STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION

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Valerie Means	Commissioner
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In the Matter of the Decommissioning Trust Fund for the Enbridge Energy, Limited Partnership Line 3 Replacement Pipeline	**PUC Docket No. PL-9/CN-21-823**

COMMENT OF FRIENDS OF THE HEADWATERS IN RESPONSE TO ENBRIDGE'S DRAFT TRUST AGREEMENT AND ENBRIDGE'S JANUARY 3, 2023 COMMENTS

I. INTRODUCTION

Pursuant to the Commission's January 11, 2023 Notice of Comment Period, Friends of the Headwaters ("FOH") submits these initial comments on the draft trust agreement and comments Enbridge Energy, Limited Partnership ("Enbridge") filed on January 3, 2023. This is, of course, the second round of comments since the Commission opened up a separate docket for the Decommissioning Trust for Line 3, now Line 93, so FOH incorporates its earlier submissions on May 19, June 20, and July 20, 2022 into this submission.

Enbridge has addressed few, if any, of the concerns FOH raised in the initial round. Enbridge still cannot explain why an untested "non-charitable purpose trust" under South Dakota law is superior to the trust mechanisms government agencies have been using for financial assurance for decades. Enbridge offers no justification for its insistence that the trust remain underfunded, massively underfunded at first, but never fully funded until 2051. And Enbridge does not offer any rationale for its unwillingness to specify that the estimated total costs must be calculated as if it were the State, not Enbridge, assuming the decommissioning and reclamation obligations.

First, however, FOH wants to review the original rationale for the decommissioning trust, explain why decommissioning may come sooner rather than later, and outline the strategies for avoiding end-of-life reclamation obligations that have unfortunately proven to be successful, and which any decommissioning trust must be designed to prevent.

II. DECOMMISSIONING TRUST—PURPOSE AND LIKELY NEED

The Decommissioning Trust requirement is based on this Commission's well-placed skepticism that Enbridge, or any of its affiliates, successors, or assigns will be willing and able to return Line 93's route to its original condition when it reaches the end of its useful, or adequately profitable, life. At that point, when Line 93 is no longer bringing in sufficient revenue, Enbridge (or whomever is responsible) and its creditors will want to avoid as many regulatory costs related to Line 93 as possible. Assuming that it or a successor wants to stay in business, Enbridge will want to pay its pecuniary creditors first, the ones who supply the capital for Enbridge's investments, and pay for "dead weight" reclamation obligations last, if at all. The Commission's authority to revoke or suspend Line 93's Certificate of Need no longer creates any leverage because Enbridge no longer needs or wants to operate the pipeline. The State can sue, but the Enbridge entity left with Line 93 may well use the Bankruptcy Code either to abandon Line 93 under 11 U.S.C. § 554, and thereby avoid its reclamation obligations altogether, or treat those obligations as general unsecured claims dischargeable at no more than pennies on the dollar.

This scenario is hardly far-fetched. Nor is it far off in the future. Since the Commission granted Enbridge the Certificate of Need for Line 93, the oil industry's medium- and long-term prospects have not grown brighter. As electric vehicles (EVs) displace vehicles powered by internal combustion engines, demand for oil will slow and then dramatically decline. Analysts believe "peak oil demand" will occur by the mid-2020s and go down thereafter.[1] Eleven states, the European Union and several other countries, including China, have banned the sale of gas or diesel-powered vehicles after 2035.

Investors continue to flee. Because western Canadian oil sands are energy-intensive and higher-cost, disinvestment in western Canadian oil continues. None of the global Big Oil companies, like BP, Shell, or Koch, who got out in the 2010s, have returned, and dozens more banks, insurers, other oil companies have announced they are ending or curtailing investment in oil sands.[2] Huge investors like Norway's Sovereign Wealth Fund, BlackRock, the New York State Common Retirement Fund, and Caisse de depot et placement du Quebec are pulling their investments.

The International Energy Agency has concluded that fossil fuel reliance must effectively end by the mid-2040s if the planet is to reach its decarbonization goals.[3] And the Canadian oil sands are likely to be among the first to go. Bitumen extraction is so energy-intensive that the cumulative greenhouse gas emissions from extraction, processing, and transportation from dilbit is four or five times that of conventional oil.[4]

All of that means that the demand for oil transportation capacity from the western Canada oil basin cannot be sustained. Therefore, the prospects for oil pipelines reaching the end of their useful, or adequately profitable, life sooner rather than later are greater than ever.

