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

July 30, 2018

VIA ELECTRONIC FILING

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

> **RE: Comments of Intervenor Friends of the Headwaters (FOH) on Enbridge July 16 Compliance Filing**
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> **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 PL-9/CN-14-916; OAH 65-2500-32764**

Dear Mr. Wolf:

Friends of the Headwaters (FOH) submits these comments in response to the "compliance filing" Enbridge made on July 16, 2018. FOH's comments focus on the financial assurance or financial responsibility issues, covered in Enbridge Attachments 1, 3, and 5.[1] These comments start from the premise that the Commission's conclusion that "the consequences to society of granting the Certificate of Need (CN) are more favorable than the consequences of denying the certificate" under Minn R. 7851.0120.C. rested on imposing a CN condition to assure that Enbridge and its shareholders, and not Minnesota taxpayers, bear the potentially catastrophic costs of potential pipeline spills as well as the costs of closing pipelines down when they reach the end of their useful life.

Enbridge's proposals provide no such assurance. Their "risk consequence calculation" will not capture the true costs of a "worst-case" oil spill. The proffered "parental guaranty" and agreement to provide limited financial information to the state will do little to prevent an insolvent Enbridge from avoiding its responsibilities. Nor will Enbridge's vague commitment to some future decommissioning trust offer much hope that those costs will not eventually be borne by Minnesota taxpayers.

As FOH has pointed out several times in previous memoranda, several other state and federal agencies have wrestled with the question of how to make financial assurance packages work. Those agencies have developed much more robust protocols for estimating potential costs of catastrophic events like oil spills. They have consulted extensively with the financial industry on instruments to provide better protection and they have established minimum requirements that any financial assurance package needs to meet. In other words, the PUC does not have to reinvent the wheel, but can build on the work that has already been done. Throughout this comment, FOH offers suggestions based on that previous agency work on what modifications to the CN need to be made. Without significant changes to the CN's financial responsibility requirements, the opportunity for better taxpayer protection cannot be counted as a "benefit" that justifies a finding that "need" exists.

1. **Enbridge's "risk consequence calculation" proposal will not capture the true costs of a worst-case oil spill from a new Line 3.**

Obviously, the first step in any consideration of financial assurance or financial responsibility has to be an estimate of the potential costs of a worst-case spill. Enbridge's compliance filing, Attachment 1, at 4, acknowledges that the goal is to assure that Enbridge can appropriately respond "to a full-bore pipeline rupture at maximum design capacity and with maximum drain down effect within a range of High Consequence Areas ("HCAs")." Enbridge does not, however, give us a number or even a range of numbers to evaluate. Without that, there is no way to determine what kind of financial assurance CN condition will be necessary.[2] The information Enbridge does provide, the "Enbridge Risk Consequence Calculation," described in Attachment 1C, is likely to grossly underestimate the potential costs.

a. Enbridge provides no estimates at all on the cost of a worst-case spill.

The first problem is the absence of a number, or even a range of possible values. We know that the costs of the 2010 Kalamazoo dilbit spill are approaching $1.4 billion. A draft report dated July 16, 2018 from multiple organizations led by Michigan Technological University estimated that the costs of a worst-case oil spill from Enbridge's light crude Line 5 pipelines under the Straits of Mackinac would be $1.868 billion.[3] If these reflect the numbers that would follow a worst-case spill along the new Line 3 route, then Enbridge's claims that they are now and always will be more than able to cover those potential costs are not credible. Without any estimate, there is no way to evaluate Enbridge's assurances. Therefore, step one in

[2] Enbridge apparently plans to produce an estimate by October 31, 2018, betting that, by then, the Commission will want this case to end, and be willing to simply take Enbridge's word for it on response cost and damages estimations. That, FOH submits, would be a serious mistake.

[3] *Independent Risk Analysis for the Straits Pipelines* at 395 (July 16, 2018), https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/document/pdf/Draft_Report-Risk_Analysis_Jul20.pdf. A May 2, 2018 study of the potential economic impacts and natural resources damages of a Line 5 spill in the Straits by Prof. Robert Richardson at Michigan State, commissioned by For Love of Water (FLOW) found the risk to Michigan to be over $6 billion. That study estimated that natural resources damages and restoration costs would be just under $700 million, but also found $4.8 billion in economic impacts to the tourism economy, $61 million to commercial fishing, $233 million to municipal water systems, and over $485 million to coastal property values. Richardson et al., *Oil Spill Economics: Estimates of the Economic Damages of an Oil Spill in the Straits of Mackinac in Michigan* (May 2, 2018), flowforwater.org//wp-content/uploads/2018/05/FLOW_Report_Line-5_Final-release-1.pdf.

the PUC's approach to this problem should be to insist on a number from Enbridge that represents their estimate of the costs from a worst-case scenario *before* any CN or RP is granted.

b. Enbridge's model assumes release volumes that will be too low.

