

April 21, 2008

BY ELECTRONIC AND U.S. MAIL

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

**Re: Enbridge Pipeline Projects; Alberta Clipper Pipeline Project
PUC Docket No. PL95/PPL-07-361
Supplemental Comments of the Minnesota Center for Environmental
Advocacy**

Dear Judge Lipman:

Minnesota Center for Environmental Advocacy (“MCEA”) submits these comments to supplement previous comments filed on December 14 and 21, 2007. These supplemental comments will address the inadequacy of the environmental review for the Alberta Clipper and Southern Lights routing permits, particularly related to rivers, streams, and wetlands. As set forth in MCEA’s earlier comments, MCEA requests preparation of a full Environmental Impact Statement (“EIS”) on the entirety of the Enbridge projects in Minnesota as an EIS, or the equivalent thereof, is clearly required by Minnesota law.

I. REQUIREMENTS OF MINNESOTA ENVIRONMENTAL POLICY ACT

As noted in previous filings in this and related matters, (“MEPA”), requires detailed examination of all direct, indirect, and cumulative environmental effects of this project. Minn. Stat. Ch. 116D (2006). Minnesota Statutes require that when “there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement.” Minn. Stat. § 116.D.04, subd. 2a (2006). The EIS is to be prepared early in the decision process in order to maximize its use and shall be an analytical rather than encyclopedic, document. *Id.* Moreover,

No state action significantly affecting the quality of the environmental shall be allowed...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 (2006). (emphasis added.)

While “alternative” environmental review is allowed under MEPA, it is considered acceptable only to the extent that it addresses “the same issues and utilize[s] similar procedures as an environmental impact statement.” Minn. Stat. § 116D.04, subd. 4a (2006). To the extent that the level of environmental review set out in the filings of Enbridge are, to date, not addressing the same issues as would be addressed by an EIS, they are not valid under the statute.

As set forth in detail below, the Enbridge routing applications, the Environmental Assessment Supplement (“EA”), and the mitigation plans submitted by Enbridge in this matter fail to adequately assess, disclose, and/or analyze stream and wetland impacts from the pipeline. The inadequacy of the environmental analysis in these areas also points up an apparent failure of Enbridge to conform to the Wetland Conservation Act, Minnesota’s public waters laws, and potentially, Section 404 of the Clean Water Act and related obligations.

II. REQUIREMENTS OF APPLICABLE WETLANDS AND PUBLIC WATERS LAWS.

In addition to their environmental review obligation, Enbridge has obligations under state and federal waters and wetland protection laws. Enbridge may not engage in work in public waters---work that affects the course, current or cross-section of the water—without a Department of Natural Resources (“DNR”) public waters work permits. Minn. Stat. § 103G.245 (2006). Similarly, Enbridge may not drain or fill public water wetlands¹ without a permit/written permission from the DNR and such a permit or permission may not be issued by DNR unless the affected public water wetlands are replaced by wetlands of equal or greater public value. Minn. Stat. § 103G.221 (2006). DNR rules provide that filling or excavating in public waters is in most instances prohibited, but for very limited circumstances. *See generally*, Minn. R. 6115.0190 and 6115.0200 (2007). Nowhere in the Enbridge materials cited above does Enbridge disclose whether and to what extent it has applied for a DNR public waters permit for the excavations clearly described in its routing application and EA, nor to what extent it has complied with the various regulatory requirements.

As to all other wetlands in the state, Minn. Stat. § 103G.222 (2006) provides that they may not be drained or filled, either wholly or partially, unless they are replaced by restoring or creating wetland areas of at least equal public value under an approved replacement plan.

¹ Public water wetlands are defined as Types 3, 4, and 5 wetlands (primarily open water wetlands) 10 acres or more in size. The size requirement refers to the size of the wetland, not the size of the impact.

Draining or filling, wholly or partially, includes excavation in wetlands typical of that proposed by Enbridge. *Id.* The requirements further provide that replacement plans must be guided by certain principles in descending order of priority:

1. *avoiding* the direct or indirect impact of the activities that may destroy or *diminish* the wetland:
2. minimizing the impact by limiting the degree or magnitude of the wetland activity and its implementation:
3. rectifying the impact by repairing, rehabilitating, or restoring the affect of a wetland environment:
4. reducing or elimination the impact overtime by preservation and maintenance operations during the life of the activity:
5. compensating for the impact by restoring the wetland:
6. compensating for the impact by replacing or providing substitute wetland resources or environment.

