

**STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY**

**IN THE MATTER OF THE
CONTESTED CASE HEARING
REQUESTS ON THE DRAFT 401
CERTIFICATION FOR THE LINE 3
REPLACEMENT PROJECT**

**FINDINGS OF FACT
CONCLUSIONS OF LAW
AND ORDER**

This matter involves contested case hearing requests received by the Minnesota Pollution Control Agency (MPCA) on its preliminary determination to issue a Section 401 Water Quality Certification (401 Certification) to Enbridge Energy, Limited Partnership (Enbridge) for the proposed Line 3 Replacement Pipeline Project (Line 3 Project or Project).

Based on staff review, comments and information received during the public comment period, and other information in the record of the MPCA, the MPCA hereby makes the following Findings of Fact, Conclusions of Law, and Order.

I. OVERVIEW OF PROJECT AND 401 CERTIFICATION.

A. Background.

1. Enbridge proposes to construct and operate a new 36-inch-diameter underground oil pipeline and associated facilities for the Line 3 Project. The activities would cross waters of the United States and discharge dredged or fill material into Minnesota wetlands and streams.

2. The proposed activities would occur within a route that was approved by the Minnesota Public Utilities Commission (PUC) on May 1, 2020. The PUC is the Minnesota unit of government with decision authority over oil and gas pipeline route decisions. *See* Minn. Stat. ch. 216G. The route extends from the Red River of the North near Mattson, Minnesota to the Minnesota-Wisconsin border near Wrenshall, Minnesota.

3. The new pipeline would replace Enbridge's existing, 34-inch-diameter pipeline that was built in the 1960s. The existing pipeline is corroding and operating at only 51% capacity due to safety issues. The new pipeline would transport crude oil from Alberta, Canada to Superior, Wisconsin.

4. The PUC approved the need for the new pipeline on May 1, 2020. The PUC is the Minnesota unit of government with decision authority over the need for oil and gas pipelines. *See* Minn. Stat. § 216B.243.

B. Legal Background and Request for 401 Certification.

1. Under Section 401 of the federal Clean Water Act (CWA), a state must provide a water quality certification before a federal license or permit can be issued for activities that may result in a discharge into intrastate navigable waters. *See* 33 U.S.C. § 1341.

2. Under Section 401, a state waives its certification authority if it does not act on a certification request “within a reasonable period of time (which shall not exceed one year) after receipt of such request.” 33 U.S.C. § 1341(a)(1); *accord* Minn. R. 7001.1460.

3. In Minnesota, the MPCA is the agency responsible for responding to requests for Section 401 Certifications. *See* Minn. Stat. § 115.03, subds. 1, 4a; Minn. R. 7001.1420. As relevant here, the MPCA may respond to a 401 Certification request by taking one of the following actions: (i) issuing the certification; (ii) denying the certification; or (iii) waiving the agency’s authority to issue the certification. Minn. R. 7001.1450.

4. Enbridge has applied to the U.S. Army Corps of Engineers (USACE) for a permit under Section 404 of the CWA, which regulates the discharge of dredged or fill material into waters of the United States (including wetlands), for the Line 3 Project (the Section 404 Permit). Enbridge must obtain a 401 Certification or waiver before USACE will issue the Section 404 Permit.

5. On October 28, 2018, Enbridge submitted its initial request for the 401 Certification for the Line 3 Project to the MPCA. The request included Enbridge’s Joint Application for a 401 Certification and the USACE Section 404 Permit. Enbridge also submitted an Antidegradation Assessment, which is required under state water quality standards. *See* Minn. R. 7050.0250-.0335.

6. On September 27, 2019, the MPCA denied Enbridge’s initial request for a 401 Certification. The MPCA found that Enbridge needed to submit additional information regarding oil spill modeling, aquatic resource monitoring, and compensatory wetland mitigation before the agency could determine whether the Project complied with water quality standards.

7. On November 15, 2019, Enbridge submitted its second request for a 401 Certification to the MPCA. According to Enbridge’s second request, the proposed Project includes the following activities:

- a) construction of a 36-inch-diameter crude oil pipeline spanning approximately 330 miles across Minnesota;
- b) expansion of the footprint of and mechanical upgrades to the existing Clearbrook Terminal in Clearwater County;
- c) expansion of four pump stations and construction of four new pump stations and associated electrical services;
- d) construction of 38 mainline valves near major rivers, additional environmentally sensitive areas, population centers and pump stations together with construction of permanent roads to access each valve site;
- e) construction of cathodic protection system facilities and electrical services;

f) construction of new access roads to gain access to construct the Project where existing roads are not available; and

g) permanent deactivation and removal of the existing Line 3 pipeline from service after the new Line 3 pipeline is operational, in accordance with federal law.

8. The Project proposes to cross 212 streams in Minnesota (outside of the Fond du Lac Reservation). In addition, the Project proposes to temporarily impact 730.10 acres of wetland, permanently convert 212.37 acres of wetland to a different wetland type, and permanently fill 5.52 acres of wetland.

C. Procedural History.

1. On March 2, 2020, pursuant to Minn. R. 7001.0100, the MPCA issued public notice of the MPCA's preliminary determination to issue the 401 Certification, a National Pollution Discharge Elimination System/State Disposal System Permit, and a capped air emission permit. The draft 401 Certification and accompanying Preliminary Antidegradation Determination for the 401 Certification were made available for public comment on the same day.

