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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1513**

In the Matter of Enbridge Line 3 Replacement Project in Minnesota
Kittson, Marshall, Pennington, Polk, Red Lake, Clearwater, Hubbard, Wadena, Cass,
Crow Wing, Aitkin, St. Louis, and Carlton Counties
Section 401 Water Quality Certification.

**Filed August 30, 2021
Affirmed
Smith, Tracy M., Judge**

Minnesota Pollution Control Agency
File No. 2014-01071-TJH

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Considered and decided by Florey, Presiding Judge; Jesson, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this certiorari appeal, relators Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Sierra Club, Honor the Earth, and Friends of the Headwaters challenge the decision by respondent Minnesota Pollution Control Agency (the MPCA) to issue a section 401 certification under the federal Clean Water Act for the Line 3 replacement project proposed by respondent Enbridge Energy Limited Partnership. Relators contend that the MPCA's decision to grant the section 401 certification was based on legal error because (1) the MPCA failed to consider alternative routes for the pipeline, (2) the MPCA improperly determined that the project would comply with state water-quality and wetlands standards, (3) the MPCA improperly limited the scope of its authority under section 401 to discharges and construction impacts, and (4) the MPCA improperly shifted the burden of proof to relators. Respondents MPCA and Enbridge contend that this appeal is moot because, shortly after the MPCA issued its section 401 certification, the U.S. Army Corps of Engineers (the Corps) issued its final section 404 permit for the project and, respondents argue, reversing the section 401 certification will not affect the permit. Respondents also argue that, in any event, the MPCA did not err.

We conclude that this appeal is not moot and therefore address relators' challenges to the section 401 certification. Addressing those challenges, we conclude that the MPCA's section 401 certification is not affected by legal error and is supported by substantial evidence in the record. We therefore affirm the MPCA's decision.

FACTS

This appeal is one of several matters brought to us regarding replacement Line 3.¹ The facts regarding the project are set forth in more detail in our previous decisions. Because the appeal at hand concerns the MPCA's decision to grant a section 401 certification for the project, we focus here on the regulatory framework and facts related to that decision.

The Regulatory Framework

Because replacement Line 3 will cross state lines and navigable waters, the federal Water Pollution Control Act—commonly known as the Clean Water Act—applies to the project. 33 U.S.C. §§ 1251-1387 (2018). The Clean Water Act generally prohibits the discharge of pollutants into navigable waters without a permit. 33 U.S.C. § 1311. In this case, the project requires a permit from the Corps under section 404 of the Clean Water Act. *See* 33 U.S.C. § 1342(a).

The Clean Water Act establishes a two-tiered system that provides a role to both the federal and state governments in protecting navigable waters. *In re 401 Water Quality Certification*, 822 N.W.2d 676, 679 (Minn. App. 2012). The federal government is responsible for issuing the relevant permit for a proposed project that involves discharge

¹ *See In re Application of Enbridge Energy, Ltd. P'ship*, ___ N.W.2d ___ (Minn. App. June 14, 2021) (*Enbridge II*); *In re Applications of Enbridge Energy, Ltd. P'ship*, 930 N.W.2d 12 (Minn. App. 2019) (*Enbridge I*); *In re Application of Enbridge Energy, Ltd. P'ship for a Certificate of Need*, No. A19-0510 (Minn. App. Oct. 29, 2019) (order); *In re Application of Enbridge Energy, Ltd. P'ship for a Routing Permit*, No. A19-0267 (Minn. App. Oct. 29, 2019) (order).

of pollutants into public waters. *See, e.g.*, 33 U.S.C. § 1342(a)(1). But, under section 401 of the Clean Water Act, the federal permit cannot issue unless the state where the discharge would originate either certifies that the discharge will comply with state water-quality standards or waives certification. 33 U.S.C. § 1341(a)(1). A state issuing a 401 certification may include conditions to ensure that the project complies with the state’s water-quality standards, and the federal government is required to incorporate those conditions into its permit. 33 U.S.C. §§ 1342(a)(1), 1341(d); 40 C.F.R. § 122.44(d) (2019). Under section 401, a state must act on a certification request within one year or the state automatically waives its certification authority. 33 U.S.C. § 1341(a)(1).

In Minnesota, the MPCA is responsible for responding to requests for section 401 certifications. Minn. Stat. § 115.03, subs. 1, 4a (2020). Under the procedure laid out in administrative rules, the project proposer first submits an application to the MPCA. Minn. R. 7001.1420, 7050.0285 (2019). In connection with its application, the applicant must prepare an antidegradation assessment and submit information regarding that assessment to the MPCA. Minn. R. 7050.0285, subp. 2.² Then the MPCA conducts its own antidegradation review based on the antidegradation assessment provided by the applicant and on “other reliable information” for the purpose of determining “whether the proposed

² This antidegradation assessment includes an analysis of any less-degrading alternatives, including design considerations, construction, operation, and maintenance costs; a comparison of other approved causes of degradation with the expected degradation from the proposed project; a comparison of existing water quality with the expected water quality after the proposed project is complete; and a comparison of existing and expected economic conditions and social services after the proposed project is completed. Minn. R. 7050.0280, subp. 2 (2019).

activity will satisfy the antidegradation standards in part 7050.0265.” Minn. R. 7050.0285, subp. 3.