Second, under the model Enbridge outlines, Enbridge's calculated release volume numbers will almost certainly be too low. The reason is that Enbridge assumes that its active leak detection and response controls are going to work, estimating that the maximum amount of time between a rupture and valves being closed will be 13 minutes. That is far too optimistic an assumption. It was 17 hours, not 13 minutes, between the rupture and closing off the pipeline in the 2010 Kalamazoo spill. Nor is Enbridge's assumption consistent with analogous federal requirements for worst-case planning. Worst-case scenarios for toxic liquids in EPA Risk Management Plans (RMPs) must assume a complete failure in which no safety equipment works except for passive measures such as dams, dikes, and basins, with weather conditions assumed to be the worst possible.[4] The Pipeline and Hazardous Materials Safety Administration's (PHMSA) Part 194 regulations define a worst-case discharge as:

> The pipeline's maximum release time in hours, plus the maximum shutdown response time in hours (based on historic discharge data or in the absence of such historic data, the operator's best estimate), multiplied by the maximum flow rate expressed in barrels per hour (based on the maximum daily capacity of the pipeline), plus the largest line drainage volume after shutdown of the line section(s) in the response zone expressed in barrels.

49 C.F.R. § 194.105.

Enbridge's "historic discharge data" from Kalamazoo certainly does not support a maximum shutdown response time of 13 minutes, nor does Enbridge's "new and improved" leak detection and response technology—Computational Pipeline Monitoring (CPM) and Supervisory Control and Data Acquisition (SCADA) —guarantee that shutdown response time will be so prompt. The fact is that leak detection technology does not always work. Only days before the 2010 Kalamazoo spill, an Enbridge executive claimed its leak detection and response system would detect and begin responding to a spill almost immediately. That almost immediately turned out to be wrong. For example, in the 2015 Refugio spill in Santa Barbara County, a CPM/SCADA system was operating, but the pressure alarms were configured incorrectly and the controller did not recognize the information being reported by the system as indicative of a problem.[5] A PHMSA-funded review of pipeline right-of-way incidents between 2010 and 2012 found that these automated detection systems were not responsible for most of the leak detections. Most incidents were reported by pipeline company employees or contractors, the

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[4] EPA, *Risk management program guidance for offsite consequence analysis* at 2-2 (March 2009), https://www.epa.gov/rmp/rmp-guidance-offsite-coonsequence-analysis.

[5] PHMSA, *Failure Investigation Report: Plains Pipeline, LP, Line 901 Crude Oil Release, May 19, 2015, Santa Barbara County* (2016), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/PHMSA_Failure_Investigation_Report_Plains_Pipeline_LP_Line_901_Public_0.pdf.

public ranked second, and CPM/SCADA programs came in third.[6] These systems are supposed to make leak detection immediate in theory, but they simply have not always done so in practice.

Automatic shutoffs and remotely controlled valves do not always work either. In 2008, the Baku-Tbilisi-Ceyhan (BTC) pipeline running from the Caspian Sea to the Mediterranean ruptured in Turkey, resulting in an explosion. The BTC pipeline had a state-of-the-art leak detection system with alarms and real-time data acquisition to provide pressure and flow readings to the control room operators. Yet the control room did not discover the rupture and explosion until 40 minutes after it had happened. Apparently, the communications system, the alarms, the cameras, the leak detection system, the automated pressure relief systems, and the automated valve shutoffs were all compromised.[7] Routine equipment failure still occurs as well—for example, natural gas condensate leaked at an Engie offshore platform in 2017, and one emergency valve failed to close as designed while another failed to open as designed. In yet another incident at the Louisiana Offshore Oil Port, a valve failed to close due to excessive wear on a stripped stem nut, and yet the SCADA system showed the value was closed.[8]

In the ongoing dispute over Enbridge Line 5 in neighboring Michigan, the Michigan Petroleum Pipeline Task Force asked Enbridge: "Assuming a leak takes place at the Straits pipelines, and any automatic or remote shut-off systems fail, approximately how long would it take Enbridge workers or contractors to manually close the pipeline on both ends of the Straits?" Enbridge acknowledged that it could take as long as "two hours depending on time of day and location of existing personnel."[9] At 760,000 to 910,000 barrels per day through a new Line 3, two hours of oil spilling from a rupture would be 63,000 to 76,000 barrels. While this is a genuine worst-case scenario under federal definitions and guidelines, it is clear that Enbridge is not contemplating anything like that.

c. Enbridge does not provide the information necessary to estimate a worst-case spill or evaluate its model.

