



## ENVIRONMENTAL LAW & POLICY CENTER

July 20, 2022

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

**Via eFiling**

RE: Supplemental Comment 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 submit supplemental comments to respond to previous comments filed on the issue of the “decommissioning trust” Enbridge has been obligated to establish since before it put Line 3, now Line 93, into operation. Friends of the Headwaters (FOH) generally endorses the comments made by DOC-DER, Honor the Earth, PEER, and other interested parties. But FOH remains concerned about the position Enbridge is taking, particularly on three issues.

First of all, FOH contends this Commission should reject Enbridge’s argument that a decommissioning “trust” where Enbridge is the beneficiary would meet the Commission’s requirements. The rationale for the decommissioning or abandonment trust is twofold: (1) to assure, as with any financial assurance requirement, that sufficient funds would be available to the *State* to do the necessary work if Enbridge defaults; and (2) to protect those funds from other Enbridge creditors, particularly in a bankruptcy proceeding. Enbridge’s proposal would accomplish neither of those purposes.

The purpose of a financial assurance mechanism like a decommissioning or abandonment trust is to ensure that necessary remediation work still be done if the responsible party—in this case, Enbridge or some Enbridge entity—is unable or unwilling to do it. Enbridge promises to do the work decades hence, or even Enbridge promises to create decommissioning “reserves” today, will be of little value when its pipelines no longer generate revenue and other creditors are at the door with legitimate or priority claims against Enbridge’s remaining assets.

35 East Wacker Drive, Suite 1600 • Chicago, Illinois 60601  
(312) 673-6500 • [www.ELPC.org](http://www.ELPC.org)

Harry Drucker, Chairperson • Howard A. Learner, Executive Director  
Chicago, IL • Columbus, OH • Des Moines, IA • Grand Rapids, MI • Indianapolis, IN  
Minneapolis, MN • Madison, WI • North Dakota • South Dakota • Washington, D.C.

If Enbridge defaults, then it will fall to the State or to landowners to complete the decommissioning project. And it will cost more than it would cost Enbridge. A state agency would need to hire the necessary expertise *and* the construction contractors *and* comply with state procurement regulations, so, as FOH explained in its earlier comments, the estimate of costs needed to determine how much money needs to be available must take those significant extra costs into account. Enbridge's solution to a situation where it defaults is no solution at all. Enbridge simply says that the State and the landowners will be free not to do the decommissioning at all and allow the State's citizens and its environment to bear that risk. That is exactly what this Commission was trying to avoid.

The "trust" mechanism Enbridge proposes would not insulate the resources from other creditor claims. Trusts generally involve three parties—the *settlor*, the *trustee*, and the *beneficiary*. The settlor creates (or "settles") the trust and the trustee manages the trust assets for the benefit of the beneficiary. There are two primary types of trusts: revocable trusts and irrevocable trusts. The assets of a revocable trust remain under the control of the settlor, are effectively still owned by the settlor, and therefore become part of the bankruptcy estate if the settlor files for bankruptcy protection.<sup>1</sup> The assets of an irrevocable trust, on the other hand, are effectively under the control of, and effectively owned by the beneficiary as soon as the trust is created. When the settlor and the beneficiary are the same entity, however, the trust cannot truly be irrevocable; indeed, in those circumstances, there really is no trust at all. Parties cannot insulate their assets from creditors simply by putting them into a trust created for their own benefit.

The Bankruptcy Code is pretty clear on the subject. Section 541(c)(1)(A) provides that "an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law that restricts or conditions transfer of such interest by the debtor." 11 U.S.C. § 541(c)(1)(A). The only exception is when there is "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." *Id.* § 541(c)(2). If Enbridge is both the settlor and the sole beneficiary, then it has the right to modify the "trust" arrangement, any restrictions are unenforceable, and those assets will be part of any bankruptcy estate. That means those funds would be distributed to creditors—whether in reorganization or liquidation proceedings—based on the priorities in the Bankruptcy Code, not on the terms of any so-called "trust" agreement or how this Commission would prefer Enbridge's assets be spent. Secured creditors would have top priority; unsecured creditors would recover what is left according to the Code's list of priorities.

