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Chapter 3

Regulatory Framework

Aside from Federal Regulations, States Regulate the Routing and Construction of Pipelines

This chapter addresses the regulations for constructing and operating oil pipelines in Minnesota. Pipelines in the United States are regulated by a variety of federal and state agencies. The Federal Energy Regulatory Commission, for example, regulates interstate oil pipeline rates and terms of service; and the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) regulates pipeline safety.

The federal government, however, does not determine whether an oil pipeline is needed or where it should be located. Those determinations generally are left to the states.¹ As a result, states regulate the routing and construction of oil pipelines through a variety of approvals, permits, and licenses.

The First Two Required State Approvals Are for Certificate of Need and Route Permit

Enbridge Energy, Limited Partnership's (Enbridge's, or the Applicant's) proposed Line 3 Project (Project) requires two initial approvals from the Minnesota Public Utilities Commission (Commission): a Certificate of Need (CN) and a route permit. The CN determines whether a project is needed and, if it is determined to be needed, the route permit determines where it should be located. Figure 3-1 provides an overview of the CN and route permit process.

Subsequent Approvals Are Needed from Federal, State, Local, and Tribal Agencies

If the CN and route permit are granted, additional approvals and consultations with other federal, state, and local agencies would be required before the pipeline could be constructed and operated along the permitted route. A license to cross public waters from the Minnesota Department of Natural Resources (Minnesota DNR), for example, would be required for each public water crossing along the permitted route, and potential wetland impacts resulting from the discharge of dredged or fill material into wetlands would require a Department of the Army permit from the U.S. Army Corps of Engineers (USACE). This wetland permit would require federal environmental review under the National Environmental Policy Act (NEPA), as well as consultation with other federal, tribal, and state agencies that are responsible for resources, such as threatened or endangered species and cultural resources.

Depending on the route approved by the Commission, a project also could require approvals from tribal nations, along with associated approvals from and consultations with federal agencies. Any routes that would pass through reservations and tribal trust lands, for example, would require review under NEPA, as well as consultations and approvals from USACE, the Bureau of Indian Affairs (BIA), and possibly the U.S. Environmental Protection Agency.

¹ The U.S. Department of State is responsible for determining whether issuing a Presidential Permit for a proposed new oil pipeline crossing the Canadian or Mexican border would "serve the national interest." See Executive Order 11423 on pipelines: <http://www.state.gov/e/eb/rls/othr/exec/114274.htm>. No Presidential Permit amendment is required for the Line 3 Project.

