

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

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

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

**ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S
REPLY COMMENTS**

INTRODUCTION

Enbridge Energy, Limited Partnership (“Enbridge”) submits these reply comments concerning its proposed draft trust agreement (“Trust Agreement”) in accordance with the Minnesota Public Utilities Commission’s (“Commission”) November 4, 2022 Order Directing Enbridge to Draft Trust Agreement for Notice and Comment (“November 2022 Order”).

Enbridge’s objective in this docket is to obtain Commission approval of a Trust Agreement that complies with prior Commission orders and is protected from creditors to the maximum extent possible to meet its goal of establishing and maintaining a trust that will have funds available when it is time to decommission Line 93. In this way, Enbridge’s goals are aligned with the Department of Commerce, Division of Energy Resources (“DER”) and Friends of the Headwaters (“FOH”)—all parties agree that the funds in the Decommissioning Trust should be available when it is time to decommission Line 93.

The draft Trust Agreement Enbridge filed on January 3, 2023, accomplishes these purposes, and Enbridge continues to believe that this draft Trust Agreement is the best option to effectuate the Commission’s orders and protect funds from creditors to the greatest extent possible.

With this filing, Enbridge is providing a draft Trust Agreement that reflects one revision to this document. The revision provides that a separate fiduciary designated the “Trust Protector,” rather than the corporate trustee, will have the authority to make distributions from the Trust. *See **Attachment A***. This revision was made in response to feedback from potential trustees, and is also consistent with one of the revisions suggested by DER. Enbridge remains ready to implement this Trust Agreement upon Commission approval.

Enbridge has also reviewed the comments and revisions filed by DER. As explained more fully herein and in **Attachment B**, DER’s revisions are problematic and, in many instances, result in a trust agreement that is inferior for accomplishing the goals of this docket. Nonetheless, for the Commission’s reference, Enbridge is also providing revisions to DER’s draft agreement (the “Revised DER Agreement”) (**Attachment C**). These revisions attempt to make DER’s version of the agreement workable and address the issues in DER’s revisions related to creditor protection. Although Enbridge believes that this version of the agreement is not optimal, it would nonetheless resolve some of the major issues Enbridge identified in DER’s draft.

With this filing, Enbridge discusses:

- Section I: Status of trustee selection;
- Section II: Status of decommissioning cost estimate;
- Section III: Reply to DER filing;
- Section IV: Reply to FOH filing;
- **Attachment A**: Revised proposed Trust Agreement;
- **Attachment B**: Table review of DER revisions; and
- **Attachment C**: Revised DER Agreement.

ADDITIONAL BACKGROUND

Enbridge has set forth the procedural background for this proceeding multiple times, and it will not restate that background here.¹ However, Enbridge highlights here certain background that is relevant to the current open issues before the Commission. First, this proceeding arises because DER recommended that Enbridge be required to establish a decommissioning trust fund “based on the decommissioning trust that the Canadian National Energy Board² directed Enbridge, Inc. to fund for the decommissioning of its pipelines in Canada,” and the Commission adopted DER’s recommendation.³ In support of its recommendation, DER’s witness testified that a decommissioning trust fund “would provide Enbridge with a pool of funds to aid in the future cost of removing the pipe from service.”⁴ DER’s witness further explained that the trust would allow Enbridge to self-fund decommissioning without having to use future funds:

The main advantage to a decommissioning trust is that *Enbridge would be able to self-fund decommissioning of the proposed Project over time and during a period of relative financial strength*. By having this fund in place, *Enbridge should have sufficient funds available to decommission the proposed Project without having to use future funds*, which as indicated above, could be a risk to Minnesota taxpayers.⁵

¹ See Enbridge Initial Comments (May 19, 2022) (eDocket No. [20225-185918-02](#)) and Enbridge Comments (Jan. 3, 2023) (eDocket No. [20231-191784-02](#)).

² Now the Canada Energy Regulator or CER.

³ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916, Order Granting Certificate of Need As Modified and Requiring Filings (Sept. 5, 2018) (reissued May 1, 2020), ordering ¶ 1(C) (emphasis added) (eDocket No. [20205-162795-03](#)).

⁴ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916, Direct Testimony of Kate O’Connell at 17 (Sept. 11, 2017) (eDocket Nos. 20179-135395-04 (TS), 20179-135395-04 (TS), [20179-135395-06](#)) (“Direct Testimony of Kate O’Connell”).