Enbridge suggests that some states, other than Minnesota, do allow settlors broad authority to dedicate funds to particular purposes, and thereby protect those funds from creditors. In particular, Enbridge references South Dakota, which allows so-called "purpose trusts" for indefinite periods without designated beneficiaries. SDCL § 55-1-20.<sup>2</sup> SDCL 55-1-21.4 creates

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<sup>1</sup> Minn. Stat. § 501C.0604 ("While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.")

<sup>2</sup> Of course, there are specific statutes and regulations that require decommissioning or similar trusts that look like the "purpose trusts" Enbridge identifies, including the Canadian laws governing pipeline abandonment, and some

a new party—an “enforcer,” either designated in a trust instrument or appointed by a court, to enforce “the purpose of a purpose trust.” An “enforcer” cannot also be the “trustee.” *Id.* There is no readily available case law on these provisions, which were apparently adopted in 2018. SL 2018, ch. 275, § 9. And it is not at all clear whether or under what circumstances these kinds of “purpose trusts” are effective in keeping trust assets out of a bankruptcy estate and beyond the reach of creditors. If the State of Minnesota were to become the “enforcer,” it is conceivable that some such structure could be useful for protection against other creditors. It would not, however, solve the problem of what to do if Enbridge defaults, because the State would be the party that would need access to the funds to do the decommissioning work. That means the logical decision is to make the State the beneficiary, not just some kind of “enforcer.”

Making the State a beneficiary does not mean that Enbridge would not have access to those funds to do the decommissioning or abandonment work. As with other financial assurance mechanisms, trust fund assets can be used to reimburse or even advance the necessary funds. If the trust assets are set at an amount to cover what it would cost the State, Enbridge would have a strong incentive to do the work on its own, and recover *more* than its costs as the work is completed. Decommissioning the pipeline becomes a source of revenue, rather than a deadweight legacy cost, and that incentive aligns with what this Commission wants to accomplish.

Second, FOH urges the Commission to insist that any decommissioning trust be fully funded—meaning what it would cost the State, not Enbridge, to decommission or “abandon” the pipeline—as soon as practicable, certainly well before 30 years have elapsed. Again, to reach climate goals, Minnesota, the United States, and indeed the world must almost entirely switch away from fossil fuels by 2045, and that will not and cannot happen all at once. The likelihood that the useful life of Line 93 and Enbridge’s Mainline system will extend 30 years is very low. The more likely scenario is that the revenue Enbridge receives from its pipelines will be reduced as the switch away from fossil fuels takes place, and so the risk that decommissioning or abandonment will be necessary in the next ten to twenty years becomes quite real. To leave the decommissioning trust unfunded only increases the risk that Minnesota’s taxpayers, landowners, and environment will be left holding the bag. That is not an outcome this Commission should allow.

Finally, FOH expressed its continuing frustration over Enbridge’s delay. Contrary to Enbridge’s assertion, it is perfectly reasonable for this Commission to require a concrete proposal, with trust instrument language, an aggressive funding timetable, and robust cost estimates to which the public can respond and comment. Enbridge proposes that it can set something up in the next ten months, if it is allowed to do so on its own, without giving the public the opportunity to comment on a concrete proposal. Presumably at that time—May 10, 2023, according to Enbridge—parties, including DOC-DER, could advise the Commission whether what Enbridge has come up with satisfies the Commission’s intent, but, by then, even

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U.S. regulations. *E.g.* Nuclear Regulatory Commission, *Financial Assurance Requirements for Decommissioning Nuclear Power Reactors*, 63 Fed. Reg. 50,465 (Sept. 22, 1998); *see generally* 10 C.F.R. pts. 30 and 50. The challenge here, however, is to use existing general legal frameworks governing trusts rather than wait for some indefinite legislative or rulemaking process specific to oil pipeline decommissioning or abandonment.

more time will have passed and the penalty for having to go back to the drawing board will be that much greater. DOC-DER's previous proposal, which still would take more time than FOH believes is necessary, would still allow all of the parties to make significant progress toward developing a decommissioning trust that would serve the Commission's purposes and protect the public.