The third problem is that most of the information needed to estimate the cost of a worst-case spill scenario is not disclosed, and Enbridge has apparently given itself until October 31, 2018 to provide that information. For example, the High Consequence Areas (HCAs) where Enbridge plans to calculate its estimates someday are not identified. Enbridge's filing does not say whether these will be the areas discussed in the FEIS, a subset of those, or different sites altogether. Enbridge does not describe the meteorological or environmental data it intends to rely on, nor does it identify the hydrodynamic or oil dispersal models it intends to employ to gauge the potential fate and transport of a substantial spill at any point on the proposed route.

There is also little indication that Enbridge plans to evaluate the full range of potential human health consequences. Although Enbridge introduces the issue of potential fatalities from ignition of released product under "Health and Safety Consequences" in Attachment 1C, page 2,

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[6] Shaw et al., *Leak Detection Study—Final Report* (PHMSA 2012), Ex. FOH-4 (Kuprewicz direct).
[7] Robertson et al., *Mysterious '08 Turkey Pipeline Blast Opened New Cyberwar*, https://www.bloomberg.com/news/articles/2014-12-10/mysterious-08-turkey-pipeline-blast-opened-new-cyberwar.
[8] *Independent Risk Analysis for the Straits Pipelines* at 49-50 (July 16, 2018).
[9] *Id.* at 50.

it does not discuss possible releases of volatile organic compounds (VOCs) and, in particular, the BTEX compounds (benzene, toluene, ethylbenzene, and xylene isomers), polycyclic aromatic hydrocarbons (PAHs), heavy metals such as nickel and vanadium, and hydrogen sulfide (H2S) from released crude oil product into the air, or possible consequences from dermal contact. These substances can have both noncarcinogenic and carcinogenic effects, and can impose very real costs on human populations, particularly vulnerable populations such as those along Enbridge's proposed route. Perhaps Enbridge also intends to estimate the costs of potential drinking water contamination along the route, but again neither the methodology nor the assumptions are disclosed.

Further, there is no indication that Enbridge intends to do a thorough assessment of potential damages from a worst-case oil spill. Under the Oil Pollution Act of 1990, 33 U.S.C. § 2702(b), Enbridge, as the responsible party, would be responsible for all "removal costs," which would include "all removal costs incurred by the United States, a State, or an Indian tribe," and "any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan." *Id.*, § 2702(b)(1). But then, Enbridge would also be liable for six different categories of damages:

(a) Natural resources: Damages for injury to, destruction of, loss of, or loss of use of, natural resources including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee;
(b) Real or personal property: Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases the property
(c) Subsistence use: Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources
(d) Revenues: Damages equal to the net loss of taxes, royalties, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
(e) Profits and earning capacity: Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant; and
(f) Public services: Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

Id., § 2702(b)(2)(A)-(F). The goal of any financial responsibility condition in a Certificate of Need for a new Line 3 should be to assure that funds will be available to cover all of those costs and damages in a worst-case spill situation. That means there need to be reliable estimates of how much those costs and damages could amount to before any such condition can be established or any CN granted. Moreover, because the assumption has to be that, in the event of a default, it would be the government that would have to arrange for response and restoration, the estimates must be for what it would cost the government, not Enbridge, to do the work. As Enbridge acknowledges, there is no such information in Enbridge's Attachment 1C or any part of its filing, and will not be until some later date.

The new draft risk assessment for a Line 5 spill in the Straits of Mackinac released two weeks ago provides a useful model.[10] The methodology that the "Line 5 team" used in their report had the following elements:

