

SECOND REVISED Staff Briefing Papers

Meeting Date: December 7, 2017

Agenda Item **1

Company: Enbridge Energy, Limited Partnership

Docket No. PL-9/CN-14-916

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

PL-9/PPL-15-137

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

- Issues:
1. Should the Commission adopt the administrative law judge's Findings of Fact, Conclusions of Law, and Recommendation?
 2. Should the Commission find that the Final Environmental Impact Statement is Adequate?
 3. Whether the data identified as Trade Secret in Appendix F and Appendix I of Enbridge Energy, Limited Partnership's Certificate of Need Application for the Proposed Line 3 Replacement Project is public under the Minnesota Government Data Practices Act?

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 Relevant Documents	Date
Enbridge Application for a Certificate of Need	April 24, 2015
Enbridge Application for a Route Permit	April 24, 2015
Environmental Impact Statement Scoping Decision Document	December 5, 2016
Draft Environmental Impact Statement	May 15, 2017
Final Environmental Impact Statement	August 17, 2017
Report of the Administrative Law Judge (ALJ)	November 1, 2017
Exceptions of Donovan and Anna Dyrdal to Report of the ALJ	November 21, 2017
Exceptions of Department of Commerce Energy Environmental Review and Analysis to Report of the ALJ	November 21, 2017
Exceptions of Fond du Lac Band to Report of the ALJ	November 21, 2017
Exceptions of Friends of the Headwaters to Report of the ALJ	November 21, 2017
Exceptions of Honor the Earth to Report of the ALJ	November 21, 2017
Exceptions of Mille Lacs Band to Report of the ALJ	November 21, 2017
Exceptions of Sierra Club to Report of the ALJ	November 21, 2017
Exceptions of Youth Climate Intervenors to Report of the ALJ	November 21, 2017
Motion of Kathy Hollander Requesting a Determination on whether the Trade Secret Data in Appendix F and Appendix I of the Certificate of Need Application Should be Classified as Public Data	November 21, 2017
 Commission Orders	
Order Approving Notice Plan, Granting Variance Request, Approving Exemption Requests, and Approving and Adopting Orders for Protection and Separate Docket	January 27, 2015
Protective Order	April 13, 2015
Protective Order for Nonpublic Highly Sensitive Trade Secret Data	April 13, 2015
Order Finding Certificate of Need Application Substantially Complete and Varying Timelines; Notice and Order for Hearing	August 12, 2015
Order Finding Route Permit Application Substantially Complete and Varying Timelines	August 12, 2015
Order Joining Need and Routing Dockets	February 1, 2016
Notice of Hearing	February 1, 2016

✓ **Commission Orders**

Order Denying Petitions for Reconsideration [of February 1 Order] and Motion to Amend Memorandum, and Referring Petitions for Intervention to OAH	March 31, 2016
Order Denying Motions, Approving Scoping Decision as Modified, and Requiring Expanded Notice	November 30, 2016
Order Denying Reconsideration [of November 30 Order]	February 10, 2017
Order Clarifying Process	March 24, 2017
Order Denying Motion for Reconsideration [of March 24 Order] and Granting Authority to the Department of Commerce to Obtain Investigative Services	May 24, 2017
Order Extending Deadline and Setting Procedural Schedule	August 14, 2017
Order Modifying Procedural Schedule	August 25, 2017
Order Denying Reconsideration [of August 25 Order]	October 10, 2017
Order Finding Certain Data Public and Requiring Refiling	November 9, 2017

I. Statement of the Issues

- Should the Commission adopt the administrative law judge’s Findings of Fact, Conclusions of Law, and Recommendation?
- Should the Commission find that the Final Environmental Impact Statement is Adequate?
- Whether the data identified as Trade Secret in Appendix F and Appendix I of Enbridge Energy, Limited Partnership’s Certificate of Need Application for the Proposed Line 3 Replacement Project is public under the Minnesota Government Data Practices Act.

II. Project Description

Enbridge Energy, Limited Partnership (Enbridge) has filed a certificate of need application and a pipeline route permit application for its proposed Line 3 Replacement Project. The Line 3 Replacement Project is described as a new 337-mile long 36-inch diameter pipeline that would replace 282 miles of the existing 34-inch Line 3 pipeline in Minnesota.¹ The pipeline route

¹ The existing Line 3 pipeline was originally installed between 1962 and 1969 and is part of the Enbridge Mainline System. The existing Line 3 pipeline originates in Canada and crosses the United States-Canada border near Neche, North Dakota. It continues through North Dakota to Clearbrook, Minnesota, heads east from Clearbrook and terminates at the Enbridge Superior Station and Terminal Facility near Superior, Wisconsin. The Enbridge Mainline System delivers crude oil to: (1) Minnesota Pipe Line Company’s interconnecting facilities at Clearbrook for

proposed by Enbridge would parallel the route of the existing Line 3 pipeline from the North Dakota-Minnesota border to Clearbrook, Minnesota, but would require a new right-of-way from Clearbrook to Superior, Wisconsin. The existing Line 3 pipeline is proposed to be permanently deactivated and left in-place after the new pipeline is installed, tested, and operational. Associated facilities would include eight pumping stations, valves, metering and monitoring equipment, and related electrical facilities. Enbridge’s proposed pipeline route would cross portions of Kittson, Marshall, Pennington, Polk, Red Lake, Clearwater, Hubbard, Wadena, Cass, Crow Wing, Aitkin, and Carlton counties.

