

FRYBERGER, BUCHANAN, SMITH & FREDERICK, P.A.

ST. PAUL OFFICE

THE FIRST NATIONAL BANK BUILDING
332 MINNESOTA ST, SUITE WEST
1260
ST. PAUL, MINNESOTA 55101
TELEPHONE (651)221-1044
FAX [651]221=1035

DULUTH OFFICE

SUITE 700
302 WEST SUPERIOR STREET
DULUTH, MINNESOTA 55802-1863
TELEPHONE (218) 722-0861
FAX [218] 725=6800

May 28, 2008

The Honorable Eric L. Lipman
Office of Administrative Hearings
P.O. Box 64620
St. Paul, MN 55164-0620

**VIA US MAIL AND
E-FILING**

**Re: In the Matter of the Application of Enbridge Energy, Limited Partnership,
and Enbridge Pipelines (Southern Lights) L.L.C. for a Routing Permit for the
Alberta Clipper Pipeline Project and the Southern Lights Diluent Project
MPUC Docket No. PL9/PPL-07-361
OAH Docket No. 8-2500-19094-2**

Dear Judge Lipman:

Attached herewith for filing is the Reply Brief of Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) LLC to the Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa. Also attached is our Affidavit of Service.

Sincerely,

/s/ John R. Gasele

John R. Gasele

Enclosures

cc: Attached Service List

OAH Docket No. 8-2500-19094-2

**MPUC Docket No. PL-9/CN-07-465 (Certificate of Need)
MPUC Docket No. PL-9/PPL-07-361 (Route)**

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

SERVICE LIST

| | |
|---|--|
| Burl W. Haar Executive Secretary Minnesota Public Utilities Commission 350 Metro Square Building 121 Seventh Place East St. Paul, MN 55101 | Sharon Ferguson Docket Coordinator Minnesota Department of Commerce 85 Seventh Place E., Suite 500 St. Paul, MN 55101 |
| Larry Hartman Planning Director Minnesota Department of Commerce 85 Seventh Place E., Suite 500 St. Paul, MN 55101 | Bret Eknes Minnesota Public Utilities Commission 350 Metro Square Building 121 Seventh Place East St. Paul, MN 55101 |
| John Lindell Minnesota Office of the Attorney General 900 BRM Tower 445 Minnesota Street St. Paul, MN 55101 | Julia Anderson Minnesota Office of Attorney General 1400 Bremer Tower 445 Minnesota Street St. Paul, MN 55101 |
| Karen Finstad Hammel Minnesota Office of Attorney General 1400 Bremer Tower 445 Minnesota Street St. Paul, MN 55101 | Valerie M. Means Office of Attorney General Telecommunications and Energy Division 445 Minnesota Street, Suite 1400 St. Paul, MN 55101 |
| Thomas E. Bailey Briggs & Morgan, P.A. 2200 IDS Center 80 South 8 th Street Minneapolis, MN 55402 | The Honorable Eric L. Lipman Office of Administrative Hearings 600 North Robert Street St. Paul, MN 55101 |
| Janette K. Brimmer Minnesota Center for Environmental Advocacy 26 E. Exchange Street, Suite 206 St. Paul, MN 55101 | Sara K. Van Norman Jacobson, Buffalo Suite 210 1360 Energy Park Drive St. Paul, MN 55108 |
| John Erik Kingstad Lake Elmo Bank Building, Suite 260 600 Inwood Avenue North Oakdale, MN 55128 | |

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

600 North Robert Street
St. Paul, Minnesota 55164

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

121 Seventh Place East, Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of the Application of
Enbridge Energy, Limited Partnership
And Enbridge Pipelines (Southern Lights)
LLC for a Pipeline Routing Permit for the
Alberta Clipper and Southern Lights
Diluent Projects

MPUC Docket No. PL9/PPL-07-361

OAH Docket No. 8-2500-19094-2

**REPLY BRIEF OF ENBRIDGE ENERGY, LIMITED PARTNERSHIP
AND ENBRIDGE PIPELINES (SOUTHERN LIGHTS) LLC
TO THE POST-HEARING BRIEF OF THE
FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA**

May 28, 2008

Introduction

Enbridge Energy, Limited Partnership and Enbridge Pipelines (Southern Lights) L.L.C. (collectively “Enbridge”) submit the following reply to the Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa (the “Band”). As detailed in the proposed findings, conclusions, and recommendations previously submitted, Enbridge requests that the MPUC designate the Proposed Fond du Lac Route Alternative in its requested pipeline routing permit for the proposed Alberta Clipper and Southern Lights Projects (the “Projects”). The Band has not demonstrated that its preferred route – through the Fond du Lac Reservation (the “Reservation”) – is a more reasonable and prudent alternative to the Fond du Lac Route Alternative. As demonstrated by the record and discussed below, construction along the Fond du Lac Route Alternative will adversely impact neither the Band nor the environment.

