

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Katie J. Sieben	Chair
Valerie Means	Commissioner
Matthew Schuerger	Commissioner
Joseph K. Sullivan	Commissioner
John A. Tuma	Commissioner

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

ISSUE DATE: May 1, 2020

DOCKET NO. PL-9/CN-14-916

DOCKET NO. PL-9/PPL-15-137

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

ORDER FINDING ENVIRONMENTAL IMPACT STATEMENT ADEQUATE, GRANTING CERTIFICATE OF NEED AS MODIFIED, AND GRANTING ROUTING PERMIT AS MODIFIED

PROCEDURAL HISTORY

I. Initial Filings

On April 24, 2015, Enbridge Energy, Limited Partnership (Enbridge, or the Applicant) filed separate applications for a certificate of need¹ and a routing permit² for an approximately 338-mile pipeline, along with associated facilities, extending from the North Dakota–Minnesota border to the Minnesota–Wisconsin border (Line 3 Project, or the Project) to replace its existing Line 3 pipeline (Existing Line 3) in Minnesota.³

The Commission subsequently joined the need and routing dockets and authorized the Department of Commerce, Energy Environmental Review and Analysis Unit (EERA) to prepare a combined environmental impact statement (EIS).⁴ The Commission referred the need and

¹ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916 (the need docket).

² *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/PPL-15-137 (the routing docket).

³ Commissioner Joseph K. Sullivan joined the Commission in April 2020, and therefore did not participate in the decisions contained in this order.

⁴ A more detailed procedural history can be found in the Commission’s previous orders in the need and routing dockets.

routing dockets to the Office of Administrative Hearings for contested-case proceedings and separately referred the question of EIS adequacy for contested-case proceedings.

II. Environmental Impact Statement

Following contested-case proceedings on the adequacy of the final EIS (FEIS), the Commission found the FEIS to be inadequate in four specific respects in December 2017.⁵ This triggered a requirement that EERA submit a revised EIS to address the issues identified by the Commission within 60 days of the decision.⁶

On February 12, 2018, EERA filed a Revised FEIS. After receiving exceptions of the parties and holding an Agenda Meeting on March 15, the Commission issued its Order Finding Environmental Impact Statement Adequate and Adopting ALJ Lipman's November 2017 Report as Modified on May 1, 2018 (May 2018 FEIS Order), which determined that the Revised FEIS was adequate.

III. Certificate of Need Orders

On September 5, 2018, the Commission issued its Order Granting Certificate of Need as Modified and Requiring Filings (September 2018 CN Order), which granted Enbridge a certificate of need contingent upon the following modifications to the Line 3 Project: (1) a Parental Guaranty for environmental damages; (2) a Landowner Choice Program allowing for removal of Existing Line 3; (3) a Decommissioning Trust Fund for eventual decommissioning of the Project; (4) a Neutral Footprint Program requiring renewable energy credits to offset increased nonrenewable energy use by the Project and a tree-for-tree replacement program; and (5) requirements regarding General Liability and Environmental-Impairment Liability insurance. The September 2018 CN Order required Enbridge to submit a compliance filing containing further details about these modifications.

On January 23, 2019, the Commission issued its Order Approving Compliance Filings as Modified and Denying Motion (January 2019 CN Order). The January 2019 CN Order approved and modified Enbridge's compliance filings to develop the certificate-of-need modifications from the September 2018 CN Order.⁷ For example, the Commission approved a revised version of Enbridge's proposed Parental Guaranty and imposed additional requirements for Enbridge's proposed Landowner Choice Program.

IV. Routing Permit Orders

On October 26, 2018, the Commission issued its Order Approving Pipeline Routing Permit with Conditions (October 2018 RP Order), which granted a routing permit for a modified version of Enbridge's preferred route for the Project subject to a number of conditions.

⁵ Need and Routing Dockets, Order Finding Environmental Impact Statement Inadequate (December 14, 2017).

⁶ Minn. R. 4410.2800, subp. 5.

⁷ The January 2019 CN Order also denied Honor the Earth's Motion to Disclose Insurance Exclusion Clauses.

These conditions required the following: (1) removal of exposed segments of Existing Line 3; (2) a Field Emergency Response Plan; (3) periodic updates on the adequacy of Enbridge’s cyber-security systems; (4) a Public Safety Liaison to ensure appropriate safety and security measures during construction and operation of the Project; (5) a Human Trafficking Prevention Plan; (6) a Public Safety Escrow Trust Account; (7) annual reports regarding construction workers and Enbridge’s county property tax liability; and (8) a Tribal Economic Opportunity and Labor Education Plan and tribal liaison to oversee implementation of this Plan.

On January 18, 2019, the Commission issued its Order Clarifying Prior Order, Excluding Filing, and Denying Reconsideration (January 2019 RP Order). The January 2019 RP Order made two clarifying changes to the Project routing permit regarding permit attachments and temporary workspaces during construction.⁸

V. Appeal and Remand

On June 3, 2019, the Minnesota Court of Appeals reversed the May 2018 FEIS Order upon the court’s determination that the Revised FEIS was inadequate due to its “failure to specifically address the potential impacts to the Lake Superior watershed.”⁹ The court remanded to the Commission for further proceedings consistent with its decision.

On September 17, 2019, the Supreme Court of Minnesota denied petitions for review of the Court of Appeals decision from several parties.

On October 8, 2019, the Commission issued its Order Finding Environmental Impact Statement Inadequate on Remand (October 2019 FEIS Order) in the need and routing dockets, which requested that EERA “revise the final EIS to include an analysis of the potential impact of an oil spill into the Lake Superior watershed consistent with the Court of Appeals’s decision, and to submit a revised final EIS to the Commission within 60 days.”¹⁰

VI. Second Revised Final Environmental Impact Statement

On December 9, 2019, EERA submitted the Second Revised FEIS in accordance with the October 2019 FEIS Order.

Also on December 9, the following notices were issued:

- The Commission issued a Notice of Availability, Public Comment Opportunity, and Written Comment Period for the Revised FEIS on the Line 3 Replacement Project (PUC Notice). The PUC Notice requested written comment on the adequacy of the Second Revised FEIS and what action the Commission should take on the certificate of need and

⁸ The January 2019 RP Order also excluded Honor the Earth’s untimely filed amended petition for reconsideration, declined to grant Enbridge’s motion to strike Friends of the Headwaters’ petition for reconsideration and rehearing, and denied reconsideration of the October 2018 RP Order.

⁹ *In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, 930 N.W.2d 12, 28 (Minn. Ct. App. 2019), *cert. denied*, (Minn. 2019).

¹⁰ October 2019 FEIS Order, at 3.

routing permit in light of the Second Revised FEIS. The PUC Notice also announced a public commenting forum to allow the public to make comments in front of an ALJ.

- EERA issued a Notice of Availability and Comment Period for the Line 3 Replacement Project Second Revised FEIS (EERA Notice), which announced the comment period for the Second Revised FEIS.

On December 19, 2019, the Commission held two public commenting forums at the Radisson Hotel in Duluth, Minnesota, where nearly 100 people gave oral comments.

By January 6, 2020, Enbridge and Friends of the Headwaters submitted comments in response to the PUC Notice.

By January 16, 2020, the following parties submitted reply comments:

- Enbridge
- Friends of the Headwaters
- Northern Water Alliance of Minnesota (Northern Water Alliance)
- Honor the Earth
- Honor the Earth and Sierra Club (Joint Commenters)
- Shippers for Secure, Reliable, and Economical Petroleum Transportation (Shippers)
- Laborers' International Union of North America (LIUNA)
- United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (United Association)

By January 16, 2020, the Commission had received approximately 360 comment letters from individual citizens, interest groups/associations, businesses, tribal governments, international governments, and state legislators, as well as several different types of form letters or letters with signees.

On January 31, 2020, Commissioners provided an additional opportunity for oral comments directly in front of the Commission and heard over 150 public comments regarding the Project in addition to those provided in Duluth in December 2019.

On February 3, 2020, the Commission heard oral argument and deliberated on the issues outlined in the PUC Notice.

FINDINGS AND CONCLUSIONS

VII. Summary of Commission Action

In this order, the Commission will take the following actions:

- Find that the Second Revised FEIS is adequate under Minn. R. 4410.2800, subp. 4;
- Grant the certificate of need for the Project by reissuing the September 2018 CN Order and the January 2019 CN Order;

- Modify certain dates contained in the January 2019 CN Order;
- Grant the routing permit for the Project by reissuing the October 2018 RP Order and the January 2019 RP Order; and
- Clarify and modify certain conditions of the routing permit contained in the October 2018 RP Order.

