

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

In the Matter of the 401 Certification
for the Line 3 Replacement Project

**PETITIONERS'
STATEMENT OF THE CASE**

CASE NUMBER: _____

Friends of the Headwaters, Sierra Club,
Honor the Earth, Red Lake Band of Chippewa
Indians, White Earth Band of Ojibwe,

AGENCY CASE NUMBER:
2014-01071-TJH

Petitioners,

OAH CASE NUMBER:
60-212--36909

vs.

**DATE OF NOTICE
OF DECISION:**
November 12, 2020

Minnesota Pollution Control Agency,

Respondent.

**1. Court or agency of case origination and name of presiding officer or hearing
officer:**

Minnesota Pollution Control Agency (MPCA), Laura Bishop, Commissioner;
Administrative Law Judge James LaFave.

2. Jurisdictional statement:

Certiorari appeal under Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.63-.68. Notice of MPCA’s final decision was on November 12, 2020, and notice of MPCA’s decision to affirm the administrative law judge’s findings, conclusions, and recommendation was on November 9, 2020. This certiorari appeal has been served and filed within the statutory 30 days.

3. State type of litigation and designate any statutes at issue:

Environment—state water quality certification under section 401 of Clean Water Act (CWA), 33 U.S.C. § 1341, Minn. Stat. § 115.44, and Minn. R. pt. 7050.

Environment—requirements of Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, subd. 6.

Utility regulation—certificate of need for large energy facility—Minn. Stat. § 216B.243.

Pipeline regulation—routing permit—Minn. Stat. § 216G.02.

4. Brief description of claims, defenses, issues litigated, and result below:

Enbridge Energy, Limited Partnership (“Enbridge”) proposes to construct a new crude oil pipeline (“Line 3”) from the Canadian tar sands region across Minnesota to Enbridge’s terminal and tank farm in Superior, Wisconsin. Along Enbridge’s proposed route, the pipeline will cross more than 200 waterbodies and more than 800 protected wetlands.

To proceed with its project, Enbridge needs federal permits from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. A precondition for those permits, however, is a state certification under section 401 of the CWA, 33 U.S.C. § 1341, that the project will not violate state water quality standards (a “401 certification”).

Respondent Minnesota Pollution Control Agency (MPCA) is the agency solely responsible for 401 certifications in Minnesota. Enbridge’s first application was denied, but, on March 2, 2020, MPCA put a draft 401 certification for Line 3 out for comment. Petitioners (and others) filed formal comments pointing out that, in the draft:

- MPCA had refused to consider alternative routes for the pipeline that would have substantially reduced negative impacts on Minnesota water quality, based on the erroneous conclusion that a routing permit issued by the Minnesota Public Utilities Commission (PUC) precluded MPCA’s consideration of alternatives;
- MPCA had limited its review to Enbridge’s crossing technique selections and to counting up the credits Enbridge would need to purchase to compensate for immediate wetland and stream impacts. There was virtually no consideration of long-term impacts, based on the notion that, if longer-term impacts arose at some future date after construction, MPCA could then ask Enbridge to purchase additional credits. The rules expressly require all compensation to take place prior to construction.
- MPCA refused to consider water quality risks from pipeline operations, e.g. spills, despite the express language in section 401; and

- MPCA did not consider climate impacts, or impacts on treaty and other tribal rights, despite its legal obligations to do so.

At the same time, petitioners and others also petitioned MPCA for a contested case. MPCA reluctantly agreed, but limited the scope of the contested case to narrow factual issues about specific water crossings and whether wetland impacts would be temporary or permanent.

After a one-day hearing, Judge LaFave from the Office of Administrative Hearings (OAH) issued findings, conclusions, and a recommendation upholding the MPCA's position on those specific factual issues. MPCA adopted the ALJ's findings and conclusions on those issues on November 9, 2020, and on November 12, 2020, issued its final determination granting the 401 certification on the same terms as its earlier draft. This appeal follows.

5. Specific issues proposed to be raised on appeal:

- a. Whether the MPCA's refusal to consider alternative routes to minimize water quality impacts of a proposed pipeline violated its obligations under section 401 of the Clean Water Act and the Minnesota Environmental Policy Act (MEPA), Minn. Stat. § 116D.04, subd. 6;
- b. Whether MPCA's decision to defer consideration of longer-term impacts to water quality and wetlands until after construction complied with the requirements of the water quality standards;
- c. Whether MPCA's refusal to consider the risks to Minnesota water quality from operation of the pipeline violated section 401; and

- d. Whether MPCA's refusal to consider climate or tribal impacts complied with the requirements of Minnesota and federal law.

6. Related appeals/cases:

There is a separate set of Line 3 appeals pending before the court of appeals, challenging the PUC's decisions finding that the second revised environmental impact statement for the project met the requirements of the Minnesota Environmental Policy Act (MEPA), and granting the project a Certificate of Need (CON) and a Routing Permit (RP) (A20-1071, A20-1072, A20-1074, A20-1075, A20-1077). Those appeals are currently in the briefing stage, with opening briefs due on or around December 7, 2020.

7. Contents of record:

Is a transcript necessary to review the issues on appeal?

Yes (X) No ()

If yes, full (X) or partial () transcript?

8. Is oral argument requested?

Yes (X) No ()

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2?

Yes () No (X)

9. Identify the type of brief to be filed:

Formal brief under Rule 128.02.

10. Names, addresses, and telephone numbers of attorneys for petitioners and respondents:

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DATED: November 30, 2020

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