



ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

November 5, 2018

VIA ELECTRONIC FILING

Mr. Daniel P. Wolf
Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
Saint Paul, MN 55101-2147

Re: Comments of Intervenor Friends of the Headwaters (FOH) on Enbridge October 16 Compliance Filing

**In the Matter of the Application of Enbridge Energy, Limited Partnership for a Certificate of Need for the Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border
MPUC Docket No. PL-9/CN-14-916; OAH 65-2500-32764**

Dear Mr. Wolf:

Pursuant to the Commission's October 29, 2018 "Notice of Comment Period on Line 3 Project – Accidental Release Cost Model Results, Decommissioning Cost Estimate, and Revised Parental Guaranty Filing," Intervenor Friends of the Headwaters ("FOH") submits this comment in response to Enbridge's October 16, 2018 filings. In its previous July 30, 2018 comment, FOH outlined several serious problems with the weak financial responsibility conditions Enbridge is proposing. We will do our best not to repeat those arguments here. Nevertheless, suffice it to say that the additional information Enbridge has provided does little or nothing to assuage FOH's concern that Enbridge's proposal will leave Minnesota taxpayers, and not Enbridge and its shareholders, with the risk of bearing the costs of potential catastrophic oil spills and the costs of retiring the pipeline when it no longer produces enough revenue for Enbridge.

FOH's particular concerns with Enbridge's more recent filing are as follows:

- 1. Enbridge does not "show its work" on estimating the costs of a worst-case oil spill. The absence of that information denies the public a meaningful opportunity to respond.**

The short seven-page consultant's "report" Enbridge submitted to justify its estimate, Attachment B, is virtually useless. It does not show what numbers the consultant relied on, what

multipliers were used, from what sources those numbers came from, or how they were manipulated to arrive at the final answer. The High Consequence Areas (“HCAs”) supposedly evaluated are not identified. As with Enbridge’s earlier filing, there is no useful description of the “model” they actually used, nor any evaluation of whether their chosen “model” would have accurately predicted the costs of past oil spills.

Instead, we get bland, state-the-obvious assertions like “environmental consequence is a function of the volume of product released, type of product, and environmental receptors in proximity to the pipeline,” and meaningless charts indicating that environmental impact equals land based impact plus water impact. The report does not even provide a calculation of clean-up costs, much less a breakdown on the different cost elements an oil spill can impose.

That should not and cannot be satisfactory to the Commission. At bare minimum, the Commission should order that Enbridge go back and explain its calculations in detail and give the state agencies, the parties and the public the opportunity to analyze and respond to those calculations. FOH supports a risk analysis similar to the one a Michigan Tech-led team of experts did to evaluate the potential costs of a worst case spill from Enbridge’s Line 5 in the Straits of Mackinac. Only with that kind of analysis, and an opportunity for experts and the public to weigh in, can the Commission determine whether Enbridge’s numbers are credible, and only then can the Commission evaluate whether Enbridge’s proffered financial assurance will be sufficient to protect Minnesota taxpayers and the environment.

2. Enbridge’s estimates are almost certainly too low.

Even with the limited information Enbridge submitted, it certainly appears that its estimates are way too low.

a. Enbridge just assumes that its automatic and remote shut-off systems will work properly in the event of a rupture.

Enbridge assumes that the time between a rupture and shutdown of the pipeline will never be more than 13 minutes. That is way too optimistic. It assumes that Enbridge’s automated detection and response technology—its Computational Pipeline Monitoring (“CPM”) and Supervisory Control and Data Acquisition (“SCADA”) systems--will work in all cases. There is no basis for such a rosy assumption.

First, as the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) requires, “maximum shutdown response time” for worst-case planning purposes must be based on “historic discharge data.” 49 C.F.R. § 194.105. For Enbridge, the “historic discharge data” is the Kalamazoo spill in 2010, when the shutdown response time was *17 hours*, not 13 minutes.

