May 17, 2019

Department of Natural Resources
Attn: Line 3 Pipeline Replacement Applications
500 Lafayette Road
St. Paul, MN 55155

To the Minnesota Department of Natural Resources:

Please find below the comments of Honor the Earth, Friends of the Headwaters, and The Sierra Club (“Joint Commenters”) on the various permits the Minnesota Department of Natural Resources (“DNR”) is reviewing for the Line 3 Replacement Project, a 340-mile, 36-inch-diameter pipeline in northern Minnesota (“Project”) proposed by Enbridge Energy, Limited Partnership (“Enbridge”). Enbridge submitted a number of state land and water related permits to the DNR, including:

• License to Cross Public Lands;
• License to Cross Public Waters;
• Public Waters Work Permit;
• Public Waters Work Permit – Willow River Permit Application;
• A number of water appropriation permits;
• Phase 1 Application for an Endangered or Threaten Species Take Permit;
• Gully 30 Calcareous Fen Management Plan;
• Leases for Short-Term uses of Forestry and Non-Forestry Roads; and
• A Lease for Long-term Use of Non-Forestry Roads.

(together, “Applications”). The Joint Commenters have members who live, work, and recreate in the area potentially affected by this project. In addition, Honor the Earth represents individual with treaty-protected rights to natural resources throughout treaty areas. We appreciate this opportunity to participate in these important decisions.

We have had the opportunity to review the application materials as well as the DNR webinars and other materials posted on the DNR Line 3 webpage. In our view, the record so far does not provide the DNR with an adequate basis for granting the requested permits.

As an initial observation, these permits trigger environmental review under the Minnesota Environmental Policy Act, Minn. Stat. Ch. 116D; Minn. R. Ch. 4410 (“MEPA”), but as
described below, the Environmental Impact Statement (“EIS”) prepared by the Minnesota Public Utilities Commission (“PUC”) and Minnesota Department of Commerce (“DOC”) for the Project deferred the sites-specific environmental review necessary for all of the foregoing permits and licenses until their review by the DNR. As a result, the Project EIS does not include the site-specific environmental impact and alternatives analyses that must be prepared by the DNR before it makes any permitting or licensing decisions.

INFORMATION REQUEST

The Joint Commenters are also concerned because it appears that the DNR has conducted extensive discussions with Enbridge related to the contents and scope of the various applications filed by Enbridge, as well as site-specific discussions of impacts and alternatives, but the DNR has failed to provide any of the information exchanged between Enbridge and the DNR to the public for its comment period. While the Joint Commenters understands that the DNR is not legally obligated to conduct a comment period and appreciates the DNR’s efforts to allow public participation, this does not mean that a failure to allow public participation for this unusual project would be just or fair. Since the DNR has elected to provide a comment period, it should strive to make the comment period meaningful and fair. Withholding all information about the years of discussions between the DNR and Enbridge indisputably puts citizens at a disadvantage, as they do not have access to information, data, and/or decisions, preliminary or otherwise, already in the DNR’s files, which information Enbridge chose not to disclose in its Applications.

The Applications submitted by Enbridge reference a number of documents that are claimed by it to be part of its applications, but a review of the information provided by Enbridge in its Applications and by the DNR on its Line 3 webpage indicates that these documents are not publicly available for use during the public comment period. The documents not provided on the Line 3 webpage are listed in the table, below, but we anticipate that there are likely more documents that Enbridge did not reference.