Argument

I. Clarification of the facts regarding negotiations between Enbridge and the Band.

Several contentions made by the Band in its post-hearing brief must be clarified. The Band asserts that Mark Sitek “materially mischaracterized” the state of right-of-way negotiations.¹ The Band provides no details to support this allegation. In his testimony, Mr. Sitek’s use of multiples of fair market value was intended to illustrate the gulf between Enbridge’s offer and the Band’s demands, using the standard method by which Enbridge and the appraisal industry value land as a benchmark.² Mr. Sitek testified that during negotiations Enbridge recognized the Band’s position that fair-market values did not apply to the land in

¹ The negotiations between Enbridge and the Band were for a new right-of-way for two proposed pipelines, not for settlement of a lawsuit as implied by the Band on page 2 of its Brief.

² See Transcript, Evidentiary Hearing, May 13, 2008, p. 120 (Testimony of Mark Sitek, “So I’m trying to indicate, I guess, that there’s a fairly large disparity between our offer and what the [B]and’s position was.”).

question, and accordingly offered the Band compensation³ well in excess of the land's fair market value. Enbridge has made a diligent effort to reach agreement with the Band. It has suggested the assistance of a mediator, a suggestion which the Band rejected.⁴ The Band has stated that it has other issues with Enbridge in connection with the existing pipelines that cross the reservation land. Enbridge has offered to sit down with the Band and pipeline safety regulators to discuss inspection data bearing on the Band's expressed interest in existing pipelines that cross reservation land.⁵ Enbridge has repeatedly stated that it remains open to negotiation.⁶

The Band now agrees with Enbridge that right-of-way negotiations are at an impasse.⁷ Because of the unavailability of eminent domain to acquire tribal lands, if the MPUC chooses to designate a route through the Fond du Lac Reservation, Enbridge would not have sufficient bargaining power to resume negotiations. In such a situation the Band, and not the MPUC, would become the arbiter as to whether the Projects should proceed. Avoiding such a scenario is precisely why the Fond du Lac Route Alternative was timely proposed as a route alternative and presented to the MPUC prior to the public hearings.⁸

³ Evidentiary Hearing, May 13, 2008, p. 127 (Testimony of Mark Sitek).

⁴ Transcript, Carlton County Public Hearing, April 9, 2008, p. 110 (Testimony of Mark Sitek in response to a question from Karen Hammel, Counsel for the Office of Energy Security)

⁵ Transcript, Carlton County Public Hearing, April 9, 2008, p. 51-52 (Testimony of Mark Sitek).

⁶ Transcript, Carlton County Public Hearing, April 9, 2008, p. 109-110 (Testimony of Mark Sitek); Transcript, Evidentiary Hearing, May 13, 2008, p. 121 (Testimony of Mark Sitek, p. 121, indicating that Enbridge is still open to negotiations, but that impasse would remain if the Band was unwilling to move from its position).

⁷ Post-hearing Brief of the Fond du Lac Band of Lake Superior Chippewa, p. 2 ("Despite the impasse...").

⁸ Fond du Lac Route Alternative Supplemental Filing, p. 3 (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5129096>, last visited May 24, 2008).

II. The MPUC must consider the significant cost differences between the Fond du Lac Route Alternative and a route through the Reservation.

A. Minn. R. 7852.1900 requires the MPUC to consider the cost of a proposed pipeline.

The Band's assertion that the MPUC may not consider the cost of a proposed route is incorrect. The Band has misinterpreted the following rule. The rule setting out the criteria for the MPUC's evaluation of a proposed route states in relevant part that

“[a]ny *new easements or right-of-way agreements obtained* from potentially affected landowners before issuance of a pipeline routing permit are obtained at the sole risk of the applicant. The fact that the *agreements have been obtained* shall not be considered by the commission in selecting the route.”⁹

This rule prevents an Applicant from persuading the MPUC to designate a route simply because easements have been acquired. It does not, however, mean that the MPUC is barred from considering the cost difference between two alternative routes.¹⁰ If the rule were meant to bar consideration of a route's unavailability, it would have plainly said so. Instead, the rule speaks only to easements that have been acquired *before* the MPUC considers a route permit application. This rule does not preclude the MPUC is barred from considering that easement acquisition will require exorbitant costs or may not even be possible due to the unavailability of statutory eminent domain powers, as is the case with a route through the Fond du Lac Reservation.¹¹

Contrary to the Band's assertions, the cost of a route alternative is specifically among the criteria that the MPUC must consider for both pipelines and electric transmission line permits.¹²

⁹ Minn. R. 7852.1900, Subp. 1 (emphasis added).

¹⁰ Post-Hearing Brief of the Fond du Lac Band at 2.

¹¹ Enbridge's lack of condemnation authority over 1.5 miles of land within the Reservation is discussed below.

¹² Minn. R. 7849.5910, L.

Minn. R. 7852.1900, Subp. 3.E. states that “pipeline cost and accessibility” are factors that must be assessed by the MPUC when evaluating an application for a pipeline routing permit.

A person submitting an alternative route must provide detailed information about the proposal.¹³ This information includes cost information. Minn. R. 7852.1400, Subp. 3.B. requires that “[t]he pipeline route or route segment proposal must contain the data and analysis required in parts 7852.2600, subpart 3, and 7852.2700, unless the information is substantially the same as provided by the applicant.” Minn. R. 7852.2700 requires the proposer to provide information on impacts of the proposed route that “include but are not limited to the impacts for which criteria are specified in part 7852.0700 or 7852.1900.”¹⁴ Minn. R. 7852.1900, of course, contains Subp. 3.E, which includes cost as one of the criteria that must be considered by the MPUC in evaluating a pipeline routing permit application.¹⁵ The Band’s assertion that the MPUC cannot consider the cost difference between two route alternatives is therefore incorrect.