Second, under the EPA’s requirements for Risk Management Plans (RMP) under section 112(r) of the Clean Air Act, which include toxic fluid releases from pipelines, worst case planning must assume a complete failure in which no safety equipment works, except for passive measures such as dikes, dams, and basins. EPA, *Risk management program guidance for offsite consequence analysis* at 2-2 (March 2009), <http://www.epa.gov/rmp/rmp-guidance-offsite-consequence-analysis>.

Third, even with all the claimed advances in leak detection and response technology since the Kalamazoo spill in 2010, these systems continue to fail. FOH’s earlier response to Enbridge’s compliance filing cited to the PHMSA-funded study showing how few pipeline leaks are detected by automatic leak detection systems, to the investigation of the 2015 Refugio spill near Santa Barbara, where the CPM/SCADA system was working but was not configured properly, resulting in a controller misinterpreting the data, and to the offshore platform leaks in 2017 where the SCADA system failed to close valves or indicated that valves were closed while they remained open.

Fourth, Enbridge itself has acknowledged that, if its automatic or remote shut-off systems were to fail, and there was a release from Line 5 in the Straits of Mackinac, it would take as long as two hours for them to respond.¹ As the Michigan Tech, Michigan State, and University of Michigan team analyzing a possible Line 5 spill concluded, two hours between rupture and shutoff is a reasonable estimate of what would happen in a worst-case scenario, where the automated systems do not work, weather conditions are severe, and Enbridge personnel would have to manually shut the valves.²

The Commission therefore should order Enbridge to redo the analysis, with a variety of detection and shut-down scenarios where it might take up to two hours to respond. The thirteen-minute assumption is just not credible as a genuine worst-case scenario.

b. Enbridge appears to be excluding many of the costs that would result from a catastrophic spill.

Enbridge’s definition of “environmental consequence” is “the costs to clean up the environmental damage caused by a release, including the costs of emergency response, containment, and site clean-up and remediation.” Attachment B at 5. That appears to exclude at least six categories of damages for which Enbridge would be strictly liable³ under the Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2)(A)-(F)—damages to natural resources, damages to real or personal property, damage for loss of subsistence use,⁴ loss of government revenues, loss of third party profits and earning capacity, and costs of increased public services.⁵ As FOH pointed out in its earlier filing, there are established methodologies for estimating clean-up

¹ This was a response to an information request from the Michigan Petroleum Pipeline Task Force. *Independent Risk Analysis for the Straits Pipelines* at 49-50 (July 20, 2018), https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/document/pdf/Draft_Report-Risk_Analysis_Jul20.pdf (accessed on November 2, 2018).

² *Id.* at 45-50.

³ Strict liability for an oil spill has been capped at \$1 billion in Canada. Liability beyond that requires culpability findings. In the U.S., however, there is no such limit under OPA90.

⁴ This would include damages to the treaty-based hunting, fishing, and gathering rights held by the Chippewa bands in the 1837 and 1854 ceded territories.

⁵ FOH’s July 30 filing spells out OPA90’s definitions of the different categories of damages.

costs,⁶ natural resources damages,⁷ and other economic damages,⁸ and Enbridge should be required to use them.

Likewise, it appears that Enbridge's assessment of human health consequences is still limited to the effects of ignition of spilled oil, which is particularly unlikely with diluted bitumen, when the greater risk would likely be contaminated drinking water resources from a release and potential health consequences from ingesting BTEX and other hazardous compounds found in crude oil. Those costs must also be part of the calculation.

3. Enbridge's estimates of pipeline decommissioning costs are also impossible to evaluate. Enbridge also appears to still be trying to avoid setting up the Decommissioning Trust the Commission ordered.

Enbridge's calculation of decommissioning costs, Attachment C, suffers from many of the same gaps as its worst-case spill cost estimates. Again, we get broad assertions that there is a methodology, but, again, no member of the public can discern what numbers they used, their sources, the calculations of each element, or whether their methodology has been ground-proofed, i.e. whether it would have accurately estimated decommissioning costs from pipelines that have been retired in the past. Moreover, there is no attempt to calculate an appropriate amount to set aside—including an analysis of the proper discount rate—for eventual decommissioning of the new pipeline.