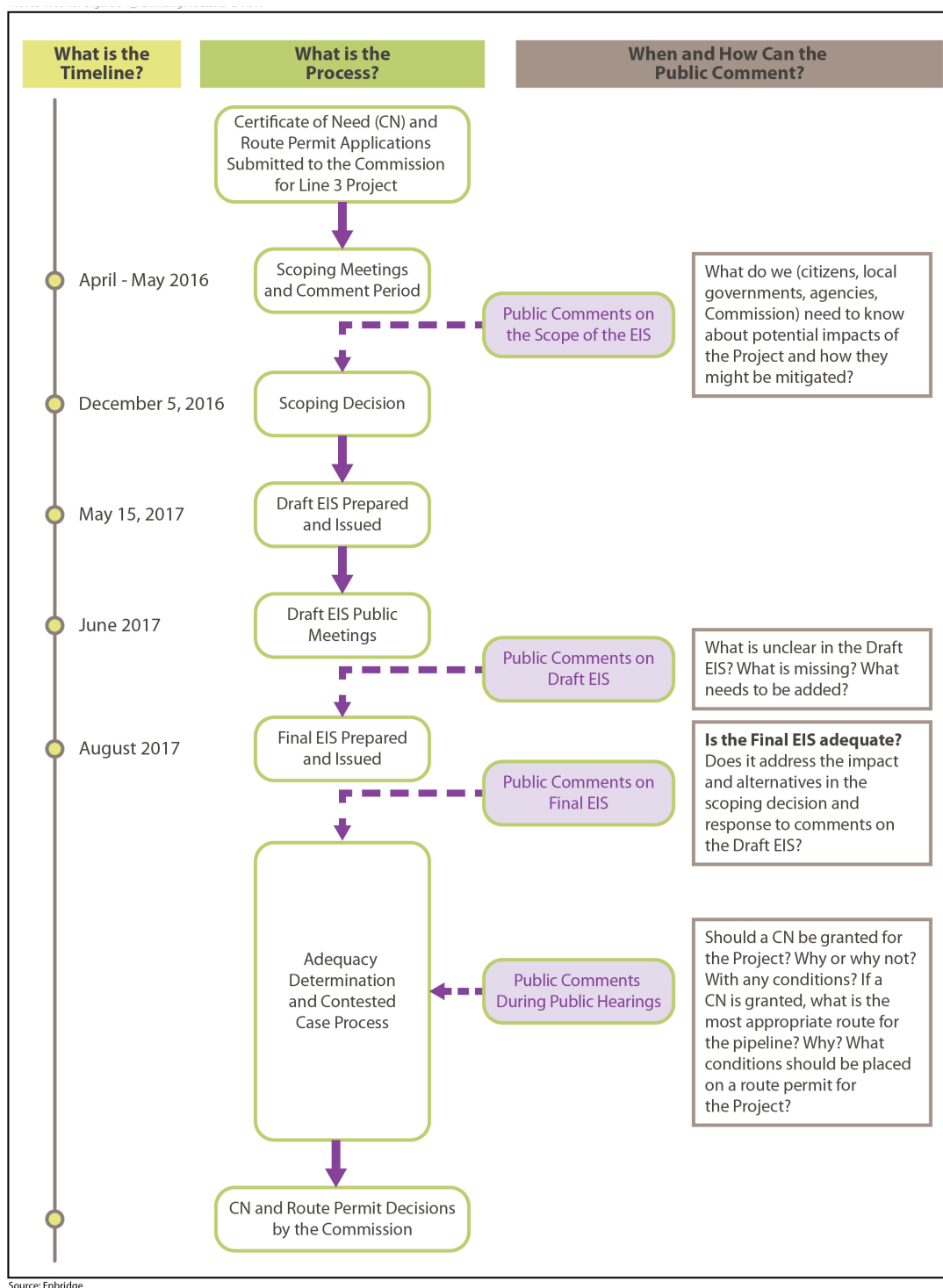


Figure 3-1. Environmental Review and Commission Permitting Process for Line 3 Project

A preliminary list of these required permits is provided in Table 3.6-1. Each of these permits and approvals is addressed in greater detail as part of the regulatory context for each resource impact evaluation in Chapters 5 and 6 of this Environmental Impact Statement (EIS).

3.1 CERTIFICATE OF NEED

A CN Is the First Permit Required for the Proposed Project, and This EIS Addresses Both CN and Routing Permit Issues

In Minnesota, no person may construct a large energy facility without a CN from the Commission.² The definition of “large energy facility” includes an oil pipeline with a diameter greater than 6 inches and more than 50 miles of its length in Minnesota.³ Enbridge’s proposed Project, therefore, requires a CN because it is an oil pipeline with a 36-inch diameter and is approximately 340 miles long.

Enbridge submitted a CN application to the Commission on April 24, 2015. After accepting the application as complete, the Commission ordered the Department of Commerce, Energy Environmental Review and Analysis (DOC-EERA) to prepare a combined EIS that addressed both the CN and routing permit dockets in accordance with Minnesota Administrative Rule Chapter 4410. The Commission also referred the application to the Office of Administrative Hearings (OAH) for a contested case hearing for the CN decision, to be conducted jointly with the hearing for Enbridge’s route permit application (discussed in Section 3.2).⁴

3.1.1 Certificate of Need Criteria

CN Criteria Address Energy Efficiency and Reliability, and Potential Social and Environmental Effects

In deciding on Enbridge’s CN application, the Commission must determine whether the Project is needed, or whether some other project would be more appropriate for the State of Minnesota. Minnesota Administrative Rules Part 7853.0130 provides four criteria that the Commission must use in determining whether to approve Enbridge’s CN application. The Commission must grant a CN if it determines that:

- A. The probable result of denial would adversely affect the future adequacy, reliability, or efficiency of energy supply to the Applicant, to the Applicant’s customers, or to the people of Minnesota and neighboring states.⁵
- B. A more reasonable and prudent alternative to the proposed facility has not been demonstrated by a preponderance of evidence on the record by parties or persons other than the Applicant.⁶
- C. The consequences to society of granting the CN are more favorable than the consequences of denying the certificate.⁷

² Minnesota Statutes § 216B.243.

³ Minnesota Statutes § 216B.2421.

⁴ Commission Order Joining Need and Routing Dockets, February 1, 2016, PL-9/CN-14-916 and PL-9/PPL-15-137, eDockets Number [20162-117877-01](#) [hereinafter Commission Order Joining Need and Routing Dockets].

⁵ Minnesota Administrative Rules Part 7853.0130 (A).

⁶ Minnesota Rules Administrative Rules Part 7853.0130 (B).

⁷ Minnesota Administrative Rules Part 7853.0130 (C).

- D. It has not been demonstrated on the record that the design, construction, or operation of the proposed facility would fail to comply with the relevant policies, rules, and regulations of other federal, state, and local agencies.⁸

Under these criteria, the Commission would first consider the underlying economic drivers for the proposed pipeline. If denying the CN would adversely affect the future adequacy, reliability, or efficiency of energy supply, the Commission would consider the EIS's analysis of the advantages and disadvantages of alternative ways of addressing these issues.

If the Commission denies a CN for the Project, it is adopting a no build or No Action Alternative (see Chapter 4). If the Commission issues a CN for the Project, it could approve the Project as proposed by Enbridge, or it could issue a CN contingent upon modifications to the Project.⁹

The Commission's CN decision would determine the pipeline's characteristics, including its diameter, throughput, and endpoints in Minnesota. The Commission could grant a CN with pipeline characteristics as proposed by Enbridge or could modify them. It also could place conditions on a CN by requiring Enbridge to take certain actions related to the receipt of a CN for the Project. These conditions, if any, would flow from the record developed during the environmental review and hearing process.

The Commission's CN decision does not determine the route that the pipeline would take between its endpoints in Minnesota. The route is determined by the Commission's route permit process (as discussed in Section 3.2 and in Table 3.1-1; further discussion is provided in Chapter 4).