Minn. Stat. § 103G.222, subd. 1(b) (2006) (emphasis added). (This process is customarily referred to as “sequencing” and will be so referred to herein.) *See also*, Minn. R. 8420.0520 (2007).² As set forth in more detail below, there is no sequencing analysis in Enbridge’s routing permit application or in the EA.

The Wetland Conservation Act (“WCA”) provides for some limited exemptions to the general replacement plan requirement, but they are not applicable here. WCA provides that a replacement plan is not required for activities associated with routine maintenance of utility and pipeline rights-of-way. Minn. Stat. § 103G.2241, subd. 6 (2) (2006). The Alberta Clipper/Southern Lights project is for expansion of the right of way and placement of significant new pipeline, not routine maintenance. Therefore, this exemption does not apply. WCA further provides that a replacement plan is not required for alteration of a wetland associated with operation, maintenance or repair of a pipeline within existing or acquired interstate pipeline rights-of-way. Minn. Stat. § 103G.2241, subd. 6 (3) (2006). This exemption also does not apply as Enbridge seeks to establish an expanded right-of-way for new pipelines.³

² DNR rules regarding public water wetlands work permits incorporate this same sequencing analysis and demonstration requirement. Minn. R. 6115.0240, subpt. 3 (2007).

³ While it appears that the Board of Water and Soil Resources (“BWSR”) rules attempt to include petroleum product distribution in the definition of utility, that definition is contrary to the specific requirements of the statute. Minn. Stat. § 103G.005, subd. 15d (2006), specifically omits petroleum pipelines from the definition of utility. Therefore, when “utility” and “pipeline” are used separately in the WCA exemption provisions, they must, under standard rules of statutory construction, be read to mean distinct things. BWSR’s attempt to sweep them into a single definition in Minn. R. 8420.0110, subpt. 49 (2007) is contrary to the clear language and intent of the statute and therefore void and unenforceable as outside the agency’s authority. The statutory language controls.

Section 404 of the Clean Water Act (“CWA”) also provides that discharge of fill whether intentionally or from excavation into wetlands of the U.S. is prohibited absent obtaining a permit from the U.S. Army Corps of Engineers (“COE”). 33 U.S.C. § 1344. There are no exceptions or exemptions set forth in section 404 that would apply in this instance. COE regulations provide for similar sequencing requirements as are set forth in Minnesota State laws. *See, e.g.*, 40 C.F.R. 230.10. In accordance with COE regulations, if wetland impacts can not be avoided they must be minimized and for those impacts that can not be avoided, replacement with wetlands of equal or greater public value, with equal ecological function are required. 33 C.F.R. parts 320 and 323. As with the state wetland laws, the Enbridge EA and associated documents fail to address any of the sequencing requirements or even to acknowledge that these requirements exist.

The Alberta Clipper/Southern Lights project is subject to the wetland replacement requirements of WCA, for all WCA wetlands that are impacted are under similar provisions of the CWA and COE rules. That requires a thorough analysis and disclosure of the analysis of the sequencing requirements, primarily avoidance of wetland impacts, required by WCA and COE rules and further analysis and disclosure of specific replacement plans for wetlands of equal or greater public values and wetland functions. As set forth in detail below, neither the application nor the EA (including the mitigation provisions) meet these requirements. As these are basic requirements of Minnesota and federal environmental and natural resources regulations, they must be included in an environmental review of the Alberta Clipper/Southern Lights project. The failure to do so renders the environmental review of this project incomplete and inadequate under MEPA.

III. WILD AND SCENIC RIVERS REQUIREMENTS

While the EA acknowledges some federal requirements regarding potential federally-designated wild and scenic rivers, the EA and associated documents fail to address parallel state laws in this regard. Minn. Stat. § 103F.301 (2006) provides for a state wild and scenic rivers act. The Lower St. Croix River and the Mississippi Headwaters are dealt with in chapter 103F specifically, with the Mississippi Headwaters being administered by the Headwaters Board. *See generally* Minn. Stat. 103F. 361 et seq. (2006). The Mississippi Headwaters is administered in accordance with a plan. *Id.*⁴ Under the statutes, wild rivers are in a primitive state and are generally to be maintained as such. Scenic rivers allow for slightly more development, but the scenic nature of the river must be strictly maintained.

