

**STATE OF MINNESOTA  
MINNESOTA POLLUTION CONTROL AGENCY**

**IN THE MATTER OF THE APPROVAL OF MPCA CERTIFICATION  
UNDER SECTION 401 OF THE CLEAN WATER ACT  
FOR THE PROPOSED ENBRIDGE LINE 3 REPLACEMENT  
PIPELINE PROJECT (2014-01071-TJH)**

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

**FINDINGS OF FACT**

This matter involves the approval of a Section 401 Water Quality Certification (401 Certification) to Enbridge Energy, Limited Partnership (Enbridge) for the proposed Line 3 Replacement Pipeline Project 2014-01071-TJH (Line 3 Project or Project). Based on the Minnesota Pollution Control Agency's (MPCA's) review of application materials, public comments, and other information in the record of the MPCA, the MPCA hereby issues the following Findings of Fact, Conclusions of Law, and Order:

**A. Overview of Project**

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 approved route extends from the Red River of the North near Mattson, Minnesota to the Minnesota-Wisconsin border near Wrenshall, Minnesota.
3. Under MPCA's antidegradation rule, no other route is considered "feasible" because the rule requires "supportive governance" as part of the definition of feasibility. No other route is permitted by the PUC, and therefore, no other route has "supportive governance." Minn. R. 7050.0265, subp 5A; Minn R. 7050.0255 subp. 17.
4. The new pipeline would replace Enbridge's existing, 34-inch-diameter pipeline that was built in the 1960s. The new pipeline would transport crude oil from Alberta, Canada to Superior, Wisconsin.
5. The PUC approved the certificate of 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. Minn. Stat. § 216B.243.
6. On August 19, 2020, the Minnesota Court of Appeals granted review of challenges by the Minnesota Department of Commerce's (DOC), Friends of the Headwaters, Red Lake Band of Chippewa Indians, and Youth Climate Intervenors to the July 20, 2020, PUC order denying

petitions for reconsideration of its May 1, 2020, order finding adequate the environmental impact statement (EIS), and approving the certificate of need and routing permit for the Project. As of the date of these findings, the litigation has not been resolved.

**B. Legal Background and Request for 401 Certification**

7. 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. 33 U.S.C. § 1341.
8. 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.
9. Based on the complexity of the Project and timelines related to Minnesota administrative procedures, the U.S. Army Corps of Engineers (USACE) granted MPCA a reasonable period of time until November 14, 2020, to act on Enbridge’s 401 Certification request.
10. In Minnesota, the MPCA is the agency responsible for responding to requests for Section 401 Certifications. Minn. Stat. § 115.03, subds. 1, 4a; also 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.
11. The MPCA does not certify projects within the boundaries of federally-recognized Indian reservations.
12. MPCA may include conditions in a 401 certification, which become conditions of any federal license or permit that is issued. Minn. R. 7001.1470; 33 U.S.C. § 1341(d).
13. If the MPCA issues the certification—with or without conditions—the certification must contain “[a] statement that there is reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards.” Minn. R. 7001.1470, subp. 1.C; 40 C.F.R. § 121.2(a)(3).
14. Enbridge has applied to the 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). 33 U.S.C. § 1344.
15. Enbridge must obtain a 401 Certification or waiver before USACE may issue the Section 404 Permit. 33 U.S.C. § 1341(a)(1).
16. On October 28, 2018, Enbridge submitted to MPCA its initial request for a 401 Certification for the Line 3 Project. 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. Minn. R. 7050.0250-.0335.