2. The public comment period was scheduled to end on April 3, 2020, but was extended to April 10, 2020, due to COVID-19.

3. During the 39-day comment period, the MPCA received over 9,723 written comments on the draft 401 Certification from government agencies, Tribal Nations, environmental groups, businesses, and individual commenters. The MPCA also hosted three telephone town halls on April 2, 7, and 9, 2020 concerning the 401 Certification and related permits. 399 individuals provided oral comment during the telephone town halls.

4. The MPCA received four petitions for contested case hearings from environmental organizations and Tribal Nations on the draft 401 Certification, including:

a) A joint petition from 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, the Friends of the Headwaters Petition);

b) A joint petition from the Red Lake Band of Chippewa Indians and White Earth Band of Ojibwe (the Red Lake-White Earth Petition);

c) A petition from the Minnesota Environmental Partnership on behalf of 29 organizations (the MEP Petition); and

d) A petition from the Whitefish Area Property Owners Association (the WAPOA Petition).

5. In addition, in accordance with the public notice,¹ the MPCA received 16 requests via letter or through the SmartComment system from individuals for contested case hearings on the draft 401 Certification, including:

- a) Ethan Brown;
- b) Joshua Colton;
- c) Alyssa Erding;
- d) Jami Gaither;
- e) Dawn Goodwin;
- f) Sarah Harper;
- g) Melodee Monicken and Richard Smith;
- h) Gerald & John Perkins;
- i) Scott Russell;
- j) Eileen Shore; and
- k) six individuals who requested contested case hearing via similar form letters/emails.

II. EVALUATION OF CONTESTED CASE HEARING REQUESTS.

A. Form and Content.

1. Minnesota Rule 7000.1800, subpart 2.A sets out the form and content requirements for a contested case petition. A petition must include:

- a) a statement of reasons or proposed findings supporting a Commissioner decision to hold a contested case hearing pursuant to the criteria in part 7000.1900, subpart 1; and
- b) a statement of the issues proposed to be addressed by a contested case hearing and the specific relief requested or resolution of the matter.

2. Minnesota Rule 7000.1800, subpart 2.B provides that a petition may also include:

¹ The MPCA limits its analysis in this document to the contested case hearing requests that were submitted through the methods identified in the public notice: (1) U.S. Mail; and (2) the State of Minnesota Enbridge Line 3 portal (also known as SmartComment).

- a) a proposed list of prospective witnesses to be called, including experts, with a brief description of the proposed testimony or summary of evidence to be presented at a contested case hearing;
- b) a proposed list of publications, references, or studies to be introduced and relied upon at a contested case hearing; and
- c) an estimate of time required for petitioner to present the matter at a contested case hearing.

3. While the information in Minn. R. 7000.1800, subp. 2.B is not required to be included in a contested case petition, the information helps the MPCA assess whether a hearing will aid the Commissioner in making a final decision.

B. Criteria to Hold a Contested Case Hearing.

1. Minnesota Rule 7000.1900, subpart 1 governs the MPCA’s decision to hold a contested case hearing. It states that the Commissioner must grant the petition to hold a contested case hearing or order upon its own motion that a contested case hearing be held if it finds that:

- a) there is a material issue of fact in dispute concerning the matter pending before the Commissioner;
- b) the Commissioner has the jurisdiction to make a determination on the disputed material issue of fact; and
- c) 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 Commissioner in resolving the disputed facts in making a final decision on the matter.

2. In order to satisfy the first criterion, Minn. R. 7000.1900, subp. 1.A, the petitioner must show there is a material issue of fact in dispute as opposed to a disputed issue of law or policy. A fact is material if its resolution will affect the outcome of the case. *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

3. In order to satisfy the second criterion, Minn. R. 7000.1900, subp. 1.B, the petitioner must show that the MPCA has jurisdiction or authority to make a determination on the disputed issue of material fact. “Agencies are not permitted to act outside the jurisdictional boundaries of their enabling acts.” *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 668 (Minn. 1984). Therefore, each issue in the contested case request must be within the MPCA’s authority to resolve.

4. Finally, under Minn. R. 7000.1900, subp. 1.C, “petitioners have the burden of demonstrating the existence of material facts that would aid the agency before they are entitled to a contested case hearing.” *In re Solid Waste Permit for the NSP Red Wing Ash Disposal Facility*, 421 N.W.2d 398, 404 (Minn. Ct. App. 1988). The Minnesota Supreme Court has recognized that to meet this standard, “[i]t is simply not enough to raise questions or pose alternatives without

some showing that evidence can be produced which is contrary to the action proposed by the agency.” *In re Amendment No. 4 to Air Emission Facility Permit*, 454 N.W.2d 427, 430 (Minn. 1990).

5. The MPCA evaluated the requests for a contested case hearing by examining whether the petitions satisfied each criterion in Minn. R. 7000.1900, subp. 1.

6. The MPCA also evaluated the requests in light of the Minnesota Court of Appeals’ recent decision in *In re NorthMet Project Permit to Mine Application*, 940 N.W.2d 216 (Minn. Ct. App. 2020). In *NorthMet*, the court of appeals analyzed Minn. Stat. § 93.483, subd. 3, which applies to contested case hearing requests on mining and dam-safety permits issued by the Minnesota Department of Natural Resources (DNR). The court of appeals held that the statutory criteria for holding a contested case hearing under Minn. Stat. § 93.483, subd. 3 “are met when there is probative, competent, and conflicting evidence on a material fact issue.” *Id.* at 231.

7. The contested case criteria in Minn. Stat. § 93.483, subd. 3 are nearly identical to the criteria in Minn. R. 7000.1900. The court of appeals emphasized precedents interpreting Minn. R. 7000.1900 in *NorthMet*. *Id.* at 230-32.