<table>
<thead>
<tr>
<th>Permit</th>
<th>Material Omitted</th>
<th>Reference</th>
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<tbody>
<tr>
<td>License to Cross Public Waters</td>
<td>MDNR Application Form for a License to Cross Public Waters, as completed by Enbridge</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, page 1</td>
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<td>Written correspondence between Enbridge and MDNR regarding the contents of the Application</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, page 1</td>
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<tr>
<td>Enbridge Report to MDNR re surveys for mussels, 2014, and Email from Lisa Joyal (MDNR) to Sarah Stai (Merjent, Inc.) dated May 21, 2015</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, page 41</td>
<td></td>
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<tr>
<td>Rogen Report</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, Attachment A, reference in “Comments” column of table</td>
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<tr>
<td>3/19/15 letter from Enbridge to MDNR</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, Attachment A, rows 3, 10, 18, 41 “Comments” column</td>
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<tr>
<td>9/27/14 letter from Enbridge to MDNR</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, Attachment A, rows 19, “Comments” column</td>
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<tr>
<td>6/12/17 Arndt-Ploetz email concurrence</td>
<td>Enbridge Application for a License to Cross Public Waters, November 2018, Revision 1, Attachment A, row 23, 25, 26 “Comments” column</td>
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<tr>
<td>Application for a License to Cross Public Lands</td>
<td>MDNR’s Application Form for a License to Cross Public Land, as completed by Enbridge</td>
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<tr>
<td><strong>Lease for Long-Term Use of Non-Forestry Roads</strong></td>
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<td></td>
<td>2013-2017 Environmental and Cultural Surveys on MDNR-Administered Lands Report submitted to the MDNR on April 30, 2018</td>
<td>Enbridge Application for a Lease for Long-Term Use of Non-Forestry Roads, September 2018 (REV 3) Section 1.0, page 5</td>
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<tr>
<td><strong>Application for Water Appropriation For Pipeline and Tank Testing March 2019</strong></td>
<td>Online application form titled “L3R SW HDD/Hydrostatic Testing” through the Minnesota Department of Natural Resources (“MDNR”) Permitting and Reporting System (“MPARS”)</td>
<td>Supplemental Information for an Individual Permit Application for Water Appropriation For Pipeline and Tank Testing March 2019, Section 1.0, page 1</td>
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<tr>
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<td></td>
<td>Written correspondence between Enbridge and the MDNR regarding the content of this application, specifically in response to MDNR comments on this application provided November 21, 2018, January 18, 2019, March 6, 2019, and a meeting with the MDNR on February 7, 2019</td>
<td>Supplemental Information for an Individual Permit Application for Water Appropriation For Pipeline and Tank Testing March 2019, Section 1.0, page 1</td>
</tr>
<tr>
<td>Phase I Application for an Endangered or Threatened Species Take Permit</td>
<td>Written correspondence between Enbridge and MDNR regarding the content of this Application</td>
<td>Phase I Application for an Endangered or Threatened Species Take Permit, January 2019, at page 1</td>
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<td></td>
<td>NHIS Review and Avoidance Plan</td>
<td>Phase I Application for an Endangered or Threatened Species Take Permit, January 2019, at page 21</td>
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Many of the foregoing documents are necessary to understand the scope and contents of the applications submitted by Enbridge, and likely contain substantial information bearing on the merits of the various applications, including the impacts of and alternatives to the proposed agency actions. Accordingly, the Joint Commenters requests that the DNR:

- provide copies of these documents, as well as all other correspondence and data exchanged between Enbridge and the DNR, on the DNR’s Line 3 website; and
- extend the comment period by two weeks from the posting of this additional information to allow the Joint Commenters and the public to use this information in the formulation of their comments.

Although we have extensively reviewed Enbridge’s application materials and watched the DNR’s webinars, it is possible that one or more of the foregoing documents have been provided by the DNR, in which case we would appreciate being directed to their locations.

As the DNR is no doubt aware, Enbridge has announced that it does not intend to start construction until after completion of the federal wetlands permitting process under 33 U.S.C. § 1344, which process cannot be finalized until after completion of the Minnesota water quality certification application, currently under review by the Minnesota Pollution Control Agency (MPCA), which process is not scheduled to be completed until October 28, 2019, over five months from now. Accordingly, we do not anticipate that a modest schedule extension by the DNR will impact the overall state permitting process for Line 3 or prejudice Enbridge.
APPLICABLE LAW

Minnesota Rules Chapter 6135 and particularly Rules 6135.1000 and 6135.1100 contain the standards against which the DNR must evaluate applications for water and land crossing licenses. In particular, Minn. R. 6135.1000, subp. 1 requires the DNR “to provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings.” To accomplish this policy directive, Minn. R. 6135.1000, subpd. 2 states that an applicant for a water or land crossing license must provide sufficient information to allow the DNR to determine if the applicant intends to comply with the route design standards contained in Minn. R. 6135.1100. To the extent an applicant does not intend to comply with these standards, it must specify how and where it proposes to not comply and provide information showing that compliance is not feasible and prudent or in the best interests of the environment.

The key word in Min. R. 6135.1100 is “avoid.” These water and land crossing standards require that applicants avoid the following resources and impacts:

- steep slopes;
- scenic intrusions into stream valleys and open exposures of water;
- the creation of tunnel vistas;
- wetlands;
- highly erodible soils;
- plastic soils subject to extensive slippage;
- areas with high water tables;
- streams;
- lakes;
- trout waters;
- special use areas under Minn. Stat. § 84.033;
- scientific and natural areas;
- units of the Minnesota Wild and Scenic River System designated under Minn. Stat. § 103F.325; and
- all areas subject to special regulation for recreational, scenic, natural, scientific, or environmental purposes.”

In addition to the foregoing avoidance standards, Minn. R. 6135.1100 includes a number of mitigation standards, such as crossing streams at their narrowest point and following existing utility corridors. Therefore, where an applicant proposes a major utility project that would cross a large number of DNR jurisdictional waters and lands it must:

a) identify each specific crossing for which it does not intend to comply with the Minn. R. 6135.1100 standards, whether by a failure to avoid or other standard;
b) describe for each crossing how it does not intend to comply the applicable standard(s);

c) explain for each crossing why compliance with Minn. R. 6135.1100 “is not feasible and prudent, or not in the best interests of the environment . . . ;” and
d) describe for each crossing its proposed efforts “to minimize any adverse effects which may result from utility crossings.”