VIII. Adequacy of Second Revised FEIS

A. Background

The Commission is tasked with determining whether the Second Revised FEIS is adequate under Minn. R. 4410.2800. An FEIS is adequate if it:

- addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with part 4410.2300, items G and H;
- provides responses to the substantive comments received during the draft EIS review concerning issues raised in scoping; and
- was prepared in compliance with the procedures of the [Minnesota Environmental Policy Act] and parts 4410.0200 to 4410.6500.¹¹

The Court of Appeals concluded that the Revised FEIS was inadequate because it failed to address the following potentially significant issue raised during the scoping process: “the potential impacts to the Lake Superior Watershed including potential impacts of oil spills along the proposed Project.”¹² The court considered a number of other alleged inadequacies in the FEIS, and concluded that

[t]he FEIS properly defined the purpose of the project, sufficiently identified alternatives, including a “no action” alternative, and utilized an appropriate methodology to analyze potential impacts from oil spills. The FEIS adequately analyzed potential impacts to GHG emissions, potential impacts on historic and cultural resources, the relative impacts of alternative routes, and cumulative potential effects.¹³

¹¹ Minn. R. 4410.2800, subp. 4.

¹² *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d at 27 and n.8 (quoting Revised FEIS); *see also* Minn. R. 4410.2800, subp.4(A).

¹³ *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d at 36.

The Second Revised FEIS describes EERA’s process for choosing the hypothetical spill location, or “representative site,” in the Lake Superior watershed.¹⁴ Approximately 150 watercourses within the Lake Superior watershed were considered as representative sites, and that list was reduced to nine after removing small crossings that presented a limited potential for oil to reach Lake Superior within 24 hours.¹⁵ Those nine sites were then assessed based on a variety of factors including proximity to Lake Superior, size, types of uses, and hydrologic features such as the presence of rapids versus flat water.¹⁶ The Second Revised FEIS explains why water crossings were chosen as representative sites rather than land crossings: “Unmitigated releases of oil into water would have a larger spatial distribution and a greater potential to cause adverse effects to larger numbers of ecological and human receptors. Therefore, this analysis focused on scenarios that result in the release of crude oil to watercourses as a conservative assumption.”¹⁷

According to the Second Revised FEIS, the intent of the representative-sites approach “was to infer a range of potential effects that may occur at this and other locations in Minnesota with similar biophysical and human use characteristics.”¹⁸ In other words, representative sites were chosen to model how a hypothetical spill of different oil types would interact with the environment downstream of that site under several different seasonal conditions; this analysis of representative sites could then be used to understand the possible outcomes of a hypothetical spill at other sites along the route that are similar to the representative site. The Court of Appeals affirmed the representative-sites approach in its decision, noting that this method analyzes the impacts of an oil spill at all locations along the Project route.¹⁹

B. Comments

1. Opponents of the Project

Friends of the Headwaters, Joint Commenters, and Northern Water Alliance argued that the Second Revised FEIS remains inadequate for several reasons. They argued that EERA should have chosen sites closer to Lake Superior, such as the Pokegama River, Little Pokegama River, or Nemadji River sites. They claimed that EERA did not choose these sites because they are located in Wisconsin, which they argued is inconsistent with the Court of Appeals’s decision in *In the Matter of Minnesota Power’s Petition for Approval of the EnergyForward Resource Package*.²⁰

¹⁴ Second Revised FEIS, at Appendix V-2, Section 1.6. Appendix V-2 of the Second Revised FEIS is the *Addendum to Assessment of Accidental Releases: Technical Report*, which assesses the potential effects of an oil spill into the Lake Superior watershed.

¹⁵ Second Revised FEIS, at Appendix V-2, page 1.7. See Figure 1-2 of Appendix V-2 for a map showing the potential representative sites as well as the Lake Superior watershed boundary.

¹⁶ Second Revised FEIS, at Appendix V-2, pages 1.9–1.10 and Table 1.3.

¹⁷ Second Revised FEIS, at Appendix V-2, page 1.4.

¹⁸ Second Revised FEIS at Chapter 10, page 10-58.

¹⁹ *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d at 28.

²⁰ 938 N.W.2d 843 (Minn. Ct. App. 2019).

These parties also argued that the spill analysis for Little Otter Creek failed to capture the full range of impacts to the Lake Superior watershed, and that EERA should have used different models and modeling assumptions in its analysis. Friends of the Headwaters objected to the comment process, arguing that parties should have had more time to comment and that the scope of the PUC Notice and EERA Notice were unclear. Friends of the Headwaters also argued that changed circumstances regarding oil prices and production, the viability of alternative pipelines, and changes in Enbridge's corporate structure and shippers' contracts required a supplement to the FEIS.

Honor the Earth argued that the FEIS is inadequate because it did not adequately accommodate indigenous analysis. Honor the Earth submitted a copy of a traditional scroll of the landscape and explained indigenous beliefs and traditional ecological knowledge. They recommended that if the Project is built, "[a]ll phases of site preparation, pipe installation and any future maintenance activities should be monitored by Tribal Monitors."²¹

2. Supporters of the Project

Supporters of the Project argued that the Commission should find the Second Revised FEIS adequate. Enbridge and United Association argued that Little Otter Creek was the proper representative site for analysis of a spill in the Lake Superior watershed. Enbridge, LIUNA, and United Association argued that the new information offered by other parties was not credible and did not rise to the level of requiring a supplement to the FEIS. Shippers disputed claims that oil production in Western Canada had decreased and maintained that apportionment remains a problem on Enbridge's system. Enbridge and Shippers argued that other parties had offered no viable alternatives to the Project. Lastly, Enbridge argued that the Commission had exceeded the public-comment requirements for the Second Revised FEIS.

3. Public Comments

The Commission received approximately 360 comment letters in response to the PUC Notice and EERA Notice from individual citizens, interest groups/associations, businesses, tribal governments, international governments, and state legislators, as well as several different types of form letters or letters with signees. In addition, over 250 people gave oral comments before an administrative law judge or in front of the Commission.

Commenters discussed a wide range of issues including the adequacy of the Second Revised FEIS, potential benefits of the Project for employment and economic development, the need to replace Existing Line 3, potential impacts from oil spills, climate change, and indigenous rights. Some of the commenters requested that the Commission find the Second Revised FEIS adequate, and some requested that the Commission find it inadequate.

C. Commission Action

The Commission concludes that the additional information and analysis contained in the Second Revised FEIS has fulfilled the directive from the Court of Appeals to address the potential impacts of an oil spill from the Project in Lake Superior's watershed. By modeling a hypothetical oil spill at the site where the Project crosses Little Otter Creek, the Second Revised FEIS

²¹ Honor the Earth comments, at 5.

describes how an oil spill could impact the watershed as the oil flows downstream. Thus, the Commission determines that the Second Revised FEIS is adequate under Minn. R. 4410.2800.

Modeling a hypothetical worst-case scenario oil spill at representative sites along the Project route is one of several ways that the Second Revised FEIS addresses the potential impacts of an oil spill. The purpose of the spill modeling was to analyze how oil would behave in the environment under a range of conditions so that the analysis could then be used to understand how oil could impact similar sites along the Project route.²² For example, a person wanting to know how oil might interact with the environment of a particular area could choose a representative site with similar characteristics to learn how oil behaves under those conditions.

The Second Revised FEIS indicates a number of reasons why the Little Otter Creek site was chosen as the representative site for the Lake Superior watershed. The area downstream of the Little Otter Creek crossing includes “rapids and waterfalls with the potential for sinking oil,” which is a major factor affecting the potential water-quality impacts of a spill.²³ Only two other representative sites besides Little Otter Creek have rapids or falls downstream, making this site an important addition to the analysis.²⁴ The downstream area also contains “large regions of environmentally susceptible receptors” such as Jay Cooke State Park and sturgeon habitat.²⁵ As EERA’s letter accompanying the Second Revised FEIS explained, “the Little Otter Creek site has a range of physical characteristics that add depth to the suite of seven representative sites previously modeled in the EIS.”²⁶

By contrast, the Pokegama River, Little Pokegama River, and Nemadji River sites are less compelling and informative representative sites for the spill analysis. These rivers are “slow moving” with “low potential for entrainment and sinking oil,”²⁷ so modeling a spill at these sites would tell us less about how oil can negatively affect water quality. Seven of the eight previously modeled representative sites have flat water that characterizes the Pokegama River, Little Pokegama River, and Nemadji River, and those previously modeled sites can be used to understand how oil would impact these waterways.²⁸ Furthermore, the area downstream of these sites is industrialized, featuring docks and manmade banks;²⁹ this means oil is less likely to collect on streambanks and impact flora and fauna, as opposed to undeveloped streambanks

²² See Second Revised FEIS, at Chapter 10, page 10-54.

²³ Second Revised FEIS at Appendix V-2, page 1.9. Rapids, waterfalls, and dams, which are all present downstream of the Little Otter Creek site, increase the turbulence of the water and cause the oil to mix vertically in the water column, a process called “entrainment.” Second Revised FEIS at Appendix V-2, page 3.47. When entrainment occurs, oil dissolves in the water, which lowers water quality and negatively affects aquatic biota. Second Revised FEIS at Chapter 10, page 10-32. For a description of how oil would interact with the rapids and dam downstream of the Little Otter Creek site, see Appendix V-2 at page 4.111.