8. The *NorthMet* decision does not disturb longstanding precedent that a contested case is not warranted if the petitioner disagrees with the MPCA on questions of law or policy. *See, e.g., In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746, 757 (Minn. Ct. App. 2003); *In re Denial of a Contested Case Hearing Request & Modification of a Notice of Coverage Under Individual Nat’l Pollution Discharge Elimination Sys. Feedlot Permit No. MN0067652*, 2019 WL 5106666, at *12 (Minn. Ct. App. Oct. 14, 2019); *In re Little Rock Creek*, 2016 WL 6923602, at *9 (Minn. Ct. App. Nov. 28, 2016). Nor does the *NorthMet* decision affect the petitioner’s core burden: to demonstrate “the existence of material facts *that would aid the agency* before they are entitled to a contested case hearing.” *In re NorthMet*, 940 N.W.2d at 231 (internal quotations and citations omitted) (emphasis added).

9. The MPCA does not necessarily agree that the court of appeals correctly interpreted the standard for granting a contested case hearing in the *NorthMet* decision, and the Minnesota Supreme Court has granted review on this issue in a still pending appeal.² The MPCA nonetheless applied these principles to its analysis of the contested case petitions that were submitted in connection with the 401 Certification.

10. If the MPCA determines that the criteria for a contested case hearing are met, the Commissioner has the authority to establish the scope of the hearing. In particular, if the MPCA decides to hold a contested case hearing, the Commissioner “shall identify the issues to be resolved and limit the scope and conduct of the hearing in accordance with applicable law, due process, and fundamental fairness.” Minn. R. 7000.1900, subp. 2.

² The Minnesota Supreme Court granted the DNR’s petition to review the *Northmet* decision on March 25, 2020. The appeal is currently in the briefing stage.

III. FINDINGS ON CONTESTED CASE PETITIONS.

A. The Friends of the Headwaters Petition.

1. The MPCA finds that the Friends of the Headwaters Petition was timely and included all of the information required by Minn. R. 7000.1800, subp. 2.A. The Friends of the Headwaters Petition also identified the information set forth in Minn. R. 7000.1800, subp. 2.B, including potential expert witnesses and an estimate of time required for a contested case hearing.

2. The Friends of the Headwaters Petition identifies seven issues for a contested case hearing. It also relies on two sets of supporting comments that were submitted by (i) Earthjustice and (ii) Dr. Laura Triplett, et al., respectively.

3. The first issue raised in the Friends of the Headwaters Petition is: *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?*³

4. The MPCA finds that the first issue raises questions of law that are not appropriate for a contested case hearing. Friends of the Headwaters acknowledges that “[t]he proper scope of the 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.”⁴ As a result, the first issue does not satisfy the criteria for a contested case.

5. The second issue raised in the Friends of the Headwaters Petition is: *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 Minn. R. 7050.0265, subp. 3(A), given that there is no need for a new pipeline in light of the current oil market?*⁵

6. The MPCA finds that the second issue raises questions of law that are not appropriate for a contested case hearing. The PUC is the Minnesota unit of government with decision authority over oil and gas pipeline need and route decisions. *See, e.g.*, Minn. Stat. § 216B.243; Minn. Stat. § 216G.02; Minn. R. ch. 7852; Minn. R. ch. 7853. The Certificate of Need issued by the PUC established the need for the Project, and consideration of need is not within the authority of the MPCA. Because the need for the Project was established in the PUC Certificate of Need proceedings, the MPCA did not require a no build or no action alternative to be considered among the prudent and feasible alternatives to avoid adverse impacts to surface water. Because the second issue turns on the interpretation of statutes and regulations regarding the authority of the PUC and the MPCA, respectively, it does not satisfy the criteria for a contested case hearing.

³ Friends of the Headwaters Pet. at 3.

⁴ *Id.* (emphasis added).

⁵ *Id.* at 3-4.

7. The third issue raised in the Friends of the Headwaters Petition is: *Are there alternative route corridors that would avoid or minimize 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)?*⁶

8. The MPCA finds that the third issue raises questions of law that are not appropriate for a contested case hearing. The PUC is the Minnesota unit of government with decision authority over oil and gas pipeline need and route decisions. *See, e.g.*, Minn. Stat. § 216B.243; Minn. Stat. § 216G.02; Minn. R. ch. 7852; Minn. R. ch. 7853. Because the route was established in the PUC Route Permit proceedings, consideration of alternatives to the route decision is not within the authority of the MPCA. As a result, the MPCA considered alternatives to avoid or minimize adverse impacts to surface water within the route right-of-way approved by the PUC. Because the third issue turns on the interpretation of statutes and regulations regarding the authority of the PUC and the MPCA, respectively, it does not satisfy the criteria for a contested case.

9. The fourth issue raised in the Friends of the Headwaters Petition is: *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?*⁷

10. The MPCA finds that the fourth issue raises mixed questions of law and fact. The MPCA bases its analysis on the allegations in the Petition, supplemented by review of supporting information in the Earthjustice and Triplett comments.

a) Whether the MPCA must determine on a stream-by-stream basis that a proposed crossing method protects existing and beneficial uses raises a question of law and policy. Under Minn. R. 7050.0265, subps. 2 and 4, the MPCA has the discretion to analyze as a group whether similar activities in similar waterbodies will protect existing and beneficial uses of affected waters. Here, the MPCA determined that the Project’s proposed use of trench crossings, as a whole, may contribute to temporary increases in parameters of concern (*e.g.*, Total Suspended Solids, dissolved oxygen, phosphorous, mercury) in affected waters. The MPCA further determined that because of the temporary nature of the discharges, the trench crossings would not prevent the maintenance of existing uses or prevent attainment of water quality standards for any crossed stream. Friends of the Headwaters’ disagreement with MPCA’s interpretation of the applicable regulations are not an appropriate basis for a contested case hearing.

b) Whether water quality impacts from trench crossings are temporary or permanent is a disputed issue of material fact. The MPCA notes that it has not treated all impacts associated with trench crossings as temporary. The MPCA

⁶ Friends of the Headwaters Pet. at 5.