Again, thank you for the opportunity to comment. FOH looks forward to the opportunity to respond to a detailed proposal from Enbridge.

Respectfully submitted,

Scott Strand  
Environmental Law & Policy Center  
60 South Sixth St. Suite 2800  
Minneapolis, MN 55402  
[sstrand@elpc.org](mailto:sstrand@elpc.org)  
(612) 386-6409

**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 July 20, 2022, 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*  
*Scott Strand*

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Michael	Ahern	ahern.michael@dorsey.com	Dorsey & Whitney, LLP	50 S 6th St Ste 1500 Minneapolis, MN 554021498	Electronic Service	No	OFF_SL_21-823_CN-21-823
Stuart	Alger	stuart.alger@faegredrinker.com	Faegre Drinker Biddle & Reath LLP	2200 Wells Fargo Center 90 S. Seventh Street Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_CN-21-823
Richard	Beatty	rjb1946@aol.com		19281 530th Lane  McGregor, MN 55760	Electronic Service	No	OFF_SL_21-823_CN-21-823
Sarah	Beimers	sarah.beimers@state.mn.us	Department of Administration - State Historic Preservation Office	50 Sherburne Avenue Suite 203 St. Paul, MN 55155	Electronic Service	No	OFF_SL_21-823_CN-21-823
Brian	Bell	bell.brian@dorsey.com	Dorsey & Whitney LLP	50 South Sixth St. Suite 1500 Minneapolis, Minnesota 55402	Electronic Service	No	OFF_SL_21-823_CN-21-823
David	Bell	david.bell@state.mn.us	Department of Health	POB 64975  St. Paul, MN 55164	Electronic Service	No	OFF_SL_21-823_CN-21-823
Frank	Bibeau	frankbibeau@gmail.com	White Earth Band of Ojibwe	51124 County Road 118  Deer River, Minnesota 56636	Electronic Service	No	OFF_SL_21-823_CN-21-823
Paul	Blackburn	paul@honorearth.org		PO Box 63  Callaway, MN 56521	Electronic Service	No	OFF_SL_21-823_CN-21-823
Ellen	Boardman	eboardman@odonoghuelaw.com	O'Donoghue & O'Donoghue LLP	5301 Wisconsin Ave NW Ste 800  Washington, DC 20015	Electronic Service	No	OFF_SL_21-823_CN-21-823
Christina	Brusven	cbrusven@fredlaw.com	Fredrikson Byron	200 S 6th St Ste 4000  Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_21-823_CN-21-823
Dan	Chapman	Daniel.Chapman@xcelenergy.com		N/A	Electronic Service	No	OFF_SL_21-823_CN-21-823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400  St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-823_CN-21-823
Riley	Conlin	riley.conlin@stoel.com	Stoel Rives LLP	33 S. 6th Street Suite 4200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_CN-21-823
Sean	Copeland	seancopeland@fdlrez.com	Fond du Lac Band of Lake Superior Chippewa	1720 Big Lake Rd  Cloquet, MN 55720	Electronic Service	No	OFF_SL_21-823_CN-21-823