⁴ It should be noted that the Mississippi Headwaters plan, available from the Headwaters Board website, <http://mississippiheadwaters.org/management/plan4/htm>, provides that the Headwaters Board and entire state administration of the Headwaters arose as a result of recommendation for designation of the Mississippi Headwaters as a federal Wild and Scenic River. In response to local request, management was retained at the state level, with a promise and commitment to the federal government that the Mississippi Headwaters would be protected and administered as though it had been federally-designated. Nowhere in the EA or associated documents does Enbridge disclose or discuss these issues.

DNR rules further set forth requirements under the state Wild and Scenic Rivers Act. DNR rules reiterate that wild rivers are rivers in an essentially primitive state keeping a wilderness or “wilderness-like” character. Minn. R. 6105.0060, subpt. 2 (2007). Scenic rivers are to be largely undeveloped with some very minimal human intrusions allowed. Minn. R. 6105.0060, subpt. 3 (2007). *See also* Minn. R. 6105.0100 (2007), permitted land uses. In addition to the Mississippi Headwaters addressed in statute, the Kettle River and various of its tributaries are state-designated wild and scenic rivers that may be affected by this project (Minn. R. 6105.0600 et seq.).⁵

Again as set forth below, the EA and associated documents for the Alberta Clipper/Southern Lights project fail to adequately disclose or analyze potential impacts to wild and scenic rivers under Minnesota’s laws and do not discuss the extent to which this project will comply with regulatory requirements relative to development on or near those rivers.

IV. THE EA AND ASSOCIATED DOCUMENTS ARE INADEQUATE UNDER MEPA AND APPLICABLE PUBLIC WATERS, RIVERS, AND WETLANDS LAWS.

The EA and associated documents are wholly inadequate and an EIS is necessary for all Enbridge projects, both for reasons set forth in MCEA’s previous correspondence, but also due to the lack of adequate analytical information regarding potential significant environmental effects to public waters, wetlands and wild and scenic rivers. Enbridge’s information is summary, conclusory and entirely lacking in the specifics required by NEPA or other applicable laws.

A. The EA And Associated Documents Fail To Specify The Actual Water And Wetland Resources That Will Be Impacted By The Alberta Clipper/Southern Lights Project.

1. No specific streams or rivers are identified.

Enbridge has failed to identify in a manner that is useful on the landscape to any member of the public or any of the regulating bodies, the actual natural resources that will be impacted by the Enbridge project. The EA and associated documents are lacking in stream and river names and locations. Moreover, there is no description of the nature of any of the stream or river crossings in question particular to any waterbody such that judgment can be made regarding impacts to a particular water from a particular crossing. While the EA and associated documents discuss the fact that there are different soils, different slopes, different types of streams, and different vegetation in various places and that all of these things will be altered in some way by the pipeline, there is simply no attempt to discuss how or to what extent the pipeline will alter any of those features nor how the impacts to the environment may change depending upon the features. There is no discussion of how the pipeline work will affect the course, current or cross-

⁵ It is also possible that the Nemadji River has been designated by the State of Wisconsin. Time did not permit research on this point, but MCEA will supplement this comment should further research demonstrate that the Nemadji is so designated.

section of any particular waterbody in the state. This is completely inadequate under the requirements of MEPA.

2. Wild and scenic river crossings are undisclosed and not analyzed.

Similarly, there are no specifics within respect to crossings of some of the rivers that are specifically identified, such as the Mississippi Headwaters. The EA identifies two crossings of the Mississippi Headwaters, but fails to identify the exact locations of those crossings or what the nature of the environment is at the crossings. In particular, the EA fails to identify whether the crossings are in either the wild or the scenic portions of the Mississippi Headwaters. In accordance with the plan and the designation by the Mississippi Headwaters board, carried out under the Minnesota Statutes, the first forty-one river miles of the Mississippi River, from its start in Lake Itasca, to just short of the city of Bemidji, are designated “wild” and managed as such. This portion of the river, which is also a canoe route, is to be maintained in a largely primitive or wilderness state. Many canoe users use this portion of the river for recreation and expect to find a largely primitive and wilderness experience, including primitive backcountry campsites. Crossings in this area will be a significant disturbance to the required wilderness character and to the experience of any canoe or other wilderness users. If the crossings are downstream from the first 41 miles, in a scenic portion of the river, there are still problems with visible crossings. Enbridge has an obligation to provide more specifics with respect to crossings of the Mississippi Headwaters in order to show effects and impacts to this very important national resource.