1. Description of worst-case scenarios (Task A): The Line 5 team used a range of potential scenarios—"tiers of failure"--based on amount and type of oil that might be spilled, different detection and response times, and whether automatic equipment was working or not.
2. Analysis of likely environmental fate and transport of oil released in a worst-case scenario (Task B): This included work that appears on the surface at least to be similar to the hydrological analysis and dispersal modeling included for several locations in the FEIS. The Task B group also did atmospheric dispersal analysis to address air quality issues.
3. Analysis of how long it would take to contain and clean up a worst-case release (Task C): The Line 5 team concluded a clean-up would take up to two years.
4. Analyzing short and long-term public health and safety impacts (Task D);
5. Analyzing short and long-term ecological impacts (Task E);
6. Analyzing potential measures to restore affected natural resources and mitigate adverse impacts upon ecological resources (Task F): This included cost estimates for primary restoration, using figures generated from the actual experience with the Deepwater Horizon ($3.06 million per oiled kilometer) and Line 6B/Kalamazoo ($510,000/km) spills. The range for primary restoration costs alone was $165 million to $1.372 billion, with $500 million ultimately chosen as a midrange figure for the final estimate;
7. Estimating the amount of natural resource and other economic damages, public and private, that would result from a worst-case release (Task GI): This was based on the now well-established formulas for calculating the losses of economic surplus values to producers and consumers, which is the approach specified by OMB for federal cost-benefit analysis[11] and for natural resource damages assessments (NRDAs) for oil spills.[12]
8. Estimating the governmental costs that would be incurred as a result of a worst-case release (Task H);
9. Analyzing broader impacts, including qualitative impacts (Task X).

Using midrange values for response costs and potential damages, the Line 5 team estimated likely costs for a worst-case Straits spill, for which Enbridge would be responsible, to exceed $1.8 billion. If Enbridge were to be unable or unwilling to pay after such a spill occurred, the taxpayers in the State of Michigan would have to pick up response costs, the

[10] *Independent Risk Analysis for the Straits Pipelines—Draft for Public Comment* (July 16, 2018), https://mipetroleumpipelines.com/sites/mipetroleumpipelines.com/files/document/pdf/Draft_Report-Risk_Analysis_Jul20.pdf. This report is currently out for 30 days of public comment, and then presumably will be finalized shortly thereafter.

[11] OMB Circular A-4, Regulatory Analysis (9/17/2013)

[12] *See generally* 15 C.F.R. pt. 990 (NRDA rules for oil spills)

State–as trustee of Michigan's natural resources– would have to absorb the natural resource damages, and Michigan property owners and businesses would likely not recover their damages.

The Minnesota PUC should insist on a similar analysis of the costs and consequences of worst-case spill scenarios along the route of a new Line 3.[13] The PUC should further require that those costs and consequences be periodically reevaluated, at least every three years, to determine if adequate financial responsibility is still in place. Government agencies who might be involved if a spill were to occur should be consulted, and their views made public. And the public should have an opportunity to comment. Only then will the PUC have an informed basis for evaluating what conditions need to be imposed in a modification to the CN to assure that Minnesota taxpayers and citizens do not bear these costs. No CN should be granted, and certainly no construction should begin unless and until this process is completed.

2. **Enbridge's filing on the "decommissioning trust" offers little assurance that funds will be available to cover the costs of removing either the old Line 3 or any new Line 3 when its time comes.**

The PUC made it quite clear that one of the "benefits" of granting a Certificate of Need was the assurance that the costs of decommissioning both the old and new Lines 3 would not fall to Minnesota taxpayers. Instead of explaining how it would propose to accomplish that, however, Enbridge used its compliance filing to explain why it cannot or should not be done. Attachment 3A, at 2-3; Attachment 3B.

Enbridge estimated that removing the old Line 3 instead of abandoning it would add $1.2 billion to the cost of the project. Presumably, that can be the basis of estimating the eventual costs of removing a new Line 3 as well, and analysis should assume that more pipelines will follow in the new corridor and the risk of damaging other pipes during removal will be similar. The PUC can set the appropriate discount rate for turning those future costs into present dollars to be deposited into the decommissioning trust.

None of the barriers to establishing a decommissioning trust in its compliance filing are significant. It is true that a trustee would have to be selected and a trust agreement would have to be executed. The form of the trust agreement could and should, however, simply follow the requirements EPA has imposed for similar financial assurance trust fund arrangements. The EPA's recent proposed financial assurance rules for hardrock mining include explicit trust instrument wording requirements that provide a ready template. Those rules, and most parallel requirements from other agencies, also stipulate that any trust fund must adopt a conservative

[13] Of course, this analysis should have been included in the Line 3 FEIS. Assuming that the areas the FEIS studied are among the HCAs that would be involved in a worst-case scenario (perhaps a flawed assumption), there is information in the FEIS about potentially affected natural resources and about possible flow and transport of a large-scale release. As FOH has pointed out many times before, the FEIS does not include analysis of likely site-specific ecological or human health impacts, and it makes no attempt to quantify response costs and damages for which Enbridge would be responsible under OPA90 under any scenario.

investment policy largely focused on government securities to reduce the risk that adequate funds will not be available.[14]

As FOH acknowledges, there will indeed be a need to estimate decommissioning costs, presumably starting from Enbridge's estimate of $1.2 billion in additional costs for removing the old Line 3, as there will be for any of Enbridge's potential liabilities arising from construction and operation of a new Line 3. The PUC will need to determine an appropriate discount rate for those future obligations—FOH suggests the 3% rate currently used by federal agencies. There will however be no need for any negotiation of new shipping tolls, or any FERC tariff amendments, or any forecasts of after-tax investment returns. Funding the decommissioning trust will simply be an Enbridge obligation from day one; if the PUC wants to entertain a two or three-year ramp-up period to fully fund the trust, Enbridge can make and justify a proposal.