⁷ Friends of the Headwaters Pet. at 5-6.

agrees that some Project impacts are permanent (e.g., the removal of riparian buffer vegetation at or near stream crossings), and the MPCA has required mitigation for those impacts. But the MPCA has determined that the impact of increases in certain parameters of concern will be temporary and should not violate water quality standards or result in a loss of existing uses. Friends of the Headwaters alleges that the assumptions made by the MPCA and Enbridge are incorrect and has presented probative, competent, and conflicting evidence to support its allegation. Accordingly, the MPCA finds that a contested case hearing on the following fact issue is appropriate: **Does Enbridge’s proposed use of trench methods for stream crossings have temporary or permanent impacts on water quality parameters of concern?**

c) Whether a less-degrading crossing method for each proposed stream crossing is prudent and feasible is a disputed issue of material fact. As part of its 401 Certification request, Enbridge submitted an Anticipated Water Quality – Parameters of Concern and Waterbody Crossing Justifications Table (Crossing Justification Table) to show that it had selected the least degrading crossing method that was prudent and feasible.⁸ The MPCA evaluated the proposed crossing methods and worked with the DNR⁹ to ensure that the proposed crossing methods prudently and feasibly minimized adverse impacts to surface water. Friends of the Headwaters alleges that Enbridge and the MPCA have not identified the least degrading crossing methods that are prudent and feasible and has presented probative, competent, and conflicting evidence to support its allegation. Moreover, Friends of the Headwaters has presented probative, competent and conflicting evidence to support its allegation that the proposed crossing methods for the following sensitive waters are unknown or insufficiently assessed: LaSalle Creek, the Mississippi River, Big Swamp Creek, Pine River, Spring Brook, Unnamed Creek – Moose Lake, Willow River, East Savanna River, and other selected sensitive peatland crossings. Accordingly, the MPCA finds that a contested case hearing on the following fact issue is appropriate: **Have Enbridge and the MPCA identified the least degrading crossing method that is prudent and feasible for each stream crossing?**

11. The fifth issue raised in the Friends of the Headwaters Petition is: *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?*¹⁰

⁸ Enbridge, Attachment G to Antidegradation Assessment.

⁹ Among other things, the DNR is the state agency with the authority to issue a Utility Crossing License for state lands and public waters. *See, e.g.*, Minn. Stat. § 84.415; Minn. R. ch. 6135.

¹⁰ Friends of the Headwaters Pet. at 6

12. The MPCA finds that the fifth issue raises mixed questions of law and fact. The MPCA bases its analysis on the allegations in the Petition, supplemented by review of supporting information in the Earthjustice and Triplett comments.

a) The legal question is whether the MPCA must consider indirect impacts to wetlands that are not physically altered within the meaning of Minn. R. 7050.0186. Under Minn. R. 7050.0186, the MPCA only needs to consider wetland impacts that are associated with “physical alteration.” “Physical alteration” means “the dredging, filling, draining, or permanent inundating of a wetland” and does not encompass indirect impacts to wetlands. Minn. R. 7050.0186, subp. 1a.A. Friends of the Headwaters’ disagreements with the MPCA’s interpretation of the applicable regulations are not an appropriate basis for a contested case hearing.

b) The factual questions regarding the acreage of affected wetlands and associated compensatory mitigation are: (i) whether Enbridge and the MPCA have undercounted the full acreage of wetland impacts due to flaws in wetland delineation and survey methodologies related to the seasonality of delineation activities; (ii) whether Enbridge and the MPCA have undercounted the acres of wetlands that are physically altered by trenching; and (iii) whether Enbridge and the MPCA incorrectly determined that the impacts to wetlands that are physically altered by trenching are temporary. The MPCA finds that each of these questions raise disputed issues of material fact, and Friends of the Headwaters has presented probative, competent, and conflicting evidence to support its allegation that the analysis of MPCA and Enbridge is deficient. Accordingly, the MPCA finds that a contested case hearing on the following fact issues is appropriate:

(1) Have Enbridge and the MPCA undercounted the full acreage of the Project’s wetland impacts due to flaws in wetland delineation and survey methodologies related to the seasonality of delineation activities?

(2) Have Enbridge and the MPCA undercounted the full acreage of wetlands that are physically altered by trenching?

(3) Have Enbridge and the MPCA incorrectly determined that the impacts to wetlands that are physically altered by trenching are temporary?

13. The sixth issue raised in the Friends of the Headwaters Petition is: *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?*¹¹

14. The MPCA finds that the sixth issue raises questions of law and policy that are not appropriate for a contested case hearing. Friends of the Headwaters alleges that the MPCA is obligated to consider water quality impacts from the operation of the Project. As a threshold matter, the federal Pipeline and Hazardous Materials Safety Administration provides U.S. oversight of the operation of oil and hazardous liquid pipelines like Line 3. But more fundamentally—and as Friends of the Headwaters recognizes earlier in its Petition (*see* Section III.A.4 above)—the scope of the MPCA’s Section 401 review under the Clean Water Act and state law is a legal issue, and therefore not appropriate for a contested case. In a similar vein, the issue does not satisfy the contested case criteria because it raises policy questions. *See* Minn. R. 7000.0100, subp. 5b (distinguishing a material issue of fact “from a policy question”). While the MPCA may have the authority, in certain circumstances, to address water quality impacts from project operations under Section 401, the agency distinguishes between intentional (or approved) and unintentional (or unapproved) discharges. Here, Enbridge does not seek approval for nor intend to discharge any grade of crude oil or crude oil-related product—including diluted bitumen—and the 401 Certification includes a condition that prohibits any such discharge from Line 3 to waters of the state. Friends of the Headwaters’ disagreement with the MPCA’s interpretation of the law and its policy judgments do not satisfy the criteria for a contested case.