Rebecca	Cramer	rebacramer@gmail.com		3148 29th Ave S  Minneapolis, MN 55406	Electronic Service	No	OFF_SL_21-823_CN-21-823
Brendan	Cummins	brendan@cummins-law.com	Cummins & Cummins, LLP	1245 International Centre 920 Second Avenue South Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_CN-21-823
Randall	Doneen	randall.doneen@state.mn.us	Department of Natural Resources	500 Lafayette Rd, PO Box 25  Saint Paul, MN 55155	Electronic Service	No	OFF_SL_21-823_CN-21-823
Richard	Dornfeld	Richard.Dornfeld@ag.state.mn.us	Office of the Attorney General-DOC	Minnesota Attorney General's Office 445 Minnesota Street, Suite 1800 Saint Paul, Minnesota 55101	Electronic Service	No	OFF_SL_21-823_CN-21-823
John E.	Drawz	jdrawz@fredlaw.com	Fredrikson & Byron, P.A.	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_21-823_CN-21-823
Kate	Fairman	kate.frantz@state.mn.us	Department of Natural Resources	Box 32 500 Lafayette Rd St. Paul, MN 551554032	Electronic Service	No	OFF_SL_21-823_CN-21-823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Leili	Fatehi	leili@advocatepllc.com	Sierra Club	4849 12th Ave S Minneapolis, MN 55417	Electronic Service	No	OFF_SL_21-823_CN-21-823
Annie	Felix Gerth	annie.felix-gerth@state.mn.us		Board of Water & Soil Resources 520 Lafayette Rd Saint Paul, MN 55155	Electronic Service	No	OFF_SL_21-823_CN-21-823
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280  Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_21-823_CN-21-823
Rachel	Freeman	rachel.freeman@scotiabank.com	Global Equity Research / Scotia Capital Inc.	40 King St. W. 65th Floor Toronto, ON, CANADA M5W 2X6	Electronic Service	No	OFF_SL_21-823_CN-21-823
Anna	Friedlander	afriedlander@odonoghuelaw.com	O'Donoghue & O'Donoghue LLP	5301 Wisconsin Ave NW Suite 800 Washington, DC 20016	Electronic Service	No	OFF_SL_21-823_CN-21-823
John R.	Gasele	jgasele@fryberger.com	Fryberger Buchanan Smith & Frederick PA	700 Lonsdale Building 302 W Superior St Ste 700 Duluth, MN 55802	Electronic Service	No	OFF_SL_21-823_CN-21-823
Todd	Green	Todd.A.Green@state.mn.us	Minnesota Department of Labor & Industry	443 Lafayette Rd N  St. Paul, MN 55155-4341	Electronic Service	No	OFF_SL_21-823_CN-21-823
Doug	Hayes	doug.hayes@sierraclub.org	Sierra Club	85 2nd St., 2nd Fl  San Francisco, CA 94105	Electronic Service	No	OFF_SL_21-823_CN-21-823
Janet	Hill	janethillnew@gmail.com		50569 218th Pl  Mcgregor, MN 55760-5592	Electronic Service	No	OFF_SL_21-823_CN-21-823
Gary	Hill	hillx001@umn.edu		50569 218th Pl  McGregor, MN 55760	Electronic Service	No	OFF_SL_21-823_CN-21-823