²⁴ Second Revised FEIS at Appendix V-2, Table 1-4, page 1.16.

²⁵ Second Revised FEIS at Appendix V-2, Table 1-2, page 1.9.

²⁶ EERA filing letter, at 2 (December 9, 2019).

²⁷ Second Revised FEIS at Appendix V-2, pages 1.9–1.10.

²⁸ See Second Revised FEIS at Appendix V-2, Table 1-4, page 1.16.

²⁹ *Id.* at Table 1-2, page 1.9.

where oil collects in and is retained by the vegetation lining the stream.³⁰ The Second Revised FEIS presents several substantive reasons why the Pokegama River, Little Pokegama River, and Nemadji River sites were rejected based on the characteristics of those water bodies, not because they are located in Wisconsin. Further, it is clear that EERA did not reject Wisconsin sites for legal reasons, because three of the nine final sites were located in Wisconsin.

In arguing that the Second Revised FEIS fails to fully capture the impacts of a spill in the Lake Superior watershed, Friends of the Headwaters and Joint Commenters appear to be repeating arguments that were already considered by the Court of Appeals. The Court of Appeals rejected the claim that the FEIS should have analyzed “the specific impacts that would result from an oil spill originating from any particular location,” and instead affirmed the representative-sites approach taken in the FEIS:

[T]he impact of any particular spill will depend on multiple variables, many of which are subject to chance. Rather than attempting to predict the consequences of an oil spill from a particular location, the FEIS focuses on analyzing the potential resource impacts of a spill at all locations along the APR and alternatives.³¹

Friends of the Headwaters also argued that EERA used “overly optimistic” assumptions for how long it would take to detect and control an oil spill. The Commission disagrees with this characterization of the modeling assumptions used to analyze a potential oil spill from the Project. The Second Revised FEIS assumed a “worst-case potential outcome” of a full-bore rupture of the pipeline that would spill unmitigated for 24 hours. This scenario is a “highly conservative” modeling assumption due to the low probability of such an event.³² EERA’s modeling methods were also upheld by the Court of Appeals and are consistent with guidance from the U.S. Environmental Protection Agency.³³ Furthermore, using the same models and modeling assumptions for all representative sites ensures consistent analysis and comparable results. The Commission concludes that the Second Revised FEIS used the appropriate modeling assumptions to analyze the potential impacts of an oil spill from the Project.

Minnesota rules require a supplement to an EIS if “substantial new information or new circumstances” come to light that “significantly affect the potential environmental effects from the proposed project” or the availability of alternatives.³⁴ Friends of the Headwaters argued that new information pertaining to the global oversupply of oil, low crude oil prices, oil production in Canada and the United States, the viability of alternative pipelines, changes in Enbridge’s corporate structure and shipper contracts, and oil leaks on other pipelines constitute substantial new information requiring a supplement to the Second Revised FEIS. However, this information is not relevant to the environmental effects from the Project, and the alternatives proposed by

³⁰ Second Revised FEIS at Chapter 10, page 10-38 to 10-39.

³¹ *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d at 28.

³² Second Revised FEIS at Appendix V-2, page 3.31.

³³ Second Revised FEIS at Appendix V-2, page 3.32.

³⁴ Minn. R. 4410.3000, subp. 3(2).

Friends of the Headwaters were already rejected by the Court of Appeals because they do not fulfill the purpose of the Project.³⁵ Therefore, a supplement to the FEIS is not warranted.

Lastly, Friends of the Headwaters objected to the comment process but did not allege any inconsistencies with statutes or rules. The Commission accepted comments on the Second Revised FEIS for over 30 days, exceeding the 10 days required by Minn. R. 4410.2800, subp. 2. The Commission also held two oral public comment sessions in Duluth in front of an administrative law judge and a full day of public comments in front of the Commission itself. The PUC Notice contains more topics for comment than the EERA Notice, but that does not render either notice improper nor require changes to the process. Further, given the volume of comments received, it does not appear that the public's ability to provide comments was impacted by the issues Friends of the Headwaters alleges. The Commission concludes it has provided sufficient opportunity for the public to comment on the topics included in the PUC Notice and has considered those comments in its decision here.

IX. Certificate of Need Orders

When the Court of Appeals reversed and remanded the May 2018 FEIS Order because it deemed the Revised FEIS inadequate, this effectively nullified the Commission's orders granting the certificate of need and routing permit. Now that the Commission has determined the Second Revised FEIS adequate, the Commission will decide whether to grant the certificate of need by reissuing those orders.

A. Background

1. Certificate of Need Criteria

The factors the Commission must consider in evaluating the need for a proposed large petroleum pipeline such as the Project are set forth by statute and rule.³⁶ In particular, Minn. R. 7853.0130 directs the Commission to issue a certificate of need when the applicant satisfies the following factors:

- A. the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states, considering:
 - (1) the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility;
 - (2) the effects of the applicant's existing or expected conservation programs and state and federal conservation programs;

³⁵ See *In re Enbridge Energy, Limited Partnership*, 930 N.W.2d at 23–26. While this information is not relevant to the environmental analysis, it is potentially relevant to the need for the Project and will be considered for that purpose.

³⁶ Minn. Stat. § 216B.243, subd. 3; Minn. Rules, Chapter 7853. Applicants seeking a certificate of need to build a pipeline need not address legal requirements that pertain exclusively to electric service.

- (3) the effects of promotional practices of the applicant that may have given rise to the increase in the energy demand, particularly promotional practices which have occurred since 1974;
 - (4) the ability of current facilities and planned facilities not requiring certificates of need to meet the future demand; and
 - (5) the effect of the proposed facility, or a suitable modification thereof, in making efficient use of resources;
- B. a more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of the evidence on the record by parties or persons other than the applicant, considering:
- (1) the appropriateness of the size, the type, and the timing of the proposed facility compared to those of reasonable alternatives;
 - (2) the cost of the proposed facility and the cost of energy to be supplied by the proposed facility compared to the costs of reasonable alternatives and the cost of energy that would be supplied by reasonable alternatives;
 - (3) the effects of the proposed facility upon the natural and socioeconomic environments compared to the effects of reasonable alternatives; and
 - (4) the expected reliability of the proposed facility compared to the expected reliability of reasonable alternatives;
- C. the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering:
- (1) the relationship of the proposed facility, or a suitable modification of it, to overall state energy needs;
 - (2) the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments, compared to the effect of not building the facility;
 - (3) the effects of the proposed facility, or a suitable modification of it, in inducing future development; and
 - (4) socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its uses to protect or enhance environmental quality; and
- D. it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply with those relevant policies, rules, and regulations of other state and federal agencies and local governments.

2. Commission's Rationale for Previously Granting Certificate of Need

In the September 2018 CN Order, the Commission analyzed each criteria and sub-factor listed above and determined that the record supported granting the certificate of need with modifications. While that order was invalidated when the Court of Appeals found the Revised FEIS inadequate, the information that the Commission relied upon to make its decision in the September 2018 CN Order is still in the record.

For its consideration of Part A of Minn. R. 7853.0130, the Commission found that denying the certificate of need for the Project would have the probable result of adversely affecting the future adequacy, reliability, and efficiency of energy supply to Enbridge's customers and to the people of Minnesota and neighboring states. In making this finding, the Commission relied on the several forecasts in the record showing that oil supply would continue to increase throughout the forecast period, as well as evidence that oil supply would continue to be equal to or less than demand during the forecast period. The Commission also found that apportionment regularly occurs when the volume of oil that shippers request to transport over Existing Line 3 exceeds the capacity of the pipeline.³⁷ Based on this evidence, the Commission concluded that the Project is needed to ensure an adequate, reliable, and efficient supply of crude oil to Enbridge's customers, Minnesota, and the region.

For Part B, the Commission considered whether transporting oil by truck and rail or alternate pipelines were reasonable and prudent alternatives to the Project. The Commission found that no alternative in the record was more reasonable or prudent than the Project.

For Part C, the Commission found that the consequences to society of granting the modified certificate of need are more favorable than the consequences of denying the certificate. The Commission found that granting the certificate of need would generally have a positive effect on the socioeconomic environment by meeting overall state energy needs, generating thousands of construction jobs and inducing further employment, and providing tax benefits to local communities. The Commission found a crucial benefit of the Project is that it would significantly reduce the risk of an accidental oil spill by replacing the rapidly deteriorating Existing Line 3 with a state-of-the-art pipeline built with stronger materials, new technology, and more effective inspection and testing.