17. The MPCA must determine whether a project or activity satisfies antidegradation standards before the agency can issue a section 401 certification. Minn. R. 7050.0285, subp. 1.
18. The antidegradation standards contemplate that a project may result in water quality degradation—including degradation that may be permanent—so long as there are no losses of any existing uses, no violation of numeric or narrative water quality criteria, and no permanent preclusion of attainment of water quality standards. Minn. R. 7050.0265, subps. 3, 5.
19. The antidegradation standards, however, also require that any degradation be prudently and feasibly minimized. Minn. R. 7050.0265, subp. 5. A “prudent alternative” is “a pollution control alternative selected with care and sound judgment.” Minn. R. 7050.0255, subp. 34. A “feasible alternative” is “a pollution control alternative that is consistent with sound engineering and environmental practices, affordable, and legal, and that has supportive governance that can be successfully put into practice to accomplish the task.” Minn. R. 7050.0255, subp. 17.
20. While Enbridge’s 401 request was pending, the Minnesota Court of Appeals held that the Project’s environmental impact statement (EIS) was inadequate because it failed to address how an oil spill would impact the Lake Superior watershed (citing Minn. R. 4410.3100); see also In re Applications of Enbridge Energy, 930 N.W.2d 12, 17 (Minn. Ct. App. 2019).
21. The absence of an adequate EIS precludes the issuance of any state permits or certifications. Minn. Stat. § 116D.04, subd. 2b.
22. On September 27, 2019, the MPCA denied without prejudice Enbridge’s initial request for a 401 Certification. The MPCA found that Enbridge needed to submit additional information regarding oil spill modeling as related to the reopened EIS, aquatic resource monitoring, and compensatory wetland mitigation before the agency could determine whether the Project complied with water quality standards.
23. On November 15, 2019, Enbridge submitted to the MPCA its second request for a 401 Certification. According to Enbridge’s second request, the proposed Project includes the following activities:
  - a. Constructing a new 36-inch diameter Line 3 crude oil pipeline that will span approximately 330 miles, which will replace the existing 34-inch diameter Line 3 that is approximately 282 miles in length;
  - b. Expanding the footprint of, and making mechanical upgrades to, the existing Clearbrook Terminal in Clearwater County;
  - c. Expanding four pump stations at the following existing facilities: Donaldson (Kittson County), Viking (Marshall County), Plummer (Red Lake County) and Clearbrook (Clearwater County);
  - d. Installing four new pump stations and associated electrical service at the following locations in the new corridor extending south and east of Clearbrook: Two Inlets

(Hubbard County), Backus (Cass County), Swatara (Aitkin County) and North Gowan (St. Louis County);

- e. Constructing 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;
  - f. Constructing small Cathodic Protection System facilities and electrical services to protect the buried pipeline from corrosion;
  - g. Constructing new access roads to gain access to construct the Project, where existing public or private roads are not available; and
  - h. Permanently deactivating and removing the existing Line 3 pipeline from service, after the new Line 3 pipeline is operational. . (Note: The Project does not include a proposal to impact state waters for the purpose of removing portions of the permanently deactivated existing Line 3 pipeline. The application states that Enbridge may seek to remove exposed segments of the permanently deactivated Line 3 pipeline in the future, including in areas where landowners have requested removal, but only after the required regulatory permits and authorizations – including, potentially, separate 401 Certifications – have been obtained.)
24. The Project proposes to cross 221 streams in Minnesota (outside of the Fond du Lac Reservation). In addition, the Project proposes to temporarily impact 726.95 acres of wetland, permanently convert 211.81 acres of wetland to a different wetland type, and permanently fill 6.0 acres of wetland.
25. The Project proposed to cross a broad spectrum of stream and wetland types, including high-quality wetlands and surface waters.
26. On May 1, 2020, the PUC found the Final EIS for the Project adequate and reissued the certificate of need and route permit for the Project.

**C. Procedural History**

***Draft 401 Certification and Public Comment Period***

27. After review and evaluation of all materials submitted, 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 and preliminary determination that the Project would satisfy the antidegradation standards in Minn. R. 7050.0265.
28. The draft 401 Certification and accompanying Preliminary Antidegradation Determination for the 401 Certification were made available for public comment on March 2, 2020.
29. The draft 401 Certification included 28 specific conditions to ensure compliance with state water quality standards. The conditions related to: construction methods; waterbody and wetland crossing methods; impaired waters; wild rice; seasonal conditions; compensatory

mitigation for permanent impacts to water bodies and wetlands; compliance with terms and conditions in additional permits and final plans; the use of independent third party monitors; and post-construction monitoring related to construction activities.

30. Throughout review of the Project, the MPCA posted documents related to the application on its website to enable access by the public. Posted documents included: application materials; general information; public comments received; documents related the contested case hearing; and MPCA decision documents. These documents were posted at: <https://www.pca.state.mn.us/regulations/401-certification-enbridge-line-3>
31. The public comment period was scheduled to end on April 3, 2020, but was extended to April 10, 2020, due to COVID-19 considerations.
32. During the 39-day comment period, the MPCA received over 9,723 written comments on the draft 401 Certification and Preliminary Antidegradation Determination 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.