As indicated in the applications, the purpose of the Line 3 Replacement Project is to replace the Minnesota portion of the existing Line 3 pipeline to: 1) address known integrity risks, 2) reduce apportionment due to decreased transport capacity related to integrity issues, and 3) restore flexibility to the Enbridge Mainline System for more efficient operation. The new Line 3 pipeline would have an annual average capacity of 760,000 barrels per day (bpd) and would serve the same markets and transport the same products as the existing Line 3 pipeline.² Operationally, the new Line 3 pipeline would continue to transport crude from Canada to the Enbridge terminal facility in Clearbrook for subsequent delivery to Minnesota refineries via interconnected pipeline facilities operated by Minnesota Pipeline Company,³ and delivery of crude oil to the Superior Wisconsin terminal for subsequent delivery on the Enbridge Mainline System to refineries in the Midwest, Eastern Canada, and the Gulf Coast.

III. Statutes and Rules

Under Minn. R. 4410.2800, subp. 2, interested persons may submit written comments on the adequacy of the final EIS for a period of not less than ten days following the notice of availability of the final EIS in the EQB Monitor. The Commission accepted written comments on the adequacy of the Final EIS from August 23, 2017 to October 2, 2017.⁴

Under Minn. R. 4410.2800, subp. 3, a determination of adequacy of the final EIS shall be made within 280 days after the preparation notice was published in the EQB Monitor unless the time is extended by consent of the proposer and the Responsible Government Unit (RGU) or by the governor for good cause. In this case, the EIS Preparation Notice was issued on December 5, 2016, thereby making September 11, 2017, the 280-day adequacy deadline date. Due to the

ultimate redelivery to Minnesota refineries, and (2) the Superior Terminal for ultimate delivery to other refineries in the United States and Canada (See Certificate of Need Application).

² The average annual capacity of the existing Line 3 has been restricted to 390,000 bpd due to safety-related pressure restrictions and transports a mixture of heavy and light crudes (See Certificate of Need Application).

³ Enbridge currently transfers approximately 400,000 bpd to the Minnesota Pipeline Company pipeline system (See Final EIS, at 1.4, Section 1.2).

⁴ The “Notice of Comment Period on Adequacy of Final EIS for the Proposed Line 3 Replacement Project” was posted to the Commission’s eDocket System on August 23, 2017; Published in the EQB Monitor on August 28, 2017; and mailed to a list of affected landowners on September 13, 2017. In addition, the Department of Commerce issued a press release on August 17, 2017, published notice of availability of the Final EIS in 23 local newspapers and made a copy of the Final EIS available at 48 libraries and community centers.

deadline for publication of the Final EIS being extended by the Governor,⁵ and the general magnitude of the Final EIS, the Commission, with the consent of Enbridge, extended the statutory deadline on Final EIS adequacy to December 11, 2017. The Commission also referred the matter of Final EIS adequacy to the Office of Administrative Hearings for the purpose of developing the record and issuing a report and recommendation.⁶

Minn. Stat. § 116D.04, subd. 2b, states that if an environmental assessment worksheet or an environmental impact statement is required for a governmental action under subdivision 2a, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:

- (1) a petition for an environmental assessment worksheet is dismissed;
- (2) a negative declaration has been issued on the need for an environmental impact statement;
- (3) the environmental impact statement has been determined adequate; or
- (4) a variance has been granted from making an environmental impact statement by the environmental quality board.

The criteria the Commission, as the Responsible Government Unit (RGU), must consider in making its determination as to whether the Final EIS (FEIS) is adequate can be found in Minn. R. 4410.2800, subp. 4. This part provides:

The final EIS shall be determined adequate if it:

- A. addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with part 4410.2300, items G (comparing potentially significant impacts of the proposed project with those of other reasonable alternatives to the proposed project) and H (presenting a thorough but succinct discussion of potentially significant direct, indirect, or cumulative adverse and beneficial environmental, economic, employment, and sociological effects of the proposed project and major alternatives);
- B. provides responses to the substantive comments received during the draft EIS review concerning issues raised in scoping; and

⁵ See Statement from Governor Mark Dayton on Proposed Enbridge Line 3 Pipeline, <https://mn.gov/governor/newsroom/#/detail/appld/1/id/307544>.

⁶ See Commission *Order Extending Deadline and Setting Procedural Schedule* (August 14, 2017).

- C. was prepared in compliance with the procedures of the act and parts 4410.0200 to 4410.6500.

If the Commission determines that the Final EIS is adequate it shall, within five days of the decision, notify all persons receiving copies of the final EIS pursuant to Minn. R. 4410.2700. In addition, public notice of the decision shall be published in the EQB Monitor.

If the Commission determines that the Final EIS is inadequate, Minn. R. 4410.2800, subp. 5, provides 60 days in which to prepare an adequate Final EIS.

IV. Procedural History

Staff has reviewed Section I, Section IV, and Section V(A) of the Report of the Administrative Law Judge (ALJ Report). These three sections detail the procedural history related to the Certificate of Need and Route Permit applications, the EIS scoping process, preparation of the Draft EIS, and preparation of the Final EIS. Staff believes the Administrative Law Judge (ALJ) provided an accurate and thorough summary of the procedural history. Therefore, staff does not repeat the procedural history in this briefing paper, and instead recommends reviewing the ALJ Report at the identified sections for a summary of the procedural history.