B. The Fond du Lac Route Alternative will cost significantly less than a direct route through the Reservation.

The cost of easement acquisition is a significant part of the cost to construct a pipeline.¹⁶ In this case the cost difference between the route through the Fond du Lac Reservation and the route alternative is very substantial.¹⁷ Requiring Enbridge to route the new pipelines through the Fond du Lac Reservation and therefore acquiesce to the Band’s demands would result in a significant increase in the total cost of the Projects. This increased cost would in turn be

¹³ Minn. R. 7852.1400.

¹⁴ Minn. R. 7852.2700 (emphasis added).

¹⁵ Enbridge has provided cost information, to the extent it is available, on all route alternatives it has filed throughout the hearing process.

¹⁶ Fond du Lac Route Alternative Supplemental Filing, p. 10.

¹⁷ Transcript, Evidentiary Hearing, May 13, 2008, p. 119-120 (Testimony of Mark Sitek).

reflected in the transportation rate charged to shippers and the prices consumers would ultimately pay.¹⁸ The Band's demands may even make the Projects too expensive to be feasible.

State law provides Enbridge with the power of eminent domain because it is in the business of transporting crude petroleum.¹⁹ Under Minnesota law, the services provided by Enbridge are "in the public interest and necessary to the public welfare."²⁰ Enbridge can therefore resort to eminent domain to acquire the easements needed to complete a route when a private landowner demands excessive compensation. The eminent domain process is designed to ensure that compensation is fair to both parties.²¹

Eminent domain is *not* available to Enbridge for a number of parcels essential to a route through the Reservation. Routing the Projects through the Reservation therefore presents a unique and extraordinary situation under Minnesota law. 25 U.S.C. § 357 extends the power of eminent domain to lands "allotted in severalty to Indians." Allotted land is land that was allotted to individual Indians by the United States under the Indian General Allotment Act.²² Federal law treats tribal land differently: "[I]f the land is now considered tribal land, as opposed to allotted land, it cannot be condemned pursuant to 25 U.S.C. § 357."²³ Tribal land is "land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance."²⁴ Enbridge

¹⁸ *See Id.* at p. 121.

¹⁹ Minn. Stat. § 117.48.

²⁰ Minn. Stat. § 117.48.

²¹ Minn. Stat. § 117.075, Subd. 2 requires use of three disinterested commissioners to determine the damages caused by the taking under eminent domain. Minn. Stat. § 117.075, Subd. 3 requires these commissioners to be disinterested, unbiased, and at least two must have knowledge of real estate values.

²² 25 U.S.C. § 348; *Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, Hiram Grant*, 719 F.2d 956, 958 (8th Cir. 1983).

²³ *Id.* at 961.

²⁴ 25 C.F.R. § 169.1(d)(2005).

estimates that approximately 1.5 miles of the 13.2-mile route through the Fond du Lac Reservation is tribal land.²⁵

The MPUC is entitled to consider – and *should* consider – the wide gulf between Enbridge’s offers and the Band’s demands. Minn. R. 7852.1900, Subp. 3.E. requires that the MPUC consider the cost of a proposed pipeline. Enbridge cannot use eminent domain, the tool provided by Minnesota law to ensure the reasonableness of land acquisition costs, to complete the route through the Reservation. The Fond du Lac Route Alternative is therefore a vastly less expensive route for the proposed pipelines, and may in fact be the only feasible route.

III. The Band has not provided sufficient or accurate information regarding alleged policies, rules and regulations or treaty rights that would bar construction along the preferred Fond du Lac Route Alternative.

Cost, although critical to Enbridge’s ability to complete the Projects, is only one of the factors that must be assessed by the MPUC in determining which route is more appropriate. Much of the Band’s post-hearing brief contains a discussion of Subpart 3.J. of Minn. R. 7852.1900, which requires the MPUC to consider “the relevant applicable policies, rules and regulations of other state and federal agencies, and local government land use laws . . . relating to the location, design, construction, or operation of the proposed pipeline and associated facilities.” What the Band fails to do, however, is identify these alleged policies, rules or regulations, or explain how Enbridge is not following them. The Band further fails to explain how the MPUC must incorporate such policies, rules and regulations into its decision-making process. The Band’s assertions about its treaty rights are general, conclusory, and lack sufficient detail to be evaluated in this proceeding.

²⁵ Transcript, Evidentiary Hearing, May 13, 2008, p. 119-120 (Testimony of Mark Sitek).

A. The Band’s assertions about federal regulations and policies lack sufficient detail to be considered in this matter, and to the extent information is provided, misstates the law.

The Band’s general assertions regarding federal law and its “federally-delegated authority” lack sufficient detail to enable the MPUC to select the Band’s favored route over the Fond du Lac Route Alternative. Further, what limited information is provided overstates the law. Finally, the Band provides no legal authority to support its conclusions.

The Band asserts that “it is plain that, in this case, there is a possibility that the federal government could approve the preferred route through the Reservation even if the state does not.”²⁶ However, the mere possibility that the federal government might make an impact assessment of the environmental implications of one route versus another in the course of preparing an Environmental Impact Statement should have no bearing on the MPUC’s obligation to make a decision in this routing proceeding based on Minnesota law.