Absent such site-specific information, it is not possible for the DNR to independently determine whether or not an applicant will comply with the policy objectives and standards in Minn. R. Ch. 6135.

In addition, Minn. R. 6135.1600 makes clear that the DNR must apply the stricter standards contained in the Minnesota Environmental Policy Act, Minn. Stat. Ch. 116D (“MEPA”), and its implementing regulations, Minn. R. Ch. 4410, to its route crossing decisions. This means that the DNR must evaluate the impacts of the Project at each water and land crossing as well as alternatives to each water and land crossing, including route alternatives and the no-action alternative.

MEPA requires that all Minnesota agencies prepare either an environmental assessment worksheet (“EAW”) or and EIS for agency actions that have the potential to result in significant environmental effects, unless such action is exempted under Minn. R. 4410.4600. The MEPA exemptions include five standard exemptions, subp. 2, and 24 project-specific exemptions, subp. 3-27. The only standard exemption that might be applicable here is the fifth, which exempts “projects for which environmental review has already been completed or for which environmental review is being conducted pursuant to part 4410.3600 or 4410.3700.” None of the project-specific exemptions apply to the Applications.

As are all state agencies, the DNR is subject to the “general duty” clause in MEPA:

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. What that section means is that, even if an applicant for a project like a crude oil pipeline meets each of the technical requirements for a particular permit
under Minnesota rules, no agency can lawfully grant that permit without adequate assurance that the project will not likely cause pollution, impairment, or destruction of Minnesota’s air, water, land or other natural resources.

I. COMPLIANCE WITH CROSSING STATUTE AND REGULATIONS

Enbridge’s Application for a License to Cross Public Waters (“Water Crossing Application”) and its Application for a License to Cross Public Lands (“Land Crossing Application”) fail to provide the DNR with the information needed to make the findings required of it by Minn. R. 6135.1000. They discuss water and land crossings almost entirely in general terms but fail to provide the DNR with the details needed to make judgments that Enbridge’s proposed crossings “provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings.” Enbridge generally claims it has “sought to minimize or avoid impacts on relevant features when possible through its iterative pipeline routing process; however, it is not feasible to adhere to all routing standards on a project of this scope and size, given northern Minnesota’s topography and environment (e.g., avoiding wetlands).” Water Crossing Application at 22; Land Crossing Application at 21. It then states in both Applications identically:

Enbridge has proposed its construction alignment and workspace based on a detailed review of landowner and environmental constraints, the results of survey data, feedback received from regulatory agencies such as the MDNR, detailed engineering design, and BMPs. Enbridge has considered lessons learned from past pipeline projects, including those experiences shared by the MDNR, to plan for pipeline construction methods that emphasize resource protection through impact avoidance where possible and impact minimization.

Id. However, Enbridge provides no detail with regard to how its “review” and “lessons learned” were applied to particular proposed water or land crossings, ether with regard to avoidance or mitigation via best management practices (“BMPs”).

The only compilation of crossing-specific data in the Water Crossing Application is in Attachment A, which provides the following information:

- each crossing’s location and type of water crossed (PWI Type with some additional descriptions in the Comments column);
- each crossing’s length and width;
- the crossing method, an alternative method, proposed for each crossing; and
- a reference to either an “SSP” (Site Specific Plan), and “HDD Plan” (Horizontal Directional Drill Plan), or an “ECP” (Environmental Crossing Plan), which are contained in Attachment B.
The SSPs, HDD Plans, and ECPs are drawings of crossings showing Enbridge’s proposed crossing route. None of these water crossing “plans” include any discussion of applicable Minn. R. Ch. 6135 standards, explanations for failing to comply with these standards, identification of route alternatives, discussions of route selection, or discussions of efforts to minimize adverse impacts via use of BMPs or other methods.

The crossing specific information in the Land Crossing Application is contained in its Attachment A, which is similar in scope to the Water Crossing Application’s Attachment A, and which similarly references a set of maps as its crossing “plans”. None of these land crossing “plans” include any discussion of applicable Minn. R. Ch. 6135 standards, explanations for failing to comply with these standards, identification of route alternatives, discussions of route selection, or discussions of efforts to minimize adverse impacts via use of BMPs or other methods. In addition, the Land Crossing Application includes information in Section 8.13 related to state hiking trails, hunting and hunting trails, grant-in-aid trails, mineral resources, state forests, forestry crossings of the pipeline for future logging activities, aquatic management areas, sensitive species, archeological resources, and visual impacts. Enbridge provides summary site-specific information related to hiking and grant-in-aid trails, mineral resources. However, it provides no site-specific impact information for state forest lands, aquatic management areas, or sensitive species, nor does it discuss alternatives or mitigation related to these particular resources. Since the State Forest crossings total 33.2 miles of the requested total 36.3 miles of land crossing license (91.5 percent of the total land crossings requested), it is clear that Enbridge has failed to provide site-specific impact or alternatives analyses for the vast majority of the requested DNR land crossings.