V. Report of the Administrative Law Judge

On November 1, 2017, the ALJ filed his report in this matter. The ALJ's report provided findings, conclusions, and a recommendation as it concerns the adequacy of the Final EIS in this matter. Specifically, the ALJ's report included: 293 findings of fact, 20 conclusions of law, and a recommendation.

The ALJ recommended that the "Commission determine that the Final Environmental Impact Statement for the Line 3 Replacement Project is adequate, as those terms are used in Minn. R. 4410.2800, subp. 4."

The ALJ made his recommendation based on the following conclusions:

1. The Commission is charged with determining the adequacy of the FEIS for the Line 3 Replacement Project.
2. The FSDD [Final Scoping Decision Document] specified those potentially significant issues and impacts that were to be developed during the scoping process. Each of these issues and impacts were explored in the DEIS [Draft EIS] and FEIS [Final EIS].

3. Each alternative that was identified in the FSDD was developed during scoping and later analyzed in the DEIS and FEIS.
4. The DEIS met the requirements of Minn. R. 4410.2300(G), in that the DEIS compared potentially significant impacts of the Project with those of the other alternatives that were specified in the FSDD.
5. The DEIS addressed the potentially significant adverse or beneficial environmental, economic, employment, and sociological impacts generated by the project and alternatives. It addressed direct, indirect, or cumulative impacts commensurate with their importance.
6. Notwithstanding the procedural error with respect to the scheduling of the public meeting in Hinckley, Minnesota, the Commission did meet the public meeting requirements of Minn. R. 4410.2100, subp. 3(B).
7. The public was afforded opportunities to shape the scope of the EIS, contribute to the DEIS and FEIS, and assess the adequacy of the FEIS, in accordance with the requirements of MEPA and Minn. R. Ch. 4410.
8. The information presented in the FEIS adequately addresses the issues that were identified in the FSDD.
9. The FEIS was prepared in compliance with the procedures of Minn. Stat. § 116D.04 (2016) and Minn. R. 4410.0200 to 4410.6500 (2015).
10. The proposed action is described in sufficient detail.
11. The FEIS meets the content requirements of Minn. R. 4410.2300.
12. The FEIS adequately analyzes significant environmental impacts.
13. The FEIS adequately presents alternatives to the proposed action and their impacts.
14. The FEIS adequately presents methods by which adverse environmental impacts can be mitigated.
15. The FEIS addresses direct, indirect, and cumulative potentially significant impacts that could result from the Project.
16. The FEIS adequately presents the economic, employment and sociological effects that cannot be avoided if the proposed action, or an alternative, is implemented.
17. The FEIS addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been thoroughly analyzed.
18. The FEIS provides responses to the substantive comments received during the DEIS review as to issues that were raised during the scoping process.
19. The FEIS addresses the potentially significant issues and alternatives that were raised during the scoping process.
20. The FEIS was prepared in compliance with the procedures of MEPA and Minn. R. 4410.0200 to 4410.6500.

The ALJ addressed the following arguments made against finding the FEIS to be adequate. The ALJ provided factual and legal explanations as to why he disagreed with each claim and cited to the appropriate location in the record or other legal citations in support of his determination:

- a. The FEIS improperly used the Applicant's stated need and purpose for the proposed project as the need and purpose in the FEIS. The ALJ did not find it inappropriate for the DOC-EERA to focus on alternatives that deliver crude to the Applicant's identified endpoints of Clearbrook, Minnesota and Superior, Wisconsin. (See ALJ Findings 170 to 175, and 178 to 183).
- b. The FEIS only evaluates alternatives that deliver crude oil and excludes alternative technologies, such as electric cars, that could avoid the need for crude oil to meet Minnesota's transportation needs. The ALJ did not agree with this argument and indicated that the crude oil to be delivered by the pipeline will be used for a wide range of products in addition to transportation uses. (See ALJ Findings 176 to 179).
- c. The FEIS did not evaluate impacts in relation to the ultimate annual average rated capacity (915,000 bpd) of the proposed project. Rather, the FEIS only evaluated the impacts associated with transporting 760,000 bpd, as requested by the Applicant in its Certificate of Need Application. The ALJ disagreed indicating that the Applicant could not transport more than 760,000 bpd, should that be approved, without seeking additional approval from the Commission. (See ALJ Findings 184 to 187).
- d. The FEIS did not evaluate a theoretical pipeline (Line 66) in Wisconsin as a cumulative impact. The ALJ disagreed by referencing Minn. R. 4410.2000, subp. 4, and indicated that "declining to evaluate a yet-to-be proposed project, wholly within a neighboring state, was not error." (See ALJ Findings 188 to 191).
- e. The FEIS comparative analysis between the Applicant's Proposed Route and System Alternative SA-04 was skewed because DOC-EERA failed to make adjustments to the SA-04 route so as to avoid karst features in southeastern Minnesota. The ALJ disagreed, indicating there is nothing in the record to support a finding "that DOC-EERA, or its sister agencies the DNR and the MPCA, aimed the digital centerline of SA-04 at sensitive resources so as to tilt later comparisons in favor of Enbridge's proposal." In addition, under Minn. R. 4410.2300(l), DOC-EERA did not have a duty to make improvements to competing alternatives. (See ALJ Findings 196 to 207).
- f. The spill analysis performed and included as part of the FEIS did not assess a hypothetical discharge of oil into the headwaters of the Mississippi River, Itasca State Park, and the Straight River. The ALJ disagreed, indicating that the DOC-EERA analyzed a broad representation of potential spill scenarios along the pipeline route that provided

adequate information to inform the Commission of the potential impacts from an accidental discharge of crude oil. (See ALJ Findings 208 to 215).