If the Commission decides not to issue a CN for the proposed Project, it has no regulatory standing to determine the fate of the existing Line 3. There is no legal authority in a CN proceeding of a separate proposed project (at the state or with the Public Utilities Commission) to evaluate the ongoing need of an existing project. Once constructed, the safety and operation of an existing pipeline is regulated by the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration. In this particular case, Enbridge has entered into a consent decree with the United States Environmental Protection Agency that allows for the continued operation of the existing Line 3 if a replacement for the line is not approved. In other words, if the proposed Line 3 project is not approved by the PUC, the continued operation of the existing Line 3 will be regulated by the Federal government, not the State of Minnesota. Accordingly, shutting down and removing existing pipelines in the mainline corridor is not included in the No Action Alternative. If the Commission decides to issue a CN for the proposed Project, the Commission may determine that their regulatory jurisdiction allows them to consider permit conditions prescribing abandonment, removal, or a combination of abandonment and removal for the existing Line 3.

⁸ Minnesota Administrative Rules Part 7853.0130 (D).

⁹ Minnesota Administrative Rules Part 7853.0800.

Table 3.1-1. Commission Decisions and Decision Criteria

Commission Decision	Certificate of Need				Route Permit
	Would denial adversely affect future adequacy, reliability, or efficiency of energy supply?	If yes, is there a more reasonable and prudent alternative, such as different endpoints or transport method?	If yes, are the consequences to society of granting the CN more favorable than denial?	Does the Project comply with other laws?	If yes, what is the most appropriate route for the pipeline?
Commission Decision Criteria	Minnesota Administrative Rules Part 7853.0130 (A)	Minnesota Administrative Rules Part 7853.0130 (B)	Minnesota Administrative Rules Part 7853.0130 (C)	Minnesota Administrative Rules Part 7853.0130 (D)	Minnesota Administrative Rules Part 7852.1900
Analysis in EIS	--	EIS Chapter 5: Existing Conditions, Impacts, and Mitigation – CN			EIS Chapter 6: Existing Conditions, Impacts, and Mitigation – Route Permit
Other Analysis	Economic analysis conducted by Minnesota Department of Commerce, Division of Energy Resources and other parties to the contested case hearing	--			--

CN = Certificate of Need; EIS = Environmental Impact Statement

3.2 ROUTE PERMIT

A Route Permit Is Required for the Proposed Project, and This EIS Addresses Both CN and Routing Permit Issues

In Minnesota, no person may construct a pipeline with a diameter of 6 inches or more that is designed to carry a hazardous liquid without a route permit from the Commission.¹⁰ Accordingly, Enbridge's proposed Project, an oil pipeline with a diameter of 36 inches, requires a route permit. The Commission may not grant a route permit for the Project until a CN has been issued (although these approvals could occur consecutively at the same Commission meeting).

Enbridge submitted a route permit application to the Commission on April 24, 2015. After accepting the application as complete, the Commission ordered DOC-EERA to prepare an EIS for the Project and

¹⁰ Minnesota Statute § 216G.02.

referred the application to OAH for a contested case hearing to be conducted jointly with the hearing for Enbridge's CN application.

3.2.1 Route Permit Criteria

Route Permit Criteria Address Human and Environmental Effects, Including Cumulative Effects

The Commission is charged with routing pipelines in an orderly manner that minimizes or mitigates human and environmental impacts.¹¹ Minnesota Administrative Rules Part 7852.1900 provides the criteria that the Commission must consider in evaluating Enbridge's route permit application:

- A. Human settlement, existence and density of populated areas, existing and planned future land use, and management plans;
- B. The natural environment, public and designated lands, including but not limited to natural areas, wildlife habitat, water, and recreational lands;
- C. Lands of historical, archaeological, and cultural significance;
- D. Economies within the route, including agricultural, commercial or industrial, forestry, recreational, and mining operations;
- E. Pipeline cost and accessibility;
- F. Use of existing rights-of-way and right-of-way sharing or paralleling;
- G. Natural resources and features;
- H. The extent to which human or environmental effects can be mitigated by regulatory control and by applying the permit conditions contained in Minnesota Administrative Rule 7852.3400 for preparing the right-of-way, constructing the pipeline and associated facilities, and cleaning up, and restoring the right-of-way.
- I. Cumulative potential effects of related or anticipated future pipeline construction; and
- J. The relevant applicable policies, rules, and regulations of other state and federal agencies, and local government land use laws, including ordinances adopted under Minnesota Statutes Section 299J.05, on the location, design, construction, or operation of the proposed pipeline and associated facilities.

A pipeline route permit must designate a route for the pipeline and the conditions for preparing the right-of-way, constructing the pipeline and associated facilities, and cleaning up and restoring the right-of-way—in addition to any other appropriate conditions relevant to minimizing human and environmental impacts.¹² If issued a CN and route permit by the Commission, Enbridge could exercise the power of eminent domain to acquire land for the Project.¹³ DOC-EERA has provided a sample Route Permit in Appendix I.

¹¹ Minnesota Administrative Rules Part 7852.0200.

¹² Minnesota Administrative Rules Part 7852.3200.

¹³ Ibid.

3.3 ENVIRONMENTAL REVIEW

This EIS Addresses CN and Routing Permit Issues to Facilitate Informed Decision-Making

The Minnesota Environmental Policy Act (MEPA) requires that an EIS be prepared for major governmental actions with the potential to create significant environmental impacts.¹⁴

An EIS is intended to facilitate informed decision-making by entities with regulatory authority over a project. It also assists citizens in providing guidance to decision-makers regarding the project. An EIS describes and analyzes the potential environmental and socioeconomic impacts of a project and possible mitigation measures, including alternatives to the project.¹⁵ It does not advocate or state a preference for a specific alternative. Instead, it analyzes and compares alternatives so that citizens, agencies, and governments can work from a common set of facts.