Rather than provide site-specific analyses, Enbridge has prepared a number of general plans for various construction-related activities, but has not provided any discussion of how these general plans will “provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result” at each crossing. Enbridge’s approach to its Applications is generally to assert that it intends to do the best job it can to minimize impacts without discussing the situation at each crossing. In particularly, it does not discuss alternatives to the crossing method selected at each crossing, route alternatives considered at each crossing, potential environmental impacts at each crossing, or mitigation measures, such as applicable BMPs, to minimize impacts at each crossing. Further, Enbridge does not provide any site-specific discussions of its route selection process or why it “is not feasible or prudent or in the best interests of the environment” to avoid any crossing.

Absent such site-specific information, the DNR does not have sufficient information to justify Enbridge’s proposed non-compliance with the standards in Minn. R. 6135.1100. Based on the Applications, the DNR cannot determine if Enbridge will “provide maximum protection and preservation of the natural environment and to minimize any adverse effects which may result from utility crossings.” Instead, the DNR would need to blindly accept Enbridge’s best
intentions and unexplained site-specific judgments as to the maximum protection and preservation possible and minimization of adverse effects.

For example, Water Crossing Application Attachment A identifies four very long open cut crossings through wetlands:

<table>
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<tr>
<th>MDNR ID No.</th>
<th>Proposed Crossing Method</th>
<th>Crossing Length (feet)</th>
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<tr>
<td>32</td>
<td>Open Cut</td>
<td>1,028</td>
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<tr>
<td>42</td>
<td>Open Cut</td>
<td>448</td>
</tr>
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<td>46</td>
<td>Open Cut</td>
<td>705</td>
</tr>
<tr>
<td>51</td>
<td>Open Cut</td>
<td>535</td>
</tr>
</tbody>
</table>

The Application does not explain the potential benefits and costs of using horizontal directional drilling (“HDD”) instead at these locations, or why it is neither feasible nor prudent to use HDD at these locations. Further, the Application does not discuss routing alternatives that might cross at narrower locations, and thereby reduce impacts. It also does not discuss particular BMPs applicable to these crossings or methods to minimize impacts at each of these long crossings. Enbridge has simply chosen its preferred and alternative crossing methodologies, generally described the types of BMPs and environmental protection measures that might be applicable at these locations, and presumed its site specific routing will minimize impacts more than route or non-route alternatives.

Because it lacks site specificity, Enbridge’s generic approach to permit compliance is not in accordance with the requirements of Minn. R. Ch. 6135. The law requires site-specific analyses for each of the crossings, and separate findings that justify waiver of the crossing standards contained in Minn. R. 6135.1100. As such, the DNR should reject the Water Crossing Application and the Land Crossing Application because Enbridge has failed to carry its burden to provide the DNR with the information needed to make the findings required by law.

II. COMPLIANCE WITH MEPA

The DNR’s actions on the Applications are subject to MEPA, it participated in the development of the EIS as a cooperating agency, and is obligated to evaluate the Applications in light of the environmental analyses required by MEPA for its particular agency actions. The DNR must evaluate Enbridge’s proposed water and land crossings in light of an adequate MEPA impacts and alternative analyses. Further, Minn. R. 6135.1600 makes clear that the DNR must apply the stricter MEPA standards, to its route crossing decisions, such that the DNR must evaluate the impacts of the Project at each water and land crossing as well as alternatives to each water and land crossing, including route alternatives and the no-action alternative.

The EIS record clearly fails to contain any meaningful site-specific analyses for the state lands at issue here. Providing a map of a crossing does not identify impacts or alternatives to that crossing, as required by MEPA. Providing the length and width of crossings and the total
numbers of acres impacted is not by itself an analysis of environmental impacts. Identifying generic types of impacts at water and land crossings and summarizing the impacts of dozens of distinct crossings also does not identify impacts to the degree required by MEPA. Further, as described below in our State Forest comments, the EIS did not include site-specific information for the land and water crossings because it deferred site-specific environmental review of the DNR’s land and water permits and licenses until submission of applications for them. The EIS in effect anticipated that the DNR would need to supplement the EIS for its permitting processes.

To the extent that the EIS fails to contain adequate site-specific impacts and alternatives analyses, the DNR must nonetheless comply with MEPA by requiring Enbridge to provide this information as part of its water crossing applications and by supplementing the EIS. Such supplementation is also necessary given that not all of the crossings at issue were identified at the time that the EIS was drafted and found adequate by the PUC, due to the substantial route change through the Fond du Lac Reservation contained in the PUC’s final orders. The DNR cannot on the one hand agree, as a cooperating agency, to not have the EIS include the site-specific environmental and alternatives analyses needed to inform the DNR of the environmental effects and alternatives to its particular permitting and licensing activities, and now claim that the EIS is adequate for its agency actions.

