ENVIRONMENTAL LAW & POLICY CENTER

May 19, 2022

Public Advisor
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Via eFiling

RE: Comments of Friends of the Headwaters (FOH)

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

Dear Commission:

Thank you for the opportunity to offer some initial additional comments on setting up the Decommissioning Trust Fund required by the Commission's Certificate of Need orders in PUC Docket 14-196. As the Commission is well aware, the Commission's approval of a Certificate of Need for Enbridge's Line 3 project was contingent upon the creation and funding of a trust fund for decommissioning the Project, including the costs of removal of the Project. 9/5/2018 Order. The Decommissioning Trust Fund has, to our knowledge, never been set up and never funded, and the costs of the fund have not been included in Enbridge's "rate base" at the Federal Energy Regulatory Commission (FERC). As a result, when Enbridge stops using all or part of the new line 3, there is today no assurance that the costs of decommissioning or abandoning the pipeline will be borne by Enbridge or its successors, assigns, or affiliates. That puts Minnesota's taxpayers, Minnesota's landowners, and Minnesota's environment at unnecessary risk.

As the November 20, 2021 petition to open this docket explained in detail, this matter has now become more urgent. The expected life of this new pipeline is now likely to be much closer to 20 years than to the 50 years the Commission previously assumed. Enbridge's own Depreciation Study Update in May 2021 reduced the economic life of its entire Mainline System, including the new line 3, to 20 years, with a new "truncation date" of 2040. That new estimate is based on the assumption that the need for crude oil transportation from western Canada to the

U.S. is likely to drop between now and then,[1] which will reduce Enbridge's revenues, and require higher rates because Enbridge will have a shorter time to recoup its investment.

Friends of the Headwaters (FOH)[2] has previously commented on the Decommissioning Trust Fund questions, once on July 30, 2018 and again on November 5, 2018, and FOH stands by the positions it took in those written comments, and will try not to repeat them here.[3] FOH also looks forward to commenting on an actual proposal from Enbridge, if one is ever forthcoming. For now, however, all FOH can do is offer general comments that identify some of the major issues and, where possible, make recommendations that FOH hopes can inform the PUC's process.

One overarching recommendation. There is a need for speed here, and the Commission cannot allow Enbridge to continue operating its pipeline and, at the same time, insist that all issues be finally and fully resolved before getting the Decommissioning Trust Fund up and running. Enbridge's previously tried to persuade this Commission that this process would need to take years, with endless stakeholder discussions, and eventually a formal rulemaking process, or passage of legislation. At least in its written orders, the Commission refused to accept Enbridge's excuses for delay then, and it should not allow Enbridge to put this off any longer.

What the Commission should order now is the establishment of the required trust fund by a date certain in the near future. The original PUC requirement, and original Enbridge commitment, was to have this in place before the new line 3 went into service. FOH recommends proceeding from the trust agreement language in the EPA's proposed CERCLA financial assurance rules for hardrock mining,[4] or in the rules governing hazardous waste facilities, with the State of Minnesota as the designated beneficiary.[5] FOH recommends setting the initial contribution at the $1.5 billion figure the Commission referenced in its January 23, 2019 Order at page 8. Once a fund is in place, then, modifications can be made if necessary and justifiable, e.g. increased amounts to reflect higher construction costs, or to include contract administration and indirect costs. But in no circumstances should the Commission continue to provide Enbridge with an incentive to stall and thereby shift the risks to Minnesota's taxpayers

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[1] McKinsey & Co.'s most recent projections see peak oil demand globally at some point between 2023 and 2025, with a steep decline to follow under any reasonable set of assumptions. https://www.mckinsey.com/industries/oil-and-gas/our-insights/global-energy-perspective-2022

[2] Friends of the Headwaters (FOH) is a volunteer-driven nonprofit set up to address the issues presented by pipeline construction and operation in central Minnesota, and has been an active intervenor in the PUC's line 3 (and Sandpiper) dockets since 2014.

[3] FOH also concurs with the positions expressed by the Division of Energy Resources (DOC-DER) in its 2018 comments, many of which were expressly adopted by the Commission in its January 2019 Order.