The Commission acknowledged that construction of the Project would impact the natural environment by causing habitat loss and fragmentation, but noted that denying the certificate of need would require continued maintenance on Existing Line 3 with ongoing impacts similar to new pipeline construction. These maintenance impacts were a major concern highlighted repeatedly by the Leech Lake Tribal Government throughout the proceeding. To mitigate environmental impacts of the Project, the Commission modified the certificate of need to require a Neutral Footprint Program to offset the incremental increase in nonrenewable energy consumed by the Project and replace each tree removed during construction with a new tree on public land, a Landowner Choice Program to facilitate the removal of Existing Line 3 where requested, a Parental Guaranty for environmental damages, a Decommissioning Trust Fund, and general liability and environmental impairment liability insurance policies.

³⁷ The Commission also found that current and planned facilities are insufficient to meet future demand and that the Project would make efficient use of resources. September 2018 CN Order, at 16–18.

The Commission also acknowledged the significant lifecycle-greenhouse-gas emissions from the Project and the cost to society arising from those emissions. However, the Commission found that most of those emissions would not result directly from the Project but rather from ultimate consumption of the oil transported by the Project. The Commission recognized the potential impacts of global climate change, but after carefully reviewing the record concluded that denying the certificate of need would not significantly reduce the demand for crude oil and would therefore not significantly reduce climate change impacts. Instead, the record demonstrated that the most likely consequence of denial would be increased transport of crude oil via more dangerous means such as truck, rail, and Existing Line 3.

The Commission expressed serious concern with the Project's impacts to indigenous populations, acknowledging that the Project would traverse ceded territories where Minnesota's Ojibwe and Chippewa tribes hold usufructuary hunting, fishing, and gathering rights. But the Commission concluded that denying the certificate of need would have disproportionate and serious effects on the Leech Lake reservation—as the Leech Lake Tribal Government clearly asserted to the Commission on multiple occasions through the process—because it would require continued disruptive maintenance of Existing Line 3 and increase the risk of an accidental oil spill on those lands.

Lastly, the Commission found that granting the certificate of need was consistent with all applicable laws and policies, including Minnesota's energy policy.

B. Parties' Comments

1. Opponents of the Project

Project opponents, particularly Friends of the Headwaters, raised several pieces of new information that it asserts should lead the Commission to reach a different result. Friends of the Headwaters suggested that other pipelines and new, more efficient methods of transporting oil by rail are viable alternatives to the Project. Friends of the Headwaters also claimed that oil prices and demand for oil from Western Canada have dropped, obviating the need for the Project. Friends of the Headwaters noted that Enbridge intends to shift its monthly allocation system to a take-or-pay contract system, which Friends of the Headwaters claims will eliminate apportionment on its system. Friends of the Headwaters argued that Enbridge's corporate reorganization calls into question its financial assurance. Finally, Friends of the Headwaters claimed that there is new information available suggesting that the risk of leaks from a new pipeline such as the Project is higher than previously reported.

2. Supporters of the Project

In response, Shippers provided information that Western Canadian oil production is projected to increase significantly in the next decade. Shippers also explained that its members expected apportionment to worsen for many years into the future. Shippers argued that Friends of the Headwaters had not provided any reasonable or prudent alternatives to the Project.

Enbridge argued that Friends of the Headwaters' proposed alternatives did not meet the purpose for the Project, which the Court of Appeals affirmed in its decision.

C. Commission Action

The Commission has thoroughly considered all of the information in the record and concludes that the information offered by Friends of the Headwaters does not materially impact the need for the Project that was determined in the September 2018 CN Order. For that reason, the Commission will grant a certificate of need for the Project by reissuing its prior orders—including the important modifications to the certificate of need that are necessary to protect the public interest.

The Commission incorporates by reference the September 2018 CN Order and the January 2019 CN Order, which contain the complete rationale for the Commission’s decision to grant the certificate of need. In the following section, the Commission addresses the new information raised by the parties as it relates to the criteria for considering a certificate of need.

1. **The Probable Result of Denial Would Adversely Affect the Future Adequacy, Reliability, or Efficiency of Energy Supply to Enbridge, Enbridge’s Customers, and the People of Minnesota.**

After evaluating the record, the weight of the evidence continues to show that there has historically been, and likely will continue to be over the long-range forecast period, an increasing supply of the oil that will be transported through Enbridge’s system.³⁸ While Friends of the Headwaters point to changes in oil prices and regulatory structures in Canada, opponents did not produce any evidence that this information would have a material impact on oil supply during the long-range forecast period. The Commission relies on long-range forecasts in its certificate-of-need analysis because evidence of short-term fluctuations in oil markets are not particularly useful in determining the need for a petroleum pipeline.

The record also shows that there has been and likely will continue to be apportionment on Enbridge’s system, indicating that the current capacity of the system is not sufficient and the Project is needed to alleviate that apportionment.³⁹ The Commission is satisfied that the record demonstrates that the probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to Enbridge, Enbridge’s customers and to the people of Minnesota and neighboring states.

2. **A More Reasonable and Prudent Alternative Has Not Been Demonstrated by a Preponderance of Evidence.**

Friends of the Headwaters advanced several pieces of information to support its contention that there are reasonable and prudent alternatives to the Project, including new information about truck and rail transport alternatives. As described in the ALJ’s Report and in the Commission’s September 2018 CN Order, however, transport by truck or rail is much more expensive and comes with greater environmental risk.⁴⁰ To the extent that Friends of the Headwaters has identified new and relevant information, it does not materially affect the Commission’s conclusion that transport by truck or rail are not reasonable and prudent alternatives to the Project.

³⁸ September 2018 CN Order, at 13–14.

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 19–20.

Friends of the Headwaters also pointed to new information about different pipelines located in other areas of the country. The certificate of need criteria, however, require the Commission to consider alternatives that fulfill the purpose of the Project, which would transport crude oil from the North Dakota-Minnesota border to the Minnesota-Wisconsin border in order to “reallocate transport capacity on Enbridge’s Mainline System to make the system itself more efficient and economical for Applicant’s customers.”⁴¹ The ALJ considered alternative pipelines in her Report and concluded that they did not provide reasonable and prudent alternatives to the Project.⁴² The new information pointed to by Friends of the Headwaters does not materially affect the prior conclusions of the ALJ and the Commission. Having reviewed the new information in combination with the existing record, the Commission concludes that a more reasonable and prudent alternative has not been identified.

3. The Consequences to Society of Granting the Certificate of Need Are More Favorable Than the Consequences of Denial.

The Commission also continues to conclude that the consequences to society of granting the modified certificate of need are more favorable than the consequences of denial. The record demonstrates that there are real, immediate, and potentially catastrophic risks associated with continuing to use Existing Line 3. The U.S. Department of Justice recognized these risks when it executed a Consent Decree in which Enbridge agreed to replace Existing Line 3 in Minnesota if it can obtain the necessary regulatory approvals to do so.⁴³ And these risks were further amplified by the additional information provided in the Second Revised FEIS regarding the potential impacts to the Lake Superior watershed.

Existing Line 3 is deteriorating at an alarming rate, increasing the public safety and environmental risks to Minnesota and requiring constant and disruptive maintenance impacting hundreds of thousands of acres of land.⁴⁴ The Leech Lake Tribal Government has continued to urge the Commission to grant the certificate of need and remove the risks to its reservation lands posed by Existing Line 3.⁴⁵ The environmental, sociological, cultural, and economic cost of a serious leak on Existing Line 3 would be severe, and leaks become more likely as the pipeline continues to age.⁴⁶

⁴¹ *Id.* at 19 (quoting ALJ Report at finding 806).

⁴² *Id.* at 20–22.

⁴³ *See* September 2018 CN Order, at 6. Once Enbridge obtains regulatory approval to replace Existing Line 3, the Consent Decree requires Enbridge to decommission the Existing Line 3 by cleaning out the pipeline and ceasing its operation. If Enbridge does not receive all necessary approvals for the replacement, it must carry out an extensive maintenance program involving 6,250 “integrity digs” over the next 15 years to repair and replace many segments of the line. *Id.*

⁴⁴ *Id.* at 27–28.

⁴⁵ *See, e.g.*, Transcript of February 3, 2020 Agenda Meeting, at 11–13, 119–121.

⁴⁶ September 2018 CN Order, at 28 (“[T]here is no feasible technology or operational changes that can arrest or reverse the external corrosion on Line 3 and/or remove the defects that were inherent in the way the pipe was originally manufactured.”).

In its prior decision, the Commission carefully considered these facts along with the Project's potential impact on climate change. The Commission recognized that most of the emissions attributed to the Project would result from ultimate consumption of the oil, not the construction or operation of the Project. The Commission previously found that denial of the certificate of need would not significantly reduce demand for crude oil, and would instead lead to "increased transport of crude oil via more dangerous means such as rail, and continued use of the deteriorating Existing Line 3."⁴⁷ In weighing this record evidence, the Commission continues to conclude that the consequences to society of denying the certificate of need are more potentially dangerous and detrimental than the consequences of granting the certificate of need. The Commission also modified the certificate of need to mitigate the impact of the Project's emissions, and will ensure that these modifications are reissued.