3.3.1 Scoping

After Obtaining Agency and Public Input, the Commission Determined the Scope of the EIS

The first step in preparing an EIS is scoping. The purpose of scoping is “to reduce the scope and bulk of the EIS, identify only those potentially significant issues relevant to the proposed project, define the form, level of detail, content, alternatives, time table for preparation, and preparers of the EIS, and to determine the permits for which information will be developed concurrently with the EIS.”¹⁶

A scoping Environmental Assessment Worksheet and a Draft Scoping Decision Document were issued for Enbridge’s Project on April 11, 2016. DOC-EERA staff provided notice of the scoping Environmental Assessment Worksheet and the Draft Scoping Decision Document, as well as the schedule for EIS scoping meetings. The scoping notice initiated a 45-day comment period, and comments on the scope of the EIS were accepted through May 26, 2016.

Between April 25, 2016, and May 11, 2016, DOC-EERA, Minnesota DNR, and Minnesota Pollution Control Agency (Minnesota PCA) staff conducted 12 scoping meetings throughout the Project area. In addition to making oral comments at these meetings, citizens and agencies submitted 322 scoping comment letters and 1,118 form letters.¹⁷

For the CN decision, based on the scoping comments, DOC-EERA suggested to the Commission several Project alternatives for inclusion in the scope of the EIS, including alternative technologies and a system alternative.¹⁸ The Commission therefore included these in the scope of the EIS.¹⁹ These alternatives are

¹⁴ Minnesota Statutes § 116D.04.

¹⁵ Minnesota Administrative Rules Part 4410.2300.

¹⁶ Minnesota Administrative Rules Part 4410.2100.

¹⁷ DOC-EERA Comments and Recommendations to the Commission, September 21, 2016, PL-9/CN-14-916 and PL-9/PPL-15-137, eDockets Numbers [20169-125060-02](#), [20169-125058-02](#), [20169-125058-04](#), [20169-125058-06](#), [20169-125058-08](#), [20169-125058-10](#), [20169-125058-12](#), [20169-125058-14](#), [20169-125058-16](#), [20169-125058-18](#), [20169-125058-20](#), [20169-125064-01](#), [20169-125064-03](#), [20169-125064-05](#), [20169-125064-07](#), [20169-125064-09](#), [20169-125064-11](#), [20169-125064-13](#), [20169-125064-15](#), [20169-125064-17](#), [20169-125064-19](#) [hereinafter DOC-EERA Scoping Comments].

¹⁸ Id.

¹⁹ Order Denying Motion, Approving Scoping Decision as Modified, and Requiring Expanded Notice, November 30, 2016, eDockets Number [201611-126917-01](#) [hereinafter Order Approving Scoping Decision].

described in detail in Chapter 4 and are analyzed and compared in Chapters 5 and 10 through 12 of this EIS.

DOC-EERA also recommended four route alternatives and 23 route segment alternatives for inclusion in the scope of the EIS,²⁰ which the Commission included in the scope of the EIS.²¹ The Commission also included an additional route segment alternative (RSA-53).²² These alternatives are described in detail in Chapters 4 and 7 and are analyzed and compared in Chapters 6 and 10 through 12 of this EIS.

3.3.2 Environmental Impact Statement

A Key Purpose of This EIS Is to Help the Commission Decide on CN and Route Permit Applications

This combined CN and route permit EIS has been prepared by DOC-EERA staff in cooperation with the Minnesota DNR and Minnesota PCA. It was first issued as a Draft EIS so that it could be improved through public comment,²³ and a Final EIS could be developed based on those comments.²⁴ Once the Final EIS is issued, the public may comment on the adequacy of the Final EIS.²⁵ The Commission must then determine whether the Final EIS is adequate for decision-making purposes or whether it needs to be revised.²⁶

On the issue of need, this EIS for the combined CN and route permit proceedings will aid the Commission's consideration under Minnesota Administrative Rules Part 7853.0130 (B) about whether a more reasonable and prudent alternative to the proposed facility exists, as well as the Commission's consideration of societal consequences under Minnesota Administrative Rules Part 7853.0130 (C). Specifically, the EIS will help to inform the Commission regarding reasonable and prudent alternatives as the Commission considers "the effect of the proposed facility on the natural and socioeconomic environments compared to the effects of reasonable alternatives"²⁷ and "the effect of the proposed facility, or a suitable modification of it, upon the natural and socioeconomic environments compared to the effect of not building the facility."²⁸

On the issue of routing, this EIS for the combined CN and route permit proceedings will aid the Commission's consideration of each of the Commission's decision criteria in Minnesota Administrative Rules Part 7852.1900, Subpart 3.

²⁰ DOC-EERA Scoping Comments.

²¹ Order Approving Scoping Decision.

²² Ibid.

²³ Minnesota Administrative Rules Part 4410.2600.

²⁴ Minnesota Administrative Rules Part 4410.2700.

²⁵ Minnesota Administrative Rules Part 4410.2800.

²⁶ Ibid.

²⁷ Minnesota Administrative Rules Part 7853.0130 (B)(2).

²⁸ Minnesota Administrative Rules Part 7853.0130 (C)(3).