[1] DNV, Energy Transition Outlook 2022: The Fall of Fossil Fuels, https://www.dnv.com/energy-transition-outlook/fall-of-fossil-fuels.html; McKinsey, Global Energy Perspective 2022, https://www.mckinsey.com/industries/oil-and-gas/our-insights/global-energy-perspective-2022

[2] Oil Sands Divestment, oilsandsdivest.com (last accessed March 13, 2023)

[3] International Energy Agency, *Net Zero by 2050* (March 2021), https://www.iea.org/reports/net-zero-by-2050.

[4] Energy Education, *Climate Impacts of Oil Sands*, https://energyeducation.ca/encyclopedia/Climate_impacts_of_oil_sands

III. AVOIDING RECLAMATION OBLIGATIONS

Enbridge is therefore likely, relatively soon, to have oil pipeline assets, including Line 93, whose value will be declining, but where end-of-life reclamation obligations will be only getting more expensive. That will lead Enbridge, and those with a stake in Enbridge, to seek ways to avoid those obligations. The coal industry provides the road map.

Just like this Commission's Certificate of Need does, the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201 *et seq.*, requires coal companies to restore land affected by surface mining to "a condition capable of supporting the uses which it was capable of supporting prior to any mining." *Id.* § 1265(b)(2). That includes restoring the "approximate original contour" of the land, replacing topsoil, revegetation of the surrounding area, disposing of waste, and protecting the local hydrology. *Id.* 1265(b). SMCRA also requires coal companies to post reclamation bonds or other financial assurance to ensure that they will be able to restore a site to its original condition once mining concludes. Those bonds must be "sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority." *Id.* 1259(a).

All of that sounds good, but the coal companies have largely been able to avoid those obligations. The same sequence of events has occurred time and time again:

- Patriot Coal: In the late 2000s, Peabody Energy, the nation's largest coal company, spun off Patriot Coal, and transferred several mine "assets" that had little value, but enormous environmental liabilities. Then, Arch Coal did the same, again sending unprofitable/high liability mines to Patriot. Patriot then filed for bankruptcy in 2012, and was allowed to sell whatever mines had some value free and clear of environmental obligations, and to abandon the rest.

- Alpha Natural Resources: Alpha was the fourth largest coal producer in the U.S., and it filed for bankruptcy in 2015. In the chapter 11 proceedings, it was allowed to split itself into two companies—Contura, which got all the profitable Powder Basin mines, and a reorganized Alpha, which got the unprofitable Appalachian mines with most of the environmental liabilities. The plan of reorganization said that Contura could not be held liable if the new Alpha liquidated. Then, they did it again. Alpha sold off its legacy and abandoned mines and their liabilities to a company called Lexington Coal, kept the mines that were operating, and then merged again with Contura. The result was that Alpha shed about half a billion dollars of environmental liability.
- Arch Coal: Even after spinning off its liabilities to Patriot Coal, Arch Coal, the second largest U.S. coal producer, still went bankrupt in 2016. It was able to negotiate lower liability numbers with the states, who were faced with the possibility that those debts would be treated as general unsecured debts in a chapter 7 liquidation and discharged at pennies on the dollar.
- Peabody Energy: Peabody, the world's largest coal company, filed for bankruptcy in 2016, and it followed the same strategy as Arch, convincing states to accept 17 cents on the dollar to avoid recovering much less if the company liquidated. Then, after emerging from bankruptcy, Peabody started the cycle again, spinning off additional environmental liability into a "Gold Fields Liquidating Trust," which then abandoned the contaminated property. All told, Peabody was able to avoid $3 billion in environmental liabilities, nearly 98% of its obligations.[5]

[5] Details of these and other coal bankruptcy cases involving avoidance of reclamation and other environmental obligations are provided in Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 Stan. L. Rev. 879, 910-35 (2019).

Enbridge may well follow a similar strategy. As its liquid pipelines lose value, it will be tempted to spin them off into subsidiaries and retain the assets that still have profitable futures. Or, which amounts to the same thing, divest its profitable assets into another company, and leave the crude oil pipelines and their liabilities in Enbridge, Inc., which will be unable (or unwilling) to pay.

IV. NECESSARY ELEMENTS OF EFFECTIVE DECOMMISSIONING TRUST

So how does the Commission avoid those outcomes? The only way to do that is to require Enbridge to deposit sufficient money in a "ring-fenced" trust immediately or as soon as possible, a trust that will not be reachable by Enbridge, any Enbridge affiliates, or any of Enbridge's creditors.

