

INTRODUCTION

MCEA opposes Enbridge's request that the PUC adopt the Greenfield Route around the Fond du Lac reservation as the preferred route for the Alberta Clipper tar sands and Southern Lights diluent pipelines. It is clear that cost alone is motivating Enbridge's request and Minnesota law prohibits the PUC from adopting an environmentally damaging alternative where cost alone is the justification. Alternatively, if, as Enbridge asserts, the existing route through the reservation is no longer "available," Minnesota law would require the PUC to study alternative routes in addition to the Greenfield Route proposed by Enbridge and develop a full record of the environmental impacts of the alternatives to inform the PUC's decision. Enbridge has offered no alternatives to the Greenfield Route and the PUC's environmental review is not sufficient to provide for an informed choice among alternatives. Therefore, even if the existing Fond du Lac route is no longer available, the PUC cannot adopt Enbridge's preferred route without further analysis.

I. Cost Alone Cannot Justify Selection Of The Greenfield Route Around The Fond Du Lac Reservation.

Minnesota law prohibits the PUC from authorizing construction of the Alberta Clipper tar sands and Southern Lights diluent pipelines through a Greenfield rather than in the existing corridor solely because of cost, and therefore the PUC must reject Enbridge's request.

Both the Minnesota Environmental Policy Act, Minn. Stat. § 116D, ("MEPA") and the Minnesota Environmental Rights Act, Minn. Stat. § 116B, ("MERA") make plain that cost alone cannot justify the selection of an environmentally damaging alternative. MEPA, which requires analysis of the significant environmental impacts of a proposed

action and its alternatives, also prohibits the authorizing a project when a feasible and prudent alternative exists. The law explicitly states that cost alone does not render an alternative infeasible or imprudent:

Subd. 6. Prohibitions.

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, *so long as there is a feasible and prudent alternative* consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. *Economic considerations alone shall not justify such conduct.*

Minn. Stat. § 116D.04, subd. 6. (emphasis added). MERA establishes the same requirement, providing a cause of action against any party – here both the PUC and Enbridge – for pollution, impairment or destruction of the environment. *See* Minn. Stat. § 116B.03; *People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council*, 266 N.W.2d 858 (Minn. 1978). The PUC and Enbridge could not defend against such suit by pointing to the cost of using the existing, already disturbed route. “The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative . . . [However,] economic considerations alone shall not constitute a defense hereunder.” Minn. Stat. § 116B.04.

While Enbridge has not disclosed the amounts it has offered or the amounts the Fond du Lac Band has demanded during its negotiations, its February 13, 2009 filing makes clear that economic considerations are the sole factor motivating the company’s

request to construct the two pipelines in an environmentally sensitive Greenfield rather than an already disturbed existing corridor. Enbridge, for example, rests its entire request on the argument that if the PUC selected the existing corridor option, Enbridge would be subject to the “economic demands” of the Band. (Enbridge February 13, 2009 Letter Brief, p. 10) The PUC is prohibited by MEPA, and would be subject to suit and liability under MERA, if it selected the Greenfield Route based only on the economic considerations Enbridge has offered to justify its request.

Further, there is nothing in the record to suggest that the route along the existing corridor is “no longer available” as claimed by Enbridge. The statement is belied by the documents submitted by Enbridge itself. The Band’s letter from January 14, 2009, attached to Enbridge’s February 13, 2009 filing as Exhibit 3, offered Enbridge in September 2008, 20-year and 10-year agreements “under the same terms” as requested by Enbridge but at a different price. As established in the same letter, in December 2008, the Band again offered Enbridge a 20-year agreement, this time apparently with an automatic 20-year renewal. The record is crystal clear that “economic considerations alone” stand between Enbridge and the already-disturbed pipeline corridor through the Fond du Lac reservation. The route *is* available.

Finally, contrary to Enbridge’s claims, *People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council*, 266 N.W.2d 858 (Minn. 1978), is exactly on point and controlling. In *PEER*, the Minnesota Supreme Court explained that the destruction of natural resources is “non-compensable and injurious to all present and future residents of Minnesota.” *Id.*, at 869. As a result, where there is a choice between alternatives that differ with respect to their environmental

impact, MERA compels the choice of the least destructive route. *Id.*, at 873 (“Implicit in the operation of MERA is the principle that environmentally damaging action cannot be taken if there is another, less damaging way to achieve the desired result”). Enbridge has not demonstrated that the route through the Fond du Lac reservation is “unavailable”; rather, it has merely alleged that it does not wish to pay the Band’s asking price.

Minnesota law prohibits the PUC for authorizing the destruction of the State’s non-compensable natural resources solely to boost the profits of a Canadian pipeline company.

II. If The Existing Route Through The Reservation Is “Not Available,” The PUC Must Study And Consider The Environmental Effects On The Proposed Greenfield Route And As-Yet-Not-Identified Alternatives.

MCEA disagrees with Enbridge’s assertion that the existing corridor route is not available; however, if the PUC adopts such reasoning, it would then have to study the environmental effects on the proposed Greenfield Route as well as alternatives to that proposed route prior to issuing a permit.

