A20-1071

STATE OF MINNESOTA

IN COURT OF APPEALS

CASE TITLE:

In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border

Friends of the Headwaters,

Petitioner,

vs.

Minnesota Public Utilities Commission,

Respondent.

MEMORANDUM OF RELATOR FRIENDS OF THE HEADWATERS IN SUPPORT OF MOTION TO STAY CONSTRUCTION PENDING APPEAL

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INTRODUCTION

Respondent Enbridge Energy, Limited Partnership ("Enbridge") has been seeking permission to build its controversial Line 3 Project ("Project") for the past several years. The Project would construct a 36-inch pipeline to carry primarily heavy high-sulfur Canadian "tar sands" oil from Alberta to refineries and export terminals in the Midwest, in eastern Canada, and the Gulf Coast. On May 1, 2020, respondent Minnesota Public Utilities Commission (PUC) issued an order approving the environmental impact statement (EIS) prepared for the project, and granting Enbridge a Certificate of Need (CN) and a Routing Permit (RP). (Add. at 61). The PUC denied reconsideration on July 20, 2020, and this appeal followed.

On November 12, 2020, the Minnesota Pollution Control Agency (MPCA) granted Enbridge a certification under section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, that the Project will comply with state water quality standards. That decision is also on appeal to this Court.[1] (Add. at 91).

The MPCA decision was followed by the decision of the U.S. Army Corps of Engineers, St. Paul District, on November 23, 2020,[2] to grant permits for the project under section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and under section 404 of the Clean Water Act, 33 U.S.C. § 1344. Those permits are now the subject

[1] *In the Matter of the 401 Certification for the Line 3 Replacement Project,* Case No. A20-1513. The writ of certiorari was issued on November 30, 2020.

[2] The Record of Decision, Environmental Assessment, and Statement of Findings supporting the Corps' decision first became available on December 8, 2020.

of a lawsuit under the federal Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706 in U.S. District Court.

On November 24, 2020, the PUC indicated that Enbridge had made the necessary Compliance Filings under the RP, and could commence construction.[3] (Add. at 286). The next day, November 25, 2020, the White Earth Band of Ojibwe and the Red Lake Band of Chippewa Indians, with the support of relator FOH and other parties, filed a motion with the PUC to stay its final orders and in effect suspend construction of the pipeline pending the outcome of this appeal. The PUC denied the tribes' stay motion on December 9, 2020, and denied reconsideration on December 23, 2020. (Add. 362-370). Relator FOH and the tribes then filed motions for a stay with this Court on December 29, 2020. Relator FOH submits this memorandum in support of those motions.

[3] Pipeline Routing Permit Compliance Filing Review, Letter from Will Seuffert to Barry Simonson (Nov. 24, 2020), Doc. 202011-168562-02, Minnesota Dept. of Commerce e-docket, Line 3, PUC Nos. 14-916, 15-137, https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={D012FB75-0000-CC30-9AC1-4C3F460576DC}&documentTitle=202011-168562-02

ARGUMENT

I. STANDARDS FOR GRANTING A STAY

On a motion for a stay pending appeal, this Court reviews the decision of the "trial court," which includes an administrative agency under Minn. R. Civ. App. P. 101.02, subd. 4, for abuse of discretion. *Webster v. Hennepin Cty.*, 891 N.W.2d 290, 293 (Minn. 2017); *State v. Northern Pacific Railway Co.*, 221 Minn. 400, 406 (1946). The basic standard is that:

> As a rule a supersedeas or a stay should be granted, if the court has the power to grant it, whenever it appears that without it the objects of the appeal or writ of error may be defeated, or that it is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellee or defendant in error will sustain irreparable or disproportionate injury in case of affirmance.

Id. at 409. A stay is particularly appropriate "where important questions of law are raised" or "to protect the appellate court's jurisdiction." *Id.* at 410.

The key issues then are straightforward:

1. Does the appeal raise substantial issues?
2. Will there be injuries to one or more parties absent a stay?
3. Would a stay promote the public interest in preserving the appellate court's jurisdiction?

Webster, 891 N.W.2d at 893; *see also DRJ, Inc. v. City of St. Paul,* 741 N.W.2d 141 (Minn. Ct. App. 2007). In the circumstances presented by this case, the answer to these questions is clearly yes. Therefore, the PUC's decision to deny a stay was indeed an abuse of discretion.

