

**OAH 65-2500-32764
MPUC PL-9/CN-14-916**

**OAH 65-2500-33377
MPUC PL-9/PPL-15-137**

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION**

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

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

**PETITION TO INTERVENE OF
THE FOND DU LAC BAND
OF LAKE SUPERIOR CHIPPEWA**

Introduction

The Fond du Lac Band of Lake Superior Chippewa (hereinafter “the Band”), as a tribal government and on behalf of its enrolled members, hereby petitions to intervene in the above-referenced dockets pursuant to Minn. R. 1400.6200. The Band is a federally recognized Indian tribe and the Band maintains legally-protected rights and interests in the areas of both the proposed and alternative routes for the 36-inch diameter pipeline proposed by applicant Enbridge Energy, Limited Partnership (“Enbridge”). The Fond du Lac Reservation (the “Reservation”) is located at *Nagaajiwanaang*, or “where the water stops,” in St. Louis and Carlton counties of Northeastern Minnesota. Therefore, the Band is entitled to intervene with full party participation. The Band also shares the public interest in ensuring that the PUC reviews a well-

developed factual record in connection with these routes. The Band respectfully requests that intervention be granted.

Background

1. Relevant Project details.

Enbridge seeks to replace an existing oil pipeline known as Line 3 within the company's Lakehead system, which currently extends 282 miles through Minnesota from the North Dakota border in Kittson County to Superior, Wisconsin.¹ The proposed replacement pipeline would be 337 miles long, and also two inches greater in diameter, providing an increased pumping capacity to serve the same market.² The proposed route for the replacement pipeline would follow the route for the current Line 3 from the North Dakota border in Kittson County to the Clearbrook Terminal, and then Enbridge proposes a new right-of-way from the Clearbrook Terminal to Superior, Wisconsin.³ The proposed path for the replacement pipeline travels through the following Minnesota counties: Kittson, Marshall, Pennington, Polk, Red Lake, Clearwater, Hubbard, Wadena, Cass, Crow Wing, Aitkin, and Carlton.⁴ On February 1, 2016, the Public Utilities Commission combined the proceedings on Enbridge's applications for a certificate of need and route permit for the Line 3 replacement pipeline.⁵

2. The Band.

The Band is comprised of the descendants of the Ojibwe people who have lived in this region of what is now the State of Minnesota since the mid-1700s, supporting their communities by hunting, fishing, and gathering wild rice. The Band has over 4,200 enrolled members and is

¹ Notice of Hearing at 3 (Feb. 1, 2016).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Docket No. PL-9/CN-14-916; PL-9/PPL-15-137, *Order Joining Need and Routing Dockets*, February 1, 2016, at 9-10.

culturally obligated to ensure the well-being of both living Band Members and their future descendants going seven generations forward. For this reason the Band has worked actively to protect the land, air, and water resources of both the Reservation and the surrounding millions of acres of ceded territories in Minnesota, Wisconsin, and Michigan (the “Ceded Territories”).⁶



Figure 1. Royce Map showing 1837 Ceded Territory (No. 242, in yellow) and 1854 Ceded Territory (No. 332, in pink).

The Band is also a governmental co-regulator in the Ceded Territories in Minnesota due to treaty-retained hunting, fishing, and gathering rights on lands in the Ceded Territories in

⁶ See Fig. 1.

Minnesota.⁷ Accordingly, the Band is unique in its obligation and motivation to defend the interests of enrolled Band members, many of whom reside on the Reservation or on lands within the Ceded Territories near Enbridge's proposed new Line 3 route, the new Line 3 route alternatives, or the new Line 3 route segment alternatives.

Argument

The Band meets the requirements to intervene under Minnesota Rule 1400.6200. Minnesota Rule 1400.6200 requires that that a proposed intervenor to a contested case file and serve a timely written petition, showing (1) how "the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case;" (2) "how the petitioner may be directly affected by the outcome;" and (3) setting forth "the grounds and purposes for which intervention is sought." The Band meets all these requirements

I. The Band's legal rights, duties, and privileges may be affected by this contested case, and the Band may be directly affected by the outcome.

Because the existing, proposed, and alternatives for new Line 3 all either go directly through the Reservation or through the Ceded Territories, the Band's legal rights are directly affected by this permit proceeding. The construction and operation of the proposed pipeline would, among other things: have significant potential to harm the Band's on- and off-reservation wild rice resources; cause degradation of water quality and changes in hydrology; increase the risk and potential size of oil spills that would, in turn, affect wild rice resources and other aquatic plants and species, as well as drinking water resources; have the potential to impact wildlife and

⁷ See, e.g. *Minnesota v. Mille Lacs Band of Chippewa Indians et al.*, 526 U.S. 172, 177 (1999) (holding that "the privilege of hunting, fishing, and gathering wild rice, upon the lands, the rivers and the lakes included in the territory ceded is guaranteed to the [Band and other Bands of Chippewa]") (affirming *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997)).

other natural resources in the region; and impact and likely destroy traditional cultural properties, historic sites.