⁵ *Id.* at 119-20.

DER repeated these *exact* recommendations in its briefing and again in its proposed findings regarding the certificate of need.⁶

After the Commission issued a certificate of need for Line 93, the parties engaged in extensive comments and briefing regarding the certificate of need modifications, including the decommissioning trust fund. There, in comments, DER specifically recommended that the Commission order Enbridge to establish a decommissioning trust fund similar to those required in Canada.⁷ Likewise, DER repeatedly recommended that the trust fund “[i]nclude collections over the expected 50-year life of Line 3 project in Minnesota. . . .”⁸

Consistent with DER’s recommendations, then, the Commission’s previous orders require a trust that is similar to those required in Canada, and which includes collections over the expected 50-year life of the pipeline.⁹ Enbridge has provided a draft Trust Agreement that implements the Commission’s orders.

DISCUSSION

I. STATUS OF TRUSTEE SELECTION.

Enbridge described the process for its trustee selection in its January 3, 2023 comments.¹⁰ That process is ongoing and is proving to be complex for multiple reasons. First, the Trust at issue

⁶ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916, DER Brief at 143 (Jan. 23, 2018) (eDocket No. [20181-139259-03](#)) and DER Reply Brief – Proposed Findings at 107 (Feb. 16, 2018) (eDocket No. [20182-140226-02](#)).

⁷ DER Comments at 2 (June 26, 2018) (eDocket No. [20186-144190-01](#)).

⁸ *Id.* at 2; DER Reply Comments (November 5, 2018) (eDocket No. [201811-147613-02](#)).

⁹ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916, Order Approving Compliance Filings as Modified and Denying Motion at 8 (Jan. 23, 2019) (reissued May 1, 2020) (eDocket No. [20205-162795-03](#)).

¹⁰ Enbridge Comments at 18 (Jan. 3, 2023) (eDocket No. [20231-191784-02](#)).

in this proceeding is unique in the U.S. Second, given the scope and substantial size of the trust fund, it has thus far not been possible to definitively select a single trustee because the specific terms and conditions of the Trust Agreement that will ultimately be approved by the Commission are unknown. For example, there continues to be disagreement regarding the basic structure of the Trust Agreement. Enbridge is continuing to coordinate and negotiate with potential trustees, but it is possible (or even likely) that a final trustee selection will not be possible until the form of Trust Agreement is final, or nearly so.

II. STATUS OF DECOMMISSIONING COST ESTIMATE.

As of the date of this filing, DER has not filed the independently reviewed cost estimate being completed by WSP. Enbridge provided background in prior comments:

Enbridge coordinated with the Department of Commerce to retain WSP, the same entity engaged by the Department of Commerce to provide an independent engineering review with respect to the Landowner Choice Program. Enbridge proposed that WSP would be appropriate for this review, given its familiarity with removal of the Line 3 pipeline, also in Minnesota. Enbridge first approached the Department of Commerce regarding engaging WSP for this role prior to filing its Supplemental Comments in July 2022. Enbridge approached the Department of Commerce again in September 2022, following the Commission meeting. On November 16, 2022, WSP informed DER and Enbridge that it could provide the services requested, but would need additional time to execute a contract, complete other administrative tasks, and actually perform the review. On December 7, 2022, WSP provided a scope of work for the independent review. The parties executed the agreement on December 12, 2022. WSP has indicated that it believes it will need approximately four weeks after contract execution to complete its review, after which time it will provide the results of its review to DER; DER will review and provide comment on WSP's draft, and WSP will subsequently provide DER with a final version. As such, Enbridge anticipates that the results of WSP's review will be available to DER in mid- to late-January, and that DER will file WSP's review in this docket once it is finalized.¹¹

¹¹ *Id.* at 14.

In its reply comments on March 13, 2023, DER stated that the cost estimate review had not yet been completed.¹² On March 15, 2023, Enbridge submitted correspondence requesting that DER file the cost estimate as soon as possible, and well before the April 12, 2023 reply comment deadline. Enbridge explained that it does not have control or influence over the content or timing of the cost estimate.¹³

Thereafter, on March 20, 2023, Enbridge received a second set of requests for information (“RFI”) concerning the cost estimate.¹⁴ Enbridge provided responses to the RFIs shortly thereafter, on March 24, 2023.