3.4 PUBLIC HEARINGS

Public Hearings Will Determine Whether CN and Route Permit Criteria Have Been Met

After the public has reviewed the Final EIS, and it has been deemed adequate by the Commission, public hearings, presided over by an administrative law judge (ALJ) from OAH, will be held in the Project area. The hearings on the CN will be held jointly with those for the route permit.²⁹ At these hearings, citizens, agencies, and governmental bodies will have an opportunity to submit comments, present evidence, and ask questions. Commenters specifically will be able to address whether CN and route permit criteria have been met. After the public hearings, an evidentiary hearing will be held, and the ALJ will submit a report to the Commission with findings of facts, conclusions of law, and recommendations about issuing a CN and a route permit for the Project.

3.5 COMMISSION DECISION

The Commission Will Use All Information to Decide on the CN and Route Permit

After considering the entire record, including the Final EIS, input received during the public hearings, and the ALJ's findings and recommendations, the Commission will determine whether to deny the CN, grant a CN for the Project as proposed, or grant a CN contingent upon modifications to the Project.³⁰ As noted previously, the Commission may place conditions on a CN, requiring Enbridge to take certain actions before it can receive a CN for the Project.

The Commission will similarly determine what route should be permitted. Route permits include a permitted route and an anticipated alignment, as well as conditions specifying construction and operating standards. Route permits also typically include mitigation plans and project-specific mitigation measures (Interagency Pipeline Coordination Team 2015).

Decisions by the Commission on Enbridge's CN and route permit applications are anticipated in spring 2018.

3.6 ADDITIONAL PERMITS AND APPROVALS

Additional Federal, Tribal, State, and Local Approvals Also Could Be Required

A route permit from the Commission is the only state permit required for the routing of Enbridge's Project—that is, the Commission's route permit determines where the pipeline would be located. The Commission's route permit supersedes and preempts all local zoning, building, and land use regulations.³¹

Various federal, tribal, state, and local approvals could be required, however, for activities related to constructing and operating the Project. Once the route permit has been issued, Enbridge must obtain all other required permits (commonly referred to as "downstream permits"). The information in this EIS may be used by downstream permitting agencies in their evaluation of effects on resources. Table 3.6-1 lists the downstream permits and additional approvals required for Enbridge's Project.

²⁹ Commission Order Joining Need and Routing Dockets.

³⁰ Minnesota Administrative Rules Part 7853.0800.

³¹ Minnesota Statutes § 216G.02; Minnesota Administrative Rules Part 7852.0200.

Table 3.6-1. Additional Permits and Approvals Required for the Line 3 Project

Unit of Government	Type of Application	Reason Required
U.S. Environmental Protection Agency – Region 5	Clean Water Act Section 402 NPDES	EPA has permitting authority for NPDES discharge and construction within the Leech Lake and Fond du Lac Reservations
U.S. Army Corps of Engineers – St. Paul District and Minnesota Pollution Control Agency	Section 10/404 Individual Permit and associated state 401 Individual Water Quality Certification	Authorizes discharge of dredged and fill material into waters of the United States, including wetlands, and crossing of navigable waters of the United States
	Section 14 Rivers and Harbor Act, Section 408 Flowage Easement Permit	Authorizes construction activities within flowage easements
U.S. Fish and Wildlife Service	Section 7 Endangered Species Act consultation (federally protected species)	Establishes conservation measures and authorizes, as needed, take of federally protected species
	Eagle Incidental Take or Eagle Nest Take Permit (Bald and Golden Eagle Protection Act [BGEPA] protected birds)	Allows known bald eagle nests near construction activities to be removed, relocated, or destroyed. Also, allows for nonpurposeful (incidental) take (disturbance, injury, or killing) of eagles during construction and/or operation activities.
U.S. Forest Service/U.S. Department of Agriculture	Special Use Permit	Authorizes crossing of U.S. Forest Service land
Bureau of Indian Affairs	Right-of-Way Grant	Authorizes crossing of tribal trust land
Minnesota Department of Natural Resources	License to Cross Public Waters	50-year license that allows a proposed utility to cross public waters
	License to Cross Public Lands ^a	50-year license that allows a proposed utility to cross public lands
	Water Appropriation Permit – Pipeline and Facilities	Authorizes withdrawal and use of water from surface water or groundwater sources
	State Endangered Species Permit and Avoidance Plan	Outlines plans for avoidance, minimization, and mitigation for take of state-listed species
	Osprey Nest Removal Permit	Authorizes removal of inactive osprey nest
	Fen Management Plan	Outlines plans for avoidance, minimization, and mitigation of fens within Project corridor

Table 3.6-1. Additional Permits and Approvals Required for the Line 3 Project

Unit of Government	Type of Application	Reason Required
	Infested Waters Transport permit	Permits transport of waters with identified invasive species infestation
	Federal Consistency Review	Ensures that activities requiring a federal license or permit are consistent with the state's coastal management program
	Public Waters Work Permit	In instances when a license to cross permit is not required, work in the beds of public waters would require a work permit
Minnesota Pollution Control Agency	Clearbrook Terminal Air Quality Permit – Synthetic-Minor Individual State Operating Permit	Authorizes construction and operation at the modified Clearbrook terminal
	Clean Water Act Section 401 Water Quality Certification	Certification under the Clean Water Act Section 401 certifies that the Project will comply with state water quality standards if the Project complies with all permit conditions.
	National Pollutant Discharge Elimination System (NPDES) Individual Construction Stormwater, Hydrostatic Test, and Trench Dewatering Permit – Pipeline Construction	Authorizes ground disturbance with approved protection measures to manage soil erosion and stormwater discharge on construction site; discharge of water from hydrotesting activities; and removal of water that may accumulate in pipeline trench
	NPDES General Construction Stormwater Coverage – Facilities	Authorizes ground disturbance with approved protection measures to manage soil erosion and stormwater discharge on construction site
	NPDES General Construction Stormwater Coverage – Pipeyards and Contractor Yards	Authorizes ground disturbance with approved protection measures to manage soil erosion and stormwater discharge on construction site
Minnesota Department of Health	Drinking Water Supply Management Area/Wellhead Protection Area Consultation	Ensures that pipeline construction and operation are compatible with goals of relevant plans
Minnesota State Historic Preservation Office	Cultural resources consultation; Section 106 of the National Historic Preservation Act, as amended – review and consultation Review and consultation with state agencies pursuant to M.S. 138.665-666 and M.S. 138.40	Ensures adequate consideration of impacts on significant cultural resources