MCEA has demonstrated in previous filings that the environmental review conducted for the Alberta Clipper tar sands and Southern Lights diluent pipelines is flawed and insufficient for multiple reasons and it incorporates those arguments here by reference. Of particular relevance to the Greenfield Route around the reservation are (1) the fact that the PUC has not done an adequate analysis of the natural resources (waterbodies, wetlands, species, soil types, etc.) to know the extent of the potential environmental impacts associated with the Greenfield Route; (2) the PUC has not adequately considered ways to mitigate impacts; (3) the PUC is in violation of Minnesota environmental review rules by moving forward with permitting and ignoring the development of a federal Environmental Impact Statement for the same project (*see* Minn.

R. 4410.3900, subp. 3); and (4) the pipeline routing rules, as interpreted and applied by the PUC, have not resulted in a valid equivalent to an EIS and therefore violate MEPA (*see* Minn. Stat. § 116D.04, subd. 4a).

It should now be obvious to the Commission that what Enbridge relies on to conclude that the Greenfield Route is “environmentally acceptable” is simply not sufficient under MEPA. Enbridge cites to its April 21, 2008 “supplemental filing” in support of its assertion. The April 21, 2008 supplemental filing is a fourteen-page document written by Enbridge’s lawyers containing about three pages of very general information related to the landscape the Greenfield Route would cross. It dismisses a separate alternative route that would have followed an existing disturbed high-voltage transmission line corridor based on alleged “significant residential development.” How much residential development, the location of the residential development, the ability to avoid residential development, and the like are not discussed. A different alternative to the north is dismissed as too long. This is *not* an EIS equivalent.

An EIS or an EIS equivalent would present *scientific* and *analytical* information on the potential environmental impacts the proposal could cause to the 17-miles of Greenfield considering the disturbance during construction and operation including the threat of degradation from spills and leaks of tar sands crude and carcinogenic hydrocarbons and other possible impacts. It would additionally analyze and compare those impacts to the impact of other alternative routes. *See* Minn. R. 4410.2300(G) (one or more alternatives, including alternative sites, must be considered); Minn. R. 7852.1900, subp. 2 (Commission to select route that minimized environmental impact). If Enbridge and the PUC conclude the Fond du Lac reservation route as unavailable, then that route

has not been considered as an alternative. MEPA and the EQB rules make explicit that alternative project sites *must* be developed and evaluated during environmental review for projects with the potential for significant environmental effects. *See* EQB Guidance, 2008 Guide to Minnesota Environmental Review Rules, pp. 27 - 28 (an EIS must consider alternative sites).

If the existing route through the reservation is unavailable, the PUC must identify other alternatives for comparison to the Greenfield Route. Environmental impact analyses on the Greenfield Route and alternatives must be developed to inform the PUC on selection of the least environmentally damaging option. No alternative route has yet been identified; no environmental analysis for the Greenfield Route or any other route has been developed to inform the Commission's decision. Therefore, it cannot proceed with Enbridge's request.

Moreover, if the PUC adopts Enbridge's position that the reservation route is "unavailable," then the PUC must further evaluate the consequences that will result if the Band ejects Enbridge and its existing four pipelines from Band territory. The Band reminded the Commission of its authority to proceed with ejectment at the November 25, 2008 hearing and wrote to Enbridge that it would pursue legal recourse with regard to the company's trespasses if a settlement was not reached. A likely consequence of finding the reservation route "unavailable" will be ejectment of an additional four pipelines currently running through reservation land. The environmental consequences of that result, whether considered a direct effect, indirect effect or connected action, must be addressed prior to the PUC granting any authorization for the project. At a minimum, if

the PUC wishes to avoid evaluating the environmental consequences of an ejection, it must, under the circumstances, establish that the Band will not proceed with its threat.

The PUC has not taken a “hard look” at the environmental impacts of the proposed Greenfield Route or considered any alternative. As MCEA has asserted with regard to the PUC’s environmental review for the entire proposal, it is insufficient. The U.S. Department of State’s draft EIS provides the PUC with an example, if inadequate itself, of the analysis required for an EIS-equivalent. *See* U.S.DOS DEIS (attached). The Department of State’s Draft EIS – while going far beyond anything the PUC has produced in this proceeding – has not satisfied the level of analysis an EIS requires. Note, for example, that the Environmental Protection Agency expressed “concerns regarding the environmental impacts of the proposed project as well as a lack of some important information in the DEIS pertaining to alternatives and mitigation.” *See* EPA January 30, 2009 Comments, p. 2 (attached). In particular, EPA expresses concern for impacts to wetlands and stream crossings. *Id.* But the federal DEIS, at a minimum, leaves no question that the PUC’s approach to environmental review for these pipelines simply does not comport with MEPA’s requirement that the Commission’s decisions be preceded and informed by an analysis of impacts and alternatives addressing the “same issues” and using “similar procedures” as for an EIS. This is true of the environmental review for the project as a whole as it is for the issue Enbridge now presents to the Commission in asking for approval of the Greenfield Route around the Fond du Lac reservation.

CONCLUSION

The PUC must deny Enbridge's request that the Greenfield Route around the Fond du Lac reservation be approved. Economic considerations alone are at the root of Enbridge's request and, as a result, the selection of the Greenfield Route is contrary to both MERA and MEPA.

Alternatively, if the PUC adopts the incorrect position that the Fond du Lac reservation route is no longer "available," it still cannot approve the Greenfield Route. The PUC has not yet conducted sufficient environmental review or analyzed the potential significant environmental impacts of the Greenfield Route and has not identified or evaluated the environmental impacts of any alternatives to that Route.

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