Under the antidegradation standards, the MPCA may approve a proposed activity “only when existing uses and the level of water quality necessary to protect existing uses are maintained and protected.” Minn. R. 7050.0265, subp. 2 (2019). The MPCA may not approve a proposed activity “that would permanently preclude attainment of water quality standards.” *Id.*, subp. 4 (2019). The antidegradation standards do not prohibit all degradation. *Id.*, subp. 5 (2019). In general, the MPCA may approve an activity that results in some degradation provided that (1) there are no prudent and feasible alternatives available that would avoid the degradation and the degradation caused by the proposed activity will be “prudently and feasibly minimized,” (2) “lower water quality resulting from the proposed activity is necessary to accommodate important economic or social changes in the geographic area in which degradation of existing high water quality is anticipated,” (3) approving the 401 certification will help achieve compliance with all applicable federal and state water pollution control measures, and (4) the MPCA provides intergovernmental coordination and public participation during the process. *Id.* The MPCA may allow compensatory mitigation as a means of preserving the existing uses of waters to be affected by a proposed activity if certain conditions are met. *Id.*, subp. 3(A)(1) (2019).

Based upon its antidegradation review, the MPCA must prepare and give public notice of a written preliminary decision whether to issue a 401 certification. Minn. R. 7001.1440, 7050.0295, subp. 4 (2019). The MPCA must include in its preliminary determination whether the project meets antidegradation standards or whether conditions

attached to a 401 certification will ensure that the project can meet antidegradation standards. Minn. R. 7050.0285, subp. 4. A public-comment period follows the public notice, during which persons may also petition for a contested-case hearing. *Id.*, subp. 5; Minn. R. 7000.1800, subp. 1 (2019). The MPCA then determines whether any petitions warrant holding a contested-case hearing. Minn. R. 7000.1900, subp. 1 (2019). Following the public-comment period and any contested-case hearing, the MPCA makes its final determination whether to approve, approve with conditions, deny, or waive a section 401 certification of the project. Minn. R. 7001.1450 (2019). The MPCA may issue a section 401 certification only if it concludes that there is “reasonable assurance that the activity will be conducted in a manner that will not violate applicable water quality standards.” Minn. R. 7001.1470, subp. 1(C) (2019).

Replacement Line 3 Project

The replacement Line 3 project is a proposed crude-oil pipeline running from the North Dakota-Minnesota border to the Minnesota-Wisconsin border, to be built and operated by Enbridge. The pipeline will replace an aging pipeline that is operating at limited capacity due to safety and spill concerns. In October 2018, the Minnesota Public Utilities Commission (PUC) granted a certificate of need for, and approved the route of, replacement Line 3, and, in May 2020, following a remand from this court for further environmental review, the PUC reissued its orders granting the certificate of need and routing approval. We recently affirmed the PUC’s decisions. *See Enbridge II*, 2021 WL 2407855, at *2.

Replacement Line 3's approved route through Minnesota will differ from the route of the existing pipeline. Along the new route, replacement Line 3 will cross more than 200 streams and rivers, and the proposed construction activities will discharge dredged or fill material into Minnesota wetlands and streams.

Enbridge's Section 401 Certification Application

Enbridge filed its application for a section 401 certification on November 15, 2019.³ On March 2, 2020, the MPCA issued its preliminary determination to grant a section 401 certification. The preliminary determination included 28 conditions to be incorporated into the section 404 permit, which the MPCA preliminarily determined would satisfy the antidegradation standards. In making its preliminary determination, the MPCA limited the scope of its review to the pipeline route approved by the PUC, reasoning that, because the PUC had the sole authority to approve the route of replacement Line 3, consideration of alternative routes was outside the MPCA's authority.

The MPCA notified the public of its preliminary determination and began accepting public comments. Along with more than 9,000 public comments were several petitions for a contested-case hearing, including a petition submitted by relators. The MPCA granted relators' petition for a contested-case hearing on five fact issues raised by relators and denied the rest of relators' petition. On August 24, 2020, the administrative law judge

³ Enbridge initially requested a section 401 certification for replacement Line 3 on October 28, 2018. The MPCA dismissed Enbridge's first section 401 certification application without prejudice after we reversed the PUC's decision that the first environmental-impact statement for replacement Line 3 was adequate and remanded for further environmental review. *Enbridge I*, 930 N.W.2d at 36.

(ALJ) held a contested case hearing on the five fact issues. At the hearing, the ALJ placed the burden of proof on relators to prove by a preponderance of the evidence that the fact issues raised in their challenge to the preliminary determination must be resolved against the MPCA.

On October 16, 2020, the ALJ issued his findings of fact, conclusions of law, and recommendation that relators had not proved any factual errors in the MPCA's preliminary determination and that the MPCA's conclusions were supported by the record. The MPCA adopted the ALJ's recommendation.

On November 12, 2020, the MPCA made its final determination approving replacement Line 3's section 401 certification application. As part of this determination, the MPCA issued (1) its findings of fact, conclusions of law, and order determining that replacement Line 3 met the requirements for section 401 certification; (2) the final section 401 certification, including 35 conditions; and (3) a final antidegradation certification.

On November 23, 2020, the Corps approved Enbridge's application for a section 404 permit. The permit incorporated the conditions in the MPCA's section 401 certification.

On November 30, 2020, relators filed for certiorari review of the MPCA's decision to issue the section 401 certification.

DECISION

As outlined above, relators raise several challenges to the MPCA's decision to grant a section 401 certification to the project. But, before addressing these challenges, we must first address respondents' assertion that this appeal is moot.

I. This appeal is not moot.

In general, courts may only decide actual controversies. *See In re Guardianship of Tschumy*, 853 N.W.2d 728, 735 (Minn. 2014). Courts will dismiss appeals where the issues in the case are moot. *Id.* Mootness is a “flexible discretionary doctrine” that applies when “a decision on the merits is no longer necessary or an award of effective relief is no longer possible.” *Dean v. City of Winona*, 868 N.W.2d 1, 4-5 (Minn. 2015). “We consider de novo whether an appeal is moot.” *In re Civil Commitment of Breault*, 942 N.W.2d 368, 374 (Minn. App. 2020).