The new information raised by Project opponents does not materially impact the environmental risks posed by continuing to operate Existing Line 3 nor the other societal impacts that the Commission considered. The entire record, including the new information advanced by opponents, continues to demonstrate that denying the certificate of need is not likely to reduce the transport of crude oil and, as a result, not likely to reduce the overall consumption of oil or the emissions that result. Further, the record continues to demonstrate that the risks to Minnesota from continued operation of Existing Line 3 are significant. Granting the certificate of need is likely to stop the flow of oil through old and corroded infrastructure that crosses the Leech Lake reservation. The Commission concludes that the consequences to society of granting the certificate of need are more favorable than those for denial.

4. It Has Not Been Demonstrated That the Design, Construction, Or Operation of the Project Will Fail to Comply with the Relevant Policies, Rules, and Regulations.

Finally, the Commission concludes that the applicant has demonstrated that the design, construction, and operation of the proposed facility can comply with policies, rules, and regulations of other state and federal agencies and local governments.

The record demonstrates that the Applicant has satisfied each of the criteria for granting a certificate of need. The Commission will therefore grant the certificate of need for the Project by reissuing the September 2018 CN Order and the January 2019 CN Order, both of which are filed concurrently with this order. If there is a conflict between the September 2018 CN Order and January 2019 CN Order, the January 2019 CN Order will control, as the January 2019 CN Order contains further refinement of the certificate of need modifications.

X. Modifications to Certificate of Need

The Commission has determined that certain dates contained in the January 2019 CN Order should be updated to reflect the passage of time. In particular, the Commission finds that deadlines in the Landowner Choice Program should be extended by one year in order to allow enough time for landowners and Enbridge to accomplish the Program's goals. The Commission will therefore modify Section I.B.2 and ordering paragraph 2 of the January 2019 CN Order as described below.

⁴⁷ *Id.* at 29.

XI. Routing Permit Orders

The Commission must also decide whether to reissue the routing permit for the Project. In response to the PUC Notice, no party proposed modifications to the route or routing permit previously approved by the Commission. Further, the additional information provided in the Second Revised FEIS does not change the Commission's conclusions regarding the appropriateness of the route.

The Commission continues to find that this route and the conditions contained in the routing permit "best optimizes the considerations set forth" in the applicable rule.⁴⁸ The Commission will therefore grant a routing permit for the Project by reissuing the October 2018 RP Order and the January 2019 RP Order, both of which are filed concurrently with this order.

XII. Modifications to Routing Permit

After the October 2018 RP Order was issued, the Commission began taking steps to implement that order. Through these actions, the Commission has identified several ways to improve and clarify the details of certain routing-permit conditions.

For example, the Commission has determined that state agencies may have a role in combating drug and human trafficking and ensuring public safety related to the Project, and should therefore have access to funding through the Public Safety Escrow Trust Account for incremental costs of activities directly related to the Project. The Commission has also determined that a preliminary deposit in the Public Safety Escrow Trust Account will help facilitate development of the protections included in the routing permit.

The Commission will therefore modify and clarify ordering paragraphs 6, 7, 8, and 9 of the October 2018 RP Order as described below.

ORDER

1. The Commission finds that the Second Revised Final Environmental Impact Statement filed on December 9, 2019, is adequate under Minn. R. 4410.2800, subp. 4.
2. The Commission approves the certificate of need for the Line 3 Replacement Project (the Project) by reissuing the following orders:
 - Order Granting Certificate of Need as Modified and Requiring Filings, dated September 5, 2018 (September 2018 CN Order); and
 - Order Approving Compliance Filings as Modified and Denying Motion, dated January 23, 2019 (January 2019 CN Order).

If there is a conflict between the September 2018 CN Order and January 2019 CN Order, the January 2019 CN Order will control.

⁴⁸ See 7852.1900, subp. 3.

3. The Commission makes the following modifications to Section I.B.2 and ordering paragraph 2 of the January 2019 CN Order:
 - a. Landowners must indicate their decision regarding their participation in the Program by July 1, ~~2024~~ 2025.
 - b. Enbridge will file a plan by July 1, ~~2022~~ 2023, outlining steps to be taken to contact landowners who have not responded with their decision regarding their participation in the Program.
 - c. Any landowner whose request for removal cannot be honored for any reason, even after July 1, ~~2024~~ 2025, shall be offered compensation for allowing the pipe to be decommissioned in-place on the same terms as all other landowners who choose decommissioning in-place.
4. The Commission grants a routing permit to Enbridge Energy, Limited Partnership for the Project by reissuing the following orders:
 - Order Approving Pipeline Routing Permit with Conditions, dated October 26, 2018 (October 2018 RP Order); and
 - Order Clarifying Prior Order, Excluding Filing, and Denying Reconsideration (January 2019 RP Order).
5. The Commission makes the following modifications and clarifications to ordering paragraphs 6, 7, 8, and 9 of the October 2018 RP Order:
 - a. Within 10 days of this order, Enbridge shall open the Public Safety Escrow Trust Account as described in ordering paragraphs 6, 7, 8, and 9 of the October 2018 RP Order to provide for deposit of a limited preliminary funding;
 - b. Prior to the Executive Secretary determining the “initial amount” to be deposited in the Public Safety Escrow Trust Account, Enbridge shall make a limited preliminary public safety funding deposit in the amount of \$250,000 that may be accessed prior to the Executive Secretary’s determination of the “initial amount” in paragraph 9.B of the October 2018 RP Order;
 - c. The Commission clarifies that funding under these ordering paragraphs is available to state agencies with expertise in specific functions directly related to combating drug and human trafficking and public safety;
 - d. State agencies may only seek this funding if they can show that the activities are incrementally additional activities beyond their present funding and they are specifically related to the Project;
 - e. The Commission clarifies that pipeline project activities covered by these ordering paragraphs include removal of Existing Line 3;

- f. The Commission modifies ordering paragraph 9.E of the October 2018 RP Order as follows:

Local units of government may also seek reimbursement for the added costs for law enforcement, public safety, public health, planning, and other services arising from activities in and around the construction site during the term of the routing permit as a direct result of the pipeline construction. After having sought reimbursement from state or federal funding programs as appropriate, local units of government may submit to the Public Safety Liaison a written request for reimbursement. The request should contain an itemized list of expenses and sufficient detail to permit the ~~Commission~~ Executive Secretary to determine whether the services rendered were reasonable and appropriate additional municipal services uniquely provided as a result of the construction of the pipeline during the term of this permit.

6. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Will Seuffert
Executive Secretary



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Commissioner Matthew Schuerger, dissenting

I respectfully dissent from the Commission’s decision to grant Enbridge Energy a certificate of need to construct a new Line 3 pipeline. After considering the requirements of Minn. Stat. § 216B.243, subd. 3, and the factors established in Minn. R. 7853.0130, as applied to the record evidence, I find that the project does not meet the criteria to grant a certificate of need and the application should be denied.

The applicant has not, in my view, met its burden of proof. The applicant failed to provide an accurate forecast of demand for the type of energy that would be supplied by the proposed facility, and did not establish that the consequence of denial would adversely affect adequacy, reliability, or efficiency of energy supply. And at a minimum, the law requires the Commission to refer this matter for further contested case proceedings.

This decision is immensely important and intensely consequential. The record is significantly enhanced by extensive public participation, through public hearings that were held around the state and through written comments. But, while there is a robust record of evidence—tens of thousands of pages—considerable time has passed since the record was developed. Significant new and relevant information is available including:

- new information on climate change and its impact on demand for oil and its refined products;
- new information on electrification of transportation and its impact on demand for oil and its refined products;
- new information on the applicant’s actions to fundamentally change the way capacity on the Mainline system is contracted and will likely materially affect apportionment, upon which the Commission relied in the prior and current decisions.

The Commission should be fully informed about the extent and consequences of these developments before rendering a decision on the certificate of need. For these reasons, which are explained in greater detail below, the Commission should either deny the Certificate of Need or refer the matter to the Office of Administrative Hearings for supplemental record development and analysis.

I. Introduction

This decision, like all cases that come before the Commission, is entirely about the law and the evidence. Do the law and the record evidence support the project, or, a suitable modification of the proposed project? Has the applicant met its burden of proof?

There are four criteria that must be met to establish need under Minnesota law.¹ As I examine and match the criteria with the record evidence, clear shortfalls emerge regarding rule criteria A and C—particularly items A(1), C(1) and (2).

¹ Minn. R. 7853.0130 A – D.

A(1) concerns the accuracy of the applicant’s demand forecast, which is a foundational question for the need determination, and C(1) and (2) concern the consequences to society.