- g. The FEIS did not include a complete tribal cultural survey to evaluate the presence of Traditional Cultural Properties (TCPs) along the Applicant's Proposed Route and the alternative routes. The ALJ disagreed, indicating in Finding 255 that, "Completion of the Tribal Cultural Properties survey is not required in order for the FEIS to meet the adequacy standards of Minn. R. 4410.2800, subp 4. With this FEIS, the Commission has the "information [that] can be reasonably obtained" and this data has been "analyzed in conformance with part 4410.2300, items G and H." (See ALJ Findings 243 to 255).
- h. The FEIS did not provide assurance that the Applicant will be a viable company throughout the expected life of the proposed pipeline, nor will it have the financial means to remediate future oil spills in that scenario. The ALJ disagreed, indicating that the information was provided in Section 10.6.3 of the FEIS. The ALJ also cited to Minn. R. 4410.2800, subp. 4(A), which provides that a FEIS is not inadequate because it does not include an analysis of matters that cannot be "reasonably obtained." (See ALJ Findings 273 to 275).
- i. The DNR and MPCA, who assisted DOC EERA in the preparation of the FEIS, failed to submit written comments as independent reviewers of the preliminary EIS drafts, in violation of their legal duty. The ALJ disagreed, stating that there is no legal requirement that state agencies submit public comments on draft environmental impact statements. (See ALJ Findings 286 to 288).

VI. Exceptions to the ALJ Report

The Commission, in its August 25, 2017 *Order Modifying Procedural Schedule*, set forth November 21, 2017, as the due date for exceptions to the ALJ Report on FEIS adequacy. The Commission received exceptions from the following eight parties: Donovan and Anna Dyrdal, Department of Commerce Energy Environmental Review and Analysis (DOC-EERA), Fond du Lac Band of Lake Superior Chippewa, Friends of the Headwaters, Honor the Earth, Mille Lacs Band of Ojibwe, Sierra Club, and Youth Climate Intervenors. With the exception of DOC-EERA, all the other parties that filed exceptions recommended that the Commission find the FEIS inadequate and authorize a supplement.

Staff has reviewed the exceptions filed by the above parties. The exceptions fall into roughly four categories:

- 1) exceptions to the ALJ's rejection of a party's argument(s) that the FEIS is inadequate because it fails to address a significant issue or does not include all of the reasonably obtainable information relevant to a significant issue;
- 2) exceptions to prior Commission decisions regarding information requirements set forth in the Final Scoping Decision Document,⁷ and the procedures established for the Commission's adequacy determination;
- 3) exceptions that the ALJ Report did not draw certain conclusions related to the merits of the proposed project, and thus do not go to the issue of whether the FEIS is adequate or not; and
- 4) exceptions that the FEIS does not evaluate or discuss certain information included in the FEIS to the objecting party's satisfaction.

Staff provides a high-level overview of all the parties' exceptions to the ALJ's Findings of Fact, Conclusions of Law, and Recommendation below. Staff refers the Commission to each party's filing for a more detailed presentation of their exceptions.

A. Donovan and Anna Dyrdal

The Dyrdal's provided exceptions that point out issues they believe the ALJ omitted from his Report concerning their objections related to FEIS adequacy. However, their current exception filing is very different than their comments dated October 2, 2017, that were provided to the ALJ for his consideration.⁸ That said, the ALJ Report does address the issues raised by the Dyrdal's in their exceptions. Staff has grouped the arguments made by the Dyrdal's as follows:

1. The ALJ Report did not address the replacement of Line 3 in its existing trench west of Clearbrook, nor analyze the effects of removal of Line 3 compared to abandonment in-place.

This specific adequacy objection was not presented to the ALJ to address. There is a robust discussion of this issue in the FEIS, which the ALJ Report notes. The removal of the existing Line 3 pipeline was evaluated and discussed in Chapter 8 of the FEIS and included routes west and east of Clearbrook. The ALJ cites to Chapter 8 of the FEIS in Findings 269 and 270. The ALJ also noted in Finding 117 that the Final Scoping Decision Document (FSDD) indicated the EIS would include an evaluation of "three scenarios for deactivating the existing Line 3 pipeline

⁷ These requests were reviewed by the Commission in comments during one or more of the three phases of the EIS scoping for the Line 3 project. See November 30, 2016 *Order Denying Motions, Approving Scoping Decision as Modified, and Requiring Expanded Notice*.

⁸ Comments of Donovan and Anna M. Dyrdal on the FEIS (dated October 2, 2017), filed in eDockets as part of "Public Comment – Final EIS Adequacy – Batch 5 (Document ID [201710-136067-02](#)).

(abandonment in place, removal following construction of the Project, and removal of existing Line 3 and construction of the Project in the same trench and right-of-way.” (See also Finding 122).