With regard to identifying site-specific crossing alternatives in accordance with MEPA, the DNR may consider possible minor re-routes in its MEPA and licensing alternatives analysis, because:

a) the designated route approved by the PUC in its Route Permit, Section 3, page 10, is generally 750 feet wide with expanded widths in some locations not to exceed 1,300 feet, which is substantially wider than the 50 foot permanent right-of-way and 120 foot construction right-of-way, specifically to give Enbridge “flexibility for minor adjustments of the alignment or right-of-way”; and

b) the Route Permit, Section 3.5, page 11, allows Enbridge to apply for route variations that arise from “state agency requirements.”

That the DNR has the authority to analyze and order adoption of site-specific alternatives is demonstrated by Enbridge’s April 25, 2019, route modification requests numbers 1 through 17 (filed in PUC Docket No. 15-137), which requested seventeen route variations pursuant to Route Permit Section 3.5 for a variety of purposes, including changing the crossing of the Tamarac River to avoid a cultural site, accessing water for hydrotesting, avoiding a landowner without a voluntary easement, installation of cathodic protection equipment, reduce impacts to wetlands protected by U.S. Fish & Wildlife Service conservation easements, among other reasons.

Enbridge’s route modification requests also include site-specific environmental impact analyses and comparison of the existing and proposed route modifications, thereby demonstrating that Enbridge is fully capable of providing the site-specific impact and alternative analyses required for the DNR to comply with MEPA.
Moreover, Minn. Stat. § 216G.02, subd. 4, does not supersede DNR authority over routing. This section states that a routing permit “supersedes and preempts all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local, and special purpose governments.” This list does not include state agencies. Therefore, the DNR retains independent authority to determine the location of land and water crossings for utilities. Therefore, the DNR must independently evaluate whether there are feasible and prudent alternatives to the pipeline route Enbridge has proposed. If there is a less damaging environmental alternative for any particular crossing, and this route falls outside of the “designated route” as defined in the Route Permit, then the DNR must deny the application for such crossing and Enbridge must seek a route variation pursuant to the route permit.

The DNR should also be aware that the adequacy of the Line 3 EIS has been challenged in court by a number of entities, including the Mille Lacs Band of Ojibwe, the Red Lake Band of Chippewa Indians, the White Earth Band of Ojibwe, Honor the Earth, and Friends of the Headwaters. Minnesota Court of Appeals Nos. A18-1283, A18-1291, A18-1292 (consolidated). Should the Minnesota courts find that the Line 3 EIS is inadequate, the DNR would need to reevaluate the water crossing alternatives in light of a supplemented EIS, including consideration of the no-action alternative. A decision is due for this action by June 18, 2019.

III. INSUFFICIENT INFORMATION ABOUT IMPACTS TO STATE FORESTS

The Land Crossing Application’s discussion about impacts to the 33.2 miles of State Forests right-of-ways and adjacent lands that would be adversely affected by the Project is wholly inadequate. The maps provided by Enbridge do not show the overall route through each State Forest, or provide any forest-specific analysis. Based on the information in the Applications, it is not possible to assess the impact of the pipeline on forest health, invasive species pathways, increased access for motorized vehicles, habitat segmentation, potential impacts on endangered and threatened species, erosion, steep slopes, highly erodible or plastic soils, and the cumulative potential effects of the Project on each forest in light of past and planned future management activities. Nothing in the Land Crossing Application even touches on these matters as they relate to the State Forests.

The EIS likewise fails to include site-specific information for State Forests. With regard to impacts to State Forests, EIS Chapter 5 at page 5-264 states:

Construction would also occur on land within eight state forests, resulting in the loss and alteration of forest habitat as well as forest fragmentation. Because the recovery of forested areas in the temporary construction work area (i.e., the disturbed areas outside of the permanent right-of-way) would take decades, the impact would be long-term to permanent but minor to major, based on the relatively small area affected compared to the nearby forested areas and habitat fragmentation.
This appears to be the full narrative discussion in the EIS of the impacts of the Project on the State Forests. It acknowledges that recovery from impacts would take decades and the impacts would range from “minor to major.” Such statement provides no meaningful description of Project impacts to the State Forests. In addition, EIS Table 5.2.4-8 (page 5-265) shows the total number of acres that would be impacted in each State Forest, but does not provide any site-specific information resulting from the Project. This acreage information is repeated on page 5-419, in Table 5.3.2-1 (page 5-503), and in multiple other locations in the EIS. These pages include no site-specific impact or alternatives analyses.

With regard to specific impacts to State Forests, EIS Chapter 5, pages 5-419-420, state: “Compatibility of the Project with designated uses would be determined during easement negotiations with the authorizing agency.” Thus, the EIS anticipates that the present crossing applications will determine the “compatibility” (which should be understood to mean impacts) of the Project on State Forest lands.