As I did when we first deliberated this case two years ago, I will address key areas of the certificate of need decision—particularly, the demand forecast, the consequences to society, and Minnesota energy policy.

II. The applicant has not provided an accurate forecast of demand for the type of energy that would be supplied by the proposed facility

Minn. R. 7853.0130, item A(1), requires us to consider the accuracy of the applicant’s forecast of demand for the type of energy that would be supplied by the proposed facility.

During oral arguments at the Commission’s June 18, 2018, meeting, commissioners discussed the legal standard, and there was agreement that where the rule states “applicant’s forecast of demand for the type of energy that would be supplied by the proposed facility” that means demand for crude oil and that includes demand for energy products from crude oil. There was further discussion of the significance of crude oil supply to Enbridge’s refinery customers and to refined product customers in Minnesota or in the five state area.

As was clarified during oral arguments on June 26, 2018, the evidence in this record, provided by the applicant, demonstrates the Minnesota refiners are, over multiple recent years, getting the oil they need. Prior Commission orders² relied heavily on the assumption that demand for refined product was expanding and would continue to do so. However, we do not have clear, cross-examined evidence in this record of refinery expansion. A forecast that assumes a future of infinite global demand for Western Canadian crude oil is not reasonable.³

As I emphasized during deliberations in June 2018—and former Commissioner Lipschultz, explicitly agreed and reinforced—the absence of a clear, transparent, independent forecast of demand for Canadian crude oil and for its refined product, which is the type of energy that would be supplied by the proposed facility, was a significant shortcoming in the record.⁴

Now, when considered together with the significant new and relevant information, the absence of an accurate, reliable demand forecast is a fatal flaw.

² See, e.g., *In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 67 (Alberta Clipper) Station Upgrade Project - Phase 2 - in Marshall, Clearwater, Itasca, Kittson, Red Lake, Cass, and St. Louis Counties*, Docket No. PL-9/CN-13-153, Order Granting Certificate of Need, at 7 (November 7, 2014).

³ In fact, significant global events have taken place in the months and years since the 2018 decision that can reasonably be forecast to reduce global energy consumption over the long term. The Commission cannot reasonably make a need determination without fully considering the new evidence of demand for oil under these new circumstances.

⁴ Former Commissioner Lipschultz: “...I agree with Commissioner Schuerger completely that there are significant flaws in the forecast presented here. Lack of transparency and a lack of focus directly on the demand for oil flowing from the demand for refined products worldwide. That’s a problem.” See Transcript of June 28, 2018 Commission Meeting, at 36.

III. Significant new material information is available and, at a minimum, requires a focused contested case to develop the record.

There is no dispute that new information is available and that relevant facts have changed.⁵ The significant changed circumstances and new information call into question the accuracy of the applicant's demand forecast. The changed circumstances include:

a. There is significant new information on climate change, and on related public policy, and their impact on demand for oil and its refined products

The science of climate change and the urgency of action is now clear and undeniable. Internationally, nationally, and particularly in Minnesota, individuals, businesses large and small, states, and cities are taking action to reduce greenhouse gas emissions. The applicant's forecast fails to account for the significant impact these developments will have reducing the demand for the type of energy supplied by the proposed project.

Among the significant developments since September 2018: the UN's Intergovernmental Panel on Climate Change (IPCC) issued its report on the impacts of global warming above 1.5°C;⁶ 13 federal U.S. agencies issued the Fourth National Climate Assessment of the consequences of climate change for the United States,⁷ the governor issued Executive Order 19-37 establishing a climate change subcabinet and Governor's Advisory Council on Climate Change;⁸ and Minnesota's Pollution Control Agency and Department of Commerce issued a report recognizing that "transportation is now the largest source of [greenhouse gas] emissions generated within the borders of Minnesota."⁹

In the October 2018 IPCC Report, the world's leading scientists found that: limiting warming to 1.5°C requires major and immediate transformation; the scale of the required low-carbon transition is unprecedented; and, everyone—countries, cities, the private sector, individuals—will need to strengthen their action, without delay.

The 2018 National Climate Assessment, a major scientific report issued by 13 federal agencies, found that without substantial and sustained global efforts to reduce greenhouse gas emissions

⁵ It is also likely that changed circumstances to further undermine the Applicant's evidence of demand will continue to occur, and at an accelerating rate. This record lacks a reliable analysis of the likely direction and the rate of change in forecasted demand.

⁶ UN Intergovernmental Panel on Climate Change (IPCC), "Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty" (2018), available at <https://www.ipcc.ch/sr15/download/>.

⁷ U.S. Global Change Research Program, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II, available at <https://nca2018.globalchange.gov/>.

⁸ Executive Order 19-37, Establishing the Climate Change Subcabinet and the Governor's Advisory Council on Climate Change to Promote Coordinated Climate Change Mitigation and Resilience Strategies in the State of Minnesota. December 2, 2019, available at https://mn.gov/governor/assets/2019_12_2_EO_19-37_Climate_tcm1055-412094.pdf.

⁹ "Greenhouse Gas Emissions in Minnesota: 1990–2016" at 7 (2019), available at <https://www.pca.state.mn.us/sites/default/files/lraq-2sy19.pdf>.

and regional initiatives to prepare for anticipated changes, climate change is expected to cause growing losses to American infrastructure and property and impede the rate of economic growth over this century.

In establishing, through Executive Order 19-37 a climate change subcabinet and the Governor's Advisory Council on Climate Change, Governor Walz stated that "Climate change threatens the very things that make Minnesota a great place to live – from our wonderful lakes to farmable land and clean air." The subcabinet will be tasked with identifying policies and strategies that will put Minnesota back on track to meet or exceed the state's greenhouse gas emissions goals and identifying the challenges and opportunities to mitigate climate change.

A sea change is underway in how we procure and use energy. As countries, states, cities, businesses, and individuals act to reduce greenhouse emissions, demand for oil will fall. Local, national, and global actions to mitigate climate change are driving an increasingly swift transformation in the energy industry resulting in the increased likelihood of devaluing and stranding existing or future infrastructure assets including oil pipelines.

These local, national, and global changes in information availability, understanding, and public policy actions, taken together, represent a substantial change in circumstances directly relevant to the accuracy of the applicant's forecast of demand, and to the consequences to society and therefore to a reasoned decision on criteria set out in Minn. R. 7853.0130, items A and C.

b. There is significant new information on transportation electrification and its impact on demand for oil and its refined products

Since the Commission made its initial certificate of need decision, but prior to the order being issued in September 2018, the Minnesota Department of Transportation issued a report and has undertaken a project to "decarbonize transportation."¹⁰ The Department of Transportation recommended the adoption of clean car vehicle standards, funding of electric vehicle infrastructure, and providing incentives for electric vehicle adoption. And since September 2018, several of those recommendations have been implemented—Minnesota has adopted policies to promote electric vehicle adoption and has concrete plans to pursue more.¹¹

These policies, policy recommendations, and public processes are specifically intended to accelerate electric vehicle adoption, which will reduce demand for crude oil and its products. And similar changes to promote and eliminate barriers to electric vehicle adoption have taken place elsewhere in the country and the world. Moreover, jurisdictions are learning which policies

¹⁰ "Pathways to Decarbonizing Transportation in Minnesota", available at <http://www.dot.state.mn.us/sustainability/docs/pathways-report-2019.pdf>.

¹¹ See, e.g., *In the Matter of a Commission Inquiry into Electric Vehicle Charging and Infrastructure*, Docket No. E-999/CI-17-879, Order Making Findings and Requiring Filings (February 1, 2019); *In the Matter of Xcel Energy's Petition for Approval of Electric Vehicle Programs*, Docket No. E-002/M-18-643, Order Approving Pilots with Modifications, Authorizing Deferred Accounting, and Setting Reporting Requirements (July 17, 2019), appeal filed November 6, 2019; *In the Matter of Minnesota Power's Petition for Approval of its Electric Vehicle Commercial Charging Rate Pilot*, Docket No. E-015/M-19-337, Order Approving Pilot with Modifications, and Setting Reporting Requirements (December 12, 2019); "Governor Tim Walz Announces Clean Car Standards in Minnesota", available at <https://mn.gov/governor/news/?id=1055-403887>. See also "Electric Vehicles", available at <https://mn.gov/puc/energy/electric-vehicles/>.

are most effective at achieving the goal of increased EV adoption, meaning the effectiveness of policy change is also increasing. The landscape is changing rapidly, and at an accelerating rate. Because these facts have not been made part of the record,¹² none of these developments have been incorporated into the Commission’s analysis of the reliability of the applicant’s demand forecast, or of the effects of state conservation programs, and therefore the Commission’s evaluation of Minn. R. 7853.0130, item A.

c. Changes to, and continuing efforts to change, the pipeline reservation system materially affect the reliability of evidence that the Commission relies upon

In the Commission’s September 2, 2018 Order Granting Certificate of Need as Modified and Requiring Filings,¹³ the Commission wrote that:

The Commission has granted previous certificates of need to Enbridge pipeline projects based on evidence similar to the evidence that Enbridge submitted in this docket. In previous pipeline proceedings it was considered reasonable to rely on supply forecasts to establish that demand for refined product, and therefore demand for crude oil, would continue to increase, or at least not decrease, for the foreseeable future. However, governmental initiatives to reduce fossil fuel consumption to address climate change, and expanded adoption of electric vehicles could, in the future, influence whether the type of supply forecast evidence submitted in this case will be sufficient to support conclusions about demand.