The "noncharitable purpose trust" Enbridge proposes does not meet that test. As Enbridge acknowledges, noncharitable purpose trusts are a device used in individual wills for things like keeping pets or maintaining cemetery plots.[6] To our knowledge, no U.S. agency has accepted such a mechanism to meet financial assurance requirements. The reason is simple. Under Enbridge's proposal, *Enbridge* would retain control over disbursements from the trust. The State—the "Enforcer"—could demand an accounting, or sue, but it would not have the kind of control over the money that an ordinary trust beneficiary would have. This would, in effect, be the equivalent of Enbridge setting up, as many companies do, a "reserve" for an expected future liability. That does not insulate the money from the reach of creditors.

In a bankruptcy situation, assets in the "trust" Enbridge proposes might well be swept up into the bankruptcy estate. Certainly, Enbridge's other creditors would take the position that a

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[6] *See* Richard Ausness, *Non-Charitable Purpose Trusts: Past, Present, and Future*, 51 Real Prop. Tr. & Est. L. J. 321 (2016). *See also* Wendy Goffe, *Oddball Trusts and the Lawyers who Love Them or Trusts for Politicians and Other Animals*, 46 Real Prop. Tr. & Est. L. J. 543 (2012).

trust where Enbridge retains some level of control would be, at minimum, the kind of contingent, future, even speculative interest that routinely gets included in "property of the estate" under 11 U.S.C. § 541. The creditors would argue that Enbridge cannot compromise their claims just by asserting that some of its money can only be used for reclamation purposes. Litigation outcomes are uncertain, but that kind of creditor claim is quite plausible, and is consistent with the desire of most bankruptcy judges to "marshal" all of the debtor's conceivable assets and then distribute them according to the Bankruptcy Code's creditor priority scheme.

Enbridge's assertion that we are in uncharted legal waters here is not correct. Environmental agencies have been using environmental remediation trusts to assure performance of facility closure and post-closure obligations for decades. The difference is that the beneficiary of the trust is the *agency*, not the owner or operator of the facility. When it comes time to close a waste facility, and a trust has been set up for closure obligations, it is the *agency*, not the owner or operator, who directs how the money is spent. The agency may choose to, and may be obligated to, reimburse the owner or operator if they perform their closure responsibilities, but the agency retains the discretion and the ability to direct the trustee to pay other parties if the owner or operator is unable or unwilling to perform. The agency does not have to sue anybody, because it has control over the money. *See* 40 C.F.R. § 264.151. And other creditors cannot reach the money, because the owner or operator does *not* have control over the money.

The same arrangement would work here. Enbridge sets up the trust, with the State as the beneficiary.[7] When the time comes to decommission Line 93, if Enbridge does the required reclamation work, it can get reimbursement of its expenses from the trust, at the direction of the State. If, however, Enbridge (or its successors, assigns, or affiliates) does not perform all or part

[7] FOH has no position on the appropriate state agency to be designated. That is and should be up to state officials.

of its reclamation obligations, however, then the State can direct the trustee to distribute the money to reimburse the consultants, contractors, and so on that the State has hired to do the work. That has been the established practice in environmental law for quite a long time, and it has proven to be effective at getting end-of-life responsibilities done and at protecting taxpayers.

There are several other key requirements for making the Decommissioning Trust work:

(1) The trust has to be adequately funded to meet all anticipated reclamation costs.

That number should be revisited every year. Enbridge's five-year idea is not sufficient. Construction costs can and will likely change dramatically in that amount of time, and the trust would be seriously underfunded during that interval. If there is a construction cost deflator or some similar device to make this job easier in some years, that is worth discussing, so long as a full reappraisal occurs regularly.

(2) The trust has to be adequately funded to meet all anticipated reclamation costs, *as if the State was going to be doing the work.*

The whole point of the decommissioning trust is to cover the situation where Enbridge defaults on its obligations, and the State, which would have to hire others to do all of the planning and work, has to assume those obligations. That would need to be part of the initial appraisal, and the annual reappraisals, and would have to account for all of the rules that govern state contracting, e.g. prevailing wage, as well as the cost of finding and retaining the necessary expertise to plan and coordinate the work.

(3) The "pay-in period" for the trust must be as short as possible.

Enbridge's assumption that the proper way to calculate annual payments is to estimate how many years the pipeline is likely to operate, and then divide the total cost by that number.