Enbridge is taking broad references to a decommissioning trust "like the NEB does" to argue that law changes and federal administrative approvals and shipper agreements will be needed to set up such a trust fund. That is not the case. The "decommissioning trust" should be set up the same way as hazardous and solid waste facilities set up trust funds to cover closure and post-closure costs,[15] or mine operations on federal land deposit funds into federal accounts to cover their closure and post-closure costs.[16] The PUC should not countenance Enbridge's attempt to wriggle out of this requirement.

3. Enbridge's description of its "at-the-ready financial resources" and its proffered "parental guaranty" provide almost no assurance at all that Enbridge would be able to pay the full costs of a worst-case spill.

a. Even well-designed financial tests, by themselves, are not sufficient to provide adequate financial assurance. Enbridge's proposal is not well-designed.

Without the added layer of third-party financial responsibility instruments (trust funds, letters of credit, surety bonds, insurance), most state and federal agencies have concluded that any "financial test" standing alone creates too great a risk that the costs of the environmental risk at a facility such as a crude oil pipeline will fall to the public. Financial tests, at best, represent a snapshot in time. Financial situations can deteriorate, sometimes very rapidly, and it is precisely when a company becomes too weak to self-insure that alternate financial responsibility instruments from banks and insurers become unavailable. It is too late to ask a company (or a bank or insurer) to put hundreds of millions of dollars into a trust fund when the company no longer has the money.

Financial tests pose other problems. They require specialized expertise to oversee−expertise that neither the PUC nor the department of commerce may have or be able or authorized to support over the life of a pipeline. They also depend on accurate and accessible

[14] Enbridge can of course adopt whatever investment policy it wants to make sure that it can make required contributions to the trust. Once the money is in the trust, however, the investment strategy must be conservative to eliminate the possibility that downturns in the market will leave the trust underfunded.
[15] 40 CFR § 264.143(a) (closure trust funds)
[16] 43 C.F.R. 3809.555 (BLM financial guarantee mechanisms)

accounting of a company's other financial obligations, environmental or not, wherever the company might operate. Moreover, unlike third-party instruments, financial tests create no additional incentive to adopt and implement safer practices.[17] And, of course, because the potential costs and damages from a worst-case oil spill scenario are very high, the risk to the public of a default is also very high. Financial tests might be sufficient when the potential costs are fairly low, but the higher those potential costs climb, the more the risk to the public becomes unacceptable.

Enbridge's proposal does not even contemplate any kind of financial test. Instead, Attachment 1D indicates their proposal is to periodically advise the PUC about its current cash, liquid credit facility, outstanding commercial paper, and other short-term resources and encourage the PUC to follow the financial press coverage of Enbridge online. If the PUC is concerned at any point, it can notify Enbridge and Enbridge can then reassure the PUC that its resources are adequate or can be made adequate. Attachment 1, at 6-7.

That is not acceptable. If this condition is going to be meaningful, it must set specific minimum financial standards that Enbridge has to meet. The EPA's recent analysis of financial responsibility options for the hardrock mining industry recommended a three-part test for allowing self-insurance:[18]

1. At least one long-term corporate credit rating equal to or higher than A- as issued by Standard & Poor's (S&P) or an equivalent as issued by another Nationally Recognized Statistical Rating Organization (NRSRO);
2. Tangible net worth of at least six times the amount of environmental obligations, including guarantees, covered by the financial test; and
3. Assets located in the United States amounting to either at least ninety percent of total assets; or at least six times the amount of financial responsibility obligations covered by the financial test.[19]

The credit rating threshold is the same one used in the Nuclear Regulatory Commission's financial test for self-insurance of decommissioning costs, and is based on expected default rates over a three-year horizon.[20] Based on S&P bankruptcy data, fewer than one percent of companies that can maintain an A- long-term corporate credit rating default in three years. The risk of default doubles for companies with BBB+ or BBB ratings, doubles again for BBB- ratings, and then goes much higher for lower "junk" or "speculative" level credit ratings. Although the independence of the credit rating agencies has been appropriately called into

[17] With third-party guarantees, owners and operators have an incentive to adopt safer practices and do cleanups and restoration because they can get their financial assurance money back.