[4] EPA, *Financial Responsibility Requirements Under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry,* 82 Fed. Reg. 3388, 3447-48, 3495-96 (Jan. 11, 2017)(trust agreement language in proposed 40 C.F.R. § 320.50(a)(1). The Trump Administration EPA pulled those rules back, and the EPA's present intention is uncertain.

[5] The PUC notice asked who should be designated as the beneficiary, which FOH presumes means which state agency. This is part of the broader issue of the lack of resources and clear lines of responsibility for enforcing any PUC-mandated requirements, but the question of which state agency would best be able to contract with third parties to do the decommissioning or abandonment work should Enbridge default is distinct. FOH suggests that PUC and DOC-DER engage Minnesota Management & Budget (MMB) to help resolve that question, perhaps with assistance from the MPCA and DNR, who both administer financial assurance requirements.

and landowners. If Enbridge has been as diligent as it claimed it was being back in 2018 in working through trust fund issues, then this should certainly be feasible.

Whatever form the Decommissioning[6] Trust Fund ultimately takes; the guiding principles should remain the same:

Transparent Estimation of Costs

So far, Enbridge has offered two estimates—the $1.2 billion figure associated with removal of the old Line 3, and a $983 million figure Enbridge included in an attachment while the Decommissioning Trust Fund was being discussed back in 2018. In neither case, however, did Enbridge show its work, and so there has been no real opportunity for either regulators or the public to review and comment on those estimates.

There are models out there for making those estimates in a way that is transparent. The Canada Energy Regulator (formerly the National Energy Board) adopted a formal decision on May 26, 2009 regarding financial issues related to pipeline abandonment.[7] That decision laid out guiding principles, a five-year plan for companies to follow, and a set of cost parameter and physical assumptions (the "Base Case") for preparing cost estimates. In early 2013, the Board issued its first "Abandonment Cost Estimates" (ACE),[8] and described the steps:

(1) Land use designations: agricultural (cultivated, cultivated with special features, non-cultivated), non-agricultural (exiting developed land, prospective future development, no anticipated future development), environmentally sensitive areas, roads and railways, water and wetland crossings);
(2) Physical assumptions regarding abandonment methods: abandonment-in-place, abandonment-in-place with special treatment, removal;[9]
(3) Abandonment cost categories: engineering and project management (5%), abandonment preparation (including pipeline purging and cleaning), cost assumptions for three types of abandonment, above-ground facilities;
(4) Contingency costs;
(5) Post-abandonment activities, if any part of pipeline abandoned-in-place.

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[6] The Canada Energy Regulator (CER) distinguishes between "decommissioning," which is when a company shuts down the operation of all or part of a pipeline, but service is still provided through other pipelines owned by the operator, and "abandonment," which is when all service ceases, no new pipelines are built, and service does not continue through other pipelines within a system. Any "Decommissioning Trust Fund" for Line 3 must therefore not be limited to "decommissioning," but also include what this Commission was likely most concerned about, which is ultimate "abandonment." The trust funds Enbridge has set up in Canada are referred to as "abandonment trusts," to reflect Canada's somewhat idiosyncratic terminology.

[7] NEB, RH-2 2008 Reasons for Decision. "Pipeline Abandonment—Financial Issues" was "Stream 3" of the NEB's "Land Matters Consultative Initiative" (LMCI)

[8] NEB, MH-001-2012 Reasons for Decision, https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90463/782060/782061/918229/918367/A50478-1_NEB_-_Reasons_for_Decision_-_Abandonment_Cost_Estimates_%28ACE%29_-_MH-001-2012.pdf?nodeid=918198&vernum=-2

[9] "Removal" includes the costs of pipeline removal, plus "costs for backfilling the cavity and restoration of the land, removing impediments, topsoil stripping, excavation, cutting and capping of pipelines, cutting of pipeline sections and removal to stockpile, loading and hauling of removed lines, disposal of lines, coating and associated facilities." *Id.* at 42

The 2013 ACE then included tables breaking down each of those categories, with unit cost estimate ranges, *id.* at 72-78, and then actual estimates from the various pipeline companies, including Enbridge. *Id.* at 79-105.