Table 3.6-1. Additional Permits and Approvals Required for the Line 3 Project

Unit of Government	Type of Application	Reason Required
Minnesota Department of Agriculture	Agricultural Protection Plan	Establishes measures for agricultural protection
Minnesota Department of Transportation	Road crossing permits	Authorizes crossings of state-jurisdictional roadways
Minnesota Board of Water and Soil Resources/Wetland Conservation Act Local Governmental Units	Notice of Intent to Utilize Federal Approvals for Utilities Project Exemption	Notice of use of exemption required
Mississippi Headwaters Board	Local Land Use Review	Ensures compatibility with land use plan
Red Lake, Wild Rice, Two Rivers, and Middle-Snake Watershed Districts	Watershed District Permit	Authorizes crossing of legal drains and ditches within watershed
Local/County	Permits pertaining to off-right-of-way yard use	Ensures compatibility with relevant land use plans

Source: Scoping Environmental Assessment Worksheet, Section 8.0, April 11, 2016, eDockets Numbers [20164-119956-01](#) and [20164-119956-03](#).

^a Minnesota Department of Natural Resources has indicated that the agency would not grant license for line RA-03AM to cross Alexander Woods Scientific and Natural Area.

3.6.1 Federal Approvals

The proposed Project requires a number of federal permits, approvals, and decisions before construction and operation can begin. Before federal permits can be issued, the relevant agency must complete environmental review in accordance with NEPA and conduct consultations, such as with the U.S. Fish and Wildlife Service (USFWS) under Section 7 of the Endangered Species Act (ESA) and with the State Historic Preservation Office (SHPO) and tribal authorities under Section 106 of the National Historic Preservation Act (NHPA), as amended. The permits and approvals required for the proposed Project are listed in Table 3.6-1 and discussed further herein.

3.6.1.1 U.S. Army Corps of Engineers

USACE regulates impacts on navigable waters of the United States pursuant to Section 10 of the Rivers and Harbors Act of 1899 and potential impacts on waters of the United States, including wetlands, under Section 404 of the Clean Water Act. Dredged or fill material, including material that moves from adjacent construction sites into these waters, could affect the quality of the waters, and USACE requires permits for projects that could have such effects. The Project is expected to be required to obtain a permit to cross navigable waters under Section 10 of the Rivers and Harbors Act and an individual permit under Section 404 of the Clean Water Act.

3.6.1.2 U.S. Fish and Wildlife Service

USFWS oversees compliance with the Bald and Golden Eagle Protection Act, which prohibits anyone from “taking” (which includes disturbance) birds, nests, or eggs without a permit from the Secretary of the Interior. The USFWS also is responsible for overseeing compliance with the Migratory Bird Treaty Act (MBTA). The MBTA protects migratory birds and prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except as authorized under a valid permit.

USFWS also oversees compliance with the federal ESA of 1973, as amended, which requires that federal agencies “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of such species.” USFWS therefore requires permits for taking of threatened or endangered species (USFWS 2016). USFWS encourages project applicants to consult with the agency to ascertain a project’s potential to affect these species, and to identify general conservation measures for the project.

Prior to issuing permits for a project, federal agencies (e.g., USACE) are required to consult with USFWS under Section 7 of the ESA. The permitting agency must prepare a Biological Assessment in accordance with the ESA to analyze potential project-related effects on federally listed threatened or endangered species, candidate species, species proposed for listing, and their designated critical habitats. After consulting with the permitting agency, USFWS issues a Biological Opinion and Incidental Take Permit, if necessary.

3.6.1.3 U.S. Forest Service

The U.S. Forest Service (USFS) is charged with the protection of the nation’s national forests (USFS 2016). Three route alternatives analyzed in this EIS (RA-06, RA-07, and RA-08) cross the Chippewa National Forest. USFS requires a Special Use Permit or a Right-of-Way Permit/Easement if a proposed project crosses land under its jurisdiction. The U.S. Department of Agriculture oversees special use permits for USFS under 36 Code of Federal Regulations 214 Subpart B.

As part of the proposed Project, Enbridge proposes to abandon the existing Line 3. This line currently proceeds through the Chippewa National Forest. Abandonment of the pipeline could affect forest resources and could require consultation with USFS.

3.6.1.4 U.S. Department of Transportation

The U.S. Department of Transportation PHMSA administers a national regulatory program to ensure the safe and reliable transportation of hazardous materials by pipeline, including oil, and is charged with preventing and minimizing associated human and environmental impacts. Through federal regulations at 49 CFR Part 195, PHMSA develops minimum standards to ensure the safe design, construction, testing, operation, and maintenance of pipeline facilities, as well as emergency response. Many of these regulations are written as performance standards allowing for pipeline companies to use different technologies to achieve the standard. New pipelines must meet all current standards. The general requirements, reporting requirements, operation, and maintenance and corrosion control requirements are all considered retroactive and apply to all pipelines regardless of age.