- 2. The ALJ Report did not analyze potential adverse effects of pipeline construction and operation upon agricultural soils and land, the potential loss of agricultural land, and the value of mitigation measures, or the cumulative effect of additional pipelines.**

This too is an adequacy objection that was not raised for the ALJ to address. However, Chapter 5 and 6 of the FEIS include sections that provide detailed descriptions of existing geologic and soil conditions in areas affected by the Applicant’s Proposed Project, certificate of need alternatives, and route alternatives. Chapter 2 discusses construction practices, specifically as they relate to potential impacts to topsoil and mitigation methods that would be employed. In addition, detailed measures that would be implemented with regard to potential agricultural impacts are outlined in the Agricultural Protection Plan prepared in consultation with Minnesota Department of Agriculture (Appendix F of the FEIS). The ALJ also noted that the FEIS assesses the possible effects of Line 3 with respect to the disturbance and loss of agricultural land, and details the mitigation measures proposed in the Agricultural Protection Plan for Line 3 (see ALJ Findings 256-57).

B. Fond du Lac Band of Lake Superior Chippewa

- 1. The Fond du Lac Band of Lake Superior Chippewa (Fond du Lac) suggests that Finding 11 be revised to accurately summarize the serious problems with the existing Line 3 or that it directly cite the FEIS.**

Staff has reviewed Finding 11 and does not agree. The ALJ was tasked with evaluating the adequacy of the FEIS, not with elucidating the extent of the record evidence regarding issues relating to the need for Line 3 or where it should be routed (See ALJ Finding 5). Chapter 8 directly addresses the problems with the existing Line 3, and staff believes the ALJ correctly cites to the Certificate of Need Application at page 3-17 as providing a complete history of the existing Line 3, including integrity issues.

- 2. Fond du Lac does not agree with the ALJ’s selection of words or citations in Finding 19. The Band argues that the terms of the Consent Decree should be cited.**

Staff has reviewed Finding 19 and does not agree. The ALJ cites to FEIS Section 2.9 which refers also to Chapter 8 (Existing Line 3 Abandonment and Removal) and Appendix B (Line 3 Permanent Deactivation Plan), both of which discuss the terms of Consent Decree in detail.

3. Fond du Lac argues Finding 167 should be “materially revised.”

Fond du Lac asserts that the additional information included in the FEIS as a result of comments on the adequacy of the DEIS is inadequate and does not meet the requirements of Minnesota law, but does not cite to any specific legal authority for this assertion.

Staff has reviewed Finding 167 and does not agree with this exception. The finding identifies which sections of the FEIS were amended in response to comments received on the DEIS. The language of Finding 167 was pulled directly from the FEIS at page ES-11. Fond du Lac itself agrees that the “sections did, indeed, include changes from the DEIS.”

Again, the ALJ was not tasked with evaluating the quality of the FEIS evaluation and analysis of certain issues, but with evaluating the adequacy of the FEIS pursuant to Minn. R. 4410.2800. Specifically, the ALJ was to determine whether the FEIS responded to the timely substantive comments on the draft EIS consistent with the scoping decision, and did so by including the relevant information that could be reasonably obtained to address the comments. (See Minn. R. 4410.2300 (H)). The ALJ found that the FEIS met these two requirements.

4. Finding 186 should be revised to eliminate any suggestion that replacement Line 3 could ever carry more than 760,000 bpd on an annual basis.

Staff has reviewed the Finding 186 and does not agree. As provided in the Certificate of Need Application, the ultimate rated average annual capacity of the proposed Line 23 pipeline is 915,000 bpd. Staff believes the ALJ is correct in stating that any additional crude oil transportation capacity over what may be permitted, based on the current applications before the Commission, would require separate additional approvals by the Commission.

5. Findings 253-254 should be revised to reflect that the FEIS is incomplete until the tribal survey is complete.

Fond du Lac itself acknowledges that a Traditional Cultural Properties Survey was not available during the preparation of the FEIS. At this time, the date of its availability has still not been established. As indicated by the ALJ, sections 5.4.1, 5.4.1.2, 5.4.4.2 and Chapter 9 of the FEIS provide the Commission with sufficient information so that, if it determines it will grant the requested certificate of need and route permit for Line 3, it can require Enbridge to adequately mitigate any adverse impacts associated with new cultural resources that are identified before or during construction and operation of the line. Staff believes this is a case where a significant issue was addressed in the FEIS with the information that could reasonably be obtained.

6. Finding 265 should be revised for accuracy to reflect the fact that the FEIS actually concludes that paralleling is desirable.

Staff has reviewed the Finding 265 and does not agree. Fond du Lac failed to include the complete finding in its exceptions. The first sentence of the finding states, “The FEIS included a discussion of both the challenges, and benefits of right-of-way sharing (or “paralleling”) the proposed Project within existing infrastructure corridors.” The ALJ also cited to Section 6.7 of the FEIS; the exact section Fond du Lac referred to in its exception.

C. Friends of the Headwaters

The exceptions filed by Friends of the Headwaters for the most part are ones that were addressed by the ALJ in his Report as summarized above in Section V of these briefing papers. Friends of the Headwaters takes exception to the ALJ’s findings and conclusions relating to issues V.a, V.b, V.d, V.e, V.f, V.h and V.i

In addition, Friends of the Headwaters states the same exception as Fond du Lac that the additional information included in the FEIS as a result of comments on the adequacy of the DEIS is inadequate and does not meet the requirements of Minnesota law. Staff’s analysis of that exception is set forth in section VI.B.3 above.

Friends of the Headwaters also objects that the Commission’s FEIS adequacy determination will be made after rather than before the public and evidentiary hearings on the FEIS. Staff notes that objections to the procedural schedule for the Commission’s FEIS adequacy decision, including this particular objection, were argued to the Commission on August 3, 2017 (Order issued August 14, 2017), and August 22, 2017 (Order issued August 25, 2017). This issue has already been addressed by the Commission and need not be addressed once again here.