Since that time, the estimates have been revised periodically, and the entire structure has been subject to review every five years.[10] CER currently has one of those five-year review periods underway, with several Enbridge entities participating. Enbridge should be able to make any of its estimates for any of its Canadian pipelines readily available to the Commission and the public, who are entitled to at least this level of detail when reviewing estimated costs.

The Commission should also consider other available agency approaches that, in some respects, go beyond what CER has done. For example, the U.S. Bureau of Land Management (BLM) has guidelines for estimating and reviewing mine reclamation cost estimates (RCEs). Importantly, 43 C.F.R. § 3809.554(a) requires that reclamation cost estimates not be the *operator's* estimated costs, but must be "as if BLM were hiring a third-party contractor to perform reclamation of your operations after you have vacated the project area," see 40 CFR 264.142(a)(2)(hazardous waste). That is because the point of a trust fund is to assure that funds will be available for the *government* (and contractors) to do the work if Enbridge defaults on its obligations. BLM also includes "BLM's cost to administer the reclamation contract," including "any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third-party contracts are developed and executed." 43 C.F.R. § 3809.552(a). BLM guidelines suggest six months of interim operation and management by a contractor is "a good rule of thumb." BLM, *Guidelines for Reviewing Reclamation Cost Estimates, https://www.blm.gov/sites/blm.gov/files/policies/IM2009-153_att1.pdf.* BLM also expressly requires that labor costs be based on federally mandated labor rates, as required by the David-Bacon Act, 40 U.S.C. § 3141 *et seq.* There are similar requirements in state law. Minn. Stat. §§ 177.41 -.44; Minn. R. 5200.1000 - .1120.

Those same BLM guidelines also list what they see as the critical elements of an engineering, design, and construction plan, address cost overruns and other contingencies, address contractor bonding costs, profits, and contract administration and indirect costs, typically around 10 percent. The guidelines also recommend several sources to consult when making reclamation cost estimates (RCEs), including their own handbooks, the *Caterpillar Performance Handbook, R.S. Means Site Work & Landscaping Cost Data* and *R.S. Means Heavy Construction Cost Data,* and *Equipment Watch's Cost Reference Guide and Rental Rate Blue Book for Construction Equipment.* BLM's offices also keep summary sheets, checklists, and standardized cost models, including standardized unit costs and schedules.[11]

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[10] *See e.g.* the discussion papers, spreadsheet, and user guide NEB released in August 2017, https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/abandonment-cost-estimates/index.html

[11] In its previous comments, FOH encouraged the PUC to consult with MPCA and/or EPA about the financial assurance requirements they administer, such as for hazardous waste treatment, storage, and disposal facilities. (TSDFs) under 40 C.F.R. pt. 264, subpart H. The federal Bureau of Safety and Environmental Enforcement (BSEE), which regulates oil and gas pipelines located in federal waters of the Outer Continental Shelf (OCS) also prepares decommissioning cost estimates, which the federal Bureau of Ocean Energy Management (BOEM) uses to set financial assurance requirements for offshore oil and gas facility operators. *See generally* GAO, *Offshore Oil*

The point is not that there is a perfect model for the Minnesota PUC to adopt, but that the PUC should require at least the same level of granular detail when evaluating any Enbridge estimate of the cost of abandoning or decommissioning all or part of the new Line 3. And that information should be available to the public for comment. There is no basis for taking Enbridge's word on this, and Enbridge has been required for a long time to provide much greater detail on estimated abandonment and decommissioning costs for its Canadian pipelines. This Commission should require no less.