Although there is no specific permit or approval needed from PHMSA for the Project, it must be constructed and operated in accordance with PHMSA regulations. Additionally, the agency reviews oil spill response plans provided by pipeline operators and coordinates federal, state, and local planning and prevention activities.

3.6.2 Tribal Approvals

Seven Anishinaabe (Chippewa/Ojibwe) and four Dakota (Sioux) reservations are located in Minnesota. Each reservation and community is an American Indian tribal nation and is a distinct, sovereign government.

The Applicant's preferred route and route alternatives evaluated in this EIS run near several tribal reservations. In addition, as part of the Project, Enbridge proposes to abandon the existing Line 3, which currently traverses the Leech Lake and Fond du Lac Indian reservations. Abandonment of the line could affect tribal resources within these reservations.

Two route alternatives analyzed in this EIS (RA-07 and RA-08) cross the Leech Lake Indian Reservation and three route alternatives (RA-06, RA-07, and RA-08) cross the Fond du Lac Indian Reservation. If the Commission were to select one of these alternatives as the route for the Project, Enbridge would be required to obtain authorizations from the Leech Lake and Fond du Lac Bands of Ojibwe and BIA. These routes also would require BIA to conduct an environmental review under NEPA, as well as associated consultations under Section 7 of the ESA and Section 106 of the NHPA.

DOC-EERA has consulted with the Red Lake Band of Chippewa Indians, White Earth Reservation, Leech Lake Band of Ojibwe, Fond du Lac Reservation, and Mille Lacs Bands of Ojibwe regarding the Project. DOC-EERA considered its responsibilities for providing for consultation, coordination, and cooperation in accordance with State of Minnesota Executive Order 13-10. Tribal consultations are discussed further in Chapter 9.

3.6.3 State Approvals

3.6.3.1 Minnesota Department of Natural Resources

Minnesota DNR regulates potential effects on Minnesota's public lands and waters; crossing these areas requires a license, which could in turn require mitigation measures. Minnesota DNR has jurisdiction over wildlife in Minnesota and administers the Minnesota outdoor recreation system, including Wildlife Management Areas, Scientific and Natural Areas, state parks, and state forests. As with USFWS, Minnesota DNR encourages project applicants to consult with them to ascertain a project's potential to affect state-listed threatened and endangered species and to identify possible mitigation measures. Minnesota DNR also regulates water withdrawals from both groundwater and surface water sources, and requires a permit for withdrawals in excess of 10,000 gallons per day or 1 million gallons per year. Minnesota's Lake Superior Coastal Program, within the Minnesota DNR, coordinates the review of federal actions to determine whether they will be consistent with the state's coastal management program. Minnesota DNR's federal consistency review includes activities requiring certain federal licenses or permits.

3.6.3.2 Minnesota Pollution Control Agency

Minnesota PCA monitors air and water quality in Minnesota and uses technical and financial assistance as well as a variety of regulations to protect and enhance environmental quality in Minnesota. An air quality permit is required for the proposed Project due to additional air emissions that will occur at the Clearbrook terminal due to the increased oil throughput at the facility.

A general National Pollutant Discharge Elimination System (NPDES)/State Disposal System construction stormwater permit (CSW) from Minnesota PCA is required for stormwater discharges from construction projects that disturb one or more acres of land. The general CSW permit requires: (1) a Stormwater Pollution Prevention Plan; (2) use of best management practices for erosion prevention and sediment control; and (3) permanent stormwater treatment from projects that create one or more acres of new impervious surface. A general CSW permit is required for land-disturbing activities including the

construction of access roads, laydown yards, and equipment storage pads such as pipe yards and contractor yards.

A NPDES Individual Permit is required from Minnesota PCA. The individual permit authorizes discharges from hydrostatic testing of tanks/pipelines and trench dewatering during pipeline maintenance activities. The permit requires protection measures to manage soil erosion and stormwater discharge on construction sites; discharge of water from hydrotesting activities; and removal of water that may accumulate in the pipeline trench. The individual permit does not cover stormwater discharges associated with the construction or installation of new pipeline facilities.

In addition, a Clean Water Act Section 401 Water Quality Certification is required from Minnesota PCA certifying that the Project will comply with state water quality standards. Minnesota PCA administers its Section 401 Certification program in association with USACE's Section 404 process. When a public notice is issued for an individual permit by the USACE under its 404 authority, the 401 Certification is completed by Minnesota PCA and then included within the USACE 404 permit.

Minnesota PCA must certify that proposed activities will not violate air and water quality standards. The water quality permitting process, in association with USACE's Section 404 process, would provide a Section 401 Certification through the Minnesota PCA.

3.6.3.3 Minnesota Department of Health

Minnesota Department of Health assists local water suppliers in preparing wellhead protection plans within their drinking water supply management areas. Department of Health and local water suppliers encourage project applicants to consult with them to evaluate and mitigate potential effects on drinking water supplies.

3.6.3.4 Minnesota State Historic Preservation Office

The Minnesota SHPO oversees the protection of cultural resources in Minnesota by identifying, evaluating, and protecting historic and archaeological resources. The SHPO encourages project applicants to consult with them, and they can guide applicants on appropriate measures for mitigating effects on cultural resources.