15. The seventh issue raised in the Friends of the Headwaters Petition is: *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?*¹²

16. The MPCA finds that the seventh issue raises questions of law and policy that are not appropriate for a contested case hearing. Friends of the Headwaters focuses on the impact of an oil spill from Project operations on wild rice waters. But the overarching issue is the same: whether the MPCA is obligated to consider water quality impacts from Project operations. For the reasons discussed above in Section III.A.14, the issue does not satisfy the criteria for a contested case.

B. The Red Lake-White Earth Petition.

1. The MPCA finds that the Red Lake-White Earth Petition was timely and included all of the information required by Minn. R. 7000.1800, subp. 2.A. The MPCA notes, however, that the Red Lake-White Earth Petition does not identify potential witnesses, including experts, or include an estimate of the time required for the proposed contested case hearing. *See* Minn. R. 7000.1800, subp. 2.B. This information is not required but assists the MPCA’s evaluation of contested case hearing requests.

2. The MPCA has paraphrased or condensed the issue statements in the Red Lake-White Earth Petition, as appropriate.

¹¹ Friends of the Headwaters Pet. at 7.

¹² Friends of the Headwaters Pet. at 7-8.

3. The Red Lake-White Earth Petition identifies two issues for a contested case hearing. The first issue is: *Whether the MPCA may apply the provisions of the Clean Water Act to impacted Indian tribes.*¹³

4. The MPCA finds that the first issue raises a question of law that is not appropriate for a contested case hearing. The petitioners allege that the Clean Water Act does not apply to Indian tribes, which is a question of statutory interpretation. As a result, the first issue does not satisfy the criteria for a contested case.

5. The second issue raised in the Red Lake-White Earth Petition is: *Whether Congress exempted waters rights from the 1953 jurisdictional grant under Public Law 280 to all states, including Minnesota, and, if so, whether the 401 Certification violates the water rights of Chippewa Tribes.*¹⁴

6. The MPCA finds that the second issue raises a question of law that is not appropriate for a contested case hearing. The issue turns on questions of water rights under federal law, including Indian treaty rights. As a result, the second issue does not satisfy the criteria for a contested case.

C. The MEP Petition.

1. The MPCA finds that the MEP Petition was timely and includes the minimum information required by Minn. R. 7000.1800, subp. 2(A). The MPCA notes, however, that the issues identified in the MEP Petition are very broad, and MEP does not clearly identify the specific, material facts regarding the 401 Certification that are disputed. Nor does MEP clearly delineate how the issues that are identified should be resolved. The MPCA further notes that MEP does not identify potential witnesses, including experts, or include an estimate of the time required for the proposed contested case hearing. *See* Minn. R. 7000.1800, subp. 2.B. This information is not required but assists the MPCA's evaluation of contested case hearing requests.

2. Despite these deficiencies, the MPCA analyzed the MEP Petition to determine whether it satisfied the contested case criteria under Minn. R. 7000.1900. The MPCA has paraphrased or condensed some of the issue statements in the MEP Petition, as appropriate.

3. The MEP Petition identifies seven issues for a contested case hearing. The first issue is: *Meaningful public engagement has been blocked or hampered throughout the Line 3 permitting processes across multiple venues due to COVID-19.*¹⁵

4. The MPCA finds that the first issue raises a question of law that is not appropriate for a contested case hearing. Specifically, the issue turns on whether the MPCA complied with the public information meeting requirements under Minn. R. 7001.0120 by hosting telephone town halls in lieu of in-person meetings due to COVID-19. As a result, the first issue does not satisfy the criteria for a contested case.

¹³ *See, e.g.*, Red Lake-White Earth Pet. at 2.

¹⁴ *See id.* at 10-18.

¹⁵ MEP Pet. at 3.

5. The second issue raised in the MEP Petition is: *Climate impacts, including how the Project's contributions to climate change impact the water quality of Minnesota; further burden the health of forests, wildlife, ecosystems, and people in our state; further burden the health of ecosystems and people around the world; and increase the risk of the integrity of the pipeline and thus the possibility of oil spills.*¹⁶

6. The MPCA finds that the second issue raises mixed questions of law and fact. The legal question is whether the MPCA is obligated to consider climate change impacts that are not related to water quality under Section 401 of the CWA and state implementing regulations. The MPCA's position is that climate change impacts that are not tied to water quality are beyond the scope of its authority under Section 401. MEP's disagreement with the MPCA's interpretation of the scope of its authority under Section 401 is not an appropriate basis for a contested case hearing.

7. The MPCA acknowledges that global climate change can result in impacts to water quality, and whether the Project's greenhouse gas (GHG) emissions affect water quality of Minnesota (or any downstream water) raises an issue of fact. However, the MPCA is unaware of any model in existence that would identify measurable changes in Minnesota or downstream water quality from the Project's direct GHG emissions. MEP has not identified such a model, nor has it proffered any evidence—expert or otherwise—that would quantify the water quality impacts that are tied to the Project's direct GHG emissions. Instead, MEP references two general reports on the impacts of climate change on the natural environment.¹⁷ Because MEP has not provided probative, competent, and conflicting evidence concerning the water quality impacts of the Project's direct GHG emissions, the MPCA finds that MEP has not established a reasonable basis for a contested case hearing. The issue does not satisfy the criteria for a contested case.

