

September 27, 2019

Chad Konickson
U.S. Army Corps of Engineers
Regulatory Branch Chief
180 Fifth Street East, Suite 700
St. Paul, MN 55101-1678

Barry Simonson
Enbridge Employee Services Inc.
26 East Superior Street, Suite 309
Duluth, MN 55802

RE: 2014-01071-TJH
Enbridge Line 3 Replacement Project in Minnesota
Section 401 Water Quality Certification Denial

Dear Chad Konickson and Barry Simonson:

This letter is submitted by the Minnesota Pollution Control Agency (MPCA) under authority of Section 401 of the Clean Water Act, or CWA (33 USC 1251 et seq.), Minn. Stat. chs. 115 and 116 and Minn. R. chs. 7001.1400-1470, 7050, 7052, and 7053. The MPCA has examined the request for 401 Water Quality Certification (401 request) and other information furnished by the applicant, Enbridge Energy, Limited Partnership (Enbridge), for the Line 3 Replacement Project (Project) in Minnesota.

On June 3, 2019, the State of Minnesota Court of Appeals reversed the Minnesota Public Utilities Commission's finding of adequacy for the Project's Environmental Impact Statement (EIS), on the basis of its failure to address the issue of how an oil spill from the project would impact Lake Superior and its watershed. Minn. R. 4410.3100, subp. 1 prohibits final governmental decisions to grant a permit or approve a project until any required EIS for the project is determined adequate (Minn. R 7001.0140, subp. 4 requires the agency wait at least 25 days after the adequacy decision). The CWA requires that States act on a request for 401 Water Quality Certification within one year of the request for certification, or the CWA certification requirements for the project will be waived. The MPCA received the 401 request on October 29, 2018. Resolution of the State EIS process will not be possible prior to expiration of the CWA one-year deadline, rendering the MPCA unable to exercise its entire range of 401 Certification authorities prior to expiration. In order to preserve 401 Water Quality Certification Authority, the MPCA must take action to deny the project based on currently available information.

Minn. R. 4410.3100, subp. 2a does *not* prohibit a governmental unit from issuing notice of and receiving public comments on a draft permit prior to completion of environmental review. However, the Appellate Court's ruling on the EIS adequacy does suggest that additional information directly pertinent to water quality in Minnesota (and therefore, the 401 request) will likely be required to be prepared for the EIS. Such information would be necessary to inform the ongoing review of the 401 request and development of any potential draft 401 Certification to ensure compliance with water quality standards, and is therefore necessary for public notice and comment.

Additional information requested

The MPCA requires additional information to provide reasonable assurance of compliance with state water quality standards. To inform any future project review, should Enbridge wish to re-apply for 401 Certification, the following information will be needed:

1. Oil spill response modeling to assess the impacts of a spill (and strategies, as appropriate, to avoid, minimize, and mitigate such impacts) in Lake Superior and the Lake Superior watershed. Lake Superior is designated as a Restricted Outstanding Resource Value Water (ORVW) in Minn. R. 7050.0335, subp. 1. The MPCA's antidegradation standards (Minn. R. 7050.0265) require that the commissioner restrict a proposed activity in order to preserve the existing water quality as necessary to maintain and protect the exceptional characteristics for which a water was designated an ORVW. Spill response modeling will be prepared during the EIS process; if evaluation of such modeling indicates a need for additional strategies to avoid, minimize, and mitigate impacts to Lake Superior, the MPCA will require submittal of additional information addressing such strategies.
2. A revised pre- and post-construction monitoring plan for aquatic resources. Enbridge has provided a summary plan for post-construction monitoring. The MPCA requires additional information, including specific performance standards Enbridge intends to follow to monitor aquatic resources for stabilization, crowning, subsidence, restoration of hydrologic features, invasive species, vegetative cover, and species composition, to adequately ensure that there is no loss or degradation of existing uses. The MPCA also requires a description of remedial work or other strategies that will be implemented if monitoring demonstrates such a loss or degradation of existing uses, and how and when such actions are proposed to be completed.
3. A revised proposal for compensatory wetland mitigation. Enbridge has proposed a compensatory mitigation plan for proposed impacts to wetlands resulting from the Project. However, the proposal does not provide justification for the mitigation ratios proposed for permanently converted wetlands addressing the quality/existing uses of the impacted wetlands nor the expected loss of existing uses resulting from the Project. Minn. R. 7050.0186 requires that compensatory mitigation must be sufficient to ensure replacement of the diminished or lost designated uses of a physically altered wetland. Because the proposed Project would result in permanent conversion impacts to over 400 acres of currently forested or shrub wetlands, many of which are difficult-to-replace surface waters such as old-growth cedar swamps or peat bogs, it is important to ensure that proposed mitigation is sufficient. The MPCA has been working with the U.S. Army Corps of Engineers and MN Department of Natural Resources to develop a framework for compensatory mitigation for the Project, and has provided initial input to Enbridge on their proposal. A revised compensatory mitigation plan that addresses the interagency recommendations is necessary to ensure compliance with water quality standards.

Decision:

The MPCA denies, without prejudice, 401 Certification for the proposed project. At this time, additional information supporting the request for 401 Certification is needed to provide reasonable assurance of the project's ability to comply with Minnesota water quality standards. The additional information described above is necessary to inform project review, should Enbridge wish to re-apply for 401 Certification. Should Enbridge re-apply for 401 Certification, the MPCA reserves the right to request other information not listed in this letter in order to determine if the proposed project complies with applicable water quality requirements.

Chad Konickson
Barry Simonson
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If you have any questions or require additional information, please contact Melissa Kuskie of my staff.

Sincerely,

A handwritten signature in black ink that reads "Laura Bishop". The signature is written in a cursive, flowing style.

Laura Bishop
Commissioner

LB/MK:ds

cc: Bobby Hahn, Enbridge
Dave Pfeifer, EPA
Wendy Melgin, EPA
Chad Konickson, USACE
Tom Hingsberger, USACE