That would, of course, yield a stream of payments that, depending on the discount rate chosen, could end up being a trivial cost for Enbridge.

The problem is that, for a crude oil pipeline, the costs of decommissioning and reclamation go from zero to 100 percent immediately upon the commencement of operations. Decommissioning costs are not 1/20 or 1/50 of the total in year one; they are 100 percent of the total whether it is year one, year ten, year twenty, or year one hundred. This is not like a mining operation, where new mining areas are opened up and others closed (and ideally reclaimed) during the mine's lifetime. Here, the trust needs to receive the full necessary amount immediately; indeed, the trust should have been fully funded before Enbridge was able to commence operations of Line 93.

If the Commission determines that it is appropriate to give Enbridge a longer "pay-in period," FOH recommends again looking to the requirements for financial assurance used by the environmental agencies. For waste facilities, the pay-in period is the expected life of the facility, or five years, *whichever is shorter*. *See* 40 C.F.R. § 264.143(a). Then each annual payment is determined by a formula: [Current closure cost estimate] – [Current value of the trust], divided by the number of years left in the pay-in period. Any other approach would leave the decommissioning trust woefully underfunded, and therefore put taxpayers at risk, for far too long.[8]

(4) The "settlor" or "grantor" of the trust should be the parent company, Enbridge, Inc., not just a subsidiary like "Enbridge Energy, Limited Partnership."

[8] Allowing Enbridge to fund the trust with a lengthy stream of payments also increases the risk that, in the event of bankruptcy, Enbridge would simply "reject" the trust agreement as an "executory contract." 11 U.S.C. § 365.

The entity ultimately responsible for decommissioning Line 93 is and should be the parent corporation, and the same holds true for the decommissioning trust. This Commission should not allow the corporate shell game that worked so well for the coal industry in the 2010s.

(5) Enbridge should be required to notify the State of any material changes in its financial position, its corporate structure, or any asset sales or transfers.

The State is entitled to the information it needs to make an informed assessment of Enbridge's ability and willingness to meet its obligations under the Certificate of Need. The financial information should, at minimum, include:

- Net working capital and tangible net worth;
- Assets located in the United States;
- Ratios: total liabilities to net worth, total liabilities to EBITDA, current assets to current liabilities;
- Credit rating (Standard & Poor's, Moody's, or equivalent).

Right now, it appears that Enbridge's long-term debt load is around $90 billion, and its total net worth is somewhere just under $50 billion. That is already a fairly high debt load, but, more important, that may and likely will change substantially over time. The same applies to changes in corporate structure (there have been major changes just during the course of these proceedings) and material asset transactions.

V. CONCLUSION

A decommissioning trust, with the State as the designated beneficiary with control over distribution of trust assets, adequately funded to cover total decommissioning and reclamation costs if the State had to take over Enbridge's obligations, with a requirement that the trust be fully funded immediately or within a short period of time, and with adequate disclosures to allow state officials to assess Enbridge's ongoing ability to meet its obligations, could achieve the goals this Commission had in mind when it imposed the decommissioning trust requirement. Enbridge's proposal does not meet those objectives.

Respectfully submitted,

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DECLARATION OF SERVICE

Re: ***In the Matter of the Application of the Decommissioning Trust Fund for the Enbridge Energy, Limited Partnership Line 3 Replacement Pipeline***
MPUC Docket No. PL-9/CN-21-823

STATE OF MINNESOTA)
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COUNTY OF HENNEPIN)

I, Scott Strand, hereby state that on March 13, 2023, I filed, by electronic eDockets, the attached **Supplemental Comment of Friends of the Headwaters,** and eServed or sent by U.S. Mail, as noted, to all parties on the attached service list.