Similarly, Enbridge’s EA and associated documents fail to designate where or to what extent the Kettle River and/or its tributaries are crossed by the Alberta Clipper/Southern Lights pipelines. As note above, the Kettle River and many of its tributaries are designated wild and scenic rivers under the State Wild and Scenic Rivers Act. The EA seems to indicate that the pipeline will travel through portions of the Kettle River watershed. However, it makes no disclosures with respect to the specifics of river and stream crossings within that watershed and the possibility that they too have been designated as wild or scenic; where wilderness or primitive or scenic characteristics must absolutely be preserved. The EA is wholly inadequate in this regard.

3. Wetland locations, types and effects are neither disclosed nor analyzed.

The EA and associated documents further lack adequate detail with respect to wetlands, both public water wetlands and WCA wetlands that may be impacted by the pipeline. It appears from the text of the EA that Enbridge has delineated wetlands all along the route. However, no where is that wetland delineation provided. There are partial Cowardin descriptions of some wetlands, but it is clearly not all of the wetlands affected as the Cowardin list is quite short. Further, the Cowardin descriptions are incomplete in that they contain no information with respect to the specific vegetation and soil types of the each of the delineated wetlands. Moreover, the EA fails to give the Circular 39 type descriptions which are in fact the descriptions currently used under Minnesota wetland regulations. *See*, descriptions of wetland types in <http://www.bwsr.state.mn.us/wetlands/publications/wetland.pdf>. Therefore, it is unclear what impacts may mean under Minnesota’s wetland laws.

Wetland vegetation is especially important to identify and assess for impacts. Wetland vegetation varies widely with pH, hydrology (ground v. surface water), latitude, soils, and topography. Impacts to any one or a number of these variables, can impact the character of the wetland and the hydrology and habitat associated with it. BWSR provides information and assistance in wetland assessment, including careful identification of the various ecological details necessary to adequately assess wetland impacts.

<http://www.bwsr.state.mn.us/wetlands/mnram/index.html>. This includes information developed and published by biologists with the COE: Eggers, Steve D. and Donald M. Reed, *Wetland Plants and Plant Communities of Minnesota & Wisconsin*, U.S. Army Corps of Engineers, St. Paul District, 1997. Therefore, it is unacceptable that Enbridge fails to disclose and analyze any of these details.

4. The EA lacks specifics regarding construction and how the construction will affect particular rivers, streams, or wetlands.

There are no specifics concerning the details of construction of the pipeline other than some descriptions of the various methods of stream crossings. However, the EA fails to match the type of stream crossing that will be used with the streams and rivers that are to be crossed, making it impossible to determine what the actual environmental impacts to any given river or stream may be from a particular construction method.

There are also no specifics with respect to the season of construction. Impacts to various wetlands and water bodies, as well as to wildlife, can vary wildly depending upon the season. For example, the EA brushes off any impacts to wildlife, indicating that wildlife will simply move out of the area during the season of construction. As noted above, that is not likely a viable option for mussels at any time of the year. This may also not be a viable option if it is the breeding season for birds. The pipeline goes through an area of the state that is very high in breeding bird species richness, among the highest in the lower forty-eight states. *See* enclosed map regarding breeding bird diversity. The EA fails to both identify this fact and to give enough specifics to make a determination as to what extent breeding bird populations may be adversely impacted. As season whereby populations fail to breed or are interrupted could be very significant.

The EA discusses at various points the need for “work space” clearing and potential impacts from such workspace. It describes the workspace as largely a staging or access area for certain parts of the pipeline construction. However, there is no discussion of where these work spaces will be, what kind of habitat will be impacted, how many of them there will be, what kind of cumulative impacts there might be, or how they will contribute to forest or prairie habitat fragmentation⁶ on top of that which is already occurring with respect to the pipeline.

⁶ See detailed fragmentation discussion below. For that matter there is no discussion of habitat fragmentation impacts from the pipeline at all, despite the significant threat it represents to a variety of species.