This reasoning reflected the Commission’s recognition, then, that the applicant’s demand-forecast evidence was lacking¹⁴—the evidence requires an inference that the Commission was uncomfortable making without additional supporting evidence—and that evidence of that nature could be undermined by changed circumstances, such as changes in public policy and oil consumption. The Commission was skeptical in 2018 of the sort of evidence it had relied on in the past to support certificate of need decisions, and indicated that such evidence may not be adequate to support a certificate of need decision in the future.

The future that the Commission contemplated in 2018 is here, now. The Commission is deciding anew whether this certificate of need should be granted, and is not bound by its prior decision to

¹² The applicant provided a forecast that incorporated some level of electric vehicle adoption, but the assumptions of that forecast were unreasonably limited to the US market and not indicative of the magnitude of change in EV adoption that is likely. *See* Transcript of June 19, 2018 Commission Meeting, at 96–100 (filed April 10, 2019) (colloquy between Commissioner Lipschultz and Ms. Anderson of the Department of Commerce discussing the shortcomings of the applicant’s EV adoption modeling and analysis).

¹³ This docket, *rev’d and remanded by* In re Enbridge Energy, Ltd. P’ship, 930 N.W.2d 12 (Minn. Ct. App., June 3, 2019), *and cert. denied* (Minn., 2019).

¹⁴ The Applicants offered a forecast of supply, not of demand for the type of energy that would be supplied by the proposed facility. *See also* ALJ Findings of Fact, Conclusions of Law and Recommendation (ALJ Report) (April 23, 2018) at Findings ¶¶ 658–662 (“Applicant’s ‘forecast of demand’ looks only to supply of Western crude oil, not the demand for such oil.”). The forecast of supply is influenced predominantly by global demand, and not demand of the people of Minnesota and neighboring states.

grant it. The Commission is also not bound to make a certificate-of-need decision today based on a record that closed nearly two years ago.¹⁵ The reliability of the evidence of demand has been reasonably called into question.¹⁶ The Commission should not rely again on a tenuous inference drawn from an aging forecast of supply, given the Commission’s own earlier recognition of the evidence’s weakness as evidence to support a finding of need, and in light of the new evidence available.

And the evidence that the Commission relied on to justify drawing the inference of demand from the supply forecast data—the evidence of apportionment—has also been called into question. Enbridge is pursuing a change to the terms by which it supplies oil over its mainline pipeline system, to allocation of capacity mostly by long-term contracts.¹⁷ But as the ALJ found, a finding the Commission adopted and relied upon, only “if shipper nominations remain consistent or increase (as Applicant contends), without any changes to the Mainline System”¹⁸ did the evidence establish that the existing facilities would be unable to meet future demand.

This action by Enbridge to change the Mainline System materially affects the factors of Minn. R. 7853.0130, item A—particularly the usefulness of the record’s evidence of demand required by item A(1), which the Commission credited only premised on “substantial and persistent” apportionment.¹⁹ Will significant and persistent apportionment exist under these new circumstances? We don’t know. There is no substantial evidence in the record to support a conclusion that it will.

¹⁵ “In all contested cases where officials of the agency render the final decision, the contested case record must close upon the filing of any exceptions to the report and presentation of argument under subdivision 1 or upon expiration of the deadline for doing so.” Minn. Stat. § 14.61, subd. 2. The Court of Appeals’s decision to reverse the Commission’s EIS adequacy determination nullified the Commission’s October 26, 2018, Certificate of Need decision; the Commission is effectively determining anew today that the Certificate should be granted, on an aging and incomplete record. The Commission has the authority to, and should as a matter of administrative efficiency, consider material new evidence, and make new findings on that evidence. *See* Minn. Stat. §§ 14.67, 216B.25; *see also In the Matter of the Application of Enbridge Energy, Limited Partnership for a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/PPL-15-137 Order Clarifying Prior Order, Excluding Filing, and Denying Reconsideration, at 2 (January 18, 2019) (“The Commission may, at any time, for any reason, upon its own motion or the motion of any interested party, rescind, alter, or amend any Commission order or reopen the case, provided the Commission gives notice to the affected public utility and provides an opportunity to be heard.”).

¹⁶ This is the standard the Commission has applied when determining whether to refer a matter for contested case proceedings in light of claims of new evidence. *See In the Matter of the Investigation into Environmental and Socioeconomic Costs Under Minn. Stat. § 216B.2422, Subd. 3*, Docket No. E-999/CI-00-1636, Order Reopening Investigation and Convening Stakeholder Group to Provide Recommendations for Contested Case Proceeding, at 5 (February 10, 2014) (finding that “[t]he scientific evidentiary support for the existing [environmental externality] values has been reasonably called into question” and referring the matter for contested case proceedings). Instead, in today’s order, the Commission finds more record development unwarranted. It does so prematurely, without a contested case or any appreciable investigation into or analysis of the relevant new facts.

¹⁷ Enbridge Presses on with Controversial Plan to Overhaul Mainline Contracts, National Post (December 19, 2019), available at <https://business.financialpost.com/commodities/enbridge-presses-on-with-controversial-plan-to-overhaul-mainline-contracts>.

¹⁸ ALJ Report at Finding ¶ 698; *see also* Order Granting Certificate of Need as Modified and Requiring Filings, at 15 (relying on the ALJ’s finding).

¹⁹ Order Granting Certificate of Need as Modified and Requiring Filings, at 15.

IV. Not minimizing the cost to consumers of one particular form of energy is not a cognizable adverse effect under Minn. R. 7853.0130, Item A

The Commission, in its reissued order granting the certificate of need, repeatedly cites potentially lowered cost for refined products as a basis in support of granting a certificate of need. However, the ultimate cost of the particular type of energy supplied is not one of the considerations in Minn. R. 7853.0130, Item A—and even if it were, the Commission only credited that granting the certificate of need “could” “potentially” lower the cost.²⁰ The presumed interest in depressing the cost of oil and oil products for consumers contradicts state environmental and energy policy.²¹

The Commission incorrectly interprets its responsibility under the rule as one to maintain the lowest possible price of the particular type of energy being accommodated, rather than to ensure adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant’s customers, or to the people of Minnesota and neighboring states.²² If the consequence of denial is marginally more expensive crude oil, but an energy supply that is nevertheless adequate, reliable, and efficient, the factor does not weigh in favor of granting the requested certificate. It is not consistent with the interests of the state or its residents to reduce the cost of a disfavored form of energy supply if adequate, reliable, and efficient energy would continue to be available.

V. The consequences to society are significant and severe

We are required, by Minn. R. 7853.0130, item C, to apply a balancing test: to weigh the consequences to society of granting the certificate of need against the consequences of denying it.

The proposed project is not a “replacement” project; a replacement would use the same diameter pipe to transport the same product at the same volume and in the same trench. Instead, the proposed project is a larger diameter pipe that transports heavy Western Canadian crude oil²³ at an expanded volume along a new route in a new corridor. The consequence is that the project has a greater negative effect on the natural and socioeconomic environments than a simple replacement.²⁴ Since 2018, a fuller and clearer understanding of the likely consequences to

²⁰ Order Granting Certificate of Need as Modified and Requiring Filings, at 24 and 26.

²¹ See Section V, below.

²² Only the first factor in Item A concerns “the type of energy that would be supplied.” Item A as a whole is concerned with energy supply, regardless of type. An increase in the cost of one type does not necessarily entail, or imply, without something more, an adverse effect on adequacy, reliability, or efficiency of energy supply when market substitutes exist—particularly when those substitutes are preferred by state environmental and energy policy.

²³ The Second Revised Final Environmental Impact Statement (FEIS), at 5-464 and 5-465, notes that: “oil extracted from the Western Canadian Sedimentary Basin (WCSB) like the heavy crudes that would be carried by the proposed Line 3 pipeline, require greater energy input for extraction and upgrading than U.S. light crudes, and therefore create more greenhouse gas emissions at each stage during production.” The Second Revised FEIS Table 5.2.7-11 shows that, on a per-barrel basis, Heavy WCSB crude oil has the highest Life-Cycle greenhouse gas emissions of any crude oil on the planet.