D. Honor the Earth

Honor the Earth’s exceptions to the ALJ Report focus on the FEIS adequacy issues specifically addressed in the ALJ Report, but without referencing specific findings and conclusions. Honor the Earth’s exceptions relate to issues V.a, V.b, V.e, V.f, and V.g.

Honor the Earth also states the same exception as Fond du Lac and Friends of the Headwaters regarding the adequacy of the FEIS to respond to the DEIS comments, which is discussed in Section VI.B.3 above. And Honor the Earth also objects again to the time period allowed for preparation of the exceptions to the ALJ Report. This issue was addressed by the Commission at its meetings on the procedural schedule for the Commission’s FEIS adequacy decision, which were held on August 3, 2017 (Order issued August 14, 2017), and August 22, 2017 (Order issued August 25, 2017).

E. Mille Lacs Band of Ojibwe

The Mille Lacs Band of Ojibwe (Mille Lacs Band) also filed exceptions to the adequacy of the FEIS without reference to specific findings in the ALJ Report. The Band claims that the FEIS is inadequate with respect to addressing: 1) the availability of other existing pipelines to meet the need Enbridge's proposed project (issue V.a); and 2) the significant environmental impacts of locating the project in various routes without the benefit of complete Traditional Cultural Properties surveys (issue V.g). In addition, Mille Lacs Band claims the FEIS fails to properly distinguish between the different environmental impacts of Enbridge's proposed project being located parallel to an existing pipeline right-of-way versus a non-pipeline right-of-way. Staff refers the Commission to the Band's filing for a more detailed presentation of this particular exception to how a Minnesota EIS has traditionally identified the environmental impacts associated with routes that parallel an established right-of-way corridor.

F. Sierra Club

Like various other parties, the Sierra Club identifies exceptions to the FEIS without referencing any findings in the ALJ Report. And in most instances, Sierra Club identifies its exceptions in the most general terms, referring the Commission to their comments in the record before the ALJ.

Sierra Club's six exceptions are that the FEIS: 1) improperly discounts the weight of federal law on assessing the adequacy of the FEIS; 2) mistakenly identifies Enbridge's proposed project as the "project" that is subject to the FEIS and thus fails to analyze the correct set of alternatives to the project (issues V.a, V.b, and V.d); 3) fails to properly address the cumulative effects of the project as required by MEPA; 4) fails to adequately respond to substantive comments on the adequacy of the DEIS (see Fond du Lac exception discussed at VI.B.3); 5) violates the procedural requirements of Minn. R. 4410.2600; and 6) that the FSDD is legally deficient and therefore the FEIS is "deficient as a matter of law." Staff notes that with respect to this last issue, the Commission heard and rejected all of Sierra Club's objections to the FSDD, and the issue of its purported "legal deficiency" need not be addressed again by the Commission here.

G. Youth Climate Intervenors

While generally stating that it shares the concerns of the other parties and public about the adequacy of the FEIS, the Youth Climate Intervenors identified only two exceptions to the ALJ Report, both based on the procedural schedule of the environmental review process. Specifically, Youth Climate Intervenors claim that the FEIS cannot be found: 1) to have responded to the substantive comments received during the DEIS review process (Finding 19), and 2) to have addressed the potentially significant issues and alternative raised in the scoping

process because the time period in allowed for DOC-EERA to do that was only five and half weeks.

Youth Climate Intervenors also claim the FEIS did not adequately quantify the impacts of climate change because the social cost of carbon scenarios that were developed for Enbridge’s proposed project do not extend beyond 30 years, while the project’s life, and hence the carbon effects associated with it, will most likely extend beyond 30 years.

H. Department of Commerce Energy Environment Review and Analysis

The DOC-EERA filed exceptions that: 1) clarify or correct certain findings of fact in the ALJ Report, and 2) revised certain findings to substitute different facts and/or analysis than the ALJ included in the findings.

Staff has reviewed the exceptions filed by DOC-EERA and believes the Commission should modify the ALJ Report according to the DOC-EERA’s suggestions as set forth in the table below.

ALJ Finding	Recommended Correction by DOC-EERA
11	More recently, because of operational and safety issues, Enbridge has not been operating the Line 3 pipeline at this rated capacity. To avoid stress on the pipeline, or mishaps, Enbridge has been shipping on average 360,000 <u>390,000</u> bpd from Neche, North Dakota, to Superior, Wisconsin, through Line 3. ¹¹
13	Enbridge proposes a new pipeline, as a replacement for the existing Line 3, as part of an effort to reclaim a 760,000 bpd throughput capacity from oil terminals in North Dakota <u>Edmonton, Alberta</u> to Superior, Wisconsin. ¹³ Footnote 13: See Certificate of Need Application at 1-1, 1-6, 2-5 (eDocket Nos. 20154-109653-03, 20154-109653- 01) and Route Permit Application, Section 1 at 1-1, (eDocket Nos. 20154-109661-07, 20154-109661-08, 20154-109661-09)
69	As noted above, Enbridge filed Certificate of Need and Routing Permit applications for the Project on April 24, 2015. On July 20, 2015, the Commission and <u>DOC-EERA</u> issued a notice of public information and scoping meetings for the Project. ⁶⁹
<u>69a</u>	<u>On August 12, 2015, the Commission issued an order finding the Route and Certificate of Need Applications substantially complete and among other things varied Minn. R. 7852.1300, subp. 1, to authorize public information meetings in areas near the proposed pipeline route in lieu of meetings within</u>