5. The EA contains no cumulative impact analysis for any resources.

Finally, there is a complete lack of even the mention of cumulative impacts, much less an analytical discussion thereof. As noted in previous correspondence, cumulative impacts are a critical component of thorough and adequate environmental review. An important example of problems with cumulative impacts from the pipeline and related activities is that of habitat fragmentation. Habitat fragmentation is one mechanism that has been proposed to explain declines in a number of species, and has perhaps been most extensively studied in forest dwelling birds, particularly neotropical migrants (Wilcove, et al. 1986; Finch 1991; Faaborg, et al. 1993; Morrison, et al. 1992a; Sherry and Holmes 1993). Habitat fragmentation occurs when a large tract of habitat is dissected into smaller patches isolated by other habitats or vegetation types different from the original (Wilcove, et al. 1986; Morrison, et al. 1992a; Faaborg, et al. 1993). Fragmentation causes increased extinction risk and population declines as compared to habitat loss alone (Andren 1994). Wilcove (1987) identified four ways that fragmentation can cause extinction: (1) a species can be excluded from protected patches by the loss of internal heterogeneity due to invasion of edge plant species; (2) it creates isolated populations that are susceptible to catastrophes and genetic drift; (3) it interferes with ecological relationships; and (4) fragmentation creates edge environments which typically increase predation. Fragmentation and insularization (the creation of disconnected, "island" like habitat patches) are known to cause higher extinction rates than those from reductions in area size alone (Wilcove, et al. 1986). Spatial scale is important in fragmentation effects such as dispersal (Doak, et al. 1992); however, the spatial arrangement of habitat patches does not mitigate against habitat loss in fragmentation processes (Fahrig 1997). Habitat fragments are similar to islands because there is an obstacle to dispersal, whether it is an agricultural area, a road, or a utility corridor that isolates them from other similar habitats (Diamond 1975a; Wilcove, et al. 1986). Fragments are also particularly susceptible to incursions by predators, invasive alien species, and competitors. Fragments are subject to higher invasion rates by parasites, parasitoids, and disease vectors. Populations in isolated fragments have lower growth rates than those in connected areas, and are thus more prone to extinction (Fahrig and Merriam 1985).

Fragmentation not only causes a decrease in effective area size, but also affects habitat heterogeneity (Wilcove, et al. 1986). In forested areas, forest-interior bird species are dependent upon large expanses of their preferred habitat (Wilcove, et al. 1986; Morrison, et al. 1992a). Several studies have shown that birds are habitat-specific (Lynch and Whigham 1984; Wilcove, et al. 1986; Morrison, et al. 1992a) and sage grouse are particularly habitat specific, being limited to sagebrush ecosystems. When an area is fragmented, individual fragments may not have all the habitat types that were initially found in the original block. Therefore, species that require specific habitats are vulnerable to local extinction (Wilcove, et al. 1986). If a fragment lacks a required habitat for a given species, then establishment of breeding populations in that fragment cannot occur (Wilcove, et al. 1986). Local abundances of individual bird species are influenced by the structural and floristic characteristics of the vegetation and these vegetation characteristics vary with area size (Lynch and Whigham 1984; Wilcove, et al. 1986). Many species require more than one habitat type for survival and reproduction.

Another important effect that fragmentation has on birds is the creation of edge (Wilcove 1985; Wilcove, et al. 1986; Morrison, et al. 1992a). Gates and Gysel (1978) observed higher densities of nests along forest edges which may have resulted in increased predator densities or predator search efforts in edge habitats. Such effects may be magnified in the instance of a pipeline corridor traversing the entire state creating an unbroken line of edge effects for hundreds of miles. Plant and animal species associated with patch interior conditions are sensitive to early serial stages and edge habitats. Habitat fragments are susceptible to drying, wind penetration, and invasions by early successional or invasive plant species along edges and large openings (Morrison, et al. 1992a). Wind penetration into fragments would be an especially severe problem for wintering birds. Edges increase predation on avian nests because a wide variety of avian, mammalian, and reptilian predators are abundant in such areas (Wilcove 1985; Wilcove, et al. 1986; Morrison, et al. 1992a). In flat habitats such as prairies, vertical elements that fragment such habitat can result in a tripling of nest predation rates (Burger, et al. 1994). Negative effects of fragmentation may also be indirect – fragmentation is known to affect community development, vegetation dynamics, and succession (Robinson, et al. 1993), all of which can reduce habitat quality for animal consumers.