Enbridge has received no update regarding the status of the cost estimate, nor has any update been provided in this docket. Enbridge reserves the right to submit further comments in response to the cost estimate review when it is filed.

III. REPLY TO DER FILING.

A. Purpose of Trust.

As an initial matter, DER’s comments accuse Enbridge of “misconstru[ing] the purpose of the Trust,” arguing that the “purpose of the Trust is not to provide a fund or bank account for Enbridge to use to reimburse itself for its decommissioning costs.”¹⁵ Indeed, though, that is the precise purpose of the Trust as DER itself specifically explained when first recommending that the Commission require the establishment of such a trust:

The main advantage to a decommissioning trust is that *Enbridge would be able to self-fund decommissioning of the proposed Project over time and during a period of relative financial strength*. By having this fund in place, *Enbridge should have*

¹² DER Reply Comments at 5 (Mar. 13, 2023) (eDocket No. [20233-193904-02](#)).

¹³ Enbridge correspondence (Mar. 15, 2023) (eDocket No. [20233-194019-01](#)).

¹⁴ Enbridge previously provided responses to a first set of RFIs on January 18, 2023.

¹⁵ DER Reply Comments at 2 (Mar. 13, 2023) (eDocket No. [20233-193904-02](#)).

sufficient funds available to decommission the proposed Project without having to use future funds, which as indicated above, could be a risk to Minnesota taxpayers.¹⁶

Enbridge understands that several years have now passed since DER first recommended that a decommissioning trust be established, but DER cannot ignore the record underlying this proceeding and reimagine the Trust at this late date. The Trust is a significant undertaking, and basic notions of fairness and notice necessitate that the Commission's actual orders are followed and not vastly broadened and reimagined as a result of the passage of time.

Similarly, DER states that the Trust is analogous to bonding or insurance.¹⁷ However, those analogies are misplaced. DER recommended a trust, not a bond, despite the fact that a bond is a common instrument used for decommissioning financial assurance. Had DER preferred the structure of a bond or other financial instrument, it could have recommended so.

Likewise, Enbridge again reiterates that the Commission's orders necessitating this docket *explicitly* provided that the Trust should, among other things:

- **Be similar to Canadian pipeline decommissioning trusts.**
 - Enbridge's draft Trust Agreement is similar to Canadian trusts for its CER regulated pipelines in that it: allows the pipeline operator to use the funds to actually fund decommissioning expenses; provides for collections over the pipeline's lifetime; provides for regulator review/approval for decommissioning expense distributions; and provides for regulator review of the trust contribution amounts every five years.
 - DER's proposed structure does not generally incorporate the primary features of the Canadian decommissioning trusts: DER asserts that the purpose of the Trust is not to fund Enbridge's decommissioning of the pipeline; DER asserts that contributions should be front-loaded; DER advocates for more frequent Commission review of trust contribution amounts.

¹⁶ Direct Testimony of Kate O'Connell at 119-20.

¹⁷ DER Reply Comments at 2 (Mar. 13, 2023) (eDocket No. [20233-193904-02](#)).

- **Provide for collections over the 50-year life of the pipeline.**
 - Enbridge proposes to make contributions to the Trust over the contractually-defined life of the pipeline. No party can dispute that Line 93 does, in fact, have a contractually-defined lifetime.
 - Now, DER asserts that contributions should be front-loaded over a much shorter timeframe.

Enbridge's proposed Trust Agreement accomplishes the purposes articulated in Commission orders.

B. Form of Trust.

1. Hybrid v. "traditional" trust.

DER disagrees with Enbridge's form of trust. The primary point of disagreement seems to be that DER disputes that the "Trustee would pay Enbridge as it incurs decommissioning costs."¹⁸ However, as set forth above, that was, indeed, DER's purpose in proposing a decommissioning trust in the first instance,¹⁹ and this docket is not a forum to entirely recreate the regulatory requirements applicable to Line 93.

