

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

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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

**REPLY COMMENTS OF FRIENDS OF THE HEADWATERS IN RESPONSE TO THE
MINNESOTA DEPARTMENT OF COMMERCE’S MARCH 13, 2023 COMMENTS**

I. INTRODUCTION

Pursuant to the Commission’s January 11, 2023 Notice of Comment Period, Friends of the Headwaters (FOH) submits these reply comments to respond to the comments the Minnesota Department of Commerce (DOC-DER) filed on March 13, 2023.

FOH agrees with DOC-DER that: (1) the Decommissioning Trust should not be set up as a “non-charitable purpose trust” under South Dakota or any other state’s law; (2) Enbridge’s proposed contribution amount and schedule is inadequate; and (3) periodic reviews of decommissioning costs and corresponding trust contribution requirements must occur on a more frequent basis. To some extent, however, FOH suggests different solutions than DOC-DER does for addressing each of those problems. Where it can, FOH recommends language changes to DOC-DER’s redlined version of Enbridge’s original proposed Trust Agreement.

II. FORM OF TRUST

As explained in FOH’s previous comments, any arrangement that leaves Enbridge in control of or gives them access to the assets of the Trust in any way creates the risk that those

assets would be swept into an Enbridge bankruptcy estate, and distributed to Enbridge's creditors according to the requirements of the Bankruptcy Code, not according to the purposes outlined in the Trust Agreement. The whole point of establishing a Decommissioning Trust is to take the money out of Enbridge's control, and transfer that control to an independent Trustee and a single Beneficiary, the State of Minnesota. A Trust is and has to be more than an internal "escrow" or a "reserve" that a company can alter. Enbridge's proposed "non-charitable purpose trust," without a real Beneficiary, would be little more than that.

Enbridge can promise or it can even intend that it will only use the money in the Trust for decommissioning expenses, but in an actual or looming bankruptcy situation, that will not necessarily be up to Enbridge. Enbridge's creditors will want to have access to that money, and will not be dissuaded by protests that Enbridge would not have "title" to the trust assets, or that Enbridge and the State have "agreed" that it should not be part of a bankruptcy estate. The other creditors can force Enbridge into bankruptcy, and that gives them additional leverage in a pre-bankruptcy situation to insist on getting a share of those funds.¹ And, like any company in that situation, Enbridge will want and need to pay creditors who can provide the resources necessary to keep operating.

In an actual bankruptcy, FOH would hope that the State would assert the State's interests effectively, try to convince the bankruptcy court to force Enbridge to undertake or continue decommissioning work as an obligation not subject to the bankruptcy proceeding,² or as a high-

¹ Many companies facing insolvency try to work out a deal with creditors in advance of an actual bankruptcy filing, and then bring a "pre-packaged" reorganization plan to the bankruptcy court.

² FOH supports the language DOC-DER has recommended to clarify that Enbridge's at all times remains the responsible party obligated to perform the decommissioning obligations, no matter what kind of trust arrangement is put in place. In the event of an Enbridge default, that language appears to give the State a clear right to seek injunctive relief. That does not guarantee that a bankruptcy court will treat Enbridge's decommissioning obligations as anything other than a monetary obligation to a creditor, but it might help bolster a State argument that these obligations should not be subject to discharge in bankruptcy proceedings.

priority administrative expense, or, if necessary, sue to unwind any fraudulent conveyances or transfers intended to defeat the State's interests. But, if these Trust assets are not truly out of Enbridge's control, the risk of bankruptcy or the possibility of bankruptcy and claims by other Enbridge creditors could leave the State without the necessary means to get this work done.³

The way to solve that is to do as DOC-DER has suggested, and create a Trust with the State of Minnesota as the sole beneficiary, just like state and federal environmental agencies have been doing to assure the availability of funds to meet end-of-project-life requirements for decades.⁴

That said, as DOC-DER recognizes, at the time decommissioning is required, the State may well choose to release funds from the Trust to reimburse Enbridge, if Enbridge is able and willing to do the decommissioning work. That would be the ideal situation. But, in a less than ideal situation, where Enbridge is not able or willing to do the decommissioning work, then the State must have the option to hire third parties and have adequate funds available to meet those expenses. The critical point is that those decisions must belong to the State, not to Enbridge. The process described in DOC-DER's revised paragraph 5.1(5) and Exhibit A appears sound to FOH.

FOH therefore agrees with DOC-DER's recommendation that paragraphs 1.2 and 1.3 in Enbridge's proposal be deleted. FOH also substantially agrees with DOC-DER's proposed

³ As FOH explained in its March 13 comment, that has been the actual result in several recent coal company bankruptcies.