The utter lack of discussion of cumulative impacts from cumulative stream crossings, cumulative impacts to wetlands, habitat fragmentation, and ongoing impacts from the admitted permanent clearing that is going to occur along the pipeline means that the EA and associated documents are entirely inadequate and fail to comply with the basic requirement of MEPA.

B. The EA And Associated Documents Fail To Provide Any Information With Respect To The Sequencing Requirements Under Various Applicable Wetland Protection Laws.

As set forth above, under various State and Federal regulatory programs, Enbridge is required to first demonstrate that it's routing of the Alberta Clipper/Southern Lights pipelines have avoided wetland impacts wherever possible. There is no discussion of avoidance relative to the routing of the Enbridge pipeline. Rather, it appears that a significant number of wetlands will be affected. There is no information in the EA or associated documents as to whether those wetland impacts could be avoided or to what extent such avoidance was attempted. Similarly there is no discussion of the minimization of wetland impacts. At best, there is some discussion of mitigation, but mitigation is the final step in sequencing analysis and Enbridge can get there only after demonstrating that avoidance is an impossibility. There has been no such demonstration and no analysis in this document.⁷ Finally, the failure to address avoidance and

⁷ An EIS would also require examination of alternatives. Alternatives analysis is an important component of an EIS and the sequencing obligations to show avoidance and minimization fits well within such alternatives analysis. While Enbridge has provided some alternatives to the pipeline route, there is an utter lack of any comparison or any contrasting analysis to show how alternative routes may or may not avoid wetland impacts, particularly relative to the preferred or original-proposed route. In fact, Enbridge's alternative route analysis from December 2007, simply gives summary statements that the alternative route will have similar environmental

minimization simply compounds, or is compounded by, the complete lack of specificity with respect to the wetlands that will actually be impacted; it is obviously difficult to analyze and discuss avoiding wetland impacts when the wetland impacts themselves are not clearly defined. Overall, the EA and associated documents are entirely inadequate in this regard and an EIS is necessary to cure the problems.

C. The EA And Associated Documents Are Inadequate In Their Failure To Disclose And Analyze Mitigation Or Replacement Plans or Alternatives For Wetland And Stream Crossing Impacts.

The EA and associated documents fail to disclose the requirements of WCA or other state and federal wetland laws. Therefore, there is an attendant failure to discuss or analyze the wetland replacement obligations under those laws. Again, in order to adequately provide such discussions; Enbridge is required to disclose the specific wetlands that are impacted, the nature of the impact, including the impacts to vegetation, soils, wetland hydrology, and the duration of the impacts in question. Different wetland types require different assessment of wetland functions and values. In turn, the replacement plans are required to replace those functions and values. The EA and associated documents are informational and are required to discuss significant environmental impacts. Therefore, the environmental review documents must contain this information for the public and the regulating parties. The failure of the EA to specifically address the wetland impacts and the need for replacement of the same functions and values of the wetlands renders the EA inadequate under MEPA, necessitating an EIS.

To the extent that the EA and associated documents do discuss mitigation they do so in very general and sweeping terms. Further, the mitigation that is discussed is lacking in many ways. First, it must be noted that case law interpreting and implying MEPA has made very clear that a project proponent can not put off adequate and detailed environmental review of all potential significant environmental impacts by simply referring to vague promises of good intention for mitigation or later regulation. *Trout Unlimited v. Minnesota Department of Agriculture*, 528 N.W.2d 903, 908-09 (Minn. Ct. App. 1995) and *Dead Lake Association, Inc. v. Ottertail County*, 2005 WL 221773 (Minn. Ct. App. 2005) (unpublished, copy enclosed.) Therefore, Enbridge must discuss now, within the confines of environmental review, the specific environmental impacts with specific locations related to the pipeline and how those impacts may be specifically mitigated in a way that truly addresses the impacts.

For example, the EA and associated documents often refer to “allowing” re-colonization or revegetation over a short period of time and that the damaged or affected stream or wetland area will simply recover naturally. This is completely inadequate under any applicable wetland laws and is inadequate for environmental review. Areas do not readily “re-colonize” with vegetation when they have been significantly disturbed by equipment, either through compaction or alteration of hydrology. Erosion that occurs in the short term can also significantly interfere

impacts to those of the proposed route. Because the original proposed route environmental impacts are unclear and unstudied, this “analysis” in December 2007 is utterly useless.