EIS Chapter 6 at page 6-23 has this to say about impacts to State Forests:

The Applicant’s preferred route crosses approximately 41 miles of public/municipal land in Cass, Crow Wing, and Aitkin counties. Most of this land is state forest land administered by Minnesota Department of Natural Resources (Minnesota DNR). Construction in public or municipal land would disrupt uses in this zone. The impact would be minor to major and temporary to permanent depending on the specific land type and ownership. Goals and impacts would vary across the different public land types and these are discussed further in Section 6.3.6.

Again, this statement says nothing meaningful, because impacts would range from “minor to major” and “temporary to permanent,” which logically encompasses all types of impacts. This section then states that EIS Section 6.3.6 would discuss Project impacts. Similarly, EIS page 6-26 states:

The majority of land zoned for public/municipal use crossed by the Applicant’s preferred route is state forest land, as described above. This land does not fall under local planning and zoning authority, as it is controlled by Minnesota State. The loss of forest from clearing trees would be a major permanent impact within the permanent right-of-way, which would be maintained free of trees and woody vegetation. For purposes of local government planning and zoning, the land would remain public; however, goals and impacts would vary across the different public land types, and these are discussed further in Section 6.3.6. Other public uses may be permitted to resume after construction is complete.
Again, this section states that Section 3.6.3 discusses project impacts.

Turning to Section 3.6.3, there is no impact discuss in this section. Instead, EIS Section 6.3.6.2 (EIS at 6-586) states:

State lands are lands that are held under state management. State lands that would be crossed by the Applicant’s preferred route and route alternatives include state WMAs, AMAs, and state forests. These lands are administered by each state’s respective DNR. Compatibility of the Project with designated uses varies by authorizing agencies; therefore, a general discussion of the responsible agency based on land ownership and any associated regulatory provisions is provided.

A similar statement is provided in EIS Section 6.3.6.2.1, which once again provides the acreage of impacts to State Forests, but then states: “Compatibility of the Project with designated uses would be determined during easement negotiations with the authorizing agency, which is Minnesota DNR.” Thus, the EIS fails to contain any substantial discussion of the Project’s site-specific impacts or alternatives and instead vaguely defers to the DNR’s licensing process for a full assessment of “compatibility” with designated uses. Joint Commenters assert that it is not possible to assess the compatibility of a Project to designated uses without understanding the impacts of the Project on such uses.

All we know from the EIS regarding impacts to State Forests is that they would occur, which State Forests are impacted, and how many acres would be impacted – and that’s it. The complete lack of site-specific impact and alternatives analysis applicable to the DNR’s actions, in combination with the EIS’s deferral to future DNR permitting and licensing actions, means that the EIS simply does not assess the impacts of the Project on State Forests (or other DNR administered resources). The EIS essentially punts the site-specific review for public lands to the DNR’s land and water license and permit processes, but now neither the DNR nor Enbridge have provided any site-specific environmental analyses for the State Forests. The lack of detailed information in the Land Crossing Application or on the DNR Line 3 website, much less the EIS, related to State Forest impacts means that it is impossible for citizens to know or understand what the impacts to each particular State Forests will be. This also means that neither the Land Crossing Application nor the EIS contain information needed by the DNR to ensure that approval of the Project licenses are in compliance with Minn. Stat. Chapter 89 and its related forest management regulations. Further, this lack of information means that the DNR has complied with MEPA with regard to impact assessments for its 33.2 miles of impacts to State Forests, which crossings together likely comprise one of the largest set of crossing applications ever considered by the DNR.

The EIS approved by the PUC does not provide the information required by MEPA for the DNR licensing decisions. Therefore, the DNR must prepare a supplemental EIS for its
licensing and permitting processes that assesses the site-specific impacts of and alternatives to Enbridge’s proposed crossings and other activities, including impacts to all activities and values recognized by Minn. Stat. Chapter 89 and state wildlife and natural resource laws. Further, Enbridge’s Land Crossing Application must be supplemented to provide site-specific impact and alternatives information. As stands, it appears that the DNR has completely abdicated its statutory responsibility to assess the impacts of the Project on State Forests and provide the public with this information. A failure by the DNR to rectify this situation would mean that any approval of the Applications by it would be in violation of law and arbitrary and capricious.

The DNR must also assess the impacts of the forest and public land right-of-ways on Minnesota’s Ojibwe Tribes and individuals, which have a treaty-created property right to the natural resources contained within the proposed State Forest right-of-ways, which right precedes the establishment of the State of Minnesota. These rights are secured to the Ojibwe people by a number of treaties, which expressly provide off-reservation usufructuary rights to them. Accordingly, the DNR should assess the impact of the Project on these usufructuary rights contained in the State Forest and other public lands, including impacts to plants, animals, and other resources used by the Ojibwe. The incremental destruction of these treaty-protected resources has impoverished and harmed the wellbeing of the Ojibwe people. Since the Ojibwe have a property right interest in these state-managed resources, the DNR may not disregard these property rights.