Respondents argue that this appeal is moot because this court cannot grant effective relief. They contend that, because the Corps already incorporated the MPCA's section 401 certification into its section 404 permit for replacement Line 3, including the MPCA's conditions, reversing the MPCA's section 401 certification will have no impact on the permit allowing the project's construction. Relators, on the other hand, argue that the case is not moot because overturning the section 401 certification would require action by the Corps on its section 404 permit.

Respondents have not persuaded us that an award of effective relief is “no longer possible.” *Breault*, 942 N.W.2d at 374. The Corps has continuing regulatory authority over its section 404 permit. *See* 33 C.F.R. § 325.7(a) (2019) (providing that the Corps may

modify, suspend, or revoke a 404 permit as required by “considerations of the public interest”). The parties dispute whether and how this authority would or could be used.

We find persuasive the 2018 decision by the U.S. Court of Appeals for the Fourth Circuit in *Sierra Club v. State Water Control Bd.*, 898 F.3d 383 (4th Cir. 2018). There, environmental groups appealed Virginia’s grant of a section 401 certification for a proposed natural gas pipeline.⁴ *Sierra Club*, 898 F.3d at 388. The respondents argued that the appellants lacked standing because the Federal Energy Regulatory Commission had already issued its authorization for the pipeline and therefore “no realistic possibility exist[ed]” that the appellants could “obtain the ultimate relief” that they sought. *Id.* at 401 (quotation omitted). The Fourth Circuit rejected the standing challenge. *Id.* The court recognized that the appellants would face “several hurdles even after prevailing on the merits,” including that the federal agency could argue that it was too late in the process to change its decision or that any further restrictions imposed by the state would be preempted. *Id.* at 402. But, the Fourth Circuit concluded, “none of those potentialities are sufficient to negate the ‘realistic possibility’” that the appellants could ultimately obtain more stringent requirements on the pipeline and it was not the court’s “role to engage in the speculative (if not impossible) task of predicting how an agency will exercise its discretion.” *Id.* at 402-03 (quotation omitted).

⁴ Under the Natural Gas Act, a state’s decision to issue a section 401 certification for a natural gas pipeline is appealable to the federal court of appeals for the circuit in which the proposed project is to be constructed. *Sierra Club*, 898 F.3d at 388-89. Replacement Line 3 will be a crude oil pipeline.

Though the issue before the Fourth Circuit was standing, *see id.* at 400, the analysis is analogous to our mootness inquiry. *See Tschumy*, 853 N.W.2d at 734 (observing that “mootness is ‘the doctrine of standing set in a time frame’”). And, similar to the Fourth Circuit, in deciding whether effective relief is impossible, we conclude that it is not our role to predict how the Corps might react to a reversal of the MPCA’s section 401 certification. Nor do we believe that we need to predict what the result of any litigation related to the Corps’ authority would be. Because mootness is a flexible doctrine and we are not persuaded that ultimate relief is not possible, we conclude that this appeal is not moot.⁵ We therefore turn to relators’ challenges to the section 401 certification.

II. The MPCA’s decision is not affected by legal error and does not lack substantial support in the record.

We review challenges to a section 401 certification in accordance with the appeal provisions of the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-.69 (2020). *See* Minn. Stat. § 115.05, subd. 11(1) (2020) (authorizing appeal of MPCA certifications under MAPA). Under MAPA,

⁵ Respondents urge us to come to a different conclusion based on our previous unpublished decision in *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, No. C4-97-1676, 1998 WL 481933 at *2 (Minn. App. Aug. 18, 1998), *review denied* (Minn. Oct. 20, 1998). We decline to do so for two reasons. First, while they are persuasive, we are not bound by our unpublished decisions. *See In re Collier*, 726 N.W.2d 799, 806 (Minn. 2007) (stating that unpublished decisions “do not constitute precedent”). Second, the timing of the section 401 certification was different in *Minn. Ctr. for Env’tl. Advocacy*. There, the section 401 certification was not issued until *after* the section 404 permit was approved. *Minn. Ctr. for Env’tl. Advocacy*, 1998 WL 481933 at *1. This meant the section 404 permit was not predicated on the section 401 certification because the MPCA waived its authority to issue a section 401 certification. *Id.* Here, the section 404 permit *is* predicated on the MPCA’s section 401 certification and a reversal of the certification may have different implications.

the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Minn. Stat. § 14.69.

An agency's decision is arbitrary or capricious if

the agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs, 713 N.W.2d 817, 832 (Minn. 2006) (*CARD*). Put another way, “[a]n agency’s decision is arbitrary or capricious if it represents the agency’s will and not its judgment.” *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 118 (Minn. 2009).

A decision is based on substantial evidence if “the agency has adequately explained how it derived its conclusion” and “that conclusion is reasonable on the basis of the record.” *In re NorthMet Project Permit to Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021) (quotation omitted) (*NorthMet Project*).

“[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.” *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (quotation omitted). “Our role when reviewing agency action is to determine whether the agency has taken a ‘hard look’ at the problems involved, and whether it has ‘genuinely engaged in reasoned decision-making.’” *CARD*, 713 N.W.2d at 832 (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)). The burden is on relators to demonstrate a basis for reversal under MAPA. *See Hazelton v. Comm’r of Dep’t of Human Servs.*, 612 N.W.2d 468, 471 (Minn. App. 2000).

A. The MPCA did not err by considering only the route approved by the PUC in determining whether to issue a section 401 certification.