⁴ DOC-DER has designated itself as a "trust protector," under South Dakota law, it appears. That is a concept recognized in Minnesota as well under Minn. Stat. § 501C.0808. Under that statute, the "trust protector" would have considerable authority over the Trust, including the authority to direct distribution of trust property. FOH is not necessarily opposed to that concept, as described in DOC-DER's proposed paragraph 5.2, but would like to see this fleshed out more, to understand what role DOC intends to play. FOH understands the need for DOC-DER to be ready to engage the PUC as issues arise.

additional paragraphs 1.6, 1.7, and 1.8. FOH would delete all references to South Dakota law in the document, including the sentence DOC-DER included in its proposed paragraph 1.8.⁵

III. CONTRIBUTION AMOUNT, SCHEDULE OF PAYMENTS, AND ANNUAL REVIEWS

On this topic, FOH agrees with DOC-DER that Enbridge's proposal is inadequate. FOH does not, however, think DOC-DER's proposed alternatives go far enough to genuinely protect the public, and FOH offers its own proposed solutions.

On the Contribution Amount, FOH is of course frustrated that, four and a half years after the Commission's order to set up the decommissioning trust, we still do not have an estimate that explains how any numbers have been calculated. Our frustration is compounded, of course, by the proposal to kick that issue out to some new PUC docket, presumably with no part of the Trust funded until after that new docket reaches its conclusion.

At this late date, the costs and risks of additional delay need to be borne by Enbridge, and no longer by the State and its citizens. FOH therefore recommends that the PUC adopt an interim figure—we suggest Enbridge's own \$1.2 billion estimate—so that contributions can start more quickly, with a substantial down payment. If a new docket concludes that that number is too high or too low, the contributions can be adjusted accordingly. Right now, the PUC is effectively allowing Enbridge to operate as if the costs of decommissioning and funding the decommissioning trust are zero.

The Contribution Amount has to be set at what it would cost *the State*, not Enbridge, to employ and compensate third parties to plan and do the decommissioning work, subject to all State procurement requirements and recognizing that the State does not have the expertise to do

⁵ FOH has no comment at this time on provisions related to tax status or designation of the trustee.

this in-house. If there is to be a new docket, then the PUC should make it crystal clear that any estimate of what it would cost Enbridge, or what it would cost some unidentified third party, will not be acceptable. FOH also recommends that the figure be adjusted annually. If only a three-year review is required, as DOC-DER suggests, increases in construction costs could leave the Trust seriously underfunded for too long to assure that the public will be protected. That is why EPA (and state-level agencies) require that cost estimates be adjusted annually throughout the operational life of waste facilities. 40 C.F.R. § 264.142(b). Annual reviews are hardly beyond Enbridge's capabilities; if three-year or five-year spacing of reviews is necessary because of Enbridge's finances, then the contribution schedule had better be accelerated. FOH recommends that DOC-DER's proposed language in paragraph 5.1(5) be amended to require annual reviews.

FOH of course agrees with DOC-DER that Enbridge's proposed 30-year schedule for contributions defeats the purpose of the trust. The cost of decommissioning line 93 is at 100% today, and has been at 100% since the new pipeline was put into service in 2021, and even before. As before, FOH recommends that the PUC order Enbridge to fully fund the trust immediately,⁶ or as soon as practicable, certainly no more than the five years EPA allows for waste facilities under Subpart H of its RCRA rules. To the extent a discount rate becomes relevant, FOH advises that the federal government now proposes to use a ten-year 1.7% discount rate for regulatory analysis, not the 3-6% (or even higher) that it has used in the past. Office of Management and Budget, *Circular A-4: Draft for Public Review* (Apr. 6, 2023).

The language for implementing the funding of the Trust has, it appears, been sent to Enbridge's proposed new docket, so FOH cannot comment on any specific language at this time.

⁶ Enbridge has advised Michigan officials that it is capable of picking up the entire estimated \$1.8 billion cost of a Line 5 spill in the Straits of Mackinac. The time to insist on funding is when Enbridge has the money, not at some future date when they do not.

IV. CONCLUSION

For the reasons stated above, and in its previous comments, FOH respectfully requests that the Commission require that: (1) the Decommissioning Trust be set up as a traditional trust under Minnesota law with the State of Minnesota (or whatever agency the State chooses to designate) as the Beneficiary, with the sole authority to direct disbursements from the Trust; (2) Enbridge be directed to commence contributions to the Decommissioning Trust as soon as the Trust can be established, based on Enbridge's initial estimates, and not wait for any later PUC docket on Trust funding requirements; (3) Enbridge's be required to fully fund the Decommissioning Trust immediately upon its establishment or, in no event, according to a Contribution Schedule of no more than five years; and (4) Enbridge be required to review the likely costs of decommissioning annually, so that the PUC can annually adjust Enbridge's contribution obligations.

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)
) ss.
COUNTY OF HENNEPIN)

I, Scott Strand, hereby state that on April 12, 2023, I filed, by electronic eDockets, the attached **Reply Comments 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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