

**STATE OF MINNESOTA
MINNESOTA POLLUTION CONTROL AGENCY**

In the Matter of the Draft 401 Certification
For the Line 3 Replacement Project
OAH 60-2120-36909

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER ON
CONTESTED CASE HEARING**

Based on the entire record in this matter, Assistant Commissioner Kirk Koudelka (the “Assistant Commissioner”) makes the following Findings of Fact, Conclusions of Law, and Order for the contested issues of fact addressed in the contested case hearing:

FINDINGS OF FACT

Background

1. The above-entitled matter came before Administrative Law Judge (“ALJ”) James E. LaFave for a virtual evidentiary hearing on August 24, 2020.
2. Peter Farrell and Oliver Larson, Assistant Attorneys General, appeared on behalf of the Minnesota Pollution Control Agency (“MPCA” or “agency”).
3. Scott Strand of the Environmental Law and Policy Center appeared on behalf of Friends of the Headwaters.
4. Moneen Nasmith, Sophia Jayanty, and Sharmeen E. Morrison of Earthjustice appeared on behalf of the Sierra Club.
5. Joseph Plumer, General Counsel, appeared on behalf of Red Lake Band of Chippewa Indians.
6. Paul Blackburn appeared on behalf of Honor the Earth. Frank Bibeau appeared on behalf of Honor the Earth and the White Earth Band of Ojibwe.

7. Friends of the Headwaters, Honor the Earth, Sierra Club, the Red Lake Band of Chippewa Indians, and the White Earth Band of Ojibwe are collectively referred to herein as “Joint Petitioners.”

8. Christina J. Brusven and Haley Waller Pits of Fredrickson & Byron, P.A. appeared on behalf of Enbridge Energy, LP.

9. On October 16, 2020, the ALJ issued his Findings of Fact, Conclusions of Law and Recommendation (the “ALJ Report”).

10. MPCA Commissioner Laura Bishop (the “Commissioner”) delegated the authority to issue an order on this contested case hearing to Kirk Koudelka, MPCA Assistant Commissioner for Land Policy and Strategic Initiatives.

11. By letter dated October 16, 2020, all parties were informed of their right to file exceptions and argument regarding the ALJ’s Recommendation.

12. Written exceptions were submitted by MPCA’s section 401 water quality certification review team and by the Joint Petitioners on October 26, 2020. Both exceptions were timely filed.

13. The record closed on October 26, 2020.

Adoption of ALJ Findings

14. Based on his independent review of the record and the exceptions to the ALJ Report filed by the parties, the Assistant Commissioner adopts in its entirety and incorporates as his own the Findings of Fact contained in the ALJ Report (Attachment A).

15. Any Finding of Fact herein, which should more properly be deemed a Conclusion of Law, is hereby adopted as such.

Based upon the foregoing Findings of Fact, the Assistant Commissioner makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Assistant Commissioner adopts in its entirety and incorporates as his own the Conclusions of Law contained in the ALJ Report.

2. Any Conclusion of Law herein, which should more properly be deemed a Finding of Fact, is hereby adopted as such.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The ALJ Report is adopted in its entirety.

This Order is not the MPCA’s final decision on the 401 Certification for the Line 3 Replacement Project. This Order may be appealed to the Minnesota Court of Appeals in an appeal of the Commissioner’s final decision on the 401 Certification for the Line 3 Replacement Project in the manner provided in Minn. Stat. § 14.63 to 14.69 (2018).

Dated: November 9, 2020

Kirk Koudelka
Assistant Commissioner

MEMORANDUM

The Assistant Commissioner adopts the Memorandum of the ALJ in full and hereby incorporates it into this Order. The Assistant Commissioner additionally provides the following in response to the exception letter submitted by the Joint Petitioners on October 26, 2020.

MPCA appropriately assessed and categorized anticipated impacts as temporary and permanent. Compensatory mitigation is required in the draft 401 Certification for the anticipated impacts consistent with other 401 certifications issued by MPCA.

Regarding unanticipated impacts, the draft 401 Certification contains conditions that require monitoring that will indicate if an unanticipated impact occurs. If monitoring indicates an unanticipated impact has occurred that is not addressed by existing mitigation measures, MPCA can require additional mitigation for those impacts, providing a “backstop” to further protect water quality. Additional monitoring for the effectiveness of the mitigation is to be conducted and verified by a third party, not the applicant, which also provides assurance of independent, accurate assessment.

Total Suspended Solids (TSS) is the primary pollutant of concern (POC) associated with discharges from the proposed activity. Use of TSS as a surrogate is appropriate as the primary POC since it is the root cause of other associated potential impairments or degradation, and the TSS standard was developed to be protective of aquatic life so inherently includes protection of the biological communities in these streams.

MPCA has appropriately considered biological communities in the analysis of impacts. It is likely the biotic communities will be temporarily displaced as a result of the project; however, it is fully anticipated they will return to the area once the disturbance ceases. The record reflects that these anticipated impacts to biota will be temporary.

Biological criteria were considered. Numeric water quality standards, like TSS, are developed to be protective of aquatic life. The SONAR and TSD go into detail on considerations of aquatic biota used to develop the TSS standard. The draft 401 Certification provides reasonable assurance that water quality standards are achieved, thus protecting aquatic life of all forms. Index of biological integrity (IBI) scores provide us with an assessment of the overall health of the aquatic biota in a stream, but are not pollutant standards like numeric water quality standards. The IBI scores are not intended to set project-specific regulatory parameters.

Enbridge and the MPCA identified the least degrading crossing method that is prudent and feasible for each stream crossing. The crossing methods were vetted appropriately and MPCA determined that they meet the expectation of the least degrading prudent and feasible option. MPCA's draft 401 Certification is based on the route approved by the PUC, and the MPCA does not have the authority to change the approved route.

Enbridge and the MPCA did not undercount the full acreage of the Project's wetland impacts. In their proposed amended findings of fact, conclusion, and recommendation, Joint Petitioners conceded the delineation of the acreage was "likely reasonable accurate."

Enbridge and the MPCA did not undercount the full acreage of wetlands that are physically altered by trenching. The record demonstrates that comparison to existing pipelines in Minnesota and modeling and evaluation of this project provided reasonable assurance the temporary and permanent impacts will be as anticipated and that the appropriate acreage was counted. There is a condition in the draft 401 Certification that provides for verification of any unanticipated impacts through post construction monitoring, and should additional impacts be discovered, appropriate mitigation will be required. Further, MPCA is requiring mitigation for many temporary impacts to wetlands.

Enbridge and the MPCA correctly determined that the temporary and permanent impacts to wetlands that are physically altered by trenching are appropriately classified. MPCA's analysis of this project, and past experience with other pipeline projects, has demonstrated which impacts due to trenching are permanent and which are temporary. The record supports the MPCA's classification of temporary and permanent impacts. There is a condition in the draft 401 Certification providing for verification of any unanticipated impacts through post construction monitoring, and should additional impacts be discovered, appropriate mitigation will be required. Further, MPCA is requiring mitigation for many temporary impacts to wetlands.

KGK