Further, DER appears to imply that Enbridge's draft Trust Agreement would not accomplish the purpose of ensuring "that amounts necessary to satisfy decommissioning obligations will be available to the State of Minnesota should Enbridge or its successors fail to perform their obligations or cease to exist."²⁰ If this is DER's interpretation of the draft Trust Agreement, the interpretation is incorrect. Rather, Enbridge's proposed Trust Agreement increases the certainty that the trust funds will be available to pay for decommissioning regardless of whether Enbridge is still in existence.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

DER's proposed revisions to the Trust Agreement increase the risk that if Enbridge or its successor were to become insolvent, the Trust assets could be exposed to creditor claims. Specifically, with its deletion of section 1.4 of the draft Trust Agreement, DER has deleted the language providing that the Trust will be protected from creditor claims as an asset protection trust under South Dakota law, and that the Trust is established for a purpose (decommissioning) rather than to benefit a specific beneficiary. DER argues that creditor protection can be achieved by saying the Trust is a "traditional" trust established by one party to benefit another. DER apparently believes that naming the Commission as the beneficiary of the Trust will provide protection against claims of creditors of Enbridge and its successors, even though distributions from the Trust will be used to satisfy decommissioning obligations of Enbridge and its successors. However, under both Minnesota and South Dakota law, if assets of a traditional trust can be used to satisfy any obligations of the settlor, then the assets are available to all the settlor's creditors.²¹ It is not possible to circumvent these statutes simply by including an assertion in the trust document that someone else is the beneficiary.

2. Beneficiary.

DER asserts that the Commission should be the beneficiary of the Trust Agreement and be able to use the funds to pay decommissioning expenses. However, Enbridge's draft Trust Agreement accounts for uncertainty as to whether the Commission and/or the Department of Commerce ("Department") have the jurisdiction and statutory authority to receive or distribute funds from the Decommissioning Trust. DER's proposed structure places these obligations squarely upon the Commission and Department, but DER does not explain the source of either

²¹ Minn. Stat. § 501C.0505; SDCL § 55-1-36.

agency's statutory authority to act in these roles. Further, as noted above, DER's apparent belief that naming the Commission as the beneficiary solves the creditor protection issue is wrong.

3. Enforcer v. trust protector.

Enbridge's first draft Trust Agreement provided that the trustee would have the authority to make distributions to fund decommissioning expenses, and that the trustee could rely conclusively on a certificate provided by Enbridge and the Enforcer (appointed by the Commission) as to appropriate distributions. DER has proposed that the Department act as Trust Protector with the authority to make distributions. Enbridge has received feedback from potential trustees that prefer the approach of having a fiduciary separate from the trustee to authorize distributions. Therefore, Enbridge's revised Trust Agreement uses this approach (**Attachment A**). However, Enbridge disagrees that the Trust Protector should be the Department because of a lack of clarity regarding authority to serve in this role, as well as resource availability and expertise. Instead, the Trust Protector should be an individual who has experience administering trusts, and who can act as an independent fiduciary – not under the control of any of the interested parties (similar to the way in which the Public Safety Trust in Docket No. PL-9/PPL-15-137 was administered). Enbridge proposes that the Trust Protector be proposed by Enbridge and approved by the Commission. It is important to note that the Trust Protector will not need to authorize distributions until several decades from now. Therefore, rather than appointing a Trust Protector now, the proposed Trust Agreement creates a process for appointment of a Trust Protector when the time comes. These revisions are reflected in **Attachment A**.

C. Amount of trust contributions.

DER continues to appear to assert that Enbridge should have been making contributions prior to the establishment of the Trust.²² Enbridge has addressed this issue multiple times in prior comments.²³ Likewise, the Commission already considered and resolved this issue when it initially considered requiring a decommissioning trust. The record is clear that the Commission was *not* requiring Enbridge to make contributions prior to the establishment of the Trust, recognizing that “there’s a long time before it gets decommissioned” and “We do have some time. We want to get it right, I think, before we put it in place.”²⁴ Because the Commission already concluded that contributions would not be required before the Trust is in place, this issue should not be revisited.

Similarly, DER asserts that the “Trust needs to be fully funded as soon as reasonably feasible.”²⁵ As noted previously, this is inconsistent with DER’s own prior recommendations and the Commission’s orders, which provided for “collections over the expected 50-year life of Line 3.”²⁶ Vastly shortening the collection period now would be unreasonable and a significant additional burden. Further, Line 93 is somewhat unique in that it is a *contractually-defined* lifetime. In this way, Line 93 is not subject to the same uncertainty DER and FOH raise with respect to the useful lives of other, older pipelines or other types of facilities, such as coal mines.

Overall, Enbridge understands that it is obligated to decommission Line 93 at the end of its life. Thus, just like DER and FOH, Enbridge is motivated to ensure that the Trust has sufficient funds for decommissioning at the time decommissioning will occur. It is not in Enbridge’s interest

²² DER Reply Comments at 3 (Mar. 13, 2023) (eDocket No. [20233-193904-02](#)).