The Band also fails to identify any of the alleged “policies, rules and regulations” that will prevent use of the Fond du Lac Route Alternative. Nonetheless, the Band asserts that the MPUC must take such phantom policies into account,²⁷ and that these policies may impact the routing recommendations of federal agencies.²⁸ No federal agencies have become a party, proposed route alternatives, or even provided comments in this proceeding.

The Band also overstates its regulatory authority. The Band asserts that it has “federally-delegated regulatory authority under the Clean Air and Water Acts to regulate certain aspects of pipeline construction even if the route is outside the Reservation boundaries.”²⁹ This is essentially the same argument made in the Band’s Petition to Intervene, in which it claimed that

²⁶ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 4.

²⁷ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 4.

²⁸ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 5.

²⁹ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 4-5.

it has “federally-delegated regulatory authority for both on-reservation activities and for off-reservation activities that affect air and water inside the Reservation, and will be exercising that authority in connection with [Enbridge’s] projects.”³⁰ The Band’s Treatment-as-a-State (“TAS”) status, however, is limited. Outside of any authority that the Band may have given its TAS status under the Clean Water Act and Clean Air Act, it should be noted that as a general matter, “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”³¹ While the U.S. Supreme Court carved out two narrow exceptions to this rule not applicable here,³² neither the courts nor Congress have delegated to tribes broad authority to regulate the activities of non-Indians occurring outside the exterior boundaries of their reservation lands.

Under the Clean Water Act, a tribe with TAS status may establish water quality standards for bodies of water within its reservation, and require water quality certifications for any actions that may create a discharge into those waters.³³ TAS status therefore places a tribe on an *equal footing* with regard to grants, setting water quality standards, administering permits, non-point source management, and other programs.³⁴ A tribe with TAS status may require an upstream discharger to ensure that activities do not result in contamination of downstream reservation waters.³⁵ This power is not unlimited. Even with TAS status, the Band does not have complete power to veto upstream discharge activities.³⁶ The Band may not impose water quality standards or take any action that goes beyond the federal statute or the Environmental Protection Agency’s

³⁰ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 5.

³¹ *Montana v. U.S.*, 450 U.S. 544, 565 (1981).

³² *Id.* at 565-566

³³ 33 U.S.C. § 1377(e).

³⁴ Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. Land Use & Envtl. L. 61, 77-8 (2004) (emphasis added).

³⁵ *Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001).

³⁶ *Id.* at 749-50.

power.³⁷ The Band's powers under the Clean Water Act are supervised by EPA in the same manner as a state's exercise of authority.³⁸ The Band has not offered any evidence to demonstrate that construction or operation of the two proposed pipelines along the Fond du Lac Route Alternative would violate the Clean Water Act, meaning that it cannot use its TAS status to prevent the construction or operation of the two proposed pipelines.

The Band's authority under the Clean Air Act is similarly inapplicable to activities on the Fond du Lac Route Alternative. Under amendments to the Clean Air Act, the Band may use a tribal implementation plan ("TIP") to regulate air quality *within the exterior boundaries* of the Fond du Lac Reservation.³⁹ The Band's TIP therefore cannot, by definition, apply to the Fond du Lac Route Alternative, which does not cross any tribal land and is outside the boundaries of the Fond du Lac Reservation.⁴⁰ The Band's authority under the Clean Air Act does not allow it to regulate construction or operation of the Projects along the Fond du Lac Route Alternative.

The Band has failed to provide any detailed information regarding policies of other federal, state or local governments or agencies for the MPUC to consider in this matter. What little information has been provided does not support the Band's argument that a route through the Reservation must be approved over the Fond du Lac Route Alternative.

B. The Band has failed to explain how its treaty rights would be impacted by construction along the Fond du Lac Route Alternative.

The record is devoid of information from the Band that could inform the MPUC as to how construction along the Fond du Lac Route Alternative might impact the Band's treaty rights. The only information about the Band's treaty rights in the area of the Fond du Lac Route

³⁷ *Id.*

³⁸ *Wisconsin v. EPA*, 266 F.3d at 749.

³⁹ 42 U.S.C. § 7410(o).

⁴⁰ Fond du Lac Route Alternative Supplemental Filing, p. 3.

Alternative consists of a few paragraphs in the Band's Petition to Intervene.⁴¹ In its Petition, the Band asserted that it has hunting, fishing and gathering rights in the area of the Fond du Lac Route Alternative.⁴²

The Band's assertions do not acknowledge that its hunting, fishing and gathering rights are limited. The Band does not enjoy greater rights in the area of the Fond du Lac Route Alternative than in other parts of the ceded territories. In particular, the Band's rights can only be exercised on public or private lands that are open to the general public for hunting, fishing and gathering by operation of state law.⁴³ The Band therefore has no rights over public or private lands along the Fond du Lac Route Alternative that are not open to the general public for hunting, fishing or gathering by operation of state law. Because land use patterns are not expected to change following construction,⁴⁴ the Fond du Lac Alternative will neither increase nor decrease the number of acres in which Band members will be able to exercise their treaty rights.