Relators first argue that the MPCA’s decision is affected by an error of law because the agency considered only the route approved by the PUC and did not evaluate alternative routes when reviewing Enbridge’s section 401 certification application. Relators argue that, by not considering other routes, the MPCA failed in its obligation under Minnesota rules to deny a section 401 certification if there exists a prudent and feasible alternative that would avoid or reduce adverse environmental effects. *See* Minn. R. 7050.0265, subs. 3(A)(1), 5(A). Respondents counter that routes that are not approved by the PUC are not “feasible alternatives” and that the MPCA must perform its antidegradation review with respect to the only route approved by the PUC.

Resolution of relators' challenge requires interpretation of administrative rules. The interpretation of rules generally follows the same analysis as statutory interpretation and is subject to de novo review. *See In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 576 (Minn. 2021). When the language is susceptible to only one reasonable interpretation, it is unambiguous and we apply its plain meaning. *See State v. Culver*, 941 N.W.2d 134, 139 (Minn. 2020). If the language of an administrative regulation is ambiguous, we then determine whether the agency's interpretation is "reasonable" and, if it is, then we defer to the agency's interpretation. *See Reissuance of an NPDES/SDS Permit*, 954 N.W.2d at 576. In determining whether the agency's interpretation is reasonable, we look at factors such as "the nature of the regulation at issue and the agency's expertise and judgment in relation to the subject matter of the regulation." *See id.* When determining the meaning of administrative rules, courts "interpret words and sentences in the light of their context and construe rules as a whole." *In re Ali*, 938 N.W.2d 835, 838 (Minn. 2020) (quotation omitted).

Under the antidegradation rules, the MPCA must consider whether prudent and feasible alternatives are available to avoid degradation or minimize adverse impacts to protected waters. Minn. R. 7050.0265, subps. 3(A)(1) (stating that the MPCA cannot approve a section 401 certification including compensatory mitigation unless "prudent and feasible alternatives are not available to avoid or minimize adverse impacts to the surface water"), 5(A) (stating that the MPCA cannot approve any section 401 certification involving high quality waters when "prudent and feasible prevention, treatment, or loading offset alternatives exist that would avoid degradation of existing high water quality"); *see*

also Minn. Stat. § 116D.04, subd. 6 (2020) (stating that no state action impacting the environment may be allowed “so long as there is a feasible and prudent alternative”). The terms “prudent alternative” and “feasible alternative” are defined by regulation. A “prudent alternative” means “a pollution control alternative selected with care and sound judgment.” Minn. R. 7050.0255, subp. 34 (2019). A “feasible alternative” means “a pollution control alternative that is consistent with sound engineering and environmental practices, affordable, and *legal and that has supportive governance* that can be successfully put into practice to accomplish the task.” *Id.*, subp. 17 (2019) (emphasis added).

Reading this language in the context here yields the conclusion that a feasible alternative does not include a route not authorized by the PUC. The PUC has the sole authority to authorize a pipeline route. Minnesota Statutes section 216G.02, subdivision 2 (2020) states:

A person may not construct a pipeline without a pipeline routing permit issued by the Public Utilities Commission unless the pipeline is exempted from the commission’s routing authority under this section or rules adopted under this section. A pipeline requiring a permit may only be constructed on a route designated by the commission.

The PUC issued replacement Line 3’s routing permit on May 1, 2020. Because the PUC did not authorize any other route, no other route would be “legal” or have “supportive governance” for construction. *See* Minn. R. 7050.0255, subp. 17. Thus, any other proposed route would not be a feasible alternative for Enbridge’s construction of the pipeline and the MPCA therefore could not consider it in determining whether the PUC-approved route met antidegradation standards. *See* Minn. R. 7050.0265, subps. 3(A)(1), 5(A).

To attempt to persuade us otherwise, relators argue that, because the MPCA urged the PUC to consider alternative pipeline routes, there are prudent and feasible alternatives that the MPCA should have considered in its section 401 review. But the comments that relators rely on were made by the MPCA during the PUC's review of replacement Line 3's proposed route. Though the PUC engaged relevant regulatory agencies including the MPCA when reviewing Enbridge's applications for a routing permit and a certificate of need, the PUC was ultimately charged with determining the route. *See* Minn. Stat. § 216G.02, subds. 2, 4 (2020). And, once the PUC approved a route, Enbridge was foreclosed from building along a different route. There was therefore no other feasible route for the MPCA to consider during its section 401 certification review.

Relators also argue that the MPCA had the authority to consider alternative routes because, by Minnesota statute, a pipeline routing permit preempts regional and local regulation but does not preempt the regulatory authority of state agencies. Minn. Stat. § 216G.02, subd. 4 (providing that a pipeline routing permit "preempts all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local, and special purpose governments"). This argument is unavailing. Certainly, the MPCA's regulatory authority is not preempted, but that does not mean that a route not approved by the PUC is "feasible" under the MPCA's rules.

But relators argue that to read the regulations in this way creates a conflict between the statute governing the PUC's authority and the statute governing the MPCA's authority and that we must resolve the conflict by construing the statutes to permit the MPCA to consider alternative routes. This argument is unpersuasive because it attempts to create a

conflict between the MPCA's and the PUC's authority when one does not exist. By statute, the PUC is the only agency that can ultimately approve a route. *Id.*, subd. 2. Administrative rules require the PUC to perform “[a] comparative environmental analysis of all of the pipeline routes” under consideration during the route-permitting process. Minn. R. 7852.1500 (2019). PUC's environmental review may include, as here, the preparation of an environmental impact statement and consultation with other agencies, including the MPCA. *See Enbridge I*, 930 N.W.2d at 18 (stating that the PUC brought in “assisting agencies” when drafting the environmental impact statement for replacement Line 3). Once the PUC has approved a route, the MPCA retains the authority to review the proposed project for compliance with antidegradation standards in order to decide whether to issue a section 401 certification. But, in doing so, the agency cannot consider as feasible alternatives routes that the PUC has not approved. In sum, we do not discern a statutory conflict that requires judicial construction to resolve.

