

**MINNESOTA PUBLIC UTILITIES COMMISSION
SUITE 350
121 SEVENTH PLACE EAST
ST. PAUL, MINNESOTA 55101-2147**

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In the Matter of the Decommissioning Trust
Fund for the Enbridge Energy, Limited
Partnership Line 3 Replacement Pipeline

Docket No. PL-9/CN-21-823

**INITIAL COMMENTS OF THE
MINNESOTA DEPARTMENT OF
COMMERCE**

The Minnesota Public Utilities Commission issued a certificate of need to Enbridge for its Line 3 Replacement pipeline (L3R) contingent on several modifications, including a requirement that Enbridge establish a Decommissioning Trust Fund for the replacement pipeline.¹ The Commission determined, however, that more work was needed to develop the Decommissioning Trust Fund.²

To that end, the Commission opened this docket and noticed the following topics for initial, reply, and supplemental comments: (1) What action should the Commission take to establish the Decommissioning Trust Fund required by its orders in Docket 14-916? (2) What terms and

¹ *In re Appl. of Enbridge Energy, Ltd. P'Ship, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minn. From the N.D. Border to the Wis. Border (Line 3 Replacement CN)*, Docket No. PL-9/CN-14-916, ORDER GRANTING CERTIFICATE OF NEED AS MODIFIED AND REQUIRING FILINGS (Sept. 5, 2018) (reissued on May 1, 2020) (September 2018 Order).

² *Line 3 Replacement CN*, Docket No. PL-9/CN-14-916, ORDER APPROVING COMPLIANCE FILINGS AS MODIFIED AND DENYING MOTION at 8 (Jan. 23, 2019) (January 2019 Order).

conditions should be required in the Decommissioning Trust Fund? (3) What entity should be named as the beneficiary of the Decommissioning Trust Fund?³

The Department of Commerce recommends that the Commission establish a schedule for completing several important milestones to ensure that a robust Decommissioning Trust Fund is established in a timely but thorough fashion. The Department also recommends that the Commission retain the ability to authorize the final terms and conditions of the trust agreement. Last, the Department recommends that a state actor be designated as the beneficiary of any trust agreement and have certain rights provided by the trust agreement to ensure the trust remains in the public interest over time.

I. What Action Should the Commission Take to Establish the Decommissioning Trust Fund Required by Its Orders in Docket 14-916?

The Department believes that additional process is needed to create a robust trust with sufficient funds to deactivate, monitor, and remove the pipeline and remediate soil when the pipeline is removed from service.⁴ The Department recommends that the Commission establish a schedule for completing some of the milestones required for the Decommissioning Trust Fund. Consistent with the comments made in the 14-916 docket by parties including Enbridge, the Department recommends that the schedule include the following milestones, some of which may be able to proceed concurrently:

³ NOTICE OF EXTENDED COMMENT PERIOD (Feb. 9, 2022).

⁴ The Department has been looking to its state agency partners with greater experience with remediation for guidance. The Department notes that the Minnesota Department of Natural Resources (DNR) has recently required trust funds as part of the permitting process for the NorthMet Mining Project. *See* Permit to Mine and Assignment at 17 & Appx., Minn. Dep't of Nat. Res. (Nov. 1, 2018), *available at* https://files.dnr.state.mn.us/lands_minerals/northmet/final_permit/01-polymet-ptm-northmet-approval.pdf. The Department has found review of this document and process instructive as to important components of a trust fund for decommissioning or remediating a project with significant ongoing environmental impacts.

- a) Finalize a decommissioning cost estimate;
- b) Identify and finalize contribution amounts and structure;⁵
- c) Identify the appropriate trust beneficiary;
- d) Identify and establish a process for addressing future issues related to the trust;
- e) Select a trustee;
- g) Negotiate and execute the trust agreement;
- h) Establish an investment policy for trust funds; and
- i) Forecast investment returns and income taxes to establish annual collection amount for funding plan.⁶

Additionally, pursuant to several July 30, 2018 filings in the certificate of need docket, several Tribal Nations wish to be consulted in the development of the Decommissioning Trust Fund.⁷ The Department is willing and available to participate in a tribal consultation, if so established by the Commission, to ensure that the terms and conditions of the decommissioning trust and the appropriate trust beneficiary or beneficiaries ensure adequate access to trust funds for all necessary decommissioning and remediation work on both Tribal and State lands.

Given the importance of ensuring funds are available for the eventual decommissioning of the L3R, the Department believes a more thorough process than three rounds of comments will likely be needed to finalize the trust to ensure that sufficient funds are available for that purpose.

⁵ The Department recommends that care be taken to ensure that the contribution amounts and structure account for a potentially shortened economic life of L3R to ensure the total funding obligation is met well before the pipeline is decommissioned. Honor the Earth raised the issue of potential retirement prior to Enbridge's estimated life of the project in the certificate of need docket based on Enbridge's FERC filings in its PETITION TO OPEN DOCKET FOR LINE 3 REPLACEMENT PROJECT ABANDONMENT TRUST FUND, *Line 3 Replacement CN*, Docket No. PL-9/CN-14-916 (Dec. 1, 2021) (eDocket No. 202112-180324-01 to 202112-180324-05).