#### ***Tribal Consultation***

33. Pursuant to Governor Tim Walz' Executive Order 19-24, the MPCA communicated with staff and representatives of Tribal Nations and engaged in formal consultation regarding Enbridge's request for 401 certification. On March 4, 2019, the MPCA sent letters requesting consultation to all federally-recognized Tribal Nations in Minnesota. During 2019 and 2020, consultations occurred with the following Tribal Nations in Minnesota; the Fond du Lac Band of Lake Superior Chippewa, the Leech Lake Band of Ojibwe, the Mille Lacs Band of Ojibwe, the White Earth Nation, the Grand Portage Band of Lake Superior Chippewa Indians, the Bois Forte Band of Chippewa, and the Red Lake Nation.

#### ***Contested Case Hearing***

34. During the public comment period, MPCA received 20 petitions for a contested case hearing from various environmental organizations, Tribal Nations, and individuals.
35. One petition was jointly submitted by Friends of Headwaters, Sierra Club, Honor the Earth, with the White Earth Band of Ojibwe Indians and the Red Lake Band of Chippewa Indians (Joint Petitioners).
36. The MPCA evaluated the petitions to determine whether they satisfied MPCA's criteria for a contested case hearing in Minn. R. 7000.1900, subp. 1. Under the criteria, the Commissioner must grant a contested case petition if the Commissioner determines that: (1) there is a material issue of fact in dispute concerning the matter pending before the Commissioner; (2) the Commissioner has the jurisdiction to make a determination on the disputed material issue of fact; and (3) there is a reasonable basis underlying the disputed material 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.

37. On June 3, 2020, MPCA issued its Findings of Fact, Conclusions of Law, and Order on the contested case petitions. MPCA granted the Joint Petitioners' request for a contested case in part, concluding that a hearing was warranted on the following five fact questions:
  - a. Will 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 MPCA identified the least degrading crossing method that is prudent and feasible for each stream crossing?
  - c. Have Enbridge and 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 MPCA undercounted the full acreage of wetlands that are physically altered by trenching?
  - e. Have Enbridge and MPCA incorrectly determined that the impacts to wetlands that are physically altered by trenching are temporary?
38. On June 8, 2020, the MPCA issued a Notice and Order for Hearing that referred the five fact issues to the Office of Administrative Hearings (OAH) for a contested case hearing.
39. All parties submitted pre-filed expert testimony and on August 24, 2020, OAH Administrative Law Judge James E. LaFave held a virtual evidentiary hearing at which all parties presented evidence and arguments.
40. On October 16, 2020, Judge LaFave issued his [Findings of Fact, Conclusions of Law, and Recommendation](#) (ALJ Recommendation) that the MPCA Commissioner find the Joint Petitioners failed to meet their burden of proof regarding each of the five issues presented. Specifically, Judge LaFave recommended that the Commissioner find that:
  - a. The Joint Petitioners have failed to prove that the impacts on water quality parameters of concern from trenching in streams will be permanent.
  - b. The Joint Petitioners have failed to prove that the MPCA and Enbridge have not identified the least degrading crossing method that is prudent and feasible for each stream.
  - c. The Joint Petitioners have failed to prove that the MPCA and Enbridge undercounted the full acreage of wetland impacts due to seasonality-related flaws in the wetland delineation process.
  - d. The Joint Petitioners have failed to prove that the MPCA and Enbridge undercounted the full acreage of wetlands that will be physically altered by trenching.