IV. INSUFFICIENT INFORMATION ABOUT IMPACTS TO ENDANGERED AND THREATENED SPECIES

Enbridge’s Phase I Application for an Endangered or Threaten Species Take Permit (“Take Permit”) is overly narrow and limited to just the direct takings of species by the Project. As a result, it considers impacts to just nine plant species and completely disregards potential takings resulting from ancillary activities and possible oil spills. The DNR must evaluate the possible adverse impacts on all protected species potentially impacted by construction or operation of the Project, including oil spills and carbon dioxide emissions resulting from such operations.

The DNR completely ignores the climate change impact of the Project on future takings of threatened and endangered species, which are predicted to be severe, particularly as a result of habitat conversion due to changes in Minnesota’s climate. Through its greenhouse gas emissions, the Project threatens the future viability of many more species than just the nine listed, and could result in the listing of many more species of plants and animals.

Evidence of the ongoing global extinction of species as well as the extinctions that will be caused by climate change should be known to the DNR, but many studies are available online, including a recent assessment by the United Nations (“UN”).¹ The UN found that “An average of

around 25 per cent of species in assessed animal and plant groups are threatened (figure SPM.3), suggesting that around 1 million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss.” Among the drivers of species lost is climate change. According to the UN:

**Climate change is a direct driver that is increasingly exacerbating the impact of other drivers on nature and human well-being.** Humans are estimated to have caused an observed warming of approximately 1.0°C by 2017 relative to pre-industrial levels, with average temperatures over the past 30 years rising by 0.2°C per decade. The frequency and intensity of extreme weather events, and the fires, floods and droughts that they can bring, have increased in the past 50 years, while the global average sea level has risen by 16 to 21 cm since 1900, and at a rate of more than 3mm per year over the past two decades. These changes have contributed to widespread impacts in many aspects of biodiversity, including species distributions, phenology, population dynamics, community structure and ecosystem function. According to observational evidence, the effects are accelerating in marine, terrestrial and freshwater ecosystems and are already impacting agriculture, aquaculture, fisheries and nature’s contributions to people. Compounding effects of drivers such as climate change, land/sea-use change, overexploitation of resources, pollution and invasive alien species are likely to exacerbate negative impacts on nature, as has been seen in different ecosystems such as coral reefs, the arctic systems and savannas.

* * *

Climate change is projected to become increasingly important as a direct driver of changes in nature and its contributions to people in the next decades. Scenarios show that meeting the Sustainable Development Goals and the 2050 Vision for Biodiversity depends on taking into account climate change impacts in the definition of future goals and objectives. The future impacts of climate change are projected to become more pronounced in the next decades, with variable relative effects depending on scenario and geographic region. Scenarios project mostly adverse climate change effects on biodiversity and ecosystem functioning, which worsen, in some cases exponentially, with incremental global warming. Even for global warming of 1.5°C to 2°C, the majority of terrestrial species ranges are projected to shrink profoundly. Changes in ranges can adversely affect the capacity of terrestrial protected areas to conserve species, greatly increase local species turnover and substantially increase the risk of global extinctions. For example, a synthesis of many studies estimates that the fraction of species at risk of climate-related extinction is 5 per cent at 2°C warming, rising to 16 per cent at 4.3°C warming. Coral reefs are particularly
vulnerable to climate change and are projected to decline to 10-30 per cent of former cover at 1.5°C warming and to less than 1 per cent at 2°C warming. Therefore, scenarios show that limiting global warming to well below 2°C plays a critical role in reducing adverse impacts on nature and its contributions to people.

If the DNR does not address the risks that the Project and climate change poses to the preservation of Minnesota’s diverse plant and animal species, it will ignore critical threats to and future takings of threatened and endangered species resulting from the Project. Ignoring the climate change impacts of the Project creates a risk that the DNR will be overwhelmed during the foreseeable future with a wave of species extinctions that will substantially reduce Minnesota’s natural resources and result in the DNR’s utter failure to achieve the goals of Minn. Stat. § 84.0895 and Minn. R. 6212.

Therefore, the DNR should reject the Take Permit for failing to seek authorization for all takes, including indirect and long-term foreseeable takings resulting from oil spills and greenhouse gas emissions.

V. LICENSE CONDITIONS

A. Deactivation and Subsequent Remediation

The DNR should require that Enbridge provide financial assurance for the costs of remediation of the proposed Line 3, should it be approved. Further, the DNR should include a permit condition specifying that it may order the owner of the new Line 3 to remove it entirely once it is deactivated. While the DNR may at the time of deactivation decide to allow segments of new Line 3 to remain in the ground, the DNR should make clear that allowing the pipeline to remain in the ground is not its preferred mitigation alternative, and it should retain the right to order removal of the pipeline from all parts of the proposed right of ways.