[19] 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). For the EPA, this was "Option 2"; its recommendation was that financial tests not be used at all to meet financial responsibility requirements. The six times multiplier would be applied to the amount estimated for costs and damages from a worst-case spill scenario plus decommissioning costs, plus any other environmental obligations that might also be covered, e.g. the non-Minnesota portions of the pipeline (so that the same assets are not in effect pledged to several different obligations).
[20] This is also the horizon EPA uses for hazardous waste handlers under RCRA.

question, they do provide a way for the government to use third-party expertise and analysis to evaluate financial responsibility, together with the tangible net worth and US asset requirements.

The tangible net worth and US asset requirements are the same ones used in the Resource Conservation and Recovery Act Subtitle C financial test provisions for hazardous waste treatment, storage, and disposal facilities (TSDFs),[21] the Underground Injection Controls (UIC) financial responsibility programs,[22] and in the CERCLA [Superfund] model financial test used to support financial responsibility in CERCLA orders and settlements.[23] The six times multiplier is intended to address the likelihood that, in the event of a bankruptcy, funds required to meet other obligations would reduce an owner or operator's ability to satisfy its environmental claims.

Those proposed rules also require much more robust annual financial disclosures, including:

1. A letter from the Chief Financial Officer (CFO) certifying that the company meets the financial test standards;
2. the most recent independently audited annual financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles (US GAAP) (annual statements prepared in accordance with International Financial Reporting Standards, or IFRS, would have to be adjusted);
3. a special audit report of procedures and findings of an audit conducted by a licensed, third-party, independent certified public accountant (CPA) resulting from an agreed-upon procedures (AUP) engagement in accordance with applicable Federal laws governing independence and AUP engagements, or standards set by the American Institute of Certified Public Accountants, Inc. (AICPA) to supplement Federal laws or when Federal laws are not applicable. This would have to explain differences and discrepancies between the CFO certification and the annual financials.[24]

Of course, any change in long-term corporate credit rating or financial position that would disqualify a company from using the financial test should trigger an immediate notice requirement, and the PUC or Department of Commerce or whoever would be asked to supervise this would have the right to request additional financial information whenever they have reason to believe the company may no longer meet the requirements. Failing to meet the requirements for using the financial test should trigger no more than a 120-day period for the company to get adequate alternate financial assurance in place or lose its permission to operate.

There is no reason the PUC cannot or should not impose similar minimum financial requirements on Enbridge if it intends to rely on Enbridge's claimed "financial strength" to protect Minnesota taxpayers. To accept less is to render the "benefit" of additional taxpayer protection, justifying the Certificate of Need illusory.

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[21] 40 C.F.R. pts. 264 & 265, subpart H Financial Assurance
[22] EPA, *Guidance Documents for Underground Injection Control Financial Responsibilities,* https://www.epa.gov/uic/guidance-documents-underground-injection-control-financial -responsibilities
[23] 82 Fed. Reg. at 3437.
[24] *Id.* at 3438-39.

b. Enbridge's "parental guaranty" is not adequate to instill any greater confidence.

Right now, it is not clear what corporate entity will be the owner and operator of, or permit holder for, a new Line 3. Enbridge, Inc. has made offers to "roll up" many of its subsidiaries due to a loss of favorable tax treatment for its "master limited partnerships." Now, however, the final outcome of the tax question may be in doubt, and so are Enbridge's corporate restructuring plans. Obviously, if Enbridge, Inc. becomes the owner-operator by acquiring Enbridge Energy LP, then a corporate guarantee from Enbridge, Inc. adds no value. Assuming, however, that Enbridge intends for a subsidiary, either an existing one or a new one, to be the owner and operator of the pipeline, then the assumption of responsibility by Enbridge, Inc. through a corporate guarantee might be useful, particularly if the subsidiary owner-operator cannot meet the minimum financial standards but Enbridge, Inc. can.

To be effective, a corporate guarantee must have several necessary elements, which are not currently included in Enbridge's proposal:

1. Guarantor must pass financial test: Enbridge, Inc. must meet the minimum financial requirements, that is, pass the "financial test" and comply with all of the reporting and other requirements to make that effective. If at any time it cannot, then Enbridge, Inc. must also assume the obligation to provide for alternate financial assurance within no more than 120 days in order for the pipeline to continue to operate.