Enbridge also appears to be continuing its argument that there are too many legal barriers to setting up the Decommissioning Trust the Commission ordered. Again, FOH's recommendation is that the Commission take advantage of the work done by other government agencies, and order Enbridge to set up a trust following the EPA and Bureau of Land Management ("BLM") rules for financial assurance trust funds. 40 C.F.R. § 264.143(a)(EPA closure trust funds for hazardous and solid waste facilities); 43 C.F.R. § 3809.555 (BLM mine closure trust funds). Those are in place for hundreds of facilities, the recommended instruments resolve most if not all of the technical concerns, and they have all been vetted through federal rule making.

⁶ The Michigan Tech team used actual clean-up costs from previous spills like the Deepwater Horizon spill and the Line 6B Kalamazoo spill to calculate clean-up costs per oiled kilometer. *Independent Risk Analysis of Straits Pipelines*, Task F.

⁷ *E.g.* 15 C.F.R. pt 990 (OPA90 rules for making natural resources damage assessments).

⁸ The Office of Management and Budget (OMB) uses formulas for calculating the losses of economic surplus values to producers and consumers in cost-benefit analyses, and they are a good starting point for estimating economic damages. OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

4. Enbridge’s revisions to its proffered “Parental Guaranty” do nothing to increase its value in protecting Minnesota taxpayers.

On September 18, 2018, Enbridge, Inc. announced that it had “definitive agreements” to acquire all the shares of Enbridge Energy Partners, LP to, as Enbridge described it, “bring all the core liquids and gas pipeline assets under the umbrella of a single publicly-traded entity.”⁹ If Enbridge, Inc. is, or is about to be the owner of all of Enbridge’s crude oil pipelines, it will become the responsible party under the Oil Pollution Act of 1990, and this discussion about “Parental Guaranties” will become largely academic. Of course, Enbridge, Inc. could again, in a heartbeat, decide that it wants to place ownership of its Mainline system in another separate subsidiary to try to shield itself from liability, and then this issue could arise again. Whatever Enbridge’s corporate structure is, the Commission’s goal should be that the parent company, today Enbridge, Inc., cannot shield itself from liability, and that means requiring as a condition of any certificate of need (“CN”) that Enbridge, Inc., and its successors and assigns, be jointly and severally liable for costs associated with this project.

In its July 30 filing, FOH outlined three major concerns with the Parental Guaranty Enbridge offered. First, the proposed agreement contained no method for evaluating Enbridge’s ability to pay, other than references to undefined “at the ready” resources. We suggested following the EPA’s lead, and insisting on a credit rating threshold with three parts—a long-term corporate credit rating equal to or higher than A-, tangible net worth of at least six times the amount of potential environmental obligations, and assets located in the United States amounting to at least six times the financial responsibility obligations.¹⁰ Corporations that can pass those tests have a low default rate; corporations that cannot pass those tests pose a much greater risk. If Enbridge, Inc. cannot pass those tests, then the Commission should insist on alternative financial assurance arrangements.

Second, the proposed agreement puts Enbridge, Inc. on the hook for only a subset of the potential liabilities. The Oil Pollution Act of 1990, 33 U.S.C. § 2702(b) makes responsible parties strictly liable for all response costs and six categories of additional damages from an oil discharge. Any Parental Guaranty should make Enbridge, Inc. responsible for all of those obligations and any additional obligations imposed by the CN, the route permit (“RP”), or state law. The best approach would simply be to make Enbridge, Inc. jointly and severally liable with whatever subsidiary owns and operates the pipeline, and let the Enbridge entities sort out who will be responsible for paying. Requiring litigation to make a claim under the guarantee, as this

⁹ Press Release: Enbridge Announces Definitive Agreements to Acquire All Public Equity of Enbridge Energy Partners and Enbridge Energy Management, Achieves Significant Milestones Toward Corporate Structure Simplification, *MarketWatch* (Sept. 18, 2018), <https://www.marketwatch.com/press-release/enbridge-announces-definitive-agreements-to-acquire-all-public-equity-of-enbridge-energy-partners-and-enbridge-energy-management-achieves-significant-milestones-toward-corporate-structure-simplification-2018-09-18>