with the ability of the area to revegetate. Rather, if Enbridge wants to argue that it will mitigate any impacts, thereby avoiding the need for an EIS, Enbridge must, as required under various wetland laws, agree to actively revegetate all disturbed areas at stream crossings or in wetlands with native plants that are appropriate to the area that was disturbed or impacted. The revegetation must also be actively managed, again as required under wetland mitigation requirements. In particular, Enbridge has an obligation to ensure that areas disturbed are not at high risk for introduction of invasive species, an environmental impact that is almost sure to occur if the area is left disturbed and then left to its own devices. Finally, on page 9-16 of Enbridge's environmental review document, Enbridge references placement of a "cover crop." It is unclear what a "cover crop" is and whether this is something that is non-native or agricultural in nature. Again the utter lack of specifics makes it impossible for the reader to guess what is meant here and whether this will exacerbate adverse environmental impacts to the disturbed area.

Finally, the EA and associated documents disclose that in some, as yet unspecified, areas, alterations to the natural conditions will be maintained by Enbridge as permanent. This will include removal of forest and shrub cover and possible other alterations in vegetative makeup. Again, the EA fails to specify exactly where this will occur and how it will specifically differ from the current vegetative makeup. Everything is discussed in the grossest generalities. However, it appears that Enbridge is proposing to keep the entire expanded right-of-way clear of anything other than the shortest vegetation in order to foster "aerial inspections". This is a permanent change to the environment that is given almost no discussion and no analysis of what that means on the landscape. An EIS is critical to the analysis of this very substantial and permanent impact on the landscape. An EIS should explore alternative methods of inspection that will avoid or at least minimize the permanent damage to the environment and landscape. This is a core principle behind environmental review: to provide and analyze specific information regarding environmental impacts of a project and alternatives to the parts of the project that will lessen those impacts in order to allow government regulators to understand their choices and make the best choices possible in the permitting process. This EA, in many respects, but in particular to the permanent vegetation impacts in the pipeline corridor, fails in that very basic regard. An EIS is necessary.

D. The EA And Associated Documents Fail To Disclose Or Analyze Adequate Information Regarding The Discharge Of Pollutants, Including Discharges To Outstanding Resource Value Waters.

1. Trout stream impacts may be significant.

The EA and associated documents make a general statement that a number of trout streams will be crossed, but fails to identify specific locations and circumstances of those crossings. This makes the EA inadequate in that the public and regulating agencies cannot discern what environmental impacts will occur to what trout streams. The EA provides that stream bottom contours will be returned as much as possible to original condition. The EA does not provide for return of trout stream habitat such as return of the substrate to gravel or cobbles

or pools behind debris.⁸ Moreover, as noted above, Enbridge plans on keeping the corridor free of trees and shrubs and other types of vegetation which in turn will negatively impact temperature of the trout stream. Trout have a very narrow temperature window for spawning and development. Brook trout need very cool water, cooler than most other trout species. They prefer temperatures between about 52° F (11° C) and 61° F (16° C), and can't live for long periods in water temperatures above about 75° F (24° C). The cooler water is needed for spawning and embryo survival. Minnesota's water quality standard provide that there can be *no* material increase in temperature in trout streams. Minn. R. 7050.0222, subpt. 2 (2007). *See also*, a summary of a study by Dr. Tom Waters and others regarding habitat indicators for health trout populations in Minnesota streams with streambank erosion and cover being one of the strongest indicators. <http://www4.ncsu.edu/~tkwak/troutpro.html>. (Copy enclosed). Therefore, the impacts to trout stream habitat will likely be long term and possibly permanent if the stream is unable to recover. These impacts must be disclosed and analyzed in detail in an EIS.

Impacts to mussel species is of similar concern. The EA lists some mussel species, with no specifics, as endangered/threatened/of special concern. (There is no specific indication in which category the listed species fall. In fact, the EA fails to even disclose whether these are federal or state-listed species.) Sedimentation and changes in bottom habitat to a not-very-mobile and filtration-feeding species like mussels could be deadly. Wiping out a colony of these species may result in permanent impacts. Should these species be listed as endangered, such an action constitutes an illegal "take" of an endangered species under both federal and state law and would be prohibited. The EA completely fails to discuss and analyze this possibility and makes no mention of how to protect against it.