See attached service list.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

/s/ Scott Strand________________
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Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_21-823_Official
Jason	Risdall	regulatoryaffairsUS@enbridge.com	Enbridge	11 East Superior St Suite 125 Duluth, MN 55802	Electronic Service	No	OFF_SL_21-823_Official
Steve	Roe	roetreat@crosslake.net		11663 Whitefish Ave Crosslake, MN 56442	Electronic Service	No	OFF_SL_21-823_Official
Stephan	Roos	stephan.roos@state.mn.us	MN Department of Agriculture	625 Robert St N Saint Paul, MN 55155-2538	Electronic Service	No	OFF_SL_21-823_Official
Jean	Ross	jfross@umn.edu		3624 Bryant Ave S Minneapolis, MN 55409	Electronic Service	No	OFF_SL_21-823_Official
Akilah	Sanders Reed	akilah.project350@gmail.com		2514 Emerson Ave S Apt 7 Minneapolis, Minnesota 55405	Electronic Service	No	OFF_SL_21-823_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Stan	Sattinger	sattinss@aol.com		3933 Twelfth Ave S Minneapolis, MN 55407	Electronic Service	No	OFF_SL_21-823_Official
Will	Seuffert	Will.Seuffert@state.mn.us	Public Utilities Commission	121 7th Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-823_Official
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	7400 Lyndale Ave S Ste 190 Richfield, MN 55423	Electronic Service	No	OFF_SL_21-823_Official
Eileen	Shore	eileenshore@outlook.com	Friends of the Headwaters	3137 42nd Ave So Minneapolis, MN 55406	Electronic Service	No	OFF_SL_21-823_Official
Richard	Smith	grizrs615@gmail.com	Friends of the Headwaters	P.O. Box 583 Park Rapids, MN 56470	Electronic Service	No	OFF_SL_21-823_Official
Mollie	Smith	msmith@fredlaw.com	Fredrikson Byron PA	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_21-823_Official
Scott	Strand	SStrand@elpc.org	Environmental Law & Policy Center	60 S 6th Street Suite 2800 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_Official
Adam	Sullivan	adam.sullivan@enbridge.com	Enbridge Energy Limited Partnership	26 East Superior Street Suite 309 Duluth, MN 55802	Electronic Service	No	OFF_SL_21-823_Official
Eric	Swanson	eswanson@winthrop.com	Winthrop & Weinstine	225 S 6th St Ste 3500 Capella Tower Minneapolis, MN 554024629	Electronic Service	No	OFF_SL_21-823_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Christine	Tezak	tezak@cvenergy.com		209 Constitution Avenue, NE Washington, DC 20002	Electronic Service	No	OFF_SL_21-823_Official
Jeremy	Tonet	jeremy.b.tonet@jpmorgan.com		N/A	Electronic Service	No	OFF_SL_21-823_Official
Jayme	Trusty	execdir@swrdc.org	SWRDC	2401 Broadway Ave #1 Slayton, MN 56172	Electronic Service	No	OFF_SL_21-823_Official
Melissa	Turner	melissa.turner@enbridge.com	Enbridge	7701 France Ave S Edina, MN 55435	Electronic Service	No	OFF_SL_21-823_Official
Jen	Tyler	tyler.jennifer@epa.gov	US Environmental Protection Agency	Environmental Planning & Evaluation Unit 77 W Jackson Blvd. Mailstop B-19J Chicago, IL 60604-3590	Electronic Service	No	OFF_SL_21-823_Official
Sara	Van Norman	sara@svn.legal	Van Norman Law, PLLC	Van Norman Law, PLLC 310 4th Ave. S., Ste. 5010 Minneapolis, MN 55415	Electronic Service	No	OFF_SL_21-823_Official
Ken	Vraa	N/A		6623 Peony Lane N Maple Grove, MN 55311	Paper Service	No	OFF_SL_21-823_Official
Cynthia	Warzecha	cynthia.warzecha@state.mn.us	Minnesota Department of Natural Resources	500 Lafayette Road Box 25 St. Paul, Minnesota 55155-4040	Electronic Service	No	OFF_SL_21-823_Official
Tom	Watson	twatson@iphouse.com	Whitefish Area Property Owners Association	39195 Swanburg Court Pine River, MN 56474	Electronic Service	No	OFF_SL_21-823_Official
James	Watts	james.watts@enbridge.com	Enbridge Pipelines (North Dakota) LLC	26 E Superior St Ste 309 Duluth, MN 55802	Electronic Service	No	OFF_SL_21-823_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Alan	Whipple	sa.property@state.mn.us	Minnesota Department Of Revenue	Property Tax Division 600 N. Robert Street St. Paul, MN 551463340	Electronic Service	No	OFF_SL_21-823_Official
Jonathan	Wolfgram	Jonathan.Wolfgram@state.mn.us	Office of Pipeline Safety	445 Minnesota St Ste 147 Woodbury, MN 55125	Electronic Service	No	OFF_SL_21-823_Official
David	Zoll	djzoll@locklaw.com	Lockridge Grindal Nauen PLLP	100 Washington Ave S Ste 2200 Minneapolis, MN 55401	Electronic Service	No	OFF_SL_21-823_Official