April 10, 2020

Commissioner Laura Bishop
Minnesota Pollution Control Agency
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Submitted online at http://401wqc.mpca.commentinput.com/

Re: Joint Petition for a Contested Case Hearing Regarding the Minnesota Pollution Control Agency’s Draft Section 401 Certification of the Enbridge Line 3 Pipeline Submitted by Friends of the Headwaters, Sierra Club, and Honor the Earth, with the White Earth Band of Ojibwe and the Red Lake Band of Chippewa Indians

Friends of the Headwaters, Sierra Club, and Honor the Earth, with the White Earth Band of Ojibwe and the Red Lake Band of Chippewa Indians (collectively, “Petitioners”) submit this petition for a contested case hearing pursuant to Minn. R. 7000.1800 and 7000.1900 with regard to the Draft 401 Water Quality Certification (“Draft Certification”) and the accompanying draft Antidegradation Determination issued by the Minnesota Pollution Control Agency (“MPCA”) for the Enbridge Energy, L.P. (“Enbridge”) 355-mile tar sands pipeline (the “Project”).

The Project as proposed, even with the conditions that the MPCA includes in the Draft Certification, does not meet state water quality standards. In separately submitted comments (“Petitioners’ Comments”), the Petitioners have articulated in detail the reasons why, contrary to the Draft Certification, Enbridge has not met its burden to provide a reasonable assurance of compliance with all relevant provisions of the Clean Water Act and Minnesota’s state water quality standards. Therefore, the MPCA should deny Enbridge’s application for a section 401 certification. Alternatively, as explained herein, the MPCA should order a contested case hearing to address issues concerning: the proper scope of the MPCA’s 401 certification review; prudent and feasible alternatives to the Project’s route, including the no route alternative; the appropriate methods for crossing streams during the construction of the Project; the quantitative and qualitative scope of wetlands that will be impacted, directly and indirectly, by the Project; and the risks and water quality impacts of an oil spill from the Project.

Moreover, both in light of the coronavirus pandemic and a changed oil market that renders the Project wholly unnecessary, this is not the time to rush ahead with finalizing the Draft Certification, thereby shortchanging the development of facts and opportunities for public engagement. The public interest in and controversial nature of the Project are sufficient bases for a contested case hearing, and that is even more true in light of the present circumstances.

I. Timeliness

This petition is timely pursuant to Minn. R. 7000.1800, subp. 1(A), which provides that a petition for a contested case hearing must be submitted during the public comment period. The MPCA issued the Draft Certification on February 26, 2020, and the public comment period extends through April 10, 2020.
Due to the ongoing COVID-19 pandemic, Petitioners urge the MPCA to be flexible on timelines, and to allow additional submissions after April 10. We also urge MPCA to allow those who were able to submit comments or petitions by April 10 to supplement their submissions later. As the MPCA acknowledged in last week’s suspension of the “clean cars” rulemaking process, the pandemic is posing a significant barrier to public participation, and to the gathering of material information the MPCA needs to make final decisions. See Minn. Pollution Control Agency, Clean Cars Minnesota: Delaying the publication of the rule (Apr. 3, 2020). https://www.pca.state.mn.us/air/clean-cars-mn.

II. Standard

The MPCA’s governing rules provide that “[a]ny person may petition” the MPCA for a contested case hearing.¹ Minn. R. 7000.1800, subp. 1. The MPCA “must grant the petition to hold a contested case hearing” if it finds: (1) “there is a material issue of fact in dispute concerning the matter pending before the [MPCA];” (2) the MPCA has jurisdiction to make a determination on the disputed fact; and (3) “there is a reasonable basis underlying the disputed material issue of fact or facts such that the holding of a contested case hearing would allow the introduction of information that would aid the [MPCA] in resolving the disputed facts.” Minn. R. 7000.1900, subp. 1. Interpreting a “similarly worded standard” governing the Minnesota Department of Natural Resources (“MDNR”), the Minnesota Court of Appeals stated that, even without petitions, the agency had an “independent duty” to determine whether a contested case hearing is required under these three criteria. In re NorthMet Project Permit to Mine Application Dated December 17, 2017, -- N.W.2d --, 2020 WL 130728, at *8-9 (Minn. Ct. App. Jan. 13, 2020). Establishing an issue of fact does not require the submission of “new evidence.” Id. at *9 (citing In re City of Owatonna’s NPDES/SDS Proposed Permit Reissuance for Discharge of Treated Wastewater (A03-331), 672 N.W.2d 921 (Minn. Ct. App. Jan. 6, 2004)). Nor does the fact that evidence may have been considered during another proceeding involving the Project, such as during the preparation and review of the Environmental Impact Statement (“EIS”) or the previous proceedings before the Minnesota Public Utilities Commission (“PUC”), preclude its consideration in a contested case hearing for the MPCA. Id. at *10 (“[S]uch a limitation, were it to exist, would make the right to a contested-case-hearing illusory.”). Indeed, petitioners can use the MPCA’s own analysis and statements, where they contradict the MPCA’s conclusion, to establish a dispute of fact. See id. at *11-12. If the three criteria are met, the agency does not have the discretion to deny a petition for a contested case hearing, id. at *8; it “must grant the petition,” Minn. R. 7000.1900, subp. 1.