²³ Enbridge Comments at 2-4 (Jan. 3, 2023) (eDocket No. [20231-191784-02](#)); Enbridge Reply Comments at 8-11 (July 20, 2022) (eDocket No. [20227-187645-01](#)).

²⁴ Docket 14-916 Mtg. Tr. at 56:23-57:13; 60:19-61:9; 63:15-25; 64:10-65:8 (Nov. 19, 2018).

²⁵ DER Reply Comments at 3 (Mar. 13, 2023) (eDocket No. [20233-193904-02](#)) (emphasis added).

²⁶ Enbridge Initial Comments at 4 (May 19, 2022) (eDocket No. [20225-185918-02](#)).

to overstate the potential lifetime of Line 93, and it has not done so here. Rather, Enbridge's proposed contribution timeline is reasonable and supported by the record.

D. Periodic Commission review.

DER asserts that the Commission should review the decommissioning cost estimate every three years, rather than every five years as it does for other decommissioning cost estimates under its jurisdiction. DER does not explain why five years is not sufficiently protective, as the Commission apparently believes it is for other energy infrastructure in Minnesota. As DER notes, of course circumstances may change over time, and the Commission could institute reviews more frequently once decommissioning of Line 93 is closer in time. However, reviewing the cost estimate every three years is unnecessary and inefficient because DER does not explain how its proposed review period would actually mitigate any risk of underfunding. For example, given the timeframe of this docket thus far, if the Commission required a three-year review cycle, it appears that the Commission would complete one cost estimate review and then turn immediately to the start of another.

Enbridge's proposal to review and update the decommissioning cost estimate every five years is reasonable, workable, based on the CER process and consistent with Commission practice.

E. Other issues.

Enbridge has identified additional issues regarding DER's comments and revisions to the Trust Agreement, each of which is discussed in more detail in **Attachment B**. For example, DER has added the concept of "default" to the Trust Agreement without defining "default" or identifying any related process. Enbridge has significant concerns regarding this issue, which are explained further in **Attachment B**.

IV. REPLY TO FOH FILING.

As an initial matter, FOH's comments begin with a series of hypothetical statements in which it makes numerous unfounded accusations regarding Enbridge's ability and willingness to meet its obligations. Nothing in this record supports those accusations. As it was when the certificate of need was initially issued in 2018, Enbridge remains ready to implement and fund the Decommissioning Trust for Line 93.

FOH likewise makes assertions regarding the health of Enbridge's business and the industry generally, comparing it to the coal industry. These assertions, too, are unfounded. FOH is correct, of course, that Enbridge owns and operates crude oil pipelines. But this is not all.

Enbridge is North America's leading energy infrastructure company, with four core businesses: liquids pipelines; natural gas pipelines; natural gas utilities; and renewable power. More specifically, Enbridge:

- Moves about 30 percent of the crude oil produced in North America and has more than 28,000 km (approximately 17,398 miles) of pipe.
- Transports nearly 20 percent of the natural gas consumed in the United States and has more than 120,000 km (approximately 74,564 miles) of pipe.
- Operates North America's third-largest natural gas utility by consumer count, serving more than 3.9 million retail customers and more than 670 communities.
- Was an early investor in renewable energy. Enbridge has more than 30 renewable power facilities, enough to power more than 950,000 homes.

Since its first wind farm in 2002, Enbridge has committed more than \$8 billion (CA) in capital to renewable energy and power transmission projects currently in operation or under construction. Enbridge's renewable energy projects have the capacity to generate more than 5,000 MW of zero-emission energy. Enbridge is currently one of the largest renewable energy

companies in Canada.²⁷ Enbridge has also committed to reducing emissions intensity 35 percent by 2030 and achieving net zero emissions by 2050.²⁸

Further, Canadian oil production is not forecasted to decline with the speed asserted by FOH. The most recent “Canada’s Energy Future Report” issued by the CER indicates that there is no reason to believe that Line 93 will not continue to be used and useful in 2050.²⁹

FOH’s repeated assertions that Enbridge will disappear along with Canadian oil production is wrong, and this mistaken assumption permeates the remainder of FOH’s comments. The result is arguments that are not tethered to the facts in this record and do not provide helpful context or recommendations to the Commission.