B. The MPCA's determination that the project satisfies water-quality and wetlands standards is not legally erroneous or without substantial support in the record.

Relators next contend that the MPCA erred by determining that replacement Line 3 will comply with state water-quality standards as long as Enbridge follows the section 401 certification conditions. Relators raise two arguments. First, relators contend that the MPCA did not properly consider applicable narrative standards and wrongly focused on numeric standards. Second, they argue that the MPCA improperly calculated the acreage of wetlands impacted by the project when determining Enbridge's compensatory-mitigation burden. We address each argument in turn.

1. The MPCA’s determination that the project satisfies narrative and numeric water-quality standards is not legally erroneous or without substantial support in the record.

Relators argue that the MPCA erroneously concluded that replacement Line 3 will not violate the state’s water-quality standards. They assert that the MPCA committed a legal error because it did not perform an “index of biological integrity” at each water crossing and therefore ignored the state’s narrative biological or aquatic-life standards. Instead, relators contend, the MPCA improperly addressed only numeric standards and focused on a particular parameter of concern that is not reliable for determining environmental effects. Relators further argue that the MPCA erred by failing to consider the effects of climate change in its analysis.

The MPCA’s rules establish both numeric and narrative water-quality standards. *See, e.g.*, Minn. R. 7050.0222 (2019). Relators cite to Minnesota Rule 7050.0150, subpart 3 (2019), which sets forth a narrative standard prohibiting the serious impairment of aquatic biota and the use of aquatic biota in the class of waters at issue here. Relators contend that, to evaluate whether that standard was met, the MPCA was required by subpart 6 of that rule to prepare an “index of biological integrity” at each stream crossing to determine current biological conditions and to then assess those conditions against the expected results of the project. Minn. R. 7050.0150, subp. 6 (2019). Issuance of a section 401 certification without having developed such indexes, they argue, was legal error. Respondents, on the other hand, assert that the MPCA was not required to prepare an index of biological integrity for each stream crossing before making a section 401 certification decision. Rather, they argue, under the rules, the MPCA could reasonably exercise its

expertise and judgment in determining the manner of its analysis of compliance with narrative and numeric water-quality standards and was not required to employ the particular method urged by relators.

Respondents point to the rules governing section 401 certification and antidegradation review. The procedure for the MPCA's section 401 review is set forth in Minn. R. 7050.0285. That rule requires the applicant to prepare an antidegradation assessment and requires the MPCA to conduct an antidegradation review based on the information provided in that assessment and "other reliable information available to the [MPCA] concerning the proposed activity." Minn. R. 7050.0285, subps. 2, 3. The purpose of antidegradation review is to "evaluate whether issuing the section 401 certification for the proposed activity will satisfy the antidegradation standards in part 7050.0265." *Id.*, subp. 3. The antidegradation standards in Minnesota Rule 7050.0265 (2019), in turn, require that the MPCA approve a proposed activity only when existing uses and the level of water quality necessary to protect those uses will be protected. Minn. R. 7050.0265, subps. 2, 4.

We agree with respondents that these rules do not dictate the use of the particular method described in rule 7050.0150, subpart 6. The rules for section 401 certification and antidegradation review do not specify the method that the MPCA must employ to analyze the environmental impact of a project for section 401 certification. *See* Minn. R. 7060.0265, .0285. Where a particular form of review is not dictated, how the MPCA conducts its review is subject to judicial deference. *See In re Request for Issuance of SDS*

Gen. Permit MNG300000, 769 N.W.2d 312, 323 (Minn. App. 2009). We defer to the MPCA's reasonable judgment with respect to the manner of its antidegradation review.

But relators further assert that the manner of the MPCA's review was not reliable. As explained by the MPCA, it focused on the parameters of concern that it thought were most likely to result from the project and the numeric and narrative water-quality standards associated with those parameters. The principal parameter of concern for the MPCA was total suspended solids (TSS). Relators contend that TSS is an inadequate way to measure the effect of the replacement Line 3 project on aquatic life. They point to publications and MPCA statements in an unrelated administrative proceeding that, relators assert, confirm the inadequacy of physical and chemical standards such as TSS in assessing impacts to aquatic life.

We will not reverse an agency's decision as lacking substantial evidence as long as the agency "has adequately explained how it derived its conclusion" and "that conclusion is reasonable on the basis of the record." *NorthMet Project*, 959 N.W.2d at 749 (quotation omitted). The ALJ's factual findings following the contested-case hearing, which were thereafter adopted by the MPCA, explain the MPCA's reasoning regarding TSS and identify the testimony and evidence supporting the MPCA's determinations. As explained in those findings, TSS measures sediment and other organic matter that becomes mixed with water during the construction process. The MPCA determined that the impacts from the replacement Line 3 project would result in temporary, acute spikes in TSS concentrations but would not violate narrative or numeric water-quality standards. The MPCA further determined that the project would not result in long-term risks to aquatic

life due to the duration of the proposed construction activities and characteristics of the pollutants of concern. By evaluating TSS, the MPCA thus considered potential impacts to aquatic life. The MPCA's determinations are both adequately explained and reasonable on the basis of the record.