First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Thomas	Hingsberger	thomas.j.hingsberger@usa ce.army.mil	Corps of Engineers, St. Paul District	180 5th St E Ste 700  Saint Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Terry	Hokenson	terryhokn@gmail.com		3352 Prospect Ter SE  Minneapolis, MN 55414	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Kathleen	Hollander	kath77holl77@gmail.com		3824 Edmund Blvd  Minneapolis, MN 55406	Electronic Service	No	OFF_SL_21-823_CN-21- 823
John	Hottinger	jchnorthstar@gmail.com	Hottinger Consulting LLC	14 Irvine Park Unit 14A  St. Paul, MN 55102	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Kari	Howe	kari.howe@state.mn.us	DEED	332 Minnesota St, #E200 1ST National Bank Bldg St. Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Samuel	Jackson	sam@cummins-law.com		1245 International Centre 920 Second Ave South Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Arshia	Javaherian	arshia.javaherian@enbridg e.com	Enbridge Energy	26 East Superior Street Suite 309 Duluth, MN 55802	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Susu	Jeffrey	susujeffrey@msn.com	Friends of Coldwater	1063 Antoinette Ave  Minneapolis, MN 55405	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Ray	Kirsch	Raymond.Kirsch@state.mn .us	Department of Commerce	85 7th Place E Ste 500  St. Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21- 823
Anthony	Kit	a.kit@kghl.net		2828 N Harwood St Suite 1240  Dallas, TX 75202	Electronic Service	No	OFF_SL_21-823_CN-21- 823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Rachel	Kitze Collins	rakitzecollins@locklaw.com	Lockridge Grindeal Nauen PLLP	100 Washington Ave S Suite 2200 Minneapolis, MN 55401	Electronic Service	No	OFF_SL_21-823_CN-21-823
Chad	Konickson	chad.konickson@usace.army.mil	U.S.Army Corps of Engineers	180 5th St # 700  Saint Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21-823
Stacy	Kotch Egstad	Stacy.Kotch@state.mn.us	MINNESOTA DEPARTMENT OF TRANSPORTATION	395 John Ireland Blvd.  St. Paul, MN 55155	Electronic Service	No	OFF_SL_21-823_CN-21-823
Karen	Kromar	karen.kromar@state.mn.us	MN Pollution Control Agency	520 Lafayette Rd  Saint Paul, MN 55155	Electronic Service	No	OFF_SL_21-823_CN-21-823
Winona	LaDuke	winonaladuke1@gmail.com	Honor the Earth	607 Main Avenue  Callaway, MN 56521	Electronic Service	No	OFF_SL_21-823_CN-21-823
Michelle	Lommel	mlommel@GREnergy.com	Great River Energy	12300 Elm Creek Blvd  Maple Grove, MN 55369	Electronic Service	No	OFF_SL_21-823_CN-21-823
Otto Edwin	Lueck	N/A		18719 US Hwy 2  Warba, MN 55793	Paper Service	No	OFF_SL_21-823_CN-21-823
Patrick	Mahlberg	pmahlberg@fredlaw.com	Fredrikson & Byron, P.A.	200 S 6th St Ste 4000  Minneapolis, MN 55402	Electronic Service	No	OFF_SL_21-823_CN-21-823
Philip	Mahowald	pmahowald@thejacobsonlawgroup.com	Jacobson Law Group	180 East Fifth Street Suite 940  St. Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21-823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Dawn S	Marsh	dawn_marsh@fws.gov	U.S. Fish & Wildlife Service	Minnesota-Wisconsin Field Offices 4101 American Blvd E Bloomington, MN 55425	Electronic Service	No	OFF_SL_21-823_CN-21-823
Joseph	Martoglio	Joseph.R.Martoglio@jpmchase.com		N/A	Electronic Service	No	OFF_SL_21-823_CN-21-823
Willis	Mattison	mattison@arvig.net	Self	42516 State Hwy 34  Osage, MN 56570	Electronic Service	No	OFF_SL_21-823_CN-21-823
Hayk	Minasian	hminasian@trlm.com		N/A	Electronic Service	No	OFF_SL_21-823_CN-21-823
John	Munter	mumooatthefarm@yahoo.com		14860 Bruce Crk Rd  Warba, MN 55793	Electronic Service	No	OFF_SL_21-823_CN-21-823
Michael	Murphy	mmurphy@thecobsonlawgroup.com		180 East Fifth Street Suite 940 St. Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21-823
Charles	Nauen	cnnauen@locklaw.com	Lockridge Grindal Nauen	Suite 2200 100 Washington Avenue South Minneapolis, MN 55401	Electronic Service	No	OFF_SL_21-823_CN-21-823