In addition, the MPCA also has the discretion to grant a contested case hearing on any other basis it “deems sufficient.” In re NorthMet Project Permit to Mine Application, 2020 WL 130728, at *8 n.16. For example, the Minnesota Court of Appeals contemplates agencies

¹ Under these regulations, “person” is defined as “any human being, any municipality or other governmental or political subdivision or other public department or agency, any public or private corporation, any partnership, firm, association, or other organization . . . legal entity . . . or any legal representative of any of the foregoing.” Minn. R. 7000.0100, subp. 9. The Petitioners here are persons.
granting contested case hearings where “substantial public interest in a project warrants a contested-case hearing.” *Id.*

Here, a contested case hearing is necessary because there are disputed material issues of fact, for which the MPCA has jurisdiction, that a contested case hearing would aid the resolution of, and a contested case hearing is warranted because of the substantial public interest in the Project.

### III. Statement of Reasons Supporting Finding to Hold a Contested Case Hearing, Issues, and Proposed Witnesses and Evidence

The issues identified below are appropriate for resolution through the contested case procedures identified in Minn. R. 7000.1750-2200. Each issue concerns water quality matters that are within the jurisdiction of the MPCA pursuant to the Minn. Stat. Ch. 115 and 115E and is relevant to the 401 certification decision pending before the MPCA. Minn. R. 7000.1900, subp. 1. Each of the issues identified below includes a discussion of the reasonable basis underlying the disputed material issues of fact, such that holding of a contested case hearing would allow the introduction of information that would aid the board or commissioner in resolving the disputed facts in making a final decision on the matter. *See id.*

#### a. Legal Issue

1. **Does the proper scope of MPCA’s section 401 certification review in this case include consideration of the potential water quality impacts of the entire Project?**

   The proper scope of MPCA’s review is a legal issue about the interpretation of section 401 of the Clean Water Act and the range of state laws that protect water quality. The MPCA may seek a recommendation from an administrative law judge (ALJ) about the proper scope of the 401 certification review. If it does so, briefs and oral argument should suffice, and witnesses and other evidence will likely not be necessary. In their separately filed comments, Petitioners argue that the MPCA review of the Project is too narrow and the MPCA’s refusal to look at the full range of alternatives to the Project is unlawful. *See Petitioners’ Comments at* 5-15.

#### b. Fact Issues

2. **Is the “no build” and “no action” alternative a prudent and feasible alternative to avoid or minimize adverse impacts to surface water or impairment of water, pursuant to Minn. Stat. § 116D.04, subd. 6, Minn. Stat. § 116B.09, subd. 2, and**

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2 Petitions for contested cases require the inclusion of “a proposed list of prospective witnesses to be called, including experts” and “a proposed list of publications, references, or studies to be introduced and relied upon at a contested case hearing” only “[t]o the extent known by the petitioner.” Minn. R. 7000.1800, subp. 2(B). Moreover, “[a] petitioner is not bound or limited to the witnesses, materials, or the estimated time in the petition if the requested contested case is granted.” Minn. R. 7000.1800, subp. 2(C).
Minn. R. 7050.0265, subp. 3(A), given that there is no need for a new pipeline in light of the current oil market?

The factual circumstances have changed since the MPCA released its Draft Certification and Antidegradation Determination. See Petitioners Comments at 16-20. Demand for crude oil and refined petroleum products has collapsed, and when that collapse is coupled with increased oil production from Russia and Saudi Arabia to secure market share, the lack of storage capacity, and the forthcoming significant production cuts from the Alberta tar sands region and the Bakken shale in North Dakota, the Project no longer serves any economic or social purpose that would justify potential degradation of Minnesota’s water resources.