Finally, relators argue that the MPCA's analysis was flawed because it did not incorporate climate-change-related factors into its analysis. Relators do not identify a rule that they claim was violated; rather, they challenge the adequacy of the agency's analysis of relevant facts in evaluating potential environmental effects. Our role in reviewing MPCA decisions is a limited one, and we must defer to the agency's application of its technical knowledge and expertise to the facts. *See Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002). Because, under this deferential standard, the MPCA's determination regarding compliance with state water-quality standards is based on substantial evidence in the record, relators' argument fails.

2. The MPCA's determination that the project satisfies the wetland standard is not legally erroneous or without substantial support in the record.

Relators also argue that the MPCA erred by determining that the replacement Line 3 project complies with the rule governing wetland protection and mitigation. *See Minn. R. 7050.0186* (2019). Generally, under rule 7050.0186, project proponents are required to avoid adverse impacts on wetland uses, minimize the impacts that cannot be avoided, and mitigate unavoidable impacts by compensation. *Id.*, subp. 2. Relators make three arguments challenging the MPCA's determinations with respect to compliance with rule 7050.0186, which we address in turn.

a. Consideration of Alternatives

Relators argue that the MPCA did not properly consider whether adverse impacts to the uses of wetlands could have been avoided because it did not consider an alternative route for the pipeline. Minn. R. 7050.0186, subp. 4. For the reasons discussed above, there was no feasible alternative route to consider because the PUC issued the routing permit authorizing the route before the MPCA issued its section 401 certification. The MPCA did not err by not considering an unapproved route as a way for Enbridge to avoid wetland impacts. *See* Minn. R. 7050.0265, subps. 3(A)(1), 5(A).

b. Minimizing Impacts

Relators also argue that the MPCA erred in determining whether the actions approved in the section 401 certification will minimize the impacts of the physical alteration of the wetlands. *See* Minn. R. 7050.0186, subp. 5.

If alternatives are not available to avoid adverse impacts to wetlands, rule 7050.0186, subpart 5, requires that the MPCA evaluate measures to be taken by the project proponent to minimize those impacts. In evaluating those measures, the MPCA must consider a list of seven regulatory factors. *Id.*, subp. 5(B).⁶ Relators contend that the MPCA did not consider those regulatory factors and instead relied on a “wait-and-see approach.”

⁶ These factors include (1) the project’s spatial requirements; (2) existing structural or natural features dictating placement or configuration of the project; (3) how the purpose of the project relates to its placement, configuration, or density; (4) the sensitivity of the site design to the natural features of the site; (5) the designated uses of the wetlands on the site; (6) individual and cumulative impacts of the project; and (7) applicable federal minimization activities. Minn. R. 7050.0186, subp. 5(B).

Relators' argument is not supported by the record. In the final section 401 certification, the MPCA includes several conditions connected to the seven regulatory factors to mitigate replacement Line 3's impact on affected wetlands.⁷ While he did not discuss each condition, one research scientist from the MPCA explained during the contested-case hearing that the permitting conditions would help mitigate and reduce any adverse impacts to the wetlands. We defer to the MPCA's judgment and expertise in determining whether these conditions are adequate to mitigate any adverse impacts to the wetlands. *See Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 464.

c. Compensatory Mitigation

Lastly, relators contend that the MPCA erred in determining the compensation that Enbridge must provide as mitigation for unavoidable impacts on the designated uses of wetland. *See Minn. R. 7050.186, subp. 6*. They advance several arguments.

First, relators argue that the MPCA failed to adequately account for all the wetlands for which compensation is required. The MPCA required that Enbridge buy wetland bank credits to replace each acre of physically altered wetland. The MPCA estimated that 212.37 acres of wetland will be permanently converted, 5.52 acres will be permanently filled, and 730.10 acres will be temporarily affected during construction. Relators argue that compensation should encompass not just physically altered wetlands but all wetlands that

⁷ These conditions include prohibiting construction activities in wetlands during the spring; requiring that, before construction begins in any wetland, Enbridge engages in best management practices to prevent impacts to wetlands outside of the authorized zone; prohibiting the discharge of drilling mud into wetlands; completing site-specific restoration plans after construction; and requiring Enbridge to clearly mark the edges of each construction site to prevent impacts on wetlands in the vicinity.

might be affected by the construction. They assert that total acreage of wetlands crossed by replacement Line 3 will be around 11,000 acres and the total acreage of wetlands hydrologically connected to those crossed will be around 27,000 acres. They contend that the MPCA erred by failing to estimate the acreage of those wetlands whose beneficial uses might be lost or diminished.

Rule 7050.0186, subpart 6, states, “The permit or certification applicant shall provide compensatory mitigation for unavoidable impacts on the designated uses of the wetland in accordance with this subpart.” The subpart continues, “Compensatory mitigation must be sufficient to ensure replacement of the diminished or lost designated uses of the wetland that was physically altered.” *Id.*, subp. 6(A). The rule defines “physical alteration” as “the dredging, filling, draining, or permanent inundating of a wetland.” *Id.*, subp. 1a(A). Accordingly, to comply with rule 7050.0186, the MPCA had to determine the wetlands that will be physically altered by the project and then obtain compensation to replace those physically altered wetlands. The MPCA did that here, and relators do not challenge the MPCA’s factual finding regarding the acreage of wetland that will be physically altered. Relators’ argument that the MPCA was required to account for all acreage that might be impacted by replacement Line 3 is not supported by the language of the rule.