II. THE APPEALS RAISE SUBSTANTIAL ISSUES.

At no point in the PUC's Order denying the tribes' motion for a stay does the PUC question whether the appeals currently pending before this Court raise substantial issues. Relators FOH, Sierra Club, Honor the Earth, the White Earth, Red Lake, and Mille Lacs Band, the Youth Climate Intervenors, and the Division of Energy Resources of the Minnesota Department of Commerce all filed their opening briefs on Monday, December 7, 2020, and they all raise substantial issues:

- Does the "second revised" environmental impact statement (EIS) for the project, prepared after this Court's rejection of the first EIS in *In re Enbridge Energy*, 930 N.W.2d 12 (Minn. Ct. App. 2019), meet the requirements this Court set forth in its opinion? (Add. at 60).
- Did the PUC's decision to grant Enbridge a Certificate of Need (CN) for the project without a long-term forecast for demand for oil justifying a new pipeline violate the Minnesota statute and rules governing CN's for large energy facilities? (Add. at 1).
- Did the PUC violate the CN statute and rules, and federal law, by relying primarily on the applicant's promise to retire a different pipeline as the justification for building a

new pipeline?

- Did the PUC violate its legal responsibilities by failing to consider lifecycle greenhouse gas emissions from extraction and consumption of the additional oil that would flow through the new pipeline?
- Was the PUC's acceptance of Enbridge's preferred route, which creates a new pipeline corridor through Minnesota lake country and through "ceded territories" where the Chippewa bands have treaty-based hunting, fishing, and gathering rights, consistent with its legal obligations?

Those issues are, on their face, substantial enough to merit a stay. But there are also additional, external reasons to draw the conclusion that the issues presented in the various appeals meet the "substantiality" test:

- The PUC itself was divided on the issues now on appeal;
- The PUC has already been reversed twice on the environmental review of the Line 3 project and the previous Sandpiper project that would have followed much of the same route;[4]
- The government agency with the expertise on the need/demand question—the Department of Commerce—has concluded that the project does not meet the requirements of the statute and rules, and is itself appealing the PUC's decision, not a regular occurrence;

[4] *In re Enbridge Energy*, 930 N.W.2d 12 (Minn. Ct. App. 2019); *In re North Dakota Pipeline Co.*, 869 N.W.2d 693 (Minn. Ct. App. 2015).

- The circumstances and the relevant facts have changed dramatically since the PUC's 2018 decisions. Demand for oil is down due to the pandemic, it may never recover to 2019 levels, and electrification of transportation is accelerating, yet the PUC will not take evidence on the changed circumstances;
- The new Administration has made more aggressive federal action to address climate change and to reduce fossil fuel consumption a top priority;
- Alternative means to give the Canadian oil industry better access to global markets are further along than they were in 2018, and overbuilding is becoming a greater concern.

Given all of that, no one can seriously question whether these appeals present substantial questions. And, the PUC order denying the motion for a stay did not try to characterize the issues as "insubstantial." Consideration of the first *Webster* factor—whether there are substantial issues on appeal—therefore supports granting a stay. *Webster*, 891 N.W.2d at 293.

III. THERE WILL BE SUBSTANTIAL, IRREMEDIABLE INJURIES IF A STAY OF LINE 3 CONSTRUCTION IS NOT GRANTED. THE BALANCE OF HARDSHIPS FAVORS GRANTING A STAY.

It has long been a fundamental principle that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480

U.S. 531, 545 (1987). Based on that principle—that environmental injury is irreparable injury—courts have consistently granted preliminary injunctions or stays to suspend activities like timber cutting to allow review of environmental claims on the merits. *E.g. Southeast Alaska Conservation Council v. U.S. Forest Service,* 413 F.Supp.3d 973 (D. Alaska 2019) (preliminarily enjoining timber harvesting in Tongass National Forest).

There are two kinds of irreparable harm in a case like this. First is the procedural harm from not having an adequate environmental review inform the decision making on the project. As the Eighth Circuit has consistently held, failure to comply with environmental review requirements "causes harm itself, specifically the risk that real environmental harm will occur through inadequate foresight and deliberation." *Sierra Club v. U.S. Army Corps of Eng'rs,* 645 F.3d 978, 995 (8th Cir. 2011) (enjoining construction of power plant). The court found that harm to the environment "may be presumed when an agency fails to comply with the required [National Environmental Policy Act] procedure," because of the "difficulty of stopping a bureaucratic steam roller once started." *Id.* In other words, if a project goes forward without adequate environmental review, it will prove almost impossible to modify it to address environmental concerns and potential mitigation identified in that process.