²⁴ See ALJ Report at Findings ¶¶ 1082–89, and Conclusions of Law ¶¶ 27–28 (finding that “other than temporary construction impacts of removal and construction, in-trench replacement would involve no new impacts to the environment, like a new corridor would impose,” and recommending that the Commission only grant the certificate of need contingent on in-trench replacement).

society has developed, such that the balance of the factors of item C should be considered in light of the facts available today.

a. Impact to Indigenous Populations

The record reflects, and we heard repeatedly in oral arguments that the proposed project, which would traverse ceded territories where Minnesota’s Ojibwe and Chippewa tribes hold usufructuary hunting, fishing, and gathering rights, “will directly, materially, and adversely impact” many indigenous populations. The Mille Lacs Band and the Fond du Lacs Band, highlighted, among other issues, significant risks to wild rice beds²⁵ and to Big Sandy Lake.

The ALJ found that the effects of the project upon Minnesota’s natural resources and Native American people (particularly the Anishinaabe), weigh heavily against granting a certificate of need to a project that would establish a new pipeline corridor through Minnesota.²⁶ I agree that this finding is clearly and extensively supported by the record evidence.

b. Climate Change

That the oil transported and delivered by the proposed project will ultimately be consumed and will release greenhouse gases is not in dispute.

The record reflects a possible range of greenhouse gas emissions resulting from the project, depending on the level of displacement, but all of the possibilities in the range are substantial. The ALJ found that the project would cause a significant incremental increase in life-cycle emissions, and that that increase would have significant negative consequences for society.²⁷ I agree that these findings are supported by the evidence. These substantial life-cycle emissions are not inevitable, and it is state environmental and energy policy to act to avoid them.

c. The project is not consistent with Minnesota policy as established by the Legislature

This project, which makes the transportation and consumption of fossil fuels easier and more economical, is incompatible with the energy policies of Minnesota and should weigh heavily against granting a certificate of need for this Project. The ALJ found that the carbon-intensive nature of tar sands oil extraction, and the increased use and production of non-renewable fossil fuels does not further Minnesota’s renewable energy and reduction of GHG emission goals set forth in Minn. Stat. § 216C.05, subd. 2 and 216H.02, subd. 1.²⁸ The likely effect of this project is

²⁵ See ALJ Report at Findings ¶ 876, and testimony of Nancy Schuldt.

²⁶ See ALJ Report at Findings ¶ 889:

²⁷ See ALJ Report at Findings ¶¶ 675–76, 858, and 861 (accepting the EIS life-cycle greenhouse gas emissions for the project, finding that incremental emissions will be 193 million tons of carbon dioxide emissions (CO₂), totaling \$287 billion in social cost, that the emissions contribute to climate change, and that climate change has significant negative consequences for society).

²⁸ See ALJ Report at Findings ¶¶ 939–948 (finding the project inconsistent with state and other public policy objectives).

that, by promoting consumption of oil, it will thwart the aims and responsibilities of the state established in many Minnesota energy and environmental policies.²⁹

VI. Minnesota and its citizens have legal alternatives, if needed, to address the dangers of the existing line.

As I noted in deliberations in June 2018, the evidence in the record demonstrates the deteriorating condition of existing Line 3. But the deteriorating condition of the existing Line 3 does not lead to a conclusion that the need criteria for the proposed project has been satisfied. Minnesota clearly has legal means, and statutory authority to address the risks posed by the existing pipeline to protect the environment and the public.

a. Minn. Stat. § 115E.02: Duty to Prevent Discharges

Minnesota law already places on Enbridge the responsibility for taking reasonable steps to prevent a spill from Line 3. Under this law the continued operation of a failing pipeline, which poses an unreasonable risk of a harmful spill that puts the public at risk, is not a reasonable assumption. Rather, it should be assumed that Enbridge will take the steps it has a duty to take, up to and including discontinuing use of the pipeline.

b. The Minnesota Environmental Rights Act

The state’s environmental rights act provides that

each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof.³⁰

The statute gives citizens a right of action to “for declaratory or equitable relief in the name of the state of Minnesota against any person, for the protection of the air, water, land, or other natural resources located within the state”³¹ This provides a means for both the state and its citizens to vindicate the right to protect land from pollution, impairment, or destruction.³²

²⁹ See, e.g., Minn. Stat. § 116D.02, subs. 3, 9 and 16 (providing that to carry out the environmental policy of the state, the state has the responsibility to discourage ecologically unsound practices, to minimize the environmental impact of energy production and use, and to “reduce the deleterious impact on air and water quality from all sources, including the deleterious environmental impact due to operation of vehicles with internal combustion engines in urbanized areas”); and Minn. Stat. § 216B.03 (providing that the Commission shall set rates “to encourage energy conservation and renewable energy use” to the maximum reasonable extent.).

³⁰ Minn. Stat. § 116B.01.

³¹ Minn. Stat. § 116B.03, subd. 1.

³² *Id.*

c. Public Trust Doctrine

Another possible vehicle for ensuring that the public is not harmed by the deteriorating Enbridge pipeline is a common law doctrine: the public trust doctrine. The public trust doctrine recognizes a citizen's right to compel the government to protect the environment, for the benefit of the public. The Minnesota Supreme Court has recognized at least the basis for such a doctrine to exist in Minnesota.³³ The public trust doctrine may give the public still another mechanism to ensure that the deteriorating Line 3 does not continue to pose risks to the public.

Given these legal mechanisms to protect the environment from continued operation of Line 3, it is clear that the Commission need not accept that Enbridge's commitment to continue using the existing pipeline as a threat of certain public harm. The Commission has given an excess of weight to this threat in its balancing of the factors in Rule 7853.0130, by failing to credit that that the state and its citizens are not powerless to prevent Enbridge from risking harm to the environment with its failing pipeline.

VII. Conclusion

This case is entirely about the law and the record evidence. The applicant has not, in my view, met its burden of proof. Therefore, I believe that the evidence and the law do not support granting the certificate of need.

The applicant has not provided a forecast of demand for Western Canadian crude oil and its refined products as required by Minnesota law and rule. The forecast of supply that the applicant relies upon in its models is not a forecast of demand. Overall the Applicant has not established that the consequence of denial of a certificate of need would adversely affect adequacy, reliability, or efficiency of energy supply to the applicant, to the applicant's customers, or to the people of Minnesota and neighboring states.

Significant new information is available including:

- new information on climate and the urgent actions that will be taken to reduce the consumption of fossil fuels, including reduced demand for oil and its refined products;
- new information on electrification of transportation and its impact on demand for oil and its refined products; and
- new information on the applicant's actions to fundamentally change the way capacity on the Mainline system is contracted and will likely materially affect apportionment, upon which the Commission relied in the prior and current decisions.

This information of dramatically changed circumstances has not been accounted for in the applicant's forecasts.

³³ See *State v. Kuluvar*, 123 N.W.2d 699, 706 (Minn. 1963) (recognizing that the state holds natural resources in trust).

These changed circumstances constitute new, contested, material facts relevant to the Commission's certificate of need decision. The new information is clearly relevant to the pivotal factor of "the accuracy of applicant's forecast of demand for the type of energy that would be supplied by the facility," and to the energy supply question posed by Item A. Minnesota Rule 7829.1000 requires that in these circumstances the Commission "shall refer the matter to the OAH for contested case proceedings . . ." I therefore respectfully disagree with my colleagues' conclusion that the Commission can reasonably grant a certificate of need, and certainly not without, at a minimum, further contested case proceedings.

The Minnesota Court of Appeals recently held that the Minnesota Department of Natural Resources erred by not holding contested case hearings in the face of new evidence.³⁴ I believe the Commission is making a similar error. The law, reinforced by the Minnesota Court of Appeals in *In re NorthMet*, requires us to order a contested case. At a minimum, a new contested case is required to develop the record regarding the substantial, material new information.

The scope of the contested case could be focused on the accuracy of the applicant's forecast of demand for the type of energy that would be supplied by the proposed facility. In addressing the accuracy of the forecast, record development should include, at a minimum: (1) the potential impact of new information on climate change and its impact on demand for oil and its refined products; (2) the potential impact of new information on electrification of transportation and its impact on the demand for oil and its refined products; (3) the potential impact of changes to the applicant's business plans, marketing, or contract structures; and (4) the potential impact of the passage of time.

The Commission should be fully informed about the extent and consequences of these developments before rendering a decision on the certificate of need. The Commission should either deny the Certificate of Need or refer the matter to the Office of Administrative Hearings for supplemental record development and analysis.

For these reasons, I respectfully dissent.

³⁴ *In re NorthMet Project Permit to Mine Application Dated December 2017*, 2020 WL 130728, at *9–10 (Minn. Ct. App. 2020), *petition for further review filed February 12, 2020* (holding that the DNR's decision to deny a contested-case hearing was based on errors of law and unsupported by substantial evidence, and reversing and remanding a permit decision to DNR to hold a contested case hearing in light of new evidence).