

How the PCA Didn't Follow MN Law by Granting the Line 3 Pipeline 401 Permit

The federal 401 asks the PCA for a certification of water quality, and we look to Minnesota state law to answer whether our water quality standards can be upheld with this project.

(See the [Enbridge Line 3 Antidegradation Review – Final Determination for 401 Certification](#), page 1 – which shows that this evaluation is based in Minnesota Rules.)

Minnesota state law is protective of our waters. It says that if a project cannot uphold water quality, then the water certification should be denied.

The proposed Line 3 expansion cannot uphold water quality standards.

We know this because:

- 1) The PCA says so in the [Enbridge Line 3 Antideg Review – Final Det. for 401 Certification](#).
 - a. Page 2, last paragraph: “degradation of high water quality is unavoidable, will be prudently and feasibly minimized, and is necessary to accommodate important economic or social changes in the geographic area of the project.”
 - b. Critically, this degradation relates to Tier 2 high quality waters. The MPCA explains away all kinds of damage to wetlands and more with mitigation, but it still can't avoid the fact that degradation of high quality waters is unavoidable.
 - c. **This unavoidable degradation is enough to deny the federal 401 water quality certification.** But the MPCA didn't make that choice.
- 2) The PCA then engaged in a required balancing test in order to find this degradation necessary to move forward with the project. (see the next bolded sentences below).

But state law offers an alternative if the administration wants to sacrifice the quality of state waters for a project: the Commissioner of the PCA must determine that the project is “necessary to accommodate important economic or social changes in the geographic area in which degradation of existing high water quality is anticipated.”

In order to find that the project is necessary, the Commissioner must engage in a balancing test that looks at 6 different factors, and these factors look at all impacts of the project, not just construction. The sixth factor specifically requires looking at: “other relevant environmental, social, and economic impacts of the proposed activity.”¹

The PCA did engage in a balancing test (proof that the degradation to waters violates state standards – a reason that the 401 permit could have been denied based on water quality impacts alone).

But the PCA intentionally left out many critically important factors – such as climate change, treaty rights, oil spills, and environmental justice – that by law should have been included and would have weighed against allowing the project.

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¹ MN Rule 7050.0265, Subpart 5, B: The commissioner shall approve a proposed activity **only** when the commissioner makes a finding that lower water quality resulting from the proposed activity is necessary to accommodate important economic or social changes in the geographic area in which degradation of existing high water quality is anticipated.

The commissioner **shall** consider the following factors in determining the importance of economic or social changes...
(6) Other relevant environmental, social, and economic impacts of the proposed activity.

What Commissioner Bishop and the PCA left out of the Balancing Test for Line 3

Instead of doing its own balancing test as the law provides, the Minnesota Pollution Control Agency (PCA) relied on a review of the Public Utilities Commission (PUC) analysis and Enbridge's own assessment of the benefits and harms of the project. ([Enbridge Line 3 – Preliminary Antidegradation Determination for 401 Certification, p. 9, last paragraph](#))

The PUC analysis on which the PCA relied was critically flawed, opting to leave out climate impacts, treaty rights, and consideration of oil spills through the water-rich new corridor. For instance:

ON CLIMATE: The PUC put lifecycle climate impacts at ZERO instead of the \$287 billion of social cost the Admin. Law Judge had affirmed (from the Dept. of Commerce EIS of 2017).²

ON TREATIES: The Commission omitted all discussion of treaties from their order, determining that while the Admin. Law Judge report included them, they did not need to.³

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 PCA should've conducted its own analysis of "other relevant social, environmental, and economic impacts of the project."

Leaving out factors required by the rule violates the law

If Commissioner Bishop had said, "we've looked at all of the factors and decided that climate impacts and treaty violations and the risk of oil spills do not outweigh the important social and economic benefits of this pipeline" then the PCA would have been applying the rule and following the law.

But that is not what Commissioner Bishop and the PCA said.

In the PCA's press release granting the permit, Commissioner Bishop said:

"This project invokes many strong emotions... While everyone can agree that the increased use of fossil fuels, including oil, will adversely impact our climate, the MPCA can only use its 401 certification authority to regulate water quality."

This both mis-states and ignores what the law said the PCA had to do, either:

- 1) Deny because of the unavoidable water quality impacts, or
- 2) Do a balancing test that includes "other relevant environmental, social, and economic impacts of the proposed activity"

The PCA did not follow the law.

² The PUC order from Sept. 5 2018 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.

³ The PUC order from Sept. 5 2018 says at footnote 18: "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." ³