8. The third issue raised in the MEP Petition is: *The need or demand for tar sands oil in the face of shifting oil markets and public resolve to move away from fossil fuels has changed since the PUC decision of June 2018 and February 2020.*¹⁸

9. The MPCA finds that the third issue raises questions of law that are not appropriate for a contested case hearing for the reasons set forth in Section III.A.6.

10. The fourth issue raised in the MEP Petition is: *Meaningful exploration of ecosystem impacts, including whether offsite wetland and streambed mitigation is sufficient to compensate for the Project's impacts.*¹⁹

11. The MPCA finds that the fourth issue does not raise a material question of fact concerning the 401 Certification, which is the matter pending before the Commission. The fourth

¹⁶ *Id.* at 4.

¹⁷ Specifically, the MEP Petition cites: (1) a report issued by the International Panel on Climate Change in September 2018; and (2) the Fourth National Climate Assessment issued in November 2018 as part of the U.S. Global Change Research Program. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

issue raises general legal and policy questions about “ecosystem impacts” and offsite compensatory mitigation that are not tied to the terms and conditions of the 401 Certification. To the extent the fourth issue is tied to the 401 Certification, MEP appears to allege that offsite wetland and streambed mitigation are insufficient to compensate for the Project’s impacts. However, MEP has not pointed to or submitted any evidence—much less probative, competent, and conflicting evidence—to support the allegation. The fourth issue does not satisfy the criteria for a contested case.

12. The fifth issue raised in the MEP Petition is: *Meaningful comparison of spill risks between the existing Line 3 and the proposed expansion.*²⁰

13. The MPCA finds that the fifth issue does not raise a disputed question of material fact concerning the 401 Certification, which is the matter pending before the Commissioner. The fifth issue raises general questions about oil spill risks that are not connected to the terms and conditions of the 401 Certification. The fifth issue also fails to satisfy the criteria for a contested case for two additional reasons. First, to the extent the fifth issues challenges the need for the Project, it raises questions of law that are not appropriate for a contested case hearing for the reasons set forth in Section III.A.6. Second, to the extent the fifth issues deals with oil spill risks from the operation of the Project, it raises questions of law and policy that are not appropriate for a contested case hearing for the reasons set forth in Section III.A.14.

14. The sixth issue raised in the MEP Petition is: *As of this writing, and for reasons unknown, the PUC has not yet issued the order pertaining to the approval of permits for a Certificate of Need and Route Permits (the split-decision vote was taken in the first days of February). Thus, without knowing the contents of the PUC’s yet unwritten order, it is inappropriate to rely on that order to grant the 401 certification.*²¹

15. The MPCA finds that the sixth issue is moot. On May 1, 2020, the PUC issued an Order Finding the Environmental Impact Statement Adequate and Granting a Certificate of Need as Modified and Route Permit as Modified. In addition, the MPCA finds that even if the issue were not moot, it raises questions of law that are not appropriate for a contested case hearing for the reasons set forth in Section III.A.6 & III.A.8.

16. The seventh issue raised in the MEP Petition is: *Identification of which agency along the permitting process has been charged with taking a “big picture” look at the value of the Project against its certain negative consequences pertaining to climate pollution. To date, no agency has taken responsibility for making these consequences part of its review. Recent court cases suggest this analysis should be in the purview of the MPCA.*²²

17. The MPCA finds that the seventh issue does not raise a material question of fact concerning the 401 Certification, which is the matter pending before the Commissioner. The

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.*

issue raises general policy questions that are not appropriate for a contested case. As a result, the seventh issue does not satisfy the criteria for a contested case.

D. The WAPOA Petition.

1. The MPCA finds that the WAPOA Petition was timely but does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The WAPOA Petition raises objections to and questions about the proposed 401 Certification. But the WAPOA Petition does not sufficiently identify the issues that are proposed to be addressed by a contested case hearing. The MPCA further notes that WAPOA Petition does not identify potential witnesses, including experts, or include an estimate of the time required for the proposed contested case hearing. *See* Minn. R. 7000.1800, subp. 2.B. This information is not required but assists the MPCA's evaluation of contested case hearing requests.

2. Despite the WAPOA's Petition's failure to satisfy the form and content requirements, the MPCA analyzed the WAPOA Petition to determine whether it satisfied the contested case criteria under Minn. R. 7000.1900. The MPCA has paraphrased or condensed the issues it was able to identify in the WAPOA Petition.

3. The first issue raised by the WAPOA Petition is: *MPCA improperly relied on the PUC's need and route determinations and was required to conduct an independent examination or review.*²³

4. The MPCA finds that this issue raises questions of law that are not appropriate for a contested case hearing for the reasons set forth in Section III.A.6 & III.A.8.

5. The second issue raised by the WAPOA Petition is: *MPCA's Section 401 certification review should include consideration of oil spill risks during the operation of the project.*²⁴

6. The MPCA finds that this issue raises questions of law and policy that are not appropriate for a contested case for the reasons set forth in Section III.A.14.