- e. The Joint Petitioners have failed to prove that the impacts to wetlands that are physically altered by trenching are permanent.
41. On October 16, 2020, the MPCA notified all parties to the contested case hearing of the opportunity to file exceptions, comments, and arguments in response to the ALJ's Recommendation.
42. On October 26, 2020, exceptions letters were filed by the Joint Petitioners and MPCA.
43. In February 2020, the MPCA established a team of staff and an Assistant Commissioner (Contested Case Advisory Team) to review recommendations from a contested case hearing related to the Project. Contested Case Advisory Team members had not previously participated in discussions or evaluation of the Project and were walled off from further discussions or evaluation.
44. The Contested Case Advisory Team included MPCA Assistant Commissioner Kirk Koudelka. Pursuant to, and in compliance with, Minn. Stat. 15.06, subd. 6, and Minn. Stat. 116.03, subd. 2, the MPCA Commissioner delegated authority to Assistant Commissioner Koudelka to review and consider the report of the administrative law judge and the related record and to issue an order on the contested case hearing in the Matter of the Draft 401 Certification for the Line 3 Replacement Project, OAH Docket No. 60-2120-36909.
45. Minn. R. 7001.0140, subp. 3, requires that "If a contested case hearing has been held, the agency shall comply with the procedures set forth in part 7000.2000 of the agency procedural rules prior to making a final determination." The procedures in Minn. R. 7000.2000 subp. 4 require the MPCA to "make all final decisions and orders for which a contested case hearing has been held" and that the decision "must be based solely on the record from the hearing."
46. Minn. R. 7000.2000 subp. 7 allows the MPCA to "accept, modify, or reject the recommendation of the administrative law judge, in whole or in part."
47. As expeditiously as possible after receipt of the ALJ's Recommendation, Contested Case Advisory Team members reviewed the contested case hearing record, including the ALJ Recommendation and exceptions letters. The Contested Case Advisory Team made a final determination based solely on that record and recommended that as related to the five issues that were the subject of the contested case hearing the MPCA accept the ALJ recommendations in whole.
48. On November 9, 2020, MPCA Assistant Commissioner Kirk Koudelka, based on his independent review of the record and the exceptions to the ALJ's Recommendation, issued a final order (Contested Case Hearing Order) regarding the five issues that were the subject of the contested case hearing. As to the five issues, the Contested Case Hearing Order adopted the ALJ's Recommendation in its entirety.

49. On November 9, 2020, the MPCA served the Contested Case Hearing Order on all parties to the matter and on all interested persons who submitted a request to be notified of the decision.

**D. Final 401 Certification**

50. The MPCA reviewed and considered all comments received during the public comment period, and considered whether to make changes to the draft 401 Certification in response to those comments.
51. The MPCA is not required to prepare responses to individual comments on draft 401 Certifications; however, the MPCA did prepare general responses to comment themes compiled from individual comments received during the public comment period. The thematic grouping of comments and responses to those comments are incorporated into these findings and are available at: <https://www.pca.state.mn.us/regulations/401-certification-enbridge-line-3>.
52. Following the public comment period, and based on concerns expressed in public comments, the MPCA continued to work on review of certain sensitive proposed crossings with the Minnesota Department of Natural Resources (DNR).
53. In addition, following the public comment period, and based on concerns expressed in public comments, the MPCA requested additional information from Enbridge. Additional information provided by Enbridge included: site-specific construction and restoration plans and enhanced post-construction monitoring for many sensitive crossing; and field surveys for all wetlands within the Project route.
54. Changes were made in the final 401 certification from the draft 401 certification based on public comments, coordination with DNR, additional administrative process, and additional information provided by the applicant. These changes include: enhanced third-party monitoring requirements during construction; seasonal restrictions on work in sensitive waters or upstream of wild rice waters; enhanced post-construction financial assurance for wetland restoration; additional requirements for notification to MPCA for any unauthorized direct or indirect impacts to waters of the state; and additional requirements to further minimize impacts to water quality.
55. The final 401 Certification includes 35 specific conditions to ensure compliance with state water quality standards. The conditions relate to: compliance with terms and conditions in additional permits, final plans, specifications, and procedures; the use of independent third party monitors; construction and crossing methods; waterbody and wetland crossing methods; impaired waters; wild rice waters; seasonal restrictions; compensatory mitigation for permanent impacts to water bodies and wetlands; post-construction monitoring related to construction activities; and other general requirements.

**FINAL DETERMINATION ON ISSUANCE OF 401 CERTIFICATION**

56. The MPCA's decision on the application to issue the Line 3 401 Certification is governed by the MPCA's permit rule, Minn. R. 7001.0140, subp. 1, which states:

Except as provided in subpart 2, the agency shall issue, reissue, revoke and reissue, or modify a permit if the agency determines that the proposed permittee or permittees will, with respect to the facility or activity to be permitted, comply or will undertake a schedule of compliance to achieve compliance with all applicable state and federal pollution control statutes and rules administered by the agency, and conditions of the permit and that all applicable requirements of Minnesota Statutes, chapter 116D, and the rules adopted under Minnesota Statutes, chapter 116D, have been fulfilled.