There have been numerous published reports in the past month, documenting:

- the crude oil demand and supply issues triggered by the pandemic and the breakdown of the so-called OPEC+ accord,
- the unavailability of storage (with pipeline companies like Enbridge advising that they cannot take oil because they have no place to put it),
- the drop in prices for Canadian oil to zero or below, the certainty of production cuts as wells and tar sands facilities are “shut in,”
- the likelihood that many producers in Alberta and North Dakota will go out of business in the coming months, and
- the unlikelihood that production levels will snap back quickly if the pandemic stabilizes.


Petitioners anticipate introducing some of that material into the record, and similar materials as they become available between now and any hearing date. That information, and testimony from oil economics experts including, but not limited to the expert witnesses who testified at the ALJ hearings for the PUC a couple of years ago, as well as Enbridge’s witnesses who testified before the PUC that if demand and production were to drop or stay flat and there was therefore no need for the additional transport capacity that the Project would provide, then it would be preferable to pursue the no build alternative. That evidence and testimony will demonstrate that there is certainly no economic need for this pipeline in the near future.
3. **Are there alternative route corridors that would avoid or minimize adverse impacts to surface water or impairment of water, pursuant to Minn. Stat. § 116D.04, subd. 6, Minn. Stat. § 116B.09, subd. 2, and Minn. R. 7050.0265 subp. 3.A?**

A certification may only be issued if there is “reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards,” which includes all state water quality standards. 40 C.F.R. § 121.2. Further, a certification may only use compensation, a mitigation tool of last resort, where “[p]rudent and feasible alternatives are not available to avoid or minimize adverse impacts to the surface water.” Minn. R. 7050.0265, subp.3(A)(1). The issue here is whether there are such alternatives. As the Petitioners have explained in detail in separate comments, there are alternatives—a no build alternative and other route alternatives that the MPCA has previously advocated for. See Petitioners Comments at 20-26. Previous statements from the MPCA and MDNR, both with respect to this Project and the earlier Sandpiper project, explained why alternative route corridors would pose far less risk to Minnesota water quality and are sufficient to create a material issue of fact on this issue.

4. **Does Enbridge’s use of trench crossings during the construction of the Project maintain and protect “existing uses and the level of water quality necessary to protect uses,” Minn. R. 7050.0265 subp. 2, and/or create a permanent hindrance to attaining and maintaining water quality standards, see id. at subp. 4?**

MPCA cannot approve the Project—including its crossing methods for all 212 streams the Project will cross—without a showing that (1) each method selected is protective of the existing uses, Minn. R. 7050.0265, subp.2; and beneficial uses; Minn. R. 7050.0265, subp. 4, of the waterbodies potentially affected; and (2) if compensatory mitigation has been selected, that no other method is prudent and feasible, Minn. R. 7050.0265, subp.3. The issue here is whether Enbridge’s use of trench methods for the vast majority of stream crossings violates Minnesota water quality standards. The Petitioners’ Comments, as well as the comments provided by scientific experts, explain how the planned crossing methods are inadequate (and, in some places, still unplanned). See Petitioners’ Comments at 27-34; Letter from Laura Triplett, et al. to MPCA at 10-12, 18-19 (Apr. 10, 2020) (“Expert Comments”). Moreover, the assumption made by Enbridge and the MPCA that the impacts from crossings with trenches are temporary is inaccurate.

Petitioners’ support for the existence of a material issue of fact includes the following:

- Comments from the MPCA itself asserting that trenchless crossing methods are “less degrading.” See Draft Certification.
- Testimony of Paul Stolen, a former MDNR employee, regarding the crossing of the LaSalle Creek Valley and how a dry crossing—Enbridge’s planned method—is not possible at that location. See Letter from Paul Stolen, to U.S. Army Corps of Engineers, Attachment 1 at 8–10 (Feb. 8, 2019).
- Comments from the MDNR recommending a less damaging crossing method for three locations along Shell Creek to limit cumulative impacts to the waterway. See Site Specific Excel Sheet, attached to Letter from Randall Doneen, MDNR, to Tom Hingsberger, Corps (Feb. 21, 2019).
5. **Have Enbridge and the MPCA undercounted the full acreage of wetlands that will be affected, both directly and indirectly, by the Project, and have they made an accurate assessment of the watershed-based wetland functionality that will be lost such that avoidance and minimization options have been exhausted and the Project’s compensation plan can satisfy Minn. R. 7050.0265, subp.3?**

The underlying issue is both quantitative and qualitative: whether Enbridge and the MPCA undercounted the full acreage of wetlands that will be affected by the Project, where a more accurate count could show a much greater loss of biodiversity and wetland functionality. Enbridge and the MPCA only consider wetlands in the direct path of the Project or under work areas to be affected by the Project—about 1,000 acres. This is wrong. Wetlands must be considered holistically, not in piecemeal.

