

**STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY**

**IN THE MATTER OF THE CONTESTED CASE
HEARING REQUESTS ON THE DRAFT
INDUSTRIAL WASTEWATER NPDES/SDS PERMIT
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 an Individual National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Wastewater Permit 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 DRAFT NPDES/SDS PERMIT.

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 require hydrostatic testing and buoyancy control water be discharged to waters of the state.

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 Wastewater NPDES/SDS Permit.

1. Under Section 402 of the federal Clean Water Act (CWA), an NPDES discharge permit is required for any discharge of pollutants from point sources to water of the United States. See 33 USC § 1342

2. In Minnesota, the MPCA is the agency responsible for issuing water discharge permits. State law gives the MPCA authority to require permits for the operation of disposal systems. (Minn Statutes chapter 115) As a result, all of the NPDES discharge permits issued by the MPCA are also SDS permits.

3. On October 30th, 2018, Enbridge submitted its initial permit application to discharge hydrostatic test water. The application was determined by the MPCA as complete for processing on November 27th, 2018.

4. After the determination by the PUC of the adequacy of the Environmental Impact Statement, Enbridge submitted a second application on November 15, 2019.

5. According to Enbridge's second application, the proposed Project includes the following discharge activities:

- a) Buoyancy water introduced during pipeline installation using the horizontal directional drill ("HDD") method;
- b) Buoyancy water introduced during pipeline installation using the push-pull method;
- c) Hydrostatic testing of HDD pipe segments (referred to as 'pre-tests'); and
- d) Hydrostatic testing of mainline spread segments.

6. The Project proposes to discharge to 23 surface water locations, and to 26 upland locations used for infiltration.

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 NPDES/SDS Permit, and a capped air emission permit. The draft NPDES/SDS permit and Fact Sheet 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 67 written comments on the draft NPDES/SDS 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 NPDES/SDS draft permit and related permits. 399 individuals provided oral comment during the telephone town halls.

4. The MPCA received 5 requests for contested case hearings on the draft NPDES/SDS permit from the following individuals:

- a) James Conniff,
- b) Joshua Colton,
- c) Two comments from Doretta (Dorie) Reisenweber, and
- d) Michelle Thelen.¹

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:

- 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.

¹ Copies of the letters are included in Attachment A.

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 NPDES/SDS Permit.

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.

III. FINDINGS ON CONTESTED CASE PETITIONS.

1. As noted above, the MPCA received 5 timely requests for a contested case hearing from individuals.

2. The MPCA finds that James Conniff's request for a contested case hearing 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 on the draft NPDES/SDS permit.³ 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 permit, but does not identify sufficient evidence to establish 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

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.

³ Conniff Pet. at 2.

issues that are proposed to be addressed by a contested case hearing on the draft NPDES/SDS permit.⁴ 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 permit, but does not identify sufficient evidence to establish a reasonable basis for a contested case hearing.

4. The MPCA finds that the two comments containing requests for a contested case hearing submitted by Doretta (Dorie) Reisenweber do not satisfy the form and form and content requirements of Minn. R. 7000.1800, subp. 2.A. While the requests broadly seek a contested case hearing on “net societal costs and benefits,” need, and oil spills it does not sufficiently identify the issues that are proposed to be addressed by a contested case hearing on the draft NPDES/SDS permit.⁵ 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 permit, but does not identify sufficient evidence to establish a reasonable basis for a contested case hearing.

5. The MPCA finds that Michelle Thelen’s request for a contested case hearing 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 on the draft NPDES/SDS permit.⁶ 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 permit, but does not identify sufficient evidence to establish a reasonable basis for a contested case hearing.

IV. CONCLUSIONS OF LAW

1. The MPCA has jurisdiction over the decision whether to issue the NPDES/SDS permit for the Line 3 Project. *See, e.g.*, Minn. Stat. § 115.03, subd. 1; Minn. R. 7001.1000.

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

3. The MPCA concludes that the petitions do not satisfy the criteria for granting a contested case under Minn. R. 7000.1900.

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

⁴ Colton Pet. at 2.

⁵ Reisenweber Petitions at 1 and 2.

⁶ Thelen Pet. at 2.

V. ORDER

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

IT IS SO ORDERED

Laura Bishop, Commissioner
Minnesota Pollution Control Agency

November 13, 2020

Date

Attachment A

Comments requesting a contested case hearing