Ann	O'Reilly	ann.oreilly@state.mn.us	Office of Administrative Hearings	PO Box 64620  St. Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21-823
Marsha	Parlow	mparlow@greenergy.com	Great River Energy	12300 Elm Creek Boulevard  Maple Grove, MN 553694718	Electronic Service	No	OFF_SL_21-823_CN-21-823
Andrew	Pearson	stopthewar24@gmail.com		2629 18th Ave S Apt 2  Minneapolis, MN 55407	Electronic Service	No	OFF_SL_21-823_CN-21-823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Alice	Peterson	N/A		24153 300th St NW  Argyle, MN 56713	Paper Service	No	OFF_SL_21-823_CN-21-823
Abbie	Plouff	abbie.plouff@gmail.com		308 E Prince St Apt 522 St. Paul, MN 55101	Electronic Service	No	OFF_SL_21-823_CN-21-823
Joseph	Plumer	joep@whiteearth.com	Red Lake Band of Chippewa Indians	P.O. Box 567  Red Lake, Minnesota 56671	Electronic Service	No	OFF_SL_21-823_CN-21-823
Kevin	Pranis	kpranis@liunagroc.com	Laborers' District Council of MN and ND	81 E Little Canada Road  St. Paul, Minnesota 55117	Electronic Service	No	OFF_SL_21-823_CN-21-823
James W.	Reents	jwreents@gmail.com		4561 Alder Ln NW  Hackensack, MN 56452	Electronic Service	No	OFF_SL_21-823_CN-21-823
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_CN-21-823
Steve	Roe	roetreat@crosslake.net		11663 Whitefish Ave  Crosslake, MN 56442	Electronic Service	No	OFF_SL_21-823_CN-21-823
Cynthia	Roney	cynthia.roney@enbridge.com	Enbridge Energy, Limited Partnership	5400 Westheimer Court Suite 5B-20 Houston, TX 77056	Electronic Service	No	OFF_SL_21-823_CN-21-823
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_CN-21-823
Jean	Ross	jfross@umn.edu		3624 Bryant Ave S  Minneapolis, MN 55409	Electronic Service	No	OFF_SL_21-823_CN-21-823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Akilah	Sanders Reed	akilah.project350@gmail.com		2514 Emerson Ave S Apt 7 Minneapolis, Minnesota 55405	Electronic Service	No	OFF_SL_21-823_CN-21-823
Stan	Sattinger	sattinss@aol.com		3933 Twelfth Ave S  Minneapolis, MN 55407	Electronic Service	No	OFF_SL_21-823_CN-21-823
Will	Seuffert	Will.Seuffert@state.mn.us	Public Utilities Commission	121 7th PI E Ste 350  Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_21-823_CN-21-823
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_CN-21-823
Eileen	Shore	eileenshore@outlook.com	Friends of the Headwaters	3137 42nd Ave So  Minneapolis, MN 55406	Electronic Service	No	OFF_SL_21-823_CN-21-823
Richard	Smith	grizrs615@gmail.com	Friends of the Headwaters	P.O. Box 583  Park Rapids, MN 56470	Electronic Service	No	OFF_SL_21-823_CN-21-823
Mollie	Smith	msmith@fredlaw.com	Fredrikson Byron PA	Suite 4000 200 South Sixth Street Minneapolis, MN 554021425	Electronic Service	No	OFF_SL_21-823_CN-21-823
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_CN-21-823
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_CN-21-823

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_CN-21-823
Jeremy	Tonet	jeremy.b.tonet@jpmorgan.com		N/A	Electronic Service	No	OFF_SL_21-823_CN-21-823
Jayme	Trusty	execdir@swrdc.org	SWRDC	2401 Broadway Ave #1  Slayton, MN 56172	Electronic Service	No	OFF_SL_21-823_CN-21-823
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_CN-21-823
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_CN-21-823
Ken	Vraa	N/A		6623 Peony Lane N  Maple Grove, MN 55311	Paper Service	No	OFF_SL_21-823_CN-21-823
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_CN-21-823
Tom	Watson	twatson@iphouse.com	Whitefish Area Property Owners Association	39195 Swanburg Court  Pine River, MN 56474	Electronic Service	No	OFF_SL_21-823_CN-21-823
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_CN-21-823
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_CN-21-823

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
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_CN-21-823
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_CN-21-823