2. Consideration: The law will not enforce gratuitous promises. To be enforceable, there must be "consideration," meaning a legal detriment that has been bargained for and exchanged for the promise. That means the guarantee must describe the consideration, and any CFO letter certifying that the guarantor (presumably Enbridge, Inc.) passes the financial test should describe the consideration as well.[25] Following the EPA RCRA Subtitle C rules, the attorney general in Minnesota should also certify that the guarantee is a legally valid and enforceable obligation in Minnesota.

3. Consent to suit, consent to service, and consent to enforcement in Minnesota: According to Enbridge's filing, Enbridge, Inc. is "voluntarily and expressly submitting to jurisdiction in Minnesota in an action, agreeing that Minnesota will apply, and waiving arguments that Minnesota is not a convenient forum." Enbridge filing, at 4. So far, so good, but Enbridge, Inc. should also be required to identify a registered agent for service of process in Minnesota and subject itself to enforcement proceedings in Minnesota. Moreover, Enbridge, Inc. should be required to pass the U.S. Assets test described above, to ensure that there are adequate assets reachable in this country to satisfy any judgment.

4. Joint and several liability: The Oil Pollution Act of 1990, 33 U.S.C. § 2702(b), provides that responsible parties are strictly liable for all response costs and six categories of

[25] This requirement comes from the RCRA Subtitle C financial assurance regulations. *See generally* EPA, *Liability Requirements for Hazardous Waste Facilities: Corporate Guarantee*, 52 Fed. Reg. 44314, 44316-17 and *Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities: Liability Coverage*, 52 Fed. Reg. 33938, 33942 (Sept. 1, 1988).

damages from an oil discharge. A corporate guarantee therefore must ensure that Enbridge, Inc.'s responsibility as a guarantor is co-extensive with that of a responsible party under OPA90, plus any additional obligations imposed by the Certificate of Need or Route Permit. The most straightforward way to accomplish that would be to make Enbridge, Inc. jointly and severally liable as a responsible party. If litigation proves necessary, then both Enbridge, Inc. and its subsidiary could be sued directly. Enbridge's proposal would require at least two stages of litigation: one stage against the owner-operator subsidiary to reach either a settlement or a "final, nonappealable" judgment, and then a second against Enbridge, Inc. if the subsidiary does not pay or perform under the settlement or judgment. Each stage of litigation increases the likelihood of settlement at fewer than 100 cents on the dollar, increases the time and expense required, and increases the risk of bankruptcy proceedings leaving the State or the Tribes less than whole. That is a concession the PUC need not and should not make.

c. To be effective, a financial assurance or financial responsibility condition in the Certificate of Need will require third-party coverage that meets minimum requirements.

There is no way to reduce the risk that the public will end up bearing the costs of a Line 3 spill to zero. Just as Enbridge's financial situation can deteriorate, so can banks, sureties, and insurers. Yet, most federal and state agencies that have considered the issue, at least recently, have concluded that financial tests and corporate guarantees are not sufficient, and that some form of third-party "backstop" assurance is necessary to adequately protect the public.[26]

Third-party protection can take several forms—trust funds, irrevocable letters of credit, surety bonds, insurance, or combinations. No matter the mechanism, however, there are certain minimum requirements:

1. Qualified, non-captive guarantors: Issuers of letters of credit, typically banks, must have the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or state agency. Sureties need to be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury. Insurers need to be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one

[26] The Minnesota Department of Natural Resources (DNR) has made it clear that financial tests and corporate guarantees will not be sufficient financial assurance for nonferrous mining operations like the proposed PolyMet NorthMet mine near Hoyt Lakes. The U.S. Bureau of Land Management (BLM) likewise requires surety bonds, cash, irrevocable letters of credit, certificates of deposit, or savings account, government or AAA or AA-rated securities, or insurance for mining financial assurance. 43 C.F.R. § 3809.555. The U.S. Forest Service (USFS) will not allow financial tests or corporate guarantees to suffice either. USFS, *Forest Service Manual* §§ 2817.24; 6562. The Office of Surface Mining Reclamation and Enforcement (OSMRE) has restricted the use of self-bonding to the extent permitted by the Surface Mining Control and Reclamation Act (SMCRA). Even Peabody Energy was forced to abandon self-bonding, which states had approved on the basis of Peabody's assertions about its financial strength, and arrange $1.26 billion in surety bonds for closure costs to emerge from its chapter 11 proceedings. https://www.reuters.com/article/us-peabody-energy-bankruptcy-bonding/peabody-energy-agrees-to-collateral-for-mine-cleanup-costs-idUSKBN16D2Q6.