Second, relators argue that the compensation plan does not ensure that any restored wetlands will be of the same type and in the same watershed as the impacted wetlands. Compensatory mitigation under the rule must be accomplished either through restoration of a previously diminished wetland or through the creation of a wetland, with preference

given to restoration when possible. *Id.*, subp. 6(B). Enbridge’s compensatory wetland mitigation plan breaks out the impacted wetlands into four separate “Bank Service Area[s]” based on region and watershed. Within each service area, Enbridge identified specific wetlands to develop as mitigation for any permanent damage done to nearby wetlands. The MPCA concluded, after consulting with the DNR and the Corps, that the compensatory mitigation proposed by Enbridge satisfied the regulatory requirements. The MPCA’s determination that restored wetlands will be of the same type and in the same watershed is supported by the record and is thus entitled to judicial deference. *See Minn. Ctr. for Env’tl. Advocacy*, 644 N.W.2d at 464.

Third, relators argue that the plan does not provide for the required concurrent compensatory mitigation. Under rule 7050.0186, subpart 6(D), the MPCA is required to obtain compensation “before or concurrent with the actual physical alteration to a wetland affected by the project to the extent prudent and feasible.” The ALJ found that the record supported the MPCA’s impact calculations of the number of acres of wetlands subject to compensation, and the MPCA required as part of its section 401 certification that compensation be made for those wetlands prior to construction. Relators do not challenge the ALJ’s findings or this part of the plan. But the MPCA also required Enbridge to develop a post-construction monitoring plan “to monitor state waters in and near the area in which the Project has been constructed to determine if additional impacts to Minnesota’s aquatic resources have occurred as a result of the Project’s construction.” Relators argue this post-construction component of the plan means the compensatory mitigation is not completed “before or concurrent” with the impacts to the wetlands affected by the project. But the

post-construction monitoring plan requires Enbridge to report *unforeseen* impacts and to “conduct remedial action” that may include additional compensatory mitigation. This requirement—which arises if additional impacts are determined post-construction—does not invalidate the MPCA’s approved compensatory wetland mitigation plan, which calls for compensation before or concurrent with the physical alteration of wetlands.

C. The MPCA did not erroneously limit the scope of its authority under section 401 to discharges and to construction impacts.

Relators also argue that the MPCA committed an error of law by improperly limiting the scope of its authority in performing its section 401 certification review. They argue, first, that the MPCA improperly limited its authority to “the specific locations where [Enbridge] plans ‘discharges’ into protected waters,” and, second, that the MPCA improperly limited its review “to potential *construction* impacts” and did not extend its review to “water quality risks from *operation*, of the pipeline, including oil spills.”⁸

As to their first argument, relators argue that the MPCA limited “its jurisdiction to ‘discharge’ locations,” contrary to the U.S. Supreme Court’s decision in *PUD No. 1 of Jefferson Cty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 144 S. Ct. 1900 (1994). In *PUD*, a utility sought to build a dam for hydroelectric power. 511 U.S. at 703, 144 S. Ct. at 1905. The dam required a federal license, and, because the construction and the operation of the dam would result in discharges, the project first required a state section 401 certification. *Id.* at 709, 144 S. Ct. at 1907. The State of Washington issued a section 401 certification

⁸ Relators also argue that the MPCA unlawfully limited the scope of its review by not considering alternative routes and by considering only numeric, and not narrative, water-quality standards. We addressed and rejected those arguments above.

and imposed the condition of a minimum stream-flow rate in order to protect the salmon and steelhead relied on by a fishery. *Id.* at 709, 114 S. Ct. at 1908. The utility challenged that condition, arguing that the stream-flow rate condition was thus not authorized under section 401 because stream-flow rate was unrelated to the particular discharges at issue (specifically, the discharge of dredge-and-fill material during construction, and the discharge of water after it was used to generate electricity during operation). *Id.* at 711, 114 S. Ct. at 1908. The Supreme Court rejected that argument, concluding that section 401(d) authorizes states to impose water-quality limitations that are not specifically tied to a “discharge.” *Id.* at 711, 114 S. Ct. 1909. The Court relied on the language of section 401(d), which provides that, in granting a section 401 certification, the state shall set forth “limitations . . . necessary to assure that any applicant” will comply with state water-quality standards. *Id.* (quoting 33 U.S.C. § 1341(d)). That language, the Court observed, “refers to the compliance of the applicant, not the discharge.” *Id.*

Respondents do not dispute that *PUD* holds that states may impose section 401 conditions unrelated to the discharges that triggered the section 401 review. But, respondents argue, relators have not explained how the MPCA restricted its jurisdiction in a manner contrary to *PUD*. We agree. Relators do not point us to where the MPCA wrongly believed that it could impose only conditions that were related to discharges. “An assignment of error based on mere assertion and not supported by any argument or authorities” is forfeited unless “prejudicial error is obvious on mere inspection.” *Hentges v. Minn. Bd. of Water & Soil Res.*, 638 N.W.2d 441, 446-47 (Minn. App. 2002). The error

that relators assert regarding the MPCA’s understanding of the scope of its authority to impose conditions is not obvious on mere inspection.

Relators’ second argument is that the MPCA erred by improperly limiting its review to the environmental impacts from construction and did not consider the potential impacts from operation of replacement Line 3. Specifically, they argue that the MPCA evaluated only the discharges during construction and ignored the risk of an oil spill—another kind of discharge—during operation.⁹ They argue that the language of section 401(a), which requires a federal-permit applicant to obtain a section 401 certification from the state if discharge may result from the “construction or operation of facilities,” 33 U.S.C. § 1341(a)(1), required the MPCA to consider the operation and not just the construction of replacement Line 3 and that the MPCA did not do so.