More importantly, the Band has failed to indicate how installation or operation of the proposed pipelines will impact the Band's ability to hunt, fish or gather in the areas along the Fond du Lac Route Alternative. Construction along the Fond du Lac Route Alternative will not impact the Band's treaty rights beyond the presence of construction crews for a limited time. Even then, construction would only interfere with the Band's treaty rights to the extent it occurs during hunting or fishing seasons designated by the Reservation Business Committee,⁴⁵ and in an

⁴¹ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 4-5.

⁴² Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 4.

⁴³ *Mille Lacs Band of Chippewa Indians v. State of Minnesota (Phase II)*, 952 F.Supp. 1362, 1378 (D.Minn. 1997) (affirmed by *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 124 F.3d 904, 933-4 (8th Cir. 1997)). This ruling was not part of the Supreme Court's decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187 (1999), which only reviewed Phase I of the litigation.

⁴⁴ Fond du Lac Route Alternative Supplemental Filing, p. 7.

⁴⁵ The Band regulates ceded territory hunting, fishing and gathering under its 1854 Ceded Territory Conservation Code, Ordinance #02/92, available online at <http://www.fdlrez.com/ordpdfs/1992/02-92ord.pdf>. Ordinance #02/92

area open to the public for these activities by operation of state law. If this situation arises, the Band's rights would only be restricted along a narrow strip of land occupied by the construction footprint of the Projects. This would also be the case in any construction or timber harvesting operation in the ceded territories.

Installation of the proposed pipelines will not permanently impact hunting, fishing, or gathering activities. The presence of a pipeline in an area where hunting is permitted has never presented a safety problem for Enbridge.⁴⁶ The two proposed pipelines will be buried, eliminating the possibility of damage from bullets.⁴⁷ The Fond du Lac Route Alternative will not cross any open water,⁴⁸ making it difficult to imagine how the presence of the proposed pipelines would impact fishing rights.

The Band asserts that federal agencies "cannot authorize a pipeline route that would diminish the Band's treaty rights or that otherwise violates their responsibility to protect the Reservation resources."⁴⁹ The Band argues that a federal permit under section 404 of the Clean Water Act cannot be issued if the activity permitted will impair the Band's usufructary rights within the ceded territories.⁵⁰ The place to address that issue, however, is in the context of that federal permit application. Even if the MPUC were the agency assigned the authority to issue a Section 404 permit, it would still be impossible for the MPUC to evaluate the Band's claim due to the Band's failure to explain how the proposed pipelines will impact its rights in the ceded territories.

requires the establishment of seasons for fishing (Section 105, Subd. 2), small game (Section 106, Subd. 3), trapping (Section 107, Subd. 2), deer (Section 108, Subd. 7), migratory birds (Section 109, Subd. 3), moose (Section 110, Subd. 5), Bear (Section 111, Subd. 7), and wild rice gathering (Section 112, Subd. 2).

⁴⁶ Transcript, Carlton County Public Hearing, April 9, 2008, p. 49 (Testimony of Mark Sitek).

⁴⁷ See, Transcript, Carlton County Public Hearing, April 9, 2008, p. 49 (Testimony of Paul Eberth).

⁴⁸ Fond du Lac Route Alternative Supplemental Filing, p. 6.

⁴⁹ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 5.

⁵⁰ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 4.

The Band has failed to describe what damage its treaty rights would suffer should the MPUC approve construction along the Fond du Lac Route Alternative. The record demonstrates that any impact to these rights would be extremely limited in scope and duration.

IV. The Band has not provided information which would allow the MPUC to conclude that the Fond du Lac Route Alternative should not be designated in the pipeline routing permit.

The Band did not begin to actively participate in these proceedings until the end of the process, after Enbridge announced its intention to seek approval of the Fond du Lac Route Alternative.⁵¹ The Band now asserts that neither the route through the Reservation nor the Fond du Lac Alternative can be approved by the MPUC.⁵² Rather than favoring one route over another, the Band is arguing that *neither* of the routes under consideration – on *or* off the Fond du Lac Reservation – is acceptable. The Band has provided no evidence or other concrete information to support its contention that the MPUC should not approve the Fond du Lac Alternative. In its Petition to Intervene, the Band stated that it “shares the public interest in ensuring that the PUC reviews a well-developed factual record in connection with these routes.”⁵³ The Band, however, has not provided any factual information to help develop the record.

The Band asserts that the Fond du Lac alternative is unacceptable due to “impacts on human settlement; the natural environment; lands of historical, archeological or cultural significance; natural resources and features; and other aspects of the proposed route.”⁵⁴ The only detail regarding these concerns are the general allegations contained in the Band’s Petition to Intervene. Enbridge has addressed all of these concerns, as discussed in the following sections.

⁵¹ Transcript, Clearwater County Public Hearing, March 25, 2008, p. 17 (Testimony of Mark Sitek).

⁵² Post-hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 3.

⁵³ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 1.

⁵⁴ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 3.

A. Impacts on Human Settlement

There are no population centers within one mile of the Fond du Lac Route Alternative.⁵⁵ Land use has historically been limited to forestry and timber production, and no change is expected to these patterns as a result of the installation of the two proposed pipelines.⁵⁶ Construction along the Fond du Lac Route Alternative will have little or no impact on human settlement. No landowner at any of the public hearings provided testimony against construction of the Projects on the Fond du Lac Route Alternative.