or more states. Any of them must not be "captives," that is, owned in whole or in part by Enbridge or any of its affiliates.[27]

2. Adequate coverage, equal to the estimated response costs and damages from a worst-case spill along the Line 3 route, plus decommissioning costs;[28]
3. Clear claim language, making payment mandatory upon presentation of written documents from State or Tribal officials saying required payment has not been made or performance has not occurred, not the actual non-payment or non-occurrence, so as to minimize litigation risks. The terms should also permit direct action by the beneficiaries against the guarantors.
4. Cancellation protection: When banks, sureties, insurers, or even trustees see claims coming, they can and will cancel coverage. To protect against that, Enbridge should be required to set up a standby trust. The instruments should provide that coverage will automatically renew each year, may not under any circumstances be cancelled without at least 120 days' notice, and further provide that, if Enbridge has not secured alternate financial assurance and State and Tribal approval within 90 days of that notice, the entire amount of the coverage will be paid into the standby trust.[29] That way, the third-party guarantor that wishes to terminate its responsibility must assist Enbridge to find an alternative or face paying its limits, or "penal sum," into the standby trust.

Clearly, Enbridge's current liability insurance coverage does not meet those requirements. The PUC should not find that acceptable, nor should the PUC accept Enbridge's blanket condition that, if third-party coverage in not "available in the marketplace on commercially reasonable terms," it should not be required.[30] If that is the case, if banks and insurers are unwilling to serve as backup guarantors for Enbridge's liabilities, then Enbridge can exercise set up an independent trust fund to cover these costs, should Enbridge default. The PUC must insist that Enbridge provide this kind of third-party protection, if it intends to count "future taxpayer protection" as a "benefit" to justify granting a Certificate of Need.[31]

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[27] Enbridge's General Liability Insurance Program apparently *does* rely to some extent on "affiliated insurance companies," which we presume means insurers in which Enbridge has an ownership stake. Attachment 5A, Table 1. The details of that either have not been disclosed, or are "nonpublic," but this does cast doubt on the value of this insurance coverage to cover the costs of an insolvent Enbridge.

[28] The $100 million figures DOC-DER has discussed are, FOH believes, based on little more than taking the costs of the Kalamazoo spill, and deducting the $1 billion that might be available from the federal Oil Spill Liability Trust Fund. FOH submits that calculating appropriate coverage amounts should reflect a more comprehensive analysis of potential costs and damages.

[29] This standby trust/cancellation requirement comes from the RCRA Subtitle C hazardous waste financial assurance regulations.

[30] The marketplace availability of third-party coverage would of course be a useful indicator of how the banking and insurance markets see Enbridge's long-term creditworthiness in light of its long-term liabilities.

[31] The EPA proposed rules for hardrock mining financial assurance under CERCLA spell out in detail exactly what wording must be used in trust funds, letters of credit, surety bonds, or insurance endorsements to make sure these requirements are met.

4. Conclusion

The possibility of including a robust financial responsibility condition was a significant part of the stated justification for granting a Certificate of Need in this case. What Enbridge has so far proposed falls far short of that goal.

Before a CN is granted, and certainly before any construction begins, the PUC should insist on a comprehensive and independent assessment of possible response costs and damages should a worst-case spill occur, and the costs of decommissioning both old Line 3 and new Line 3 in fifteen years. The PUC should then insist on third-party coverage for those amounts that meets the requirements other agencies have imposed that are described in this comment. If the PUC determines that it is willing to let Enbridge assertions of financial strength to be sufficient, then it should lay out the financial tests it expects Enbridge to meet, including maintaining an investment-grade long-term corporate credit rating and tangible net worth and US assets at six times the amount of its potential liability. Any future submission from Enbridge must demonstrate how those requirements will be met, and should again be subject to expert and public comment.

To do less is, frankly, to leave Minnesota taxpayers holding the bag. That is no “benefit” and cannot justify taking on the risk of another oil pipeline we do not need.

Sincerely,

Richard Smith
President, Friends of the Headwaters

Scott Strand
Attorney for Friends of the Headwaters

CERTIFICATE OF SERVICE

MPUC Docket Nos. PL-9/CN-14-916
OAH Docket Nos. 65-2500-32764

I, Adrienne Dunham, hereby certify that on the 30th day of July, 2018, I served a true and correct copy of the foregoing document for the above captioned matters to all persons at the addresses indicated on the attached service list by electronic filing or by depositing the same enveloped with postage paid in the United States Mail at Chicago, Illinois

/s/ Adrienne Dunham
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