⁶ See *Line 3 Replacement CN*, Docket No. PL-9/CN-14-916, Enbridge CN Modifications Compliance Filing, Attachment 3a: Decommissioning Trust Fund (July 16, 2018), (eDocket No. 20187-144948-04).

⁷ See *Line 3 Replacement CN*, Docket No. PL-9/CN-14-916, Response of Intervenor Fond du Lac Band of Lake Superior Chippewa to Enbridge Compliance Filing of July 16, 2018 at 5 (July 30, 2018) (eDocket No. 20187-145353-01); White Earth Band of Ojibwe and Red Lake Band of Chippewa Comments Pertaining to Proposed Decommissioning Fund at 2 (July 30, 2018) (eDocket No. 20187-145325-01).

The Department understands that Enbridge will propose a schedule to which the Department will respond in reply comments.

II. What Terms and Conditions Should Be Required in the Decommissioning Trust Fund?

In 2018, the Commission required Enbridge to consult with the Department on the following recommendations that the Decommissioning Trust Fund: (1) be consistent with existing law,⁸ (2) include collections over the expected 50-year life of the L3R to equal approximately \$1.5 billion at least, as adjusted for inflation, (3) not be controlled by Enbridge or an affiliated entity, and (4) be established for the sole purpose of deactivating, monitoring, and removing the pipeline and remediating the soil when L3R is taken out of service in Minnesota.⁹ The Department and Enbridge have had preliminary discussions and generally agree with the goals that a trust be legally robust and sufficiently funded to eventually deactivate, monitor, and remove the pipeline and remediate the soil. Enbridge also agrees that the trustee should be independent of Enbridge. The Department is not clear, however, on what role Enbridge believes itself to have in potential future amendments to the trust or decisions about issues such as investment policies. Regarding the target amount for collections, the Department recommends that Enbridge engage an independent firm to evaluate the decommissioning cost estimate and provide detailed estimates in the record. With

⁸ Although the trust must be consistent with existing law, it need not necessarily include a choice-of-law provision or situs of Minnesota. The Department believes that a choice-of-law provision designating the law of a state other than Minnesota to govern the trust may avoid potential problems with Minnesota law and allow the trust to be both robust and consistent with existing law. For example, the trust for the NorthMet Project elects to use Nevada law with specific governing provisions of Minnesota law. *See* Permit to Mine and Assignment, Appx. B, The NorthMet Project Long-Term Irrevocable Trust at 17, Minn. Dep't of Nat. Res. (Nov. 1, 2018), *available at* https://files.dnr.state.mn.us/lands_minerals/northmet/final_permit/01-polymet-ptm-northmet-approval.pdf.

⁹ September 2018 Order at 8.

these goals in mind, there is still work to be done to identify and draft terms and conditions that reflect the goals of the Commission and the State as well as the issues identified above.

Considering the number and complexity of the terms and conditions, the Department believes that the most efficient way forward is for Enbridge to propose a draft trust document and fully explain how the proposal addresses the above concerns and other concerns raised in the 14-916 docket. The Department and other participants may then review and comment on any necessary or desirable changes for the Commission's consideration. Any final trust document should be subject to Commission approval before it is executed.

III. What Entity Should be Named as the Beneficiary of the Decommissioning Trust?

The Department proposed the Decommissioning Trust Fund to ensure that funds are available for responsibly decommissioning the line if Enbridge is no longer in business in the years following the end of operation of the line.¹⁰ With that goal in mind, the Department believes the beneficiary of the trust should be the state actor anticipated to handle the decommissioning.¹¹ The beneficiary should also have certain rights provided by the trust agreement, including approval of or changes to the trustee, approval of the investment advisor, approval of trust amendments, etc. Having a single named beneficiary to direct or receive distributions from the trustee is generally the simplest procedural method for trust administration. The determination of the appropriate beneficiary for the L3R, however, is complicated given the numerous state entities either involved in the proceeding or with relevant expertise, as well as the fact that the pipeline runs through and

¹⁰ *Line 3 Replacement CN*, Docket No. PL-9/CN-14-916, Direct Testimony of Kate O'Connell at 117-18 (Sept. 11, 2017) (20179-135-395-06).

¹¹ For example, DNR is the beneficiary of NorthMet Project's remediation trust. *See* Permit to Mine and Assignment, Appx. B, The NorthMet Project Long-Term Irrevocable Trust at 1, Minn. Dep't of Nat. Res. (Nov. 1, 2018), *available at* https://files.dnr.state.mn.us/lands_minerals/northmet/final_permit/01-polymet-ptm-northmet-approval.pdf.

near Tribal lands. The Department does not take a position on which actor(s) is best equipped to direct or receive distributions to handle decommissioning but believes that a state actor should have certain rights provided by the trust agreement to ensure the trust remains in the public interest over time.

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Respectfully submitted,

KEITH ELLISON
State of Minnesota
Attorney General

/s/Katherine Hinderlie
KATHERINE HINDERLIE
Assistant Attorney General
Atty. Reg. No. 0397325

GREG MERZ
Assistant Attorney General
Atty. Reg. No. 0185942

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1468 (Voice)
(651) 297-1235 (Fax)
katherine.hinderlie@ag.state.mn.us
greg.merz@ag.state.mn.us

ATTORNEYS FOR DEPARTMENT OF
COMMERCE