B. Lands of Historical, Archeological or Cultural Significance

The Band asserts that there are two ancient trails that would be bisected by construction along the proposed Fond du Lac Route Alternative.⁵⁷ These unnamed trails did not appear in the archeological surveys that Enbridge conducted along the Fond du Lac Route Alternative in 2007,⁵⁸ and the Fond du Lac Band has provided no additional information about the location or character of these trails beyond an assertion that they exist. It is unknown whether these trails are on private or publicly-owned land along the Fond du Lac Route Alternative. If these trails or other undocumented cultural resource sites are found during construction of the proposed projects, they will be managed and protected in accordance with the terms of the Unanticipated Discoveries Plan.⁵⁹ Through use of horizontal direction drilling, Enbridge would be able to install pipelines far beneath, and without disturbance to, any ancient trails.

Further analysis of each of these issues will occur in the context of the Environmental Impact Statement that the Department of State will be preparing in connection with Enbridge's Presidential Permit application, and in connection with the actions that will be taken by the State

⁵⁵ Fond du Lac Route Alternative Supplemental Filing, p. 7.

⁵⁶ Fond du Lac Route Alternative Supplemental Filing, p. 7.

⁵⁷ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 9.

⁵⁸ See Fond du Lac Route Alternative Supplemental Filing, p. 9.

⁵⁹ See Ex. 100, Tab C, § 10.4, p. 10-3.

Department, in consultation with others, to satisfy the requirements of Section 106 of the National Historic Preservation Act.

C. Natural Resources and Features

The Band also asserts that it is concerned about impacts on natural resources and features.⁶⁰ A review of the Band's Petition to Intervene and Post-Hearing Brief, the only materials submitted by the Band, reveals only unsupported statements about general concerns regarding environmental mitigation,⁶¹ cumulative impacts caused by "anticipated segmentation of habitat,"⁶² unidentified impacts on wildlife, fish, wild rice, wetlands, and water resources,⁶³ unspecified "construction-related impacts,"⁶⁴ planned water crossings,⁶⁵ pipeline integrity,⁶⁶ and unknown "other matters."⁶⁷ The record contains ample information demonstrating that these resources have been considered,⁶⁸ and that the impact of construction will be minimized or mitigated through specific plans or construction methods.

Impacts to the environment will be thoroughly evaluated and addressed through permit conditions,⁶⁹ plans developed by Enbridge to mitigate or prevent environmental damage, and use of environmental monitors. Enbridge's applications,⁷⁰ Environmental Assessment Supplement ("EAS"),⁷¹ Environmental Mitigation Plan,⁷² and other associated mitigation plans⁷³ contain

⁶⁰ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 3.

⁶¹ Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 3.

⁶² Post-Hearing Brief of the Fond du Lac Band of Lake Superior Chippewa at 3.

⁶³ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 6.

⁶⁴ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 6.

⁶⁵ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 6.

⁶⁶ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 6.

⁶⁷ Petition to Intervene of Fond du Lac Band of Lake Superior Chippewa at 6.

⁶⁸ Except the unspecified "construction-related impacts" and unknown "other matters" which cannot be evaluated because the Band has not explained these concerns.

⁶⁹ See Minn. R. 7852.3600.

⁷⁰ Ex. 100, Ex. 101, Ex. 300.

⁷¹ Ex. 100, Tab C

⁷² Ex. 101, Tab D, Appendix B.

information regarding environmental impacts and mitigation measures⁷⁴ for wildlife and its habitat,⁷⁵ fisheries,⁷⁶ wetlands,⁷⁷ water resources,⁷⁸ water crossings,⁷⁹ and pipeline integrity programs.⁸⁰

The EAS indicates that impacts to forests will be impacted through the removal of cover during construction.⁸¹ Clearing will be limited only to the extent necessary.⁸² Following construction, the cleared areas in the temporary workspace will be restored to allow re-establishment of the forest cover.⁸³ The rate of return will be based on the fertility and type of forest, but generally early successional species will return within a few years, and later successional species will move in over time.⁸⁴

Wildlife habitat is not expected to be significantly impacted.⁸⁵ There will be temporary displacement of some species due to the clearing operation.⁸⁶ However, displaced wildlife may move to adjacent, undisturbed areas, and may reestablish in their previously-occupied territory after construction is completed and habitat reestablished.⁸⁷ Herbaceous and shrub clearing in upland and wetland areas will be necessary for construction, but impact is expected to be brief due to the quick re-colonization of these plant species.⁸⁸ Wildlife species should return to these

⁷³ Spill Prevention, Containment and Control Plan (Ex. 101, Tab D, App. C), Agriculture Mitigation Plan (Ex. 101, Tab D, App. E), Petroleum-Contaminated Soil Management Plan (Ex. 101, Tab D, App. F) and Drilling Mud Containment, Response and Notification Plan (Ex. 101, Tab D, App. G).

⁷⁴ Ex. 100, Tab C, §§ 1.4, 4.3, 6.3, 7.1.5, 7.2.3, 7.3.2, 7.4.1, 8.4, 9.2.5, 9.3.4.

⁷⁵ Ex. 100, Tab C, § 7.2, p. 7-5 to 7-6.

⁷⁶ Ex. 100, Tab C, § 7.3, p. 7-7.