Respondents point out that the trigger for the section 401 certification here was the construction permit that Enbridge sought from the Corps and that another federal agency—the Pipeline and Hazardous Materials Safety Administration—will regulate the operation of the pipeline. But, they further assert, although the MPCA will not have regulatory authority over operation of the pipeline, the MPCA nevertheless considered post-construction—that is, operational—impacts on water quality. Thus, respondents contend, contrary to relators’ argument, the MPCA did not improperly limit the scope of its section 401 review to only construction impacts.

⁹ In their reply brief, relators also briefly assert that the MPCA failed to consider the operational impact from long-term erosion and sedimentation along the strip of land where the pipeline will run.

We agree with respondents that the MPCA did not erroneously limit the scope of its authority to construction impacts. The MPCA's final certification contains a section that is devoted to "post-construction requirements." Those requirements include that Enbridge prepare oil-and-hazardous-substances-discharge plans; comply with a post-construction wetland-and-waterbody-monitoring plan to address unanticipated impacts to aquatic life; monitor the pipeline for leaks and anomalies; and, if a safety-related issue arises, report monitoring results as outlined in the plan. The certification also prohibits Enbridge from discharging any oil or crude oil-related products from replacement Line 3 to state waters when the pipeline is operational. The MPCA's section 401 certification therefore does not reflect a legally erroneous understanding on the part of the MPCA of the scope of its authority.

D. The MPCA and ALJ did not improperly shift the burden of proof to relators.

Finally, relators argue that the MPCA legally erred by shifting the burden of proof to relators. Although relators assert that the "error is evident throughout MPCA's consideration of Enbridge's application," they cite one example: They contend that the MPCA wrongly shifted to relators the burden to prove that Enbridge's proposed water-crossing methods were not the least degrading alternatives.

Respondents do not dispute that Enbridge bore the overall burden to prove that a section 401 certification should issue. As the party proposing issuance of the certification, Enbridge had the overall burden of proving that its project will comply with state water-

quality standards. *See* Minn. R. 1400.7300, subp. 5 (2019) (stating that the “party proposing that certain action must be taken” bears the burden of proof).

In connection with its application, Enbridge was required to submit an antidegradation assessment. The MPCA required Enbridge to provide, as part of that antidegradation assessment, a “justification for the crossing method selected at each waterbody based on the design considerations and the constraints for that specific crossing.” The MPCA then performed its antidegradation review and issued its preliminary determination that the proposed project would not violate state water-quality standards and that a section 401 certification should issue.

Relators then petitioned for a contested-case hearing, and the MPCA granted a hearing on five factual issues. One of those issues was, “Have Enbridge and the MPCA identified the least degrading crossing method that is prudent and feasible for each stream crossing?” In his findings of fact, conclusions of law, and recommendation following the contested case hearing, the ALJ addressed the burden of proof, stating:

Enbridge ultimately bears the burden of establishing it meets the standards for the issuance of the Draft 401 Certification. And, after careful review, the MPCA determined Enbridge met those standards and issued a Draft 401 Certification. [Relators] are challenging the MPCA’s issuance of the Draft 401 Certification. Because [relators] are the party proposing the action, the burden is on [relators] to establish by a preponderance of the evidence that the factual questions be resolved against the MPCA.

The ALJ cited our decision in *Minn. Ctr. for Envtl. Advocacy v. Comm’r of Minn. Pollution Control Agency* as authority for assigning relators the burden of proof on the factual

questions in the contested-case hearing. 696 N.W.2d 398, 404 (Minn. App. 2005). The MPCA adopted the ALJ's recommendation.

The ALJ and the MPCA did not err. In *Minn. Ctr. for Env'tl. Advocacy*, a city applied to renew its wastewater-treatment discharge permit from the MPCA. *Id.* at 401. The MPCA made a preliminary determination to reissue the permit without imposing a phosphorus-discharge limit, concluding that a phosphorus rule did not apply in the circumstances. *Id.* The relator objected to the preliminary determination not to apply the phosphorus rule and sought a contested-case hearing. *Id.* A contested-case hearing was held then on two factual issues that would determine whether the phosphorus rule applied. *Id.* at 401-02. The MPCA placed the burden of proof on the relator in the contested-case hearing, and the relator challenged that decision on appeal to this court. *Id.* at 404. We concluded that the relator bore the burden of proof in the contested-case hearing. *Id.* We reasoned that, because the relator was seeking to add the phosphorus limit after the MPCA's preliminary determination not to include it, the relator was the "party proposing action" under Minnesota Rule 1400.7300, subpart 5, and therefore had the burden of proof on the factual questions in the contested-case hearing.

Similarly, here, the MPCA issued a preliminary determination that the proposed project satisfies water-quality standards after having performed its antidegradation review, which included review of proposed water-crossing methods. Relators then sought and were granted a contested-case hearing on five factual questions, including whether respondents had identified the least degrading prudent and feasible crossing methods. Under our

decision in *Minn. Ctr. for Env'tl. Advocacy*, the ALJ and the MPCA did not err by placing the burden of proof on relators on the issues in the contested-case hearing.

As to the overall burden of proof, we disagree with relators that the MPCA shifted it from Enbridge to relators. At its core, relators' challenge seems to be less about legal error regarding the overall burden of proof and more about the substantive basis for the MPCA's decision. Again, a decision is based on substantial evidence if "the agency has adequately explained how it derived its conclusion" and "that conclusion is reasonable on the basis of the record." *NorthMet Project*, 959 N.W.2d at 749 (quotation omitted). The ALJ found, based on the record, that the MPCA engaged a cross-section of subject-matter experts to analyze the proposed crossing methods and coordinated with other environmental regulators regarding stream crossings. On this record, the MPCA's decision is based on substantial evidence.

Affirmed.