A. Form of trust.

FOH asserts that Enbridge has not explained why the purpose trust is superior to “trust mechanisms government agencies have been using for financial assurance for decades.”³⁰ This is inaccurate. Enbridge has explained why it believes the purpose trust is most appropriate for this circumstance.³¹ FOH argues that the purpose trust is “untested,” but that too is inaccurate. Non-charitable purpose trusts have been explicitly authorized under Minnesota law since our state’s adoption of the Uniform Trust Code in 2015 (Minn. Laws 2015 Ch. 5, Art. 4, § 7); and under South Dakota law since 2006 (S.D. Laws 2006 Ch. 247, § 1). Importantly, traditional trusts (like the one

²⁷ Enbridge – About Us: Renewable Energy (2023), available at <https://www.enbridge.com/about-us/renewable-energy>.

²⁸ Enbridge – About Us (2023), available at <https://www.enbridge.com/about-us>.

²⁹ Canada’s Energy Future 2021, Key Findings § 5 Crude Oil Production, available at <https://www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2021/key-findings.html#kf5> (“Canadian crude oil production levels are resilient through to 2050 despite the Evolving Policies Scenario’s relatively low prices and steadily more ambitious climate policies. This largely stems from the nature of the oil sands facilities, which are long-lived and have low operating costs once built.”).

³⁰ FOH Comments at 1 (Mar. 13, 2023) (eDocket No. [20233-193918-01](#)).

³¹ Enbridge Comments at 12 (Jan. 3, 2023) (eDocket No. [20231-191784-02](#)).

proposed by DER) have indeed been tested but have failed to protect assets from claims of the settlor's creditors. Likewise, Enbridge's proposed Trust Agreement acknowledges reality. Given that the Trust is created to achieve a purpose rather than to benefit the Commission, Enbridge, or any other "beneficiary," the Trust Agreement should work within this framework.

Further, FOH's repeated implications that there is a bevy of other, better, more settled options somewhere out there are misleading. There are certainly detailed regulatory structures that apply to *other agencies* and *other types of facilities*. There is no such detailed regulatory structure for pipelines here and, without some sort of implementing statute, Enbridge cannot simply port over other agencies' statutes and rules for Line 93.

B. Decommissioning cost estimate.

FOH asserts that the Commission should review the decommissioning cost estimate every year.³² FOH provides no analysis demonstrating that this proposal is actually workable, let alone reasonable and appropriate.

FOH further asserts that the decommissioning cost estimate should assume that the State, not Enbridge, is conducting decommissioning.³³ FOH cites to federal regulations that govern financial requirements for the closure of hazardous waste treatment, storage, and disposal facilities for which the U.S. Environmental Protection Agency has been given authority to act in this capacity. FOH provides no support for the assertion that the same regulatory framework could be applied here, nor does FOH explain the relative significance of its argument in the absence of statutory authority delegating power to any specific agency here. Regardless, FOH's underlying assertion regarding the purpose of the decommissioning trust is inaccurate. The record in this

³² Enbridge Comments at 8 (Jan. 3, 2023) (eDocket No. [20231-191784-02](#)).

³³ *Id.*

proceeding demonstrates—repeatedly—that DER and the Commission contemplated that the Trust would be used *by Enbridge* to comply with its obligation to decommission Line 93.³⁴

C. Protection from creditors.

FOH makes various, at times conflicting, arguments concerning the Trust Agreement and potential bankruptcy issues. As an initial matter, Enbridge notes that, with respect to this issue, it is aligned with FOH; like FOH, Enbridge wishes to protect the Trust from creditors, including within bankruptcy, to the extent possible, and has proposed a Trust Agreement with that goal in mind.

First, FOH refers to 11 U.S.C. § 554 and asserts that Enbridge may attempt to use the Bankruptcy Code to abandon Line 93 or “treat those obligations as general unsecured claims.”³⁵ FOH appears to misunderstand what “abandoning property” is within the context of bankruptcy. Abandoned property is not included within the bankruptcy estate; it instead is given back to the debtor or any creditor with interest in the property to address claims, including environmental claims, arising from that property. Nonetheless, the Trust is specifically structured to avoid any such “abandonment” issue to the extent possible. As described further below, “abandonment” would not affect the Trust proceeds already within the Trust itself. To the extent any risk of abandonment still exists, FOH is ultimately arguing that the Bankruptcy Code should not allow any abandonment of property in certain situations such as what the Trust aims to address. However, neither the Commission nor Enbridge can rewrite the Bankruptcy Code, and Enbridge has instead attempted to alleviate these concerns within the context of existing law.