¹⁰ EPA, *Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry*, Proposed 40 C.F.R. § 320.43(a)(1), 82 Fed. Reg. 3388, 3492 (Jan. 11, 2017); 40 C.F.R. pts 264 & 265, subpart H Financial Assurance (hazardous waste facilities).

agreement does, only adds to the costs and increases the risk that Minnesota taxpayers will have to settle for less than 100 cents on the dollar.¹¹

Third, the proposed agreement needed to be supplemented with third-party “backstop” assurance. The Department of Commerce has already outlined the problems with Enbridge’s comprehensive and general liability (“CGL”) coverage, and we also question whether traditional private insurance will be available to cover all of Enbridge’s obligations under OPA90 and Minnesota law. Perhaps a bank would issue an irrevocable letter of credit, perhaps a surety company would issue surety bonds, but if those mechanisms are not available or are prohibitive, the PUC should insist that the necessary money be set aside in a trust fund. All such mechanisms need cancellation protection, because any guarantor will run for the hills if it looks like a default might be coming.

The slightly revised language in Enbridge’s more recent filing does not address any of those concerns. We are still left with a guarantee that covers less than full liability, with insurance that will likely not cover the kind of catastrophic losses that may entail from a worst case oil spill, and with no other third-party assurance that Minnesota taxpayers will not be left holding the tab.

It does no good to promise that, if Enbridge runs out of money, the PUC will ask for alternative financial assurance. It will then be too late. Governments have made that mistake time and time again, and this Commission should not fall into that trap.

One of the supposed justifications for granting a certificate of need for this project was the ability to insist as a condition that Enbridge provide real financial assurance to protect the public. This package does not impose such a requirement, and the “benefit” is largely illusory.

FOH therefore renews the recommendations made in its July 30 filing:

- Require a much more comprehensive and transparent independent assessment of possible response costs and damages should a worst-case spill occur, and the costs of decommissioning the old Line 3 now and any new Line 3 when it stops producing adequate revenue;
- Insist on appropriate third-party coverage to cover those amounts; and
- Require a parental guarantee that makes Enbridge, Inc., its successors and assigns, jointly and severally liable for the liabilities of the owner/operator subsidiary or affiliate; and
- Insist that Enbridge, Inc. pass a financial test sufficient to assure that the risk of default is as close to zero as practicable.

¹¹ FOH of course also recommended that Enbridge, Inc. consent to suit, consent to service on a registered agent in Minnesota, and consent to enforcement in Minnesota, which is considerably more than waiving the right to challenge personal jurisdiction or forum non conveniens.

Any new proposal offered to satisfy those requirements should, of course, be subject to expert and public comment.

Getting this condition right is extremely important. Too often, government agencies do not insist on adequate protection for taxpayers. The Canadian tar sands industry itself is a prime example. The companies have posted approximately \$1.6 billion in financial assurance, but the liability for shutting down wells, facilities, and pipelines, and to clean up tailings ponds, is estimated to exceed \$260 billion.¹² At the same time, tar sands producers are facing crude oil prices under \$16 a barrel, and are losing at least \$100 million per day.¹³ The total market capitalization for Enbridge Energy Partners is only a fraction of what it was when these proceedings started, with share prices this year falling as low as \$8.89.¹⁴ Financial assurance cannot be based on an assumption that oil concerns will always have sufficient resources to handle any expense. That assumption is simply false.

Sincerely,



Richard Smith
President, Friends of the Headwaters



Scott Strand
Attorney for Friends of the Headwaters

¹² Mike De Souza, Carolyn Jarvis, Emma McIntosh, & David Bruser, “Alberta regulator privately estimates oilpatch’s financial liabilities are hundreds of billions more than what it told the public,” *National Observer* (Nov. 1, 2018).

¹³ Kyle Bakx, Tony Seskus, “Bargain price oil: How long will it last?” *CBC* (Oct. 18, 2018).

¹⁴ <https://www.enbridgepartners.com/investor-relations/eep/common-unit-information/stock-quote-and-chart.aspx>