2. Outstanding Resource Value Waters must not be degraded.

Trout streams are also considered Outstanding Resource Value Waters ("ORVWs"), a fact undisclosed and unaddressed in the EA or associated documents. ORVWs receive an extremely high level of protection from environmental impacts that can degrade their condition from the most pristine, a fact that the EA also fails to disclose or address. Under federal and state law, ORVWs, particularly those considered "Tier III" waters under federal law, are to receive no discharges of pollutants and are to receive the highest level of protection. Waters in this category in Minnesota include all federal and state wild river segments. 40 C.F.R. § 131.12 and Minn. R. 7050.0180 (2007). As set forth above, a number of federal and state wild river segments may be impacted by the Alberta Clipper/Southern Lights pipeline. All discharges, including those temporarily created from crossing these bodies of water are absolutely prohibited. The EA fails to disclose to what extent Enbridge expects to discharge to prohibited ORVWs. State law also designates a number of waters as restricted discharge ORVWs. For these waters, which include all trout streams⁹ and all scenic or recreational river segments, all

⁸ And again, as noted above, adequate environmental review in the form of an EIS cannot be escaped or avoided with vague promises of good intention to engage in some type of unspecific mitigation or regulation in the future.

⁹ While the rule specifically includes lake trout lakes, Minn. R. 7050.0180 (2007) also provides for the protection of ORVWs, as required by federal law, to include waters that are of high

discharges are restricted meaning that they are not allowed unless there is no feasible and prudent alternative to the discharge. Feasible and prudent alternatives are not to be rejected on the grounds of economics alone. Minn. R. 7050.0180 (2007). The EA is deficient in its failure to disclose, discuss and analyze the issue of impacts to ORVWs and the restrictions on discharges thereto.

The EA also fails to adequately assess discharges of pollutants to non-ORVW waterbodies. The EA indicates that some waterbodies that will be impacted are listed by the Minnesota Pollution Control Agency (“MPCA”) as impaired.¹⁰ The EA fails to indicate to what extent work in crossing those water bodies will contribute to the impairments. For example, one of the waters is listed as impaired for biotic integrity, meaning that the MPCA has determined the stream fails to contain an adequate number and/or diversity of species. To the extent that the pipeline crossing will add sediment, change the stream bottom, change habitat through permanent vegetative changes or otherwise alter the stream environment, it may contribute to the ongoing impairment. New contribution of pollutants to an already impaired condition are strictly prohibited under CWA regulations, 40 C.F.C. § 122.4(i)¹¹.

Further, while Enbridge discloses the existence of some impaired waters, the EA fails to disclose the status of other waters relative to water quality standards. The fact that a body of water is not on the impaired waters list is not conclusive of its condition as the MPCA has not assessed many waters in the state. MPCA has completed assessment of only a small percentage of rivers and streams. In order to fully understand the potential water quality impacts of Enbridge stream crossings, Enbridge must, at a minimum, disclose and discuss whether the river or stream has been assessed, either partially or fully, what is known from that assessment, and to what extent the pipeline work will affect the river and stream condition. The complete lack of attention to specifics in this EA renders it inadequate in this regard.

CONCLUSION

To summarize, MCEA is concerned that the environmental review of the Alberta Clipper/Southern Lights project is so grossly deficient in terms of detailed disclosure and

quality or unique ecological significance or that warrant a high degree of protection. The state has therefore included trout streams under this definition.

¹⁰ Impaired waters are defined as waters that are failing to meet applicable water quality standards in one or more ways and that therefore fail to support their designated uses. The Clean Water Act requires that states assess their waters to determine whether they are meeting water quality standards and to report the results of that assessment to the U.S. Environmental Protection Agency every two years. The list of waters that are impaired is often referred to as the “303(d) List”. 33 U.S.C. § 1313(d).

¹¹ It does not appear from the application or other documents relevant to Enbridge’s potential environmental impacts, that Enbridge is seeking a National Pollutant Discharge Elimination System permit (“NPDES”) from the MPCA. It must be noted that discharge of pollutants from a point source, which in this instance could include work in streams or wetlands, is illegal without an NPDES permit. 33 U.S.C. § 1342.

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analysis as to impair the ability of the public and agency decision-makers to fully understand the impacts of the project and to make good decisions regarding its permitting and regulation. MCEA strongly urges preparation of an EIS that fully analyzes the potential significant impacts from this large pipeline project for the reasons stated herein and in MCEA's previous comments. Thank you for the comment opportunity.

Sincerely,

/s/: Janette K. Brimmer

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Legal Director

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