No Reliance on Third-Party Guarantors

To date, the working assumption is that the "Decommissioning Trust Fund" will be exactly that—a trust fund not controlled by Enbridge and outside of any possible Enbridge bankruptcy estate, with the State as the beneficiary having the right to access the funds on demand. FOH encourages the Commission to stick to that position. For the reasons outlined in previous FOH comments and briefs, "self-bonding" or "parental guaranty" arrangements provide very little security. Enbridge's current cash position, or any of the measures in traditional financial tests, do not provide genuine assurance either. Neither do third-party guarantees—whether they be in the form of private insurance, surety bonds, or letters of credit. In all those cases, guarantors can refuse payment, choose to litigate, and hope to negotiate favorable settlements. It is also not uncommon for bankruptcy courts to use their broad injunction authority to sweep "assets" like these into bankruptcy estates for the benefit of all of a company's creditors, not necessarily the intended beneficiaries.

If the Commission wishes to entertain surety bonds or letters of credit as possible mechanisms, virtually all of the financial assurance regulatory frameworks include detailed prescriptions for exactly the terms the must be required. *E.g.* proposed 40 C.F.R. §§ 320.50(a)(1)(wording of instruments), 82 Fed. Reg. at 3495 et seq. Although in FOH's view, those technical requirements do not fully mitigate the risks these devices entail, they can reduce that risk somewhat. What the State needs is the ability to access money quickly to do the work if Enbridge is unwilling or unable to do so. Putting third-party guarantors into the middle of that means that it will be Minnesota taxpayers and landowners and environment that will bear the risk caused by delay, a result this Commission need not countenance.

No Heavy Discounting

As this Commission is well aware, a party asked to set money aside to cover potential future liabilities will be motivated to suggest an inappropriately high discount rate, say 7 or 8%, to keep the present costs as low as possible. FOH suggests using the discount rate published in OMB Circular A-94, or other discount rates used by federal agencies, e.g. 2.25% today for water projects, to reduce that problem. FOH understands that managing a trust fund may require making (and then periodically revising) assumptions about inflation and investment returns, but that should not be used to minimize Enbridge's upfront obligations.

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and Gas: Updated Regulations Needed to Improve Pipeline Oversight and Decommissioning (Mar. 2021), https://www.gao.gov/assets/gao-21-293.pdf. The Nuclear Regulatory Commission (NRC) also requires financial assurance to cover the costs of decommissioning nuclear power plants, which can easily exceed $1 billion. 10 C.F.R. § 30.35.

It is critical to front-load the pay-in period, so, again, Minnesota's taxpayers and landowners do not bear any unnecessary risk. The expected economic life span of crude oil pipelines is much lower than it was even a couple of years ago, and could go lower yet, which means any kind of straight-line averaging of payments into a trust fund over the new Line 3's expected life span only creates a larger risk that adequate funding will not be available. Going bankrupt happens "gradually, then suddenly," as Ernest Hemingway observed, and the likelihood of disruptive dislocations occurring in fossil fuel industries over the next couple of decades is high, not low.

No Delay due to Enbridge's Financial Concerns

FOH acknowledges that establishing and maintaining the required Decommissioning Trust Fund will have income tax implications for Enbridge if payments into the trust cannot all be treated as ordinary business expenses or the equivalent. We also recognize that this trust fund will have implications for Enbridge's financial reporting and earnings statements. At the same time, however, FOH emphasizes that Enbridge's claimed financial issues are not particularly this Commission's concern. Enbridge can make all of the arguments it wants, but, at the end of the day, this Commission's objective has to be to assure that the new line 3 is decommissioned or abandoned properly, with Minnesota's landscape and water resources fully restored, and that the financial resources necessary to do that work if Enbridge does not do it have been set aside and are not reachable by Enbridge entities or Enbridge's other creditors.

If this Commission adheres to these general principles—transparent cost estimations under shared cost assumptions, e.g. costs for the government hiring third parties, not Enbridge's costs, prevailing wages, no undue reliance on third-party guarantors like insurers or banks, no manipulation of discount rates, or inflation and return-on-investment assumptions to minimize Enbridge's pay-in, and finally an end to the delay in setting up something that was a key requirement before line 3 was to be allowed to be put in service—this Commission can and should rapidly take the necessary steps to get the Decommissioning Trust Fund in place. FOH recognizes that any specific proposal will raise new questions, but it looks forward to engaging in that review and providing additional comments.

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