7. The third issue raised by the WAPOA Petition is: *The Second Revised Final Environmental Impact Statement (Second Revised FEIS) does not adequately address oil spills risks in Lake Superior and its watershed.*²⁵

8. The MPCA finds that the issue raises questions of law as well as issues of fact that are not within the jurisdiction of the MPCA. Under the Minnesota Environmental Policy Act

²³ WAPOA Pet. at 2; *see also id.* at 5 (“MPCA has the legal authority to seriously consider, and re-consider, a number of route alternatives . . .”); *see also id.* at 8 (asserting that oil from the Project is “NOT NEEDED to serve the petroleum needs of Minnesota residents”).

²⁴ *Id.* at 5 (MPCA has legal authority to consider “the risk of oil spills to water quality along the new Line 3 APR corridor”); *see also id.* at 10-11 (discussing oil spill risks).

²⁵ *Id.* at 11-16 (alleging deficiencies in the Second Revised Final Environmental Impact Statement).

(MEPA) and its implementing regulations in Minn. R. ch. 4410, the Environmental Impact Statement for the Project is the responsibility of the PUC. On May 1, 2020, the PUC deemed the Second Revised FEIS adequate. WAPOA can raise its objections to the adequacy of the Second Revised FEIS through the appropriate administrative and judicial processes. *See, e.g.*, Minn. Stat. § 116D.04, subd. 10; Minn. Stat. § 216B.27; Minn. R. 7829.3000.

9. The fourth issue raised by the WAPOA Petition is: *Several water quality issues have not been sufficiently addressed or analyzed by MPCA, including aquatic resource monitoring, sensitive shore lands, and water quality initiatives that are significant to Lake Country and North Central Minnesota.*²⁶

10. WAPOA broadly alleges that the MPCA has failed to analyze several water quality issues in the 401 Certification. WAPOA's broad allegations do not satisfy the contested case criteria. First, WAPOA has not sufficiently identified the material issues of fact in dispute concerning the 401 Certification, which is the matter pending before the Commissioner. Second, several of the water quality and natural resource issues identified by WAPOA are not within the jurisdiction of the MPCA (*e.g.*, walleye management is within the jurisdiction of the DNR) or qualify as issues of law that are not appropriate for a contested case (*e.g.*, the scope of the MPCA's review under Section 401). Finally, to the extent WAPOA has identified any fact issues concerning the 401 Certification, there is not sufficient evidence underlying WAPOA's broad "water quality" objections to establish a reasonable basis for a contested case hearing.

E. The Individual Petitions.

1. As noted above, the MPCA received timely requests for a contested case hearing from several individual commenters, including:

- a) Ethan Brown;
- b) Joshua Colton;
- c) Alyssa Erding;
- d) Jami Gaither;
- e) Dawn Goodwin;
- f) Sarah Harper;
- g) Melodee Monicken & Richard Smith;
- h) Gerald & John Perkins;
- i) Scott Russell;

²⁶ *Id.* at 4, 8-10 (alleging various water quality issues).

j) Eileen Shore; and

k) six individuals who requested contested case hearing via a similar form letter or email.

2. The MPCA finds that Ethan Brown's request for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The request does not identify the issues that are proposed to be addressed by a contested case hearing. The request states in general terms that a contested case is necessary to "hash [] out" the risks of the Project "in a manner that allows adequate public input, such as a contested hearing."²⁷ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does not identify specific, material facts that are disputed or otherwise identify evidence that establishes a reasonable basis for a contested case hearing.

3. The MPCA finds that Joshua Colton's request for a contested case does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. While the request broadly seeks a contested case hearing on "net societal costs and benefits" and need, it does not sufficiently identify the issues that are proposed to be addressed by a contested case hearing.²⁸ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does not identify sufficient evidence to establish a reasonable basis for a contested case hearing.

4. The MPCA finds that Alyssa Erding's request for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The request does not identify the issues that are proposed to be addressed by a contested case hearing. The request states in general terms that a contested case is necessary to "bring the best analysis and science to bear on these certifications."²⁹ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does identify specific, material facts that are disputed or otherwise identify evidence that establishes a reasonable basis for a contested case hearing.

5. The MPCA finds that Jami Gaither's request for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The request does not identify the issues that are proposed to be addressed by a contested case hearing. The request states in general terms that a contested case is necessary to "assure the current facts on this project be examined in detail."³⁰ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R.

²⁷ Brown Pet. at 1.

²⁸ Colton Pet. at 2.

²⁹ Erding Pet. at 1.

³⁰ Gaither Pet. at 1.

7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does identify specific, material facts that are disputed or otherwise identify evidence that establishes a reasonable basis for a contested case hearing.

6. The MPCA finds that Dawn Goodwin’s request for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The request does not identify the issues that are proposed to be addressed by a contested case hearing. The request states in general terms that if the MPCA “cannot complete [its] MISSION to protect and improve the environment then you must begin a contested case hearing on this proposed project pipeline.”³¹ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification—particularly with respect to the potential impacts of the Project on wild rice stands. But the request primarily raises questions of law, not material issues of fact, and does not identify sufficient evidence to establish a reasonable basis for a contested case hearing in any event.

7. The MPCA finds that Sarah Harper’s request for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The request does not identify the issues that are proposed to be addressed by a contested case hearing. The request states in general terms that a contested case hearing is necessary “for more thorough analysis.”³² The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does identify specific, material facts that are disputed or otherwise identify evidence that establishes a reasonable basis for a contested case hearing.

8. The MPCA finds that the joint request of Melodee Monicken and Richard Smith for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. While the request identifies issues, it is not clear whether the identified issues are tied to the request for a contested case “to answer the questions about this project and state water quality standards.”³³ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request primarily raises questions of law, not material issues of fact, and does not identify sufficient evidence to establish a reasonable basis for a contested case hearing in any event.