The DNR has a duty to Minnesota taxpayers to avoid having taxpayer funding be used to pay for the costs of remediation following deactivation. While the PUC has provided for a parental guarantee for the costs of remediation following deactivation and provided for a landowner choice program related to such remediation, these PUC permit conditions are not by themselves sufficient to protect DNR-administered resources. Therefore, the DNR should require financial assurance in the form of a bond or other funding for remediation of DNR administered lands and waters sufficient to pay for the costs of full removal of the proposed Line 3 pipeline, to ensure that adequate funding exists at the time of deactivation.

The DNR should also separately require a parental guaranty expressly to the DNR, so as to remove any ambiguity about the applicability of the PUC-approval parental guaranty to DNR claims, and so that possible future changes by the PUC to its parental guaranty are not made over the DNR’s objection or express approval.
Financial assurance is necessary because the long-term financial well-being of the oil industry is uncertain, given the future effects of climate change policy and the development of technology that will dramatically reduce dependency on crude oil over the life of the Project. As a result, it is likely that the oil industry will face many of the same financial challenges and bankruptcies that are currently plaguing the coal industry. The DNR should not assume that because Enbridge currently has sufficient financial resources to remediate deactivated pipelines, that it will continue to have such resources in 2051 or 30 years, which is the assumed life of the Project.

The PUC and the Canadian National Energy Board both acknowledge the risk of insufficient remediation funding and so have established requirements for secured funds. The DNR must also independently require such funding to ensure that DNR interests are redressed. Although the DNR may participate in the Decommissioning Trust Fund established by the PUC, the DNR should nonetheless independently require such trust fund, ensure that the fund is adequate for state land remediation needs, and confirm that the terms of such fund’s establishing documents grant the DNR the right to access funds in it.

The need for such financial assurance is particularly important given the substantial liability created by remediation for a 36-inch diameter crude oil pipeline in comparison to the paltry fees required by Minn. R. 6135.0400 through 6135.0820. The fees required for such long crossings are well below market value, and represent a subsidy to Enbridge, and are also many orders of magnitude below the costs of remediation, which costs were described in the Administrative Law Judge’s (“ALJ”) Findings of Fact, Conclusions of Law, and Recommendation, PUC Docket Nos. 14-916 and 15-137, at Findings 381 to 389, 402 to 405, 958 to 963. The ALJ found that the cost of removal of the entire 282 miles of existing Line 3 would be approximately $1.2 billion or approximately $4,255,319 per mile. Assuming this per-mile cost and that the DNR seeks to remove 100% of the new Line 3 pipeline from DNR-administered lands (36.3 miles), then the maximum remediation liability for DNR land crossings would be in excess of $150 million. This amount could increase substantially in the event that the pipeline leaks and contaminates land and ground and surface waters.

We recommend that the DNR estimate the maximum remediation costs based on 100% removal of the proposed pipeline; require that Enbridge establish a new fund or agree to have the DNR benefit from the PUC-established Decommissioning Trust Fund; and ensure that such trust fund is of sufficient size to pay for future remediation of all state land subject to DNR administration, including a contingency to pay for the costs of possible crude oil contamination cleanup costs.

**B. General Liability And Environmental Impairment Liability Insurance**

The DNR should adopt a parallel requirement to the PUC’s Certificate of Need modification related to Enbridge’s insurance. Such condition would allow the DNR to
participate fully in any future discussions between Enbridge and the PUC related to its insurance coverage, and thereby ensure that such insurance is adequate to protect state lands.

C. Licenses Revocable Due to Climate Change

As the impacts of climate change become more apparent, it should be anticipated that public policy will change to limit use of fossil fuel infrastructure of all types, including crude oil pipelines. Therefore, the DNR should make clear that it may revoke any licenses granted for the purpose of limiting the use of crude oil.

Therefore, the Joint Commenters respectfully request that the DNR reject the Applications as lacking the information needed for DNR decisions under Minn. R. Chapter 6135, and because the DNR has not yet fully complied with MEPA. Further, we request that the DNR carefully review the modifications and conditions adopted by the PUC in its Docket Nos. 14-916 and 15-137, and ensure that Minnesota taxpayers are protected by separate DNR conditions related to remediation following abandonment of the Project, including full removal of the pipeline, as well as through establishment of a decommissioning trust fund, parental guaranty, and insurance, so that these conditions are specifically required by and intended to benefit the DNR and the lands it administers in trust for the people of Minnesota.

Should you have any questions, please contact Paul Blackburn, paul@honorearth.org, at your earliest convenience. Thank you for your consideration of these comments.

Respectfully submitted,

Paul C. Blackburn  /s/    Doug Hayes  /s/    Scott Strand  
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