No other entity can address environmental issues necessary to protect the treaty-guaranteed interests of the Band—and those interests are recognized both on- and off-reservation, where both the preferred and alternative routes are proposed. On-reservation, in addition to its inherent sovereign rights, the Band retains treaty and federal rights to regulate any activities within the Reservation that have an impact on the health, safety, and welfare of the Band. Furthermore, the Band is a landowner within the Reservation, and the federal government also holds certain parcels of land in trust for the Band. The Band is not subject to state eminent domain law, and so any right-of-way across tribal lands is subject to individual negotiation.

The Band also retains usufructuary rights (or hunting, fishing, and gathering) off-reservation pursuant to the 1837 and 1854 Treaties, and concomitant access rights to the Ceded Territories. The Band's treaty rights are an integral part of federal law, and are interwoven with the federal permitting process for these pipelines. For example, under the 2017 U.S. Army Corps of Engineers Nationwide Permit General Conditions, “[n]o NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.”⁸ The federal government, including all agencies involved in these types of pipeline projects, acknowledges the government-to-government relationship with Indian tribes.⁹

Moreover, the Band has federally-delegated regulatory authority for both on-reservation activities, and for off-reservation activities that affect air and water inside the Reservation, and

⁸ USACE NWP at 40 ¶ 17, at http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2017/nwp2017_general_conditions.pdf?ver=2017-04-27-084727-000.

⁹ See, e.g., “USACE Tribal Nations Policy Principles,” at <http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>.

will be exercising that authority in connection with these projects. This includes Treatment-in-the same manner-As-a-State (“TAS”) status under the Clean Water Act, giving the Band regulatory authority over water quality and Section 401 certifications, Section 404 dredge and fill permits, and NPDES permits.¹⁰ In addition to the surface waters, wetlands, and ground water fully inside the Reservation (totaling over 3,000 acres of lakes, 96 miles of streams, and 44,000 acres of wetlands), the Band has additional authority over those bodies of water that cross the Reservation boundaries or the flow into the Reservation. So, even assuming an alternative route is followed, the Band is a downstream regulator for water permitting purposes on this project.

Finally, the Band is uniquely suited to offer environmental input in this proceeding. The Band’s Natural Resources, Environmental Programs, and Forestry staff has monitored water quality, watershed health, wetlands, wildlife, and other natural features of this region for years, often in coordination with the Minnesota Department of Natural Resources.¹¹ The Band can provide essential input to all final siting decisions in connection with this proceeding. In fact, the Band’s staff have previously worked with Enbridge to assist in preparing environmental, wetland, protected species/habitat, and cultural resources/traditional cultural properties surveys in the past. Coordination with the Band is a fundamental part of this project.

II. The grounds and purposes for which intervention is sought include the Band’s concerns and proposed solutions regarding both the proposed preferred route, route alternatives and route segment alternatives.

While the existing 34-inch Line 3 follows the mainline Lakehead system through the Fond du Lac Reservation, the proposed expansion to 36-inch pipeline would skirt around the southern boundary of the Reservation by a few miles if it follows Enbridge’s preferred, alternative route. Other the alternate routes being examined by the Public Utilities Commission

¹⁰ See generally, 33 U.S.C. § 518e; see also 40 CFR §§ 123, 131, and 233.

¹¹ See “FDL Natural Resources” webpage at <http://www.fdlrez.com/RM/natres.htm>.

would still continue to cross the Reservation in the existing pipeline corridor with the expanded 36-inch pipe.¹²