The undercounting of wetlands feeds into a related issue: whether avoidance and minimization alternatives have been exhausted and, if so, whether the compensation included adequately replaces the functionality that will be lost. If not, as Petitioners contend, then the Project and its compensatory mitigation plan do not satisfy Minn. R. 7050.0265, subp.3(A).

The Petitioners’ Comments and the Expert Comments explain how the Antidegradation Determination fails to account for the full acreage of wetlands that will be affected by the Project, and the Expert Comments explain that an accurate count would include all wetlands hydrologically connected to the route—approximately 11,000 acres. Petitioners’ Comments at 35-37; Expert Comments at 10-11, 13, 34-41.

Petitioners’ support for the existence of a material issue of fact includes the following:

- Comments from the MPCA and Enbridge’s response that reveal Enbridge did not observe ten wetlands for which the MPCA was concerned about the method of crossing. *See MPCA Line 3 Replacement Project Section 401 Antidegradation Assessment MPCA Comment Response Matrix 6 (Jan. 2020), https://app.sharebase.com/#/document/150040/share/185-i--UgBKqDZO0PqKCmo7WTUzq-fEE.*
- Comments from the MDNR noting flaws in the Enbridge’s survey methods, upon which the MPCA relied. Specifically, the MDNR noted that the surveys were conducted at a time of year when seasonal wetlands may be dry, therefore not fully accounting for seasonal wetlands such as vernal pools and the species they support. *See Interagency Coordination: MDNR Agency Information Commendations and Recommendations at 8, 21, attached to Letter from Randall Doneen, MDNR, to Tom Hingsberger, Corps (Feb. 21, 2019).*
Ecohydrology. 9:1 21-38; and Rains et al. 2016. Geographically isolated wetlands are part of the hydrological landscape. Hydrologic processes. 30:1. 153-160.

- Expert witness testimony.

6. **Does the risk of an oil spill, either at the specific sites considered by the Draft Certification and Antidegradation Assessment or at other locations involving outstanding resource value waters, and other critical state waters, including but not limited to the upper Mississippi River, the St. Louis River Estuary, the Duluth-Superior Harbor, and Lake Superior, render the Project unable to comply with Minnesota water quality standards?**

The Draft Certification and Antidegradation Assessment fail to consider potential water quality impacts from the operation of the Project, including the likelihood of a spill. When this Project leaks or spills, it will spill diluted bitumen (“dilbit”), an extra heavy version of crude oil that can cause even greater damage to the environment and is harder to clean up. *See* Petitioners’ Comments at 38-44, 49-51; Expert Comments at 27-34. The issue of whether the risk of a spill to critical state waters renders the Project unable to comply with water quality standards is, alone, enough of a basis for a contested case hearing.

Petitioners’ support for the existence of a material issue of fact includes the following:

- Testimony presented to the PUC with respect to the risk of a dilbit spill. Direct Testimony of Richard Kuprewicz at 2 (Sept. 11, 2017).
- Information addressing the increased likelihood of spill or more extreme consequences of spill due to climate change and increase in rainfall events in Minnesota. *See* Expert Comments at 34; Minn. Pollution Control Agency, Comments Regarding the U.S. Envtl. Prot. Agency's Proposed Rule “Updating Regulations on Water Quality Certification,” at 2-3 (submitted Oct. 21, 2019).

7. **Do the potential impacts of a spill of diluted bitumen on wild rice waters, protected by Minnesota Rule 7050.0224, render the Project unable to comply with Minnesota water quality standards?**
The Project will cross extremely sensitive wild rice—or manoomin, a critical staple of great cultural significance to the Ojibwe people—wetlands. Minnesota water quality standards specifically protect wild rice waters, specifying that their quality “must not be materially impaired or degraded,” Minn. R. 7050.0224, subp. 1, and set a standard for sulfates of “10 mg/L, applicable to water used for production of wild rice during periods when the rice may be susceptible to damage by high sulfate levels,” id., subp. 2.

Because dilbit contains high levels of sulfur compounds, including sulfates and sulfides, the risk that an oil spill will cause a violation of water quality standards in waters with wild rice is particularly high. See Petitioners’ Comments at 45-48; Expert Comments at 23-24, 32-33.