ALJ Finding	Recommended Correction by DOC-EERA
	<p><u>every county along the route.</u>^{69a}</p> <p>^{69a} <u>Commission Order Finding Application Substantially Complete and Varying Timelines, August 12, 2015 (eDocket No. 20158-113179-01).</u></p>
70	<p>The 2015 scoping period, conducted under Minn. R. ch. 7852 (2015), occurred between July 20 and September 30, 2015. DOC-EERA and Commission staff held 15 public meetings between August 11 and 27, 2017 <u>2015</u>.⁷⁰</p>
70a	<p><u>DOC-EERA issued a revised public meeting notice on August 17, 2015, to accommodate a request from the Mille Lacs Band of Ojibwe to hold a meeting at the East Lake Community Center.</u>^{70a}</p> <p>^{70a} <u>Revised Public Meeting Notice filed on August 19, 2015 (eDocket No. 20158-113372-01).</u></p>
81	<p>The Commission conducted public scoping for the EIS in April and May 2016.⁸¹</p>
82	<p>The Commission <u>DOC-EERA</u> prepared a Scoping EAW and DSDD.⁸²</p>
83	<p>The Commission accepted Enbridge's completed data portions of the Scoping EAW for use in EIS scoping, and determined Enbridge's Scoping EAW data submittal to be complete for scoping purposes.⁸³</p>
84	<p><u>DOC-EERA published the A Scoping EAW and DSDD</u> were issued on April 11 <u>11</u>, 2016.⁸⁴</p>
121	<p>With respect to a No Action Alternative, the FSDD pledged that the EIS would evaluate <u>the expected condition if the certificate of need is not granted and the existing Line 3 is not replaced as proposed</u>. The FSDD pledged that <u>this analysis would include</u> options for an integrity monitoring and repair program for the Existing Line 3, as well as the potential that additional volumes of oil would be transported using alternative methods and technologies.¹²¹</p>
139	<p>Additionally, the DEIS <u>EQB</u> published notice of the availability of the DEIS in the May 15, 2017 issue of the EQB Monitor. The notice included the dates, times, and locations of the public meetings; notices of where the DEIS was available for public review; and indicated that the comment period would close on July 10, 2017.¹³⁹</p>

ALJ Finding	Recommended Correction by DOC-EERA
208	Enbridge commissioned a modeling analysis of hypothetical crude oil releases on behalf of, and with input from <u>state and federal agency staff, including DOC-EERA, Minnesota Department of Health, and the DNR and MPCA</u> . Staff from the U.S. Army Corps of Engineers were also involved. The analysis modeled the impacts following seven different hypothetical crude oil releases. The computer modeling involved “simulating the chemical and physical behavior of hypothetical oil spills in the selected environments under specified conditions, including weathering processes.” ²⁰⁸
215	The FEIS also analyzed the potential effects of reducing the pipeline diameter from 34 <u>36</u> inches, as proposed by Enbridge, to 24 <u>34</u> inches. DOC-EERA noted that while the “probability of an incident leading to a crude oil release would . . . be similar for a smaller diameter pipeline,” because the construction and operation impacts “are generally the same, a smaller diameter pipeline configuration was not evaluated as a Project configuration alternative.” ²¹⁵

Note: Some of the recommended changes will necessitate changes to the overall numbering of findings and footnotes of the ALJ’s Report.

As to DOC-EERA’s recommendations to substitute different facts and/or analysis than the ALJ included in his findings (findings 170, 170a, 170b, 171, 173, 174, 177, 177a, 179, 181, 181a, 182, 183, 241a, 277a, and 277b), staff is concerned they are not clearly necessary or appropriate. Staff believes that recommended revisions which do not go to the issue of whether the FEIS is adequate or not should be avoided. The purpose of the ALJ Report is to provide the Commission with the appropriate facts and analysis of those facts for it to make a decision on FEIS adequacy pursuant to Minn. R. 4410.2800, not to provide a more extensive description or discussion of the information in the FEIS than is actually necessary for the Commission to make its adequacy determination.

VII. Staff Discussion

A. Final Environmental Impact Statement Adequacy Determination

The issue before the Commission is to determine the adequacy of the Line 3 FEIS. The standard for making an adequacy determination is found in Minn. R. 4410.2800 which state that the FEIS shall be determined adequate if it:

- A. addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with part 4410.2300, items G and H;

- B. provides responses to the substantive comments received during the draft EIS review concerning issues raised in scoping; and
- C. was prepared in compliance with the procedures of the act and parts 4410.0200 to 4410.6500.

Based on its review, staff recommends that the Commission adopt the ALJ Report in its entirety with certain modifications recommended by DOC-EERA, as identified by staff in section VI.H above. Staff believes the ALJ Report is well reasoned, comprehensive, and thorough. The report documented that the procedural requirements were followed, and presented findings of fact that show that each of the decision criteria that must be considered by the Commission in reaching a final EIS adequacy determination have been addressed. The findings of fact support the ALJ's conclusions of law, which together support his recommendation that the Commission "determine that the Final Environmental Impact Statement for the Line 3 Replacement Project is adequate, as those terms are used in Minn. R. 4410.2800, subp. 4."