³⁴ DER Initial Comments (May 19, 2022) (eDocket No. [20225-185915-02](#)); *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916, Order Granting Certificate of Need As Modified and Requiring Filings (Sept. 5, 2018) (reissued May 1, 2020), ordering ¶ 1(C) (eDocket No. [20205-162795-03](#)).

³⁵ FOH Comments at 2 (Mar. 13, 2023) (eDocket No. [20233-193918-01](#)).

Second, FOH argues that Enbridge may spin off unprofitable assets into subsidiaries and retain assets that are still profitable (or vice versa).³⁶ However, the preexisting Trust itself and its accumulated proceeds would not be affected by any restructuring of Enbridge because those proceeds, as described below, would no longer be the property of Enbridge. Enbridge, Inc., has also already provided a parental guaranty (*see* Section F below). Likewise, statutory and case law regarding fraudulent transfers present safeguards to prevent any such voidable, creative restructuring not allowed by applicable law.

Third, FOH hypothesizes that assets in the Trust might be swept into a bankruptcy estate in the future.³⁷ FOH glosses over the details and again fails to acknowledge that the Trust Agreement is structured to account for this issue to the extent possible under the law. More specifically, pursuant to 11 U.S.C. § 541, upon the filing of a bankruptcy case, a separate estate is created consisting of the debtor's pre-petition property. What constitutes "property" going into the bankruptcy estate at the time of the bankruptcy filing is defined and controlled by applicable state law.³⁸ Additionally, the U.S. Supreme Court has noted in dicta that "Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition."³⁹ Consequently, whatever rights Enbridge might have in the Trust here would depend on what rights it has in the Trust under South Dakota law.

Enbridge has drafted the Trust Agreement as a hybrid asset protection/purpose trust under South Dakota law. Enbridge proposes structuring the Trust as a noncharitable purpose trust

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Butner v. United States*, 440 U.S. 48, 55 (1979).

³⁹ *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.10 (1983); *see also Begier v. I.R.S.*, 496 U.S. 53, 59, 110 S. Ct. 2258, 2263, 110 L. Ed. 2d 46 (1990) ("Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'").

because that is what it is – it is created for the purpose of ensuring that decommissioning expenses can be paid. However, to maximize creditor protection, the proposed Trust Agreement acknowledges that Enbridge could be deemed to benefit from trust distributions, which could expose the Trust assets to claims of creditors. The Trust Agreement takes advantage of a series of South Dakota laws (SDCL §§ 55-16-1 through 55-16-16) that protects trust assets from claims of the settlor’s creditors, even if the settlor is deemed to be a beneficiary of the trust. There is absolutely no reason to prevent the Trust from qualifying as an asset protection trust in the event Enbridge (or its successor) is deemed to be a beneficiary of the Trust—it is in the interest of all involved parties to do so.

Under Enbridge’s proposed Trust Agreement, no action of any kind by a creditor can be made against property of the Trust unless the transfer by the settlor was made with the intent to defraud the specific creditor, such as through a fraudulent transfer.⁴⁰ Only if such intent is present will a transfer not be considered a “qualified transfer” under chapter 55-16. If not a qualified transfer, creditors could then satisfy claims from just the settlor’s interest in the trust estate.⁴¹

D. Other trusts.

As it has done in prior comments, FOH continues to point to separate regulatory regimes and assert that the Commission should attempt to adopt those separate regulatory regimes for Line 93.⁴² However, FOH fails to acknowledge the *one* regulatory regime that is actually most similar—the CER trusts for pipelines in Canada.

⁴⁰ SDCL § 55-16-9.

⁴¹ SDCL § 55-1-36.

⁴² FOH Comments at 5 (May 19, 2022) (eDocket No. [20225-185923-01](#)); FOH Comments at 4 (Mar. 13, 2023) (eDocket No. [20233-193918-01](#)).

First, FOH refers to the Surface Mining Control and Reclamation Act with a lengthy discussion regarding coal companies which FOH asserts have failed to comply with their reclamation obligations.⁴³ The situation is entirely dissimilar. That Act is an act of Congress which applies generally. There is no similar legislative act and resulting regulatory structure here.