In addition, the SHPO consults with federal and state government agencies to identify historic properties in government project areas and advises on ways to avoid or reduce potential adverse effects on those properties. Under Section 106 of the NHPA, federal agencies must consult with the SHPO regarding potential effects on historic properties (i.e., those listed on or determined eligible for the National Register of Historic Places). The SHPO also consults with state agencies for projects, which may affect state archaeological sites; for projects that may affect sites listed on the State or National Register of Historic Places; and for projects that need to complete an Environmental Assessment Worksheet. State agencies and departments also must consult with the SHPO prior to state approval of state sponsored projects or those undertaken on non-federal public lands for which a state agency or department has jurisdiction.

3.6.3.5 Minnesota Department of Agriculture

Minnesota Department of Agriculture (Minnesota DA) requires an agricultural impact mitigation plan that identifies measures that could be taken to avoid, mitigate, repair, or provide compensation for the adverse effects of constructing a pipeline on agricultural lands (Minn. Stat. § 216B.243, Subd. 7).

Minnesota DA is responsible for eradicating, controlling, and abating nuisance plant species (Minn. Stat. § 18G.04); and local county agricultural inspectors administer the program.

Pipeline project applicants must consult with Minnesota DA on the potential effects of issuing a pipeline route permit on agricultural lands.³² This consultation could require development of an agricultural mitigation plan.³³

3.6.3.6 Minnesota Department of Transportation

A permit from Minnesota Department of Transportation (MNDOT) is required for pipelines that are adjacent to or cross under Minnesota trunk highway rights-of-way. MNDOT's utility accommodation policy generally allows utilities to occupy portions of highway rights-of-way where such occupation does not put the safety of the traveling public or highway workers at risk or unduly impair the public's investment in the transportation system (MNDOT 2017).

3.6.3.7 Minnesota Board of Water and Soil Resources

Minnesota Board of Water and Soil Resources oversees local governmental units (LGUs) implementation of Minnesota's Wetland Conservation Act. For linear projects that cross multiple LGUs, Minnesota Board of Water and Soil Resources typically coordinates the review of potential wetland impacts among the affected LGUs. The Wetland Conservation Act requires anyone proposing to go through a wetland to (1) try to avoid the impact; (2) try to minimize any unavoidable impacts; and (3) replace any lost wetland functions. Utilities, including pipelines, however, can request exemption from wetland replacement requirements, and Enbridge has indicated that they will seek this exemption.

In accordance with the Minnesota Wetland Conservation Act (WCA) Federal Approvals Exemption for Utilities (Approvals Exemption), local government unit approval of a WCA replacement plan for the Project is not required for wetland impacts resulting from the construction, maintenance, or repair of the pipeline and associated facilities, so long as (1) all affected wetlands are either jurisdictional under the Federal Clean Water Act or the applicant agrees to proceed with the federal review using a preliminary jurisdictional determination, which assumes that all affected aquatic resources, including wetlands, are jurisdictional under the Clean Water Act; (2) the applicant receives a signed individual permit or other applicable permit instrument from the USACE under Section 404 of the Clean Water Act; and (3) Approvals Exemption notification and review procedures between the USACE, the Board of Water and Soil Resources, and the Minnesota Department of Natural Resources (Minnesota DNR) are followed. While WCA local government units do not approve wetland crossing methods under the Approvals Exemption, they do have the opportunity to provide comments to the USACE in response to the public notice on the USACE permit.

³² Minnesota Statutes § 216E.10, Subd. 3.

³³ Ibid.

The Approvals Exemption does not change the requirement to provide compensatory wetland mitigation under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act for Project impacts to waters and wetlands. Because Enbridge has asked the USACE to conduct its Section 404 permit review under a preliminary jurisdictional determination, Enbridge has agreed to provide wetland mitigation for all affected aquatic resources, without formal jurisdictional determinations for each affected water or wetland.

3.6.3.8 Minnesota Office of Pipeline Safety

Under an agreement with the federal Office of Pipeline Safety, within PHMSA, Minnesota Office of Pipeline Safety (MnOPS) inspects liquid and natural gas pipelines and investigates pipeline accidents and spills as an authorized agent of the federal government. PHMSA officials decide the appropriate course of action with regard to non-compliance on interstate pipelines. MnOPS is responsible for reviewing pipeline spill prevention and response plans.³⁴ Although MnOPS would not issue a permit or approval for the proposed Project, if the Project is approved, they would conduct inspections and review prevention and response plans.

3.6.4 Local Approvals

The Mississippi Headwaters Board has adopted a comprehensive management plan to protect the natural, cultural, historic, and recreational values of the Mississippi Headwaters region, and the board encourages project applicants to consult with them to help protect these values.

Watershed districts in Minnesota monitor water quality and coordinate water management decisions in their particular watersheds. Project applicants are encouraged to consult with districts to evaluate and mitigate potential impacts on watersheds. Districts require permits for work within their watersheds.

Counties, townships, and cities in Minnesota regulate land use within their jurisdictions by requiring a variety of approvals. Although the Commission's route permit supersedes all local land use regulations, permittees are not excused from local approvals required for proper local government functioning, such as the safe use of local roads, or for temporary land uses associated with a project.

3.7 REFERENCES

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³⁴ Minnesota Statutes §115E; see also Interagency Report on Oil Pipelines (Interagency Pipeline Coordination Team 2015).

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