57. Minn. R. 7001.0140, subp. 2, states in relevant part:

The following findings by the agency constitute justification for the agency to refuse to issue a new or modified permit, to refuse permit reissuance, or to revoke a permit without reissuance:

- A. that with respect to the facility or activity to be permitted, the proposed permittee or permittees will not comply with all applicable state and federal pollution control statutes and rules administered by the agency, or conditions of the permit;
- B. that there exists at the facility to be permitted unresolved noncompliance with applicable state and federal pollution control statutes and rules administered by the agency, or conditions of the permit and that the permittee will not undertake a schedule of compliance to resolve the noncompliance;
- C. that the permittee has failed to disclose fully all facts relevant to the facility or activity to be permitted, or that the permittee has submitted false or misleading information to the agency or to the commissioner;
- D. that the permitted facility or activity endangers human health or the environment and that the danger cannot be removed by a modification of the conditions of the permit;
- E. that all applicable requirements of Minn. Stat. ch. 116D and the rules adopted under Minn. Stat. ch. 116D has not been fulfilled;
- F. that with respect to the facility or activity to be permitted, the proposed permittee has not complied with any requirement under parts 7002.0210 to 7002.0310 or chapter 7046 to pay fees;
- G. that with respect to the facility or activity to be permitted, the proposed permittee has failed to pay a penalty owed under Minn. Stat. § 116.072.

58. The applicant submitted a complete request for 401 Certification. The request and supporting materials have been reviewed by the MPCA staff.
59. The MPCA reviewed all materials with care and sound judgment, compiling a team of subject matter experts including hydrogeologists, research scientists, and water quality specialists. The MPCA also coordinated its review with the U.S. Army Corps of Engineers and Minnesota

Department of Natural Resources (DNR), who have overlapping jurisdiction over stream crossings.

60. The MPCA has reasonable assurance, based on the information submitted, that construction of the Project in compliance with the requirements of the 401 Certification (and expected/associated 404 permit) and completion of all required monitoring in accordance with the conditions of the 401 Certification issued by this order will not violate all applicable water quality standards, and the conditions of the permit, and will not pose a danger to human health or the environment.
61. The MPCA finds that the proposed issuance of the Line 3 Project 401 Certification and Antidegradation Determination as publicly noticed on March 2, 2020, and as since revised, meets the requirements of Minn. R. 7001.0140, subp. 1, and none of the justifications to refuse certification issuance described in Minn. R. 7001.0140, subp. 2, exist.
62. Minn. R. 7001.0140, subp. 4, requires that when an EIS is required to be prepared for a project, the MPCA shall not make its final decision until 25 days or more after the adequacy decision is made under part 4410.2800.
63. The MPCA finds that the decision in this Order has been made more than 25 days after the EIS adequacy decision was made by the PUC on May 1, 2020.
64. If a contested case hearing has been held, the agency shall comply with the procedures set forth in Minn. R. 7000.2000 of the agency procedural rules prior to making a final determination.
65. The MPCA finds that as detailed in Findings 40 through 49, above, the MPCA complied with the procedures set forth in Minn. R. 7000.2000.

#### **CONCLUSIONS OF LAW**

66. The MPCA has jurisdiction over the decision whether to issue the 401 Certification for the Line 3 Project.
67. Due, adequate, and timely public notice of the proposed 401 Certification was given in accordance with Minn. R. 7001.0100.
68. On November 9, 2020, MPCA Assistant Commissioner Kirk Koudelka, issued a final determination and order in the contested case hearing held on the MPCA's preliminary determination to issue the 401 Certification and preliminary determination that the Project would satisfy the antidegradation standards in accordance with the requirements of Minn. R. 7001.0140, subp. 3, and Minn. R. 7001.2000. That final determination applies to the five issues that were the subject of the contested case hearing held before Administrative Law Judge LaFave on August 24, 2020.

69. The antidegradation requirements for issuance of 401 Certifications set forth in Minn. R. 7050.0285 are satisfied.
70. The requirements for issuance of 401 Certifications set forth in Minn. R. 7001.0140 are satisfied and the 401 Certification and Antidegradation Determination should be issued.
71. Any findings that might properly be termed conclusions and any conclusions that might properly be termed findings are hereby adopted as such.

**ORDER**

The Minnesota Pollution Control Agency approves and authorizes issuance of the Section 401 Water Quality Certification and Antidegradation Determination for the Enbridge Energy, Limited Partnership Line 3 Replacement Pipeline Project 2014-01071-TJH.

**IT IS SO ORDERED**

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Laura Bishop  
Commissioner  
Minnesota Pollution Control Agency

November 12, 2020  
Date