⁷⁷ Ex. 100, Tab C, § 9.3, p. 9-12 to 9-16.

⁷⁸ Ex. 100, Tab C, § 8, p. 8-2 to 8-6.

⁷⁹ Ex. 100, Tab C, § 9.2, p. 9-4 to 9-10.

⁸⁰ Ex. 300, § 7853.0270.

⁸¹ Ex. 100, Tab C, § 4.3.2, p. 4-6.

⁸² See Minn. R. 7852.3600.B.

⁸³ Exhibit 100, Tab C, § 4.3.2, p. 4-6.

⁸⁴ Exhibit 100, Tab C, § 4.3.2, p. 4-6.

⁸⁵ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

⁸⁶ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

⁸⁷ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

⁸⁸ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

areas shortly after construction is completed.⁸⁹ The only long-term impacts expected are through the conversion of some forested habitat to herbaceous-dominated habitat along the permanent right-of-way.⁹⁰ With the exception of the narrow permanent right of way, natural growth and succession will restore the temporary workspace to a forested community, and wildlife typically inhabiting forest habitats will return.⁹¹

Impacts to fisheries will be minimal and temporary. Construction of a stream crossing will temporarily limit fish movement upstream and downstream of the crossing site, and some aquatic organisms will be temporarily displaced.⁹² Natural re-colonization of the disturbed area will begin shortly after the streambed is restored, and should be complete within one year.⁹³ Stream crossings are not expected to affect resident fish populations or permanently alter habitat.⁹⁴

Enbridge consulted with the Minnesota Department of Natural Resources (“DNR”) and the Fish and Wildlife Service (“FWS”) regarding threatened and endangered species.⁹⁵ No threatened or endangered species are known to be present in the area of the Projects.⁹⁶ Enbridge has committed to work with the DNR, FWS and United States Forest Service to develop mitigative strategies in the event any threatened species are found in the area of the proposed pipeline construction.⁹⁷

Construction of the Projects is not expected to have long-term impacts on ground water resources. Construction is typically restricted to the first 10 feet below the surface, and therefore

⁸⁹ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

⁹⁰ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

⁹¹ Exhibit 100, Tab C, § 7.2.3, p. 7-6.

⁹² Exhibit 100, Tab C, § 7.3.2, p. 7-7.

⁹³ Ex. 100, Tab C, § 7.3.2, p. 7-7.

⁹⁴ Ex. 100, Tab C, § 7.3.2, p. 7-7.

⁹⁵ Ex. 100, § 4415.0165; Ex. 100, Tab C, § 7.4, p. 7-8.

⁹⁶ Ex. 100, Tab C, § 7.4, p. 7-8.

⁹⁷ Ex. 100, Tab C, § 7.4.1, p. 7-10.

normally occurs above the water table.⁹⁸ Although impacts to ground water could be caused by construction-related spills,⁹⁹ Enbridge maintains a Spill Prevention, Containment and Control Plan that will significantly reduce the risk of such an event, and dictate the proper response if such a spill occurs.¹⁰⁰

Enbridge has presented significant analysis of water bodies and the impacts that can be expected by various crossing methods.¹⁰¹ This analysis includes a discussion of water quality standards and impaired waters under § 303 of the Clean Water Act.¹⁰² Enbridge has identified several methods to reduce impacts to water bodies during the crossing process. These methods vary by crossing method, and will be developed in cooperation with the appropriate regulatory agency.¹⁰³ Mitigation measures will typically include conducting any open-cut crossings within 24-48 hours,¹⁰⁴ installing of silt and erosion control methods within 24 hours,¹⁰⁵ maintaining a vegetation buffer along the stream bank until the crossing process begins,¹⁰⁶ using temporary bridges for equipment,¹⁰⁷ and restoring stream bed and bank contours.¹⁰⁸ Enbridge has also proposed a revegetation plan for water body crossings that is precedent setting in the pipeline industry.¹⁰⁹ This plan will involve replanting woody vegetation to within ten feet of the location of the proposed pipelines.¹¹⁰ The Environmental Mitigation Plan, compliance with which should

⁹⁸ Ex. 100, Tab C, § 8.4, p. 8-5.

⁹⁹ Ex. 100, Tab C, §, 8.4.2, p. 8-6.

¹⁰⁰ Ex. 101, Tab D, App. C.

¹⁰¹ Ex. 100, Tab C, §§ 9.2, pp. 9-4 to 9-12.

¹⁰² Ex. 100, Tab C, § 9.2.2, pp. 9-4 to 9-6.

¹⁰³ Ex. 100, Tab C, § 9.2.1, p. 9-4.

¹⁰⁴ Ex. 100, Tab C, § 9.2.4, p. 9-7.

¹⁰⁵ Ex. 100, Tab C, § 9.2.4, p. 9-10.

¹⁰⁶ Ex. 100, Tab C, § 9.2.4, p. 9-6.

¹⁰⁷ Ex. 100, Tab C, § 9.2.4, pp. 9-6 to 9-7.

¹⁰⁸ Ex. 100, Tab C, § 9.2.4, p. 9-10; Minn. R. 7852.3600.C.

¹⁰⁹ Enbridge's Response to Public Comments Provided by the Minnesota DNR, May 2, 2008, p. 10 and diagram (available online at <https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=5165533>). This document was filed after the Application, so this proposal is not reflected in Exhibits 100 or 101. This document was served on Counsel for the Band.