Next, referring to the draft Trust Agreement, FOH asserts that “no U.S. agency has accepted such a mechanism to meet financial assurance requirements.”⁴⁴ That, too, is irrelevant—there are no federal financial assurance requirements related to Line 93 or other pipelines, so, of course no federal agency within the U.S. would have used a similar financial assurance mechanism. However, Enbridge has modeled the draft Trust Agreement off its CER-regulated abandonment trusts in Canada.

FOH then refers to the regulatory structure governing the closure of solid waste facilities.⁴⁵ As evidenced by FOH’s comments, there is a detailed and complex regulatory structure that applies to facilities generally which would have been the result of a federal rulemaking proceeding. There is not a similar structure or industry-wide stakeholder process here, and there is no agency that has been tasked with back-stopping Enbridge in the way that federal law identifies the U.S. Environmental Protection Agency for solid waste facilities.

In sum, Enbridge of course does not dispute that federal law identifies decommissioning financial assurance mechanisms and structures for other types of facilities. However, those regulatory structures are the result of legislation and rulemaking (with broad, industry-wide stakeholder participation) that clearly delineated roles and conferred responsibilities (and jurisdiction) on the applicable federal agency. The same circumstances do not apply here. In the

⁴³ FOH Comments at 4 (Mar. 13, 2023) (eDocket No. [20233-193918-01](#)).

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 7.

absence of a comprehensive regulatory structure like those identified by FOH, the draft Trust Agreement reflects a workable, practical, and efficient approach that also has the benefit of already being utilized for the same type of asset in Canada.

E. Funding of trust.

FOH asserts that Enbridge should fully fund the Trust “immediately” or shortly thereafter.⁴⁶ This is entirely inconsistent with the Commission’s orders, which directed funding over a 50-year lifetime.⁴⁷ Further, requiring a pipeline operator to fully fund—upfront—a decommissioning trust that covers the cost of full removal of a pipeline is a significant and burdensome requirement. To the extent that was the policy of the federal or state governments, such a policy would be reflected in law. However, there is no such requirement in statute or regulation, and the applicable requirement here—the Commission’s orders—were clear that the trust would be funded over the lifetime of Line 93.⁴⁸

F. Settlor / grantor.

Finally, FOH asserts that the settlor/grantor of the Trust Agreement should be Enbridge’s parent company, Enbridge, Inc.⁴⁹ FOH forgets the extensive regulatory background here in which Enbridge, Inc. has already provided a parental guaranty on behalf of Enbridge in favor of, among

⁴⁶ *Id.* at 9.

⁴⁷ *In the Matter of the Application of Enbridge Energy, Limited Partnership, for a Certificate of Need for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*, Docket No. PL-9/CN-14-916, Order Approving Compliance Filings as Modified and Denying Motion at 8 (Jan. 23, 2019) (reissued May 1, 2020) (eDocket No. [20205-162795-05](#)).

⁴⁸ Here, FOH refers to 40 C.F.R. § 264.143(a) and asserts that regulation (related to hazardous waste facilities) requires funding in five years or less. That regulation states: “Payments into the trust fund must be made annually by the owner or operator over the term of the initial RCRA permit or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter. . . .” 264.143(a)(3). This regulation is consistent with what Enbridge proposes here. Further, FOH fails to acknowledge that those regulations provide operators with a range of options regarding the financial assurance mechanism they could use—not just fully funding a trust upon operation.

⁴⁹ FOH Comments at 9-10 (Mar. 13, 2023) (eDocket No. [20233-193918-01](#)).

others, the State of Minnesota. The parental guaranty specifically references the Decommissioning Trust and, more generally, Enbridge's obligations under the certificate of need and route permit orders.⁵⁰

CONCLUSION

For the reasons set forth herein, the Trust Agreement included with this filing as **Attachment A** best meets the purposes and requirements of the Commission's orders, and Enbridge requests that the Commission authorize Enbridge to establish a trust consistent with the Trust Agreement.

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Respectfully submitted,

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⁵⁰ See Parental Guaranty for Environmental Damages Compliance Filing, MPUC Docket No. PL-9/CN-14-916 (Oct. 30, 2020) (eDocket No. [202010-167850-01](#)). Elsewhere, FOH makes irrelevant assertions regarding Enbridge's long-term debt load and total net worth. FOH provides no support or citation for these assertions, and Enbridge is aware of no publicly available information supporting such assertions.