Petitioners’ support for the existence of a material issue of fact includes the following:

- Information on the sulfur content of crude oil and dilbit, such as can be found in the Environmental Impact Statement for the Project and other Enbridge resources.

c. Potential Expert Witnesses

Petitioners anticipate calling all or some of the individuals whose work has been cited above, as well as witnesses that provided testimony in the PUC process (or others with similar expertise in economics, engineering, and ecology). Additional expert witnesses would likely include:

- **Dr. Laura Triplett**: an Associate Professor and Chair of the Geology Department at Gustavus Adolphus College. She has Master’s and PhD degrees in Geology from the University of Minnesota, with a focus on how watershed-scale land-use change impacts stream water quality. Dr. Triplett’s recent research has been funded by grants from the National Science Foundation, the McKnight Foundation, the MPCA, the Legislative-Citizen Commission on Minnesota Resources and others. She conducts geochemical analyses of sediment records to reconstruct past environmental conditions, monitors contemporary water quality, and calculates pollutant load budgets to answer questions about past and present conditions. Previously, she worked at the MPCA in water quality enforcement. Dr. Triplett can provide testimony regarding surface water quality, stream geomorphology and sediment transport, and possible stream responses to changing climate, in addition to principles of subsurface (groundwater) contaminant transport, surface and groundwater connectivity, geologic history and geologic materials.

- **Dr. Christine Dolph**: a research scientist at the University of Minnesota. She has Master’s and PhD degrees in Water Resources Science from the University of Minnesota, and has extensive experience working with water chemistry and biological monitoring datasets from streams and rivers in Minnesota. She has worked in partnership with the

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3 Dr. Triplett’s credentials are listed here for identification purposes only; she would participate in a contested case hearing as a private citizen and not as a representative of her institution.
Minnesota Pollution Control Agency and Minnesota Department of Natural Resources to design and evaluate biological indicators of water quality, and has conducted EPA-funded research evaluating the success of reach-scale stream restoration projects. Her focus is on the impact of human land use on water quality, biophysical processes and aquatic communities in streams, rivers, lakes and wetlands. She frequently applies statistical modeling and GIS spatial analyses in her work, and is a frequent reviewer of scientific manuscripts for publication in peer-reviewed journals. Dr. Dolph can provide testimony regarding the impacts of dry trenching and undercounting wetlands impacts, as well as biological water quality standards and how stressors affect aquatic life.

Petitioners reserve the right to supplement this witness list, as contemplated by Minn. R. 7000.1800, subp. 2(B), (C).

IV. Public Interest in the Project

The MPCA should grant a contested case hearing because “substantial public interest in a project warrants a contested-case hearing.” In re NorthMet Project Permit to Mine Application, 2020 WL 130728, at *8 n.16.

There is no project in Minnesota currently that has raised more public concern about environmental risks than the new Line 3, with the possible exception of the PolyMet copper mining project. That concern mirrors the broad national concern over building more crude oil pipelines when it is imperative to move away from fossil fuels, the continuing problem with major pipeline spills from newer pipelines, with the risks of a diluted bitumen spill being particularly acute, and over the growing concern about infringing the rights of tribes to protect their sovereign interests both on and off reservations. See also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, -- F.Supp.3d --, 2020 WL 1441923, at *1 (D.D.C. Mar. 25, 2020) (recognizing that the construction of another pipeline remains “highly controversial” under the National Environmental Policy Act, largely because of leak detection and spill concerns).

All previous proceedings involving the Line 3 project have been before the PUC or its agents, so this is the first opportunity for the public to weigh in with a state agency that has environmental protection as its primary purpose. With the barriers to public participation posed by the COVID-19 pandemic, MPCA’s decision to cancel public meetings in favor of a phone-in, and MPCA’s insistence that, unlike other MPCA efforts, this process cannot be suspended until we have more stable times, denying the opportunity for a contested case hearing focused on water quality issues will only compromise the legitimacy of any decision the MPCA ultimately makes.

V. Estimate of Time Required for a Contested Case Hearing

Petitioners provide an estimate of time required for contested case hearing, as required by Minn. R. 7000.1800, subp. 2(B)(3). Petitioners anticipate two stages in a contested case proceeding. The first stage would define the proper scope of the agency’s 401 certification review—whether the MPCA properly limited the scope to construction-related stream crossing and wetland impacts, or whether its 401 review can and should extend to the water quality
impacts of the entire line 3 project. That is a primarily legal issue, so petitioners would expect briefs and an oral argument, and then a recommendation from the ALJ to the MPCA. Once the scope of the review is defined, then a trial-type proceeding on the issues of material fact within that scope should take place. Petitioners estimate that the entire process from referral to final order from the ALJ would likely take approximately three months.

VI. Relief Requested

There is no reasonable assurance that the project as proposed, even with the conditions MPCA has included in its draft certification, will meet state water quality standards, and therefore Enbridge’s application for 401 certification should be denied. Whether or not the MPCA orders a contested case, that is the relief petitioners seek.

Respectfully submitted,

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