The same reasoning applies here. In this appeal, relator FOH explains why the "second revised" environmental impact statement for this project does not meet the requirements this Court laid down in *In re Enbridge Energy,* 930 N.W.2d 12 (Minn. Ct. App. 2019), because it still does not assess the impacts of a major oil spill into Lake Superior and what it might take to remediate such an occurrence. Depending on what an

adequate environmental review might reveal, the route of the Line 3 project could change dramatically to avoid those risks. But, if construction goes forward without it, the Eighth Circuit's *Sierra Club* decision teaches that irreparable environmental harm may be presumed from failure to comply with the law's environmental review requirements. 645 F.3d at 995, *accord Richland/Wilkin Jt. Powers Auth. v. U.S. Army Corps of Eng'rs,* 826 F.3d 1030, 1037 (8th Cir. 2016) (enjoining Fargo-Moorhead diversion project); *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (reversing denial of preliminary injunction to stop highway project).[5]

Second is the substantive environmental harm that comes from construction itself. Just this month, on December 1, the U.S. Court of Appeals for the Fourth Circuit in Richmond granted a motion to stay the construction of a natural gas pipeline pending the outcome of an appeal from several U.S. Army Corps of Engineers permitting decisions. *Sierra Club v. U.S. Army Corps of Eng'rs,* --- F.3d ---, 2020 WL 7039300 (4th Cir. Dec. 1, 2020) (Mountain Valley). The Fourth Circuit found that dredging for pipeline projects "cannot be undone," *id.* at *10, and that the irreparable harm caused by pipeline dredging clearly outweighed the pipeline company's litany of concerns about the billions of dollars it had spent on project tasks, and its claimed $140 million in unrecoverable costs if construction were postponed until spring 2021. *Id.*

[5] Those cases involve the *National* Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.*, while this case involves the *Minnesota* Environmental Policy Act, Minn. Stat. § 116D.04. The courts have long recognized, however, that those two statutes are generally, if not always, similar and coextensive. *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1171 (8th Cir. 1994).

Here, the same is true. Line 3's proposed route will cross over 200 rivers and streams, and over eight hundred protected wetlands. Construction cannot proceed far without Enbridge trenching through or tunneling under Minnesota protected waters. And the damage that will cause cannot be remediated simply by filling in the trench again and planting some groundcover. When, for example, Enbridge trenches across a stream, the process will cause an increase in suspended sediment, which will pose a long-term deleterious effect on fish and wildlife when the sediment settles onto the bottom. The loss of trees, shrubs, and woody vegetation increases the risk of polluted stormwater, invasive species, and erosion. The pipe itself, once it is placed in a trench, changes the hydrology of the surrounding area, by restricting or redirecting groundwater flow. Compliance with mitigation plans—the PUC touts the "tree replacement program" PUC Order at 5) –may reduce some harms somewhat, but, as the court just recognized in the *Mountain Valley* case, good construction practices would not eliminate the long-term irreparable injuries that justified the preliminary injunction. *Id.* The PUC's conclusion that there is no harm until crude oil is actually flowing through the pipeline, PUC Order at 5, is just not accurate.

All of these cases teach that irreparable environmental injuries from construction can and do trump higher construction costs or delay in the benefits of a project. In *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs,* 826 F.3d 1030 (8th Cir. 2016), the issue was whether to preliminarily enjoin construction of a "ring levee" around three North Dakota towns, a preliminary step before construction could begin in earnest on the larger Fargo-Moorhead Diversion project until permit challenges were

resolved. The Minnesota DNR asserted that reduced stream and river stability, loss of fish connectivity, harm to aquatic habitats, and the spread of invasive species would result from the project. The Corps, on the other hand, claimed that nothing they would do in the next several months was irreparable, and that delay would result in both higher construction costs and more time before the Fargo-Moorhead community would get the permanent flood protection they needed. The court had little trouble upholding the judgment of the district court, Chief Judge Tunheim in the District of Minnesota, that the balance of hardships tilted toward granting the preliminary injunction. Not only was there the ecological harm, but also harm to the citizens' interest in seeing that the laws and required procedures would be enforced.

Likewise, in the Eighth Circuit's *Sierra Club* case, the utility argued that there would be $11 million per month in additional construction costs plus the loss of hundreds of jobs if an injunction were imposed. Again, the court had little trouble concluding that "environmental harm outweighed monetary harm," particularly when the company could have avoided that economic harm simply by waiting for the legal process to run its course. The court had little sympathy for companies that "assume the risk" of building before all of their legal hurdles have been met, i.e. that are "largely responsible for their own harm." *Sierra Club*, 645 F.3dat 997-98, *quoting Davis,* 302 F.3d at 1116.

There is little or no *public* cost if the project is delayed. The demand for oil is still well below 2019 levels, while oil transport capacity has only increased, with Enbridge's own improvements to its Mainline system, and with the approval of the doubling of capacity of the Dakota Access Pipeline (DAPL) for lighter grades of oil. That capacity

will only increase further, as construction of the Trans Mountain Expansion Project (TMEP) and the KeystoneXL pipelines continues. Enbridge and its Canadian oil producer customers may want additional pipeline capacity as soon as possible to gain a competitive advantage—or more precisely to reduce their competitive disadvantage—over U.S. producers, but that is not an interest that is entitled to any consideration in this context.

The PUC contends, of course, that halting this project would cost thousands of jobs, PUC Order at 4, but that concern is overstated. If this project is indeed on a sound legal footing, the timing of these particular construction jobs may change, but there is little basis for concluding that anyone planning to work on this project will be unable to find construction work elsewhere. Indeed, the PUC Order itself refers to individuals "passing up other work." PUC Order at 6. Of course, all projects "create jobs" in some sense, but there has never been evidence that this project will have any *net* positive impact on employment even in the short term. All parties acknowledge that there are no more than a handful of permanent jobs that might be available if this pipeline is completed.

The PUC also argues that delay in construction means that old Line 3 will have to remain in operation longer, which poses a hazard to public safety. PUC Order at 6. The maintenance of that perceived threat,[6] however, is entirely within Enbridge's control.

[6] In its opening merits brief, FOH explains why the continued operation of the old Line 3 is not a safety threat—as Enbridge itself maintains—but is becoming a cost issue that Enbridge would like to avoid. Whether that justifies granting authorization to build a new pipeline that will last another 40 to 60 years is a substantive issue in these appeals.

Enbridge can choose to take the old Line 3 out of service at any time and, with demand for oil down and oil transport capacity up, now might be an opportune moment.

The procedural and substantive environmental harms if construction of this project continues are real and irreparable, while the costs are almost entirely monetary and largely the company's own doing. Consequently, consideration of the second *Webster* factor—injury to the parties—also supports granting a stay.

IV. THE PUBLIC INTEREST FAVORS GRANTING A STAY.

Avoiding the short-term environmental risks from pipeline construction and the long-term risks of pipeline operation is in the public interest, and those risks are not outweighed by any public costs.

In today's circumstances, however, this Court must consider the potential additional spread of Covid-19 if this project is allowed to continue. With hundreds, perhaps thousands, traveling mostly from out-of-state to work and live temporarily in a part of Minnesota facing its worst outbreaks, and with only limited health care resources, insisting on construction of this project right now cannot be reconciled with any plausible conception of the public interest. Of course, Enbridge and its contractors will have written Covid-19 plans in place, and maybe they will be good ones. Unfortunately, anyone working today is working under a written Covid-19 plan, and the outbreak continues. Public health authorities warn against both interstate and intrastate travel, but there will only be limited compliance with those warnings. Once the incubation period

after Christmas passes, we can expect yet another spike in infections, hospitalizations, and, sadly, deaths. It is not in the public interest to make this situation worse.

Even in the absence of a pandemic, however, the public interest would favor granting a stay in this case just to preserve the jurisdiction of this court. This project has been highly controversial, and many cannot understand why, at a time when we know we have to move away from fossil fuels, our leaders are promoting the construction of more fossil fuel infrastructure. Others understand that, in the end, they as consumers will have to pay for this project, and they cannot understand why their leaders are demanding they help pay for a project that only serves the financial interests of some Canadian oil companies. And still others see their tax dollars go to cleaning up impaired water resources in Minnesota, while, at the same time, Minnesota regulators allow a "tar sands" pipeline to traverse some of the highest quality and most fragile freshwater resources in the state.

Those people need and deserve their day in court. But if construction of this pipeline is not stayed and is instead allowed to be substantially completed before this Court decides this case on the merits, any real opportunity for meaningful review will be lost. Once a project is built, appeals become largely moot, because courts are reluctant to order projects "unbuilt," no matter the merits of the legal arguments made by those challenging the project.

Changing the "facts on the ground" and creating a public perception of inevitability may be Enbridge's business and legal strategy, but it is not a strategy this Court should endorse and protect. It is in this Court's interest, and in the public interest,

to get the substantive issues in this case resolved by the courts, not to foreclose that possibility. Consideration of the third *Webster* factor—the public interest—therefore also supports a stay.

CONCLUSION

For the reasons stated above, and in the motion and documents filed by the White Earth and Red Lake Bands, relator Friends of the Headwaters (FOH) requests that this Court stay construction of the new Line 3 pending the resolution of these appeals.

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