

Staff Briefing Papers

Meeting Date June 22, 2023

Agenda Item **

Company Enbridge Energy, Limited Partnership

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

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

- Issues
- How should the Decommissioning Trust be structured?
 - Traditional Trust vs Noncharitable Trust?
 - Who should be designated the benefactor?
 - