sovereign nations located in Minnesota. The Commission concludes that this discussion is not necessary to the Commission’s decision, and therefore does not adopt these findings.”²

- Aside from these glaring omissions of climate impacts and ignoring treaty rights as an impact on indigenous communities, the factors the PCA did take into account are questionable at best:

- Future adequacy, reliability and efficiency of energy supplies.

The problem with including this as a primary factor in the PCA’s analysis is that the need or demand for Line 3 oil to maintain the adequacy, reliability and efficiency of energy supplies is the basis of the legal appeal by the Department of Commerce, refiled most recently in August. In 2017 the DOC concluded that the Line 3 proposal does not meet Minnesota’s legal bar to establish need for the project, due in part to Enbridge’s failure to supply an oil demand forecast. Enbridge inappropriately defined demand as oil companies wanting to ship oil through their pipeline if it were built, not a demand by end users for the oil. As PUC Commissioner Matthew Schuerger wrote in his dissent in May 2020, "the absence of an accurate, reliable, demand forecast is a fatal flaw".

Furthermore, the DOC concluded in 2017 that this oil was in fact not needed for regional oil demand.³ Demand has only further decreased since then.

It does not make sense for the PCA to adopt in its balancing test an analysis of need that is advanced by Enbridge but disputed by the Dept. of Commerce -- particularly when the reliability of energy is directly within the purview of the Dept. of Commerce, as opposed to the PCA. The PCA should use the DOC analysis when making its own determination of project impact and balancing costs and benefits.

² The Treaties of 1842, 1854, and 1855, guarantee the Anishinaabeg (Ojibwe) rights to hunt, fish, gather medicinal plants, cultivate and harvest wild rice, and preserve sacred or culturally significant sites. These treaties are still living and require adherence. The PUC had no staff attorney with knowledge of treaty rights advising their analysis and did not give it consideration outside of evaluating impacts during the EIS, which is different than weighing the legal requirements of treaties.

³ [In direct testimony](#), Department of Commerce Commissioner Kate O’Connell said "At a high level, in light of the serious risks of the existing Line 3 and the limited benefit that the existing Line 3 provides to Minnesota refineries, Minnesota would be better off if Enbridge proposed to cease operations of the existing Line 3, without any new pipeline being built."

- Removing the risk of accidental release of oil from current Line 3.
This claim comes up short on numerous levels. Here are just a few:
 - In testimony in 2017, the Department of Commerce said that Minnesota would be better off shutting down the existing Line 3 pipeline than building a new one.
 - Moving the risk of oil spills from one part of Minnesota to a whole new part of Minnesota does not create a safety benefit that weighs in favor of the project. Risk of oil spills are a danger no matter where the pipeline is placed or when the pipeline was built. This Line 3 expansion project opens up 150 miles of new corridor along Minnesota's most precious waterways and wild rice beds for the world's most polluting oil -- notorious for its difficulty to remove: tar sands oil is heavy and sinks to the bottom of the waterway instead of floating on top!
 - Numerous alternatives exist for moving oil if it is needed aside from trucking or trains. The PCA has not indicated that they have looked at any of these alternatives which include system changes that Enbridge has begun to implement such as expanding capacity on other Mainline pipelines.
- Potential for positive economic impacts to communities along the project route.
THERE IS NO ACCOUNTING OF THE NEGATIVE IMPACTS!
 - For the PCA to rely on an analysis that does not include a discussion of life-cycle climate impacts or treaties when these issues clearly, by MN administrative rules, should be part of the calculus raises serious questions: Why has the PCA deliberately decided to ignore climate and treaties even as the balancing test they are using to justify the degraded water quality requires them to do so?

The PCA still has time to correct this analysis. The Preliminary Antidegradation Determination for 401 Certification was a draft which received public comments, with the final draft due upon announcement of the PCA's decision (by November 14). The PCA should undergo a new balancing test that takes into consideration climate impacts, impacts on native communities, and treaty rights among other factors that were previously not considered.

Note: It is important not to confuse the evaluation factors of this balancing test, which is state law, with requirements of the federal rules. Federal 401 rules, both before September 11, 2020 and now, allow the state to deny the project based on water quality impacts. Water quality impacts from Line 3 have already been established by the PCA and are adequate grounds for denial of the 401 water quality certification. Even if the Commissioner chooses to look at the project through the lens of the state balancing test, and finds that on balance, the project does not justify the degraded water quality impacts, the reason the 401 permit will be denied is not because of those factors, but because of the water quality impacts.

Finally, the administrative rules offer two other paths to denial of the permit, neither of which incorporate a balancing test at all.

- [Rule 7001.0140, Subpart 2, says:](#)

The following findings by the agency constitute justification for the agency to refuse to issue a new or modified permit... (D) that the facility or activity endangers human health or the environment and that the danger cannot be removed by a modification of the conditions of the permit.

- The fact that the project will involve “unavoidable” degradation of Tier 2 high quality waters is opportunity enough for the Commissioner to deny the permit. She is not required to pursue the balancing test, though she must do so in order to find that the degradation is “necessary to accommodate important economic and social changes.”

II - What happens after the PCA denies the Line 3 expansion water quality certification

It is likely, though not assured, that Enbridge would apply again for a permit for the new Line 3 pipeline. The PCA would again be able to look at the merits of that proposal and deny it again, approve it, or waive certification for the federal government. We say this is not assured because the economics of the tar sands industry are shaky and the world is changing. As a global community we know we need to be getting off fossil fuels, not finding more of it to burn, and public policy trends are clearly pointing us in that direction. (One need only look at this agency's Clean Cars Initiative for evidence.) It is only a matter of time until some of the most expensive oil in the world to mine and process no longer looks like a good investment. In addition, the project's major permits from the Public Utilities Commission are currently before the Court of Appeals, including a key challenge to the Certificate of Need from the DOC. If the court finds in favor of any of these appeals, the timing implications could be substantial and Enbridge would be unlikely to immediately reapply for 401 certification.

Enbridge could file a lawsuit. The PCA would then be on the side of protecting people, the climate, treaties, water and ecosystems. Should Enbridge lose in court, the project would not be built. Should Enbridge win, then perhaps the Line 3 expansion is built. The new federal rules that went into effect September 11th could conceivably be in place, but then again, they may not be.

But each of these scenarios is enormously preferable to the PCA granting Enbridge the Line 3 expansion permit at this time.

As this document is being prepared, Enbridge has construction equipment, out of state workers in hotels, and timber mat and pipeline storage sites across the proposed route. If the 401 certification is granted construction will start immediately after Clean Water Act permits are granted. Tribes and advocacy groups will likely file a lawsuit, but this will not stop all that comes along with construction (civil unrest, increased sex trafficking, spread of COVID-19, the cutting of trees, bulldozing of land, dredging and filling of wetlands). While groups may plan to ask the courts to halt construction at both the federal and state level, an injunction is unlikely to come swiftly, if at all.

We understand and appreciate the PCA's attention to attaching the strongest possible conditions to the permit, if it is issued. It is likely that the updated federal rule would change the conditions that could be imposed if Enbridge does reapply following a denial. However, regardless of which version of the federal rule is active, it is beyond the PCA's ability to mitigate the crushing scale of Line 3's carbon emissions or the environmental justice implications of putting a pipeline through Native treaty territory. No mitigation through permit conditions is possible for climate and EJ impacts of this magnitude. This is why we believe that denial, rather than approval with conditions, represents the path forward that best aligns with the data on the record. The only way to avoid the damage is to not build the project.

Enbridge's interests in building this line are financial. It will receive a guaranteed rate of return for its construction costs once the oil starts flowing. In the last 70 years, fossil fuel companies have grown accustomed to getting their way.

But today we have a better understanding of the facts of climate change, of racial injustice, of the health of our wetlands, of the crisis of our ecosystems, of our harm to the people who have lived here beyond our elders' memory.

All of this matters. And none of it is prohibited from your consideration. Minnesota's administrative rules support denial.

Harmful patterns need changing.

Minnesota law gives you everything you need to deny this project right now.

Please call us to ask more questions, challenge us with conundrums, or share your thinking.

Respectfully Yours,



Steve Morse
Executive Director

cc: Peter Tester, MPCA Deputy Commissioner
Greta Gauthier, MPCA Asst. Commissioner – Legislative and Intergovernmental Relations
Katrina Kessler, MPCA Asst. Commissioner – Water Policy / Agricultural Liaison
Craig McDonnell, MPCA Asst. Commissioner – Air and Climate Policy
Helen Waquiu, MPCA Director of Public Engagement and Tribal Liaison
Melissa Kuskie, MPCA Manager – Certifications, Environmental Review & Rules Section
Charles Sutton, Policy Advisor to Governor Walz