¹¹⁰ *Id.*

be a condition of any permit issued by the MPUC for the Projects, also contains significant information on how impacts to water bodies will be mitigated.¹¹¹ Water body crossings will also be subject to the requirements and site-specific conditions of the License to Cross Public Waters from the Minnesota Department of Natural Resources.¹¹²

Wetland impacts will be minimized through modern construction practices.¹¹³ Wetland construction will result in some temporary impacts.¹¹⁴ Emergent wetlands will suffer no long-term impacts because they will be restored to pre-construction conditions and will naturally revegetate.¹¹⁵ Scrub-shrub and forested wetlands will require a longer time period to reestablish due to the growth time of woody vegetation,¹¹⁶ but there is no evidence to suggest that such vegetation will not return in the temporary workspace. The pipelines will be buried below the surface of the wetland, so wetland hydrology will remain unchanged.¹¹⁷ Enbridge has also identified methods to reduce the risk of the spread of invasive species.¹¹⁸ Areas that were wetlands before installation of the Projects will remain so after the proposed pipelines are installed. The Environmental Mitigation Plan sets forth many requirements to reduce construction-related impacts on wetlands.¹¹⁹ Wetland construction activities will also be subject to the conditions on a Section 404 permit issued by the United States Army Corps of Engineers.¹²⁰

Enbridge has thoroughly addressed potential impacts to the environment and provided significant detail regarding mitigation and restoration measures. The Band has not demonstrated

¹¹¹ Ex. 101, Tab D, App. B, pp. 10-16.

¹¹² This permit is required for the Projects. *See* Ex. 100, § 4415.0165.

¹¹³ Transcript, Carlton County Public Hearing, April 9, 2008, p. 51 (Testimony of Paul Meneghini).

¹¹⁴ Exhibit 100, Tab C, 9.3.4, p. 9-16.

¹¹⁵ Exhibit 100, Tab C, 9.3.4, p. 9-16.

¹¹⁶ Exhibit 100, Tab C, 9.3.4, p. 9-16.

¹¹⁷ Transcript, Carlton County Public Hearing, April 9, 2008, p. 50 (Testimony of Paul Meneghini).

¹¹⁸ Ex. 101, Tab D, App. B, p. 9.

¹¹⁹ Ex. 101, Tab D, App. B, pp. 17-20.

¹²⁰ Ex. 100, § 4415.0165.

that the environmental analysis is insufficient. The Band has also failed to recognize the mitigation and restoration methods that will be employed by Enbridge. These are the same impacts and mitigation measures that would have been encountered and employed along the Band's preferred route through the Reservation. Enbridge has sufficiently addressed the Band's concerns regarding environmental impacts.

V. The Band is attempting to use the permitting process to enhance its negotiating position over Enbridge.

The Band's post-hearing brief, like its Petition to Intervene, is little more than an attempt to confuse the issues before the MPUC by implying that unspecified federal agencies have undisclosed duties to the Band regarding vaguely identified concerns that will bar Enbridge from utilizing the Fond du Lac Route Alternative. Were the Band genuinely interested in these issues, it would have provided some information for the record that would have allowed Enbridge a meaningful opportunity to review the Band's data and respond to its concerns. Instead, the Band has declined to develop a record which would allow the MPUC to identify and address any impacts which might arise from selection of the Fond du Lac Route Alternative.

The Band appears to be attempting to use the state and federal regulatory processes as a negotiating tool. Enbridge has no condemnation authority over tribal land. If the Band is successful in convincing the MPUC that a route through the Reservation is preferable to the Fond du Lac Alternative, Enbridge will not have sufficient negotiating power to ensure the Projects' success. Enbridge would be forced to choose between abandoning the Projects and paying whatever amount might be demanded by the Band for the right to cross 1.5 miles of tribal land.

More importantly, the Band's efforts to steer the Projects onto the Reservation have the effect of substituting the Band for the MPUC. Minn. Stat. Sec. 216B.243 delegates to the MPUC the power to determine if an energy project, such as those proposed by Enbridge, should proceed. Yet an MPUC decision to grant Enbridge a certificate of need and pipeline routing permit would be rendered moot should the Band succeed in eliminating the Fond du Lac Route Alternative and then denying Enbridge access to tribal lands. Nothing in the hierarchy of Minnesota's pipeline approval process contemplates such a result.

Conclusion

The Band has failed to provide information or explain why the Fond du Lac Route Alternative should not be approved. Unsupported, vague statements about concerns and overstatements of the Band's regulatory authority are not evidence. Enbridge has demonstrated that the Fond du Lac Route Alternative is acceptable under the criteria set out in Minn. R. 7852.1900, and therefore requests that the MPUC approve the Fond du Lac Route Alternative.

Attorneys for Applicants Enbridge Energy,
Limited Partnership and Enbridge Pipelines
(Southern Lights) L.L.C.

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/s/ Kevin T. Walli
Kevin T. Walli, Atty. Reg. No. 183866
John R. Gasele, Atty. Reg. No. 0386700
Fryberger, Buchanan, Smith &
Frederick, P.A.
The First National Bank Building
332 Minnesota Street, Suite West 1260
St. Paul, MN 55101