9. The MPCA finds that the joint request of Gerald and John Perkins for a contested case hearing does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The request does not identify the issues that are proposed to be addressed by a contested case hearing. The request states in general terms that a contested case is necessary to “answer the many questions that a large number of Minnesota property owners have about the current siting

³¹ Goodwin Pet. at 2.

³² Harper Pet. at 2.

³³ Monicken & Smith Pet. at 4.

of the Line 3 project and the threat it poses to Minnesota’s water quality standards.”³⁴ The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does identify specific, material facts that are disputed or otherwise identify evidence that establishes a reasonable basis for a contested case hearing.

10. The MPCA finds that Scott Russell’s request for a contested case includes the minimum information required by Minn. R. 7000.1800, subp. 2.A. The petition alleges that the 401 Certification is inadequate and seeks a contested case hearing on four issues: (i) wetland impacts; (ii) climate change impacts; (iii) environmental damage from crude oil spills; and (iv) failure to apply biological water quality standards and assess the cumulative impact of trenching through streams and wetlands on biodiversity.³⁵ The MPCA finds that the request does not satisfy the contested case criteria in Minn. R. 7000.1900 for several reasons, including.

- a) *Wetland Impacts.* Mr. Russell primarily challenges the adequacy of the environmental review under MEPA. For the reasons set forth in Section III.D.8, this issue does not satisfy the criteria for a contested case. To the extent Mr. Russell alleges that the MPCA’s analysis of wetland impacts in the 401 Certification is deficient, he does not identify sufficient evidence to establish a reasonable basis for a contested case hearing.
- b) *Climate Change Impacts.* This issue does not satisfy the criteria for a contested case for the reasons set forth in Section III.C.6-7.
- c) *Oil Spill Risks.* This issue does not satisfy the criteria for a contested case for the reasons set forth in Section III.A.14.
- d) *Biological WQS and Cumulative Impacts.* Mr. Russell again challenges the adequacy of the environmental review under MEPA. For the reasons set forth above and in Section III.D.8, this issue does not satisfy the criteria for a contested case.

11. The MPCA finds that Eileen Shore’s request for a contested case hearing was timely but does not satisfy the form and content requirements of Minn. R. 7000.1800, subp. 2.A. While the request flags alleged information gaps in the 401 Certification, it does not sufficiently identify the issues that are proposed to be addressed by a contested case hearing. The MPCA further finds that, even if the request satisfied the form and content requirements, it does not satisfy the contested case criteria in Minn. R. 7000.1900. The request raises broad questions and objections to issuance of the 401 Certification, but does not identify sufficient evidence to establish a reasonable basis for a contested case hearing.

³⁴ Perkins Pet. at 1.

³⁵ Russell Pet. at 10-12.

12. The MPCA finds that the six individuals who requested contested case hearing via form letter or email have not satisfied the form and content requirements of Minn. R. 7000.1800, subp. 2.A. The form letters raise broad objections to the 401 Certification and related permits and demand a contested case hearing on “net social costs and benefits” and “the needs for an updated oil market analysis.” These broad demands do not sufficiently identify the issues that are proposed to be addressed by a contested case hearing. The MPCA further finds that, even if the requests satisfied the form and content requirements, they do not satisfy the contested case criteria in Minn. R. 7000.1900. The requests raise broad questions and objections to issuance of the 401 Certification, but do not identify specific, material facts that are disputed or otherwise identify evidence that establishes a reasonable basis for a contested case hearing.

IV. CONCLUSIONS OF LAW

1. The MPCA has jurisdiction over the decision whether to issue the 401 Certification for the Line 3 Project. *See, e.g.*, Minn. Stat. § 115.03, subds. 1, 4a; Minn. R. 7001.1450.

2. The MCPA has jurisdiction over the decision whether to grant or deny the petitions for a contested case hearing on the 401 Certification for the Line 3 Project. Minn. R. 7000.1900, subp. 1.

3. To the extent the MPCA decides to hold a contested case hearing, the MPCA has the authority to identify the issues to be resolved and limit the scope and conduct of the hearing in accordance with applicable law, due process, and fundamental fairness. Minn. R. 7000.1900, subp. 2.

4. The MPCA concludes that the following fact issues in the Friends of the Headwaters Petition—as identified, defined, and limited by the MCPA—satisfy the criteria for granting a contested case:

- a) **Does Enbridge’s proposed use of trench methods for stream crossings have temporary or permanent impacts on water quality parameters of concern?**
- b) **Have Enbridge and the MPCA identified the least degrading crossing method that is prudent and feasible for each stream crossing?**
- c) **Have Enbridge and the MPCA undercounted the full acreage of the Project’s wetland impacts due to flaws in wetland delineation and survey methodologies related to the seasonality of delineation activities?**
- d) **Have Enbridge and the MPCA undercounted the full acreage of wetlands that are physically altered by trenching?**
- e) **Have Enbridge and the MPCA incorrectly determined that the impacts to wetlands that are physically altered by trenching are temporary?**

5. The MPCA concludes that the remaining issues raised in the petitions do not satisfy the criteria for granting a contested case under Minn. R. 7000.1900.

6. Any findings that may properly be termed conclusions and any conclusions that may properly be termed findings are hereby adopted as such.

V. ORDER

1. The MPCA **GRANTS** the Friends of the Headwaters Petition for a contested case hearing with respect to the five specific issues identified in Section IV.4 above.

2. The MPCA otherwise **DENIES** the petitions for a contested case hearing.

IT IS SO ORDERED



Laura Bishop, Commissioner
Minnesota Pollution Control Agency

June 3, 2020

Date