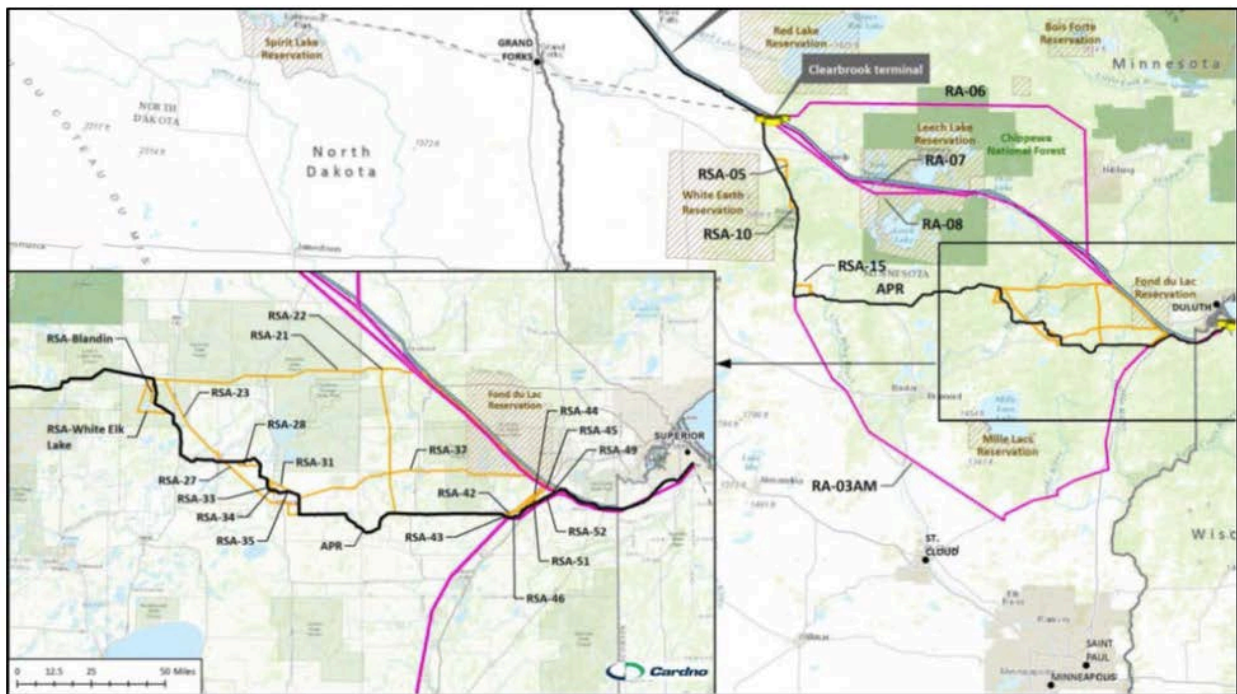


Figure 2. Department Comments and Recommendations, Figure 3: Route Alternatives and Route Segment Alternatives (Sept. 21, 2016).

Route alternative 03, if chosen, would bring the newly expanded pipeline into the Band’s 1837 Ceded Territory south of Lake Mille Lacs. All of the alternative routes for the proposed expansion of Line 3 cross through some part of the Ceded Territories. A project of this magnitude increases the amount of crude oil that crosses the land and water of the Ceded Territories and possibly the Fond du Lac Reservation as well. No other entity but the Band itself is able to represent the interests of the Band and its enrolled membership in this proceeding.

The Band has serious concerns regarding Enbridge’s plans, and strongly feels that Enbridge has not sufficiently planned to protect the land, including both Reservation and Ceded Territories, from the cumulative impacts on wildlife, fish, wild rice, wetlands (including

¹² See Fig. 2.

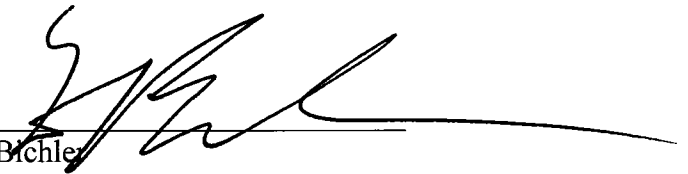
conversion of wetland type), and water resources along the proposed preferred route, the route alternatives, and route segment alternatives. The Band is also concerned with the construction-related impacts, planned water crossings, pipeline integrity, and other matters. The Band further requests that Enbridge be required to consult with the Band throughout the course of planning and construction, should the PUC issue routing permits. The Band will also ask for more detailed biological assessment/sensitive resources analysis due to the potential to impact wildlife and other natural resources in the region. To the extent that Enbridge has not included plans or assurances that it will fully and fairly remediate areas outside the permanent and temporary right-of-way, the Band asks that the PUC require additional details. The Band is also concerned about the introduction of nonnative species via the construction process, especially in wild rice watersheds. Moreover, the Band wants to ensure that the appropriate depth-of-cover practices required by Minnesota Statute Section 216G.07 are actually followed for the planned pipelines.

Conclusion

For the foregoing reasons, the Band respectfully requests that the Commission grant its petition to intervene with full party status in this proceeding.

Dated: May 11, 2017

FOND DU LAC BAND OF LAKE SUPERIOR
CHIPPEWA



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CERTIFICATE OF SERVICE

I, Sarah Phemister, hereby certify that on May 11, 2017, I served a true and correct copy of the following documents:

- **Petition to Intervene of the Fond du Lac Band of Lake Superior Chippewa; and**
- **Notice of Appearance**

in the above-captioned matter via eDockets and U.S. Mail. The documents were served to all persons listed on the attached list by electronic filing or U.S. Mail.

s/Sarah Phemister_____

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SERVICE LIST

**In the Matter of the Application of Enbridge
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in Minnesota From the North Dakota Border
to the Wisconsin Border**

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