Staff also believes that comments made by several parties that the FEIS did not respond to the substantive comments received during the draft EIS review process regarding issues raised in the EIS scoping process lack merit. Appendix T of the FEIS, which was compiled into four volumes, provides a clear explanation of the methodology DOC-EERA used in responding to the comments it received. The DOC-EERA explained that it organized the comments as:

- Substantive comments that included: 1) the specific reference to the EIS, and 2) the rationale for an addition, clarification, correction, discussion of uncertainty, or application of alternative methodology to respond to the comment; or
- Comments that provided: 1) opinions and preferences of individuals and/or organizations on high-level policy issues or on whether to issue a permit for Enbridge's proposed project; 2) general critiques of the draft document; and 3) sample studies and articles for reference without providing clear rationale for an addition, clarification, correction, discussion of uncertainty or application of alternative methodology in response to the comment.

This method of replying to comments on a draft EIS is standard practice that follows the requirements of Minn. R. ch. 4410, and is consistent with the approach taken by other state agencies when preparing Final Environmental Impact Statements that have been deemed adequate.⁹

⁹ See Minnesota Department of Natural Resources, *NorthMet Mining and Land Exchange Final Environmental Impact Statement*: <http://files.dnr.state.mn.us/input/environmentalreview/polymet/northmet-feis-adequacy-exhibit-a.pdf>; Minnesota Public Utilities Commission, *Brookings-Hampton Transmission Project Final Environmental Impact Statement*: <http://mn.gov/commerce/energyfacilities/documents/19860/Brookings->

If the Commission determines that the FEIS is not adequate. It should not adopt the ALJ Report and instead prepare findings that specify the reasons the FEIS is not adequate. Also, in accordance with Minn. R. 4410.2800, subp. 5, the Commission should request that the DOC-EERA prepare an adequate environmental impact statement.

B. Motion on Trade Secret Data in Appendix F and Appendix I of the Line 3 Certificate of Need Application

On November 21, 2017, a Motion was filed with the Commission by Ms. Kathy Hollander requesting a determination on the trade secret status of oil delivery data contained within Appendix F and Appendix I of Enbridge's Line 3 Certificate of Need Application (the Motion was initially received on November 9, 2017). Ms. Hollander is requesting that the Commission make a determination that the oil delivery data contained in the two Appendices is public data.

- Appendix F contains information on: 2010-2014 Actual Crude Deliveries by Product Type
- Appendix I contains information on: Percentage of In-State Deliveries by Crude Type

Ms. Hollander argues that the information should not be considered confidential as it is aggregate data. Ms. Hollander also believes that the data in question was not part of the exemptions authorized by the Commission that allowed for exclusion of the data in the Certificate of Need Application.

On November 22, 2017, the Commission issued a notice indicating that it will hear brief oral arguments from parties on this matter at its December 7, 2017.

The relevant considerations are whether the data is nonpublic trade secret data (*See* Minn. Stat. § 13.37, subs. 1(b) and 2), or nonpublic security data (*See* § 13.37, subs. 1(a) and 2), or having failed to come within the scope of either of those classifications, is public data (*See* Minn. Stat. § 13.03). If the data is nonpublic, the Commission still needs to determine whether or not it is reasonably necessary to disclose the data to conduct its business.

VIII. Commission Decision Alternatives

A. Final Environmental Impact Statement Adequacy

1. Adopt the Report of the Administrative Law Judge with no modifications and find that the Final Environmental Impact Statement for the Line 3 Replacement Project is adequate in pursuant to Minn. R. 4410.2800.
2. Adopt the Report of the Administrative Law Judge as modified by decision subpoints a., b., or c. below and find that the Final Environmental Impact Statement for the Line 3 Replacement Project is adequate in pursuant to Minn. R. 4410.2800.
 - a. Adopt DOC-EERA's corrected/clarified findings: 11, 13, 69, 69a, 70, 70a, 81, 82, 83, 84, 121, 139, 208, and 215.
 - b. Adopt DOC-EERA's replacement/additional findings: 170, 170a, 170b, 171, 173, 174, 177, 177a, 179, 181, 181a, 182, 183, 241a, 277a, and 277b.
 - c. Some combination of decision subpoints a. and b.
3. Adopt the Report of the Administrative Law Judge as modified by the Commission to address one or more of the exceptions filed by the Dyrdal's, Fond du Lac, Friends of the headwaters, Honor the Earth, Mille Lacs Band, Sierra Club, and Youth Climate Intervenors to the adequacy of the Final Environmental Impact Statement.
4. Reject the Report of the Administrative Law Judge and prepare findings specifying the reasons the Final Environmental Impact Statement for the Line 3 Replacement Project is not adequate pursuant to Minn. R. 4410.2800 and request that the DOC-EERA prepare an adequate environmental impact statement pursuant to Minn. R. 4410.2800, subp. 5.
5. Take some other action deemed appropriate.

B. Trade Secret Data

1. Find that the data in Appendix F and Appendix I of Elbridge's Line 3 Certificate of Need Application is public under the Minnesota Government Data Practices Act, and require Enbridge refile the appendices, thereby making this information available to the Public.
2. Find that the data in Appendix F and Appendix I of Elbridge's Line 3 Certificate of Need Application is nonpublic under the Minnesota Government Data Practices Act.

3. Take some other action deemed appropriate.

Staff Recommendation: 2a

Staff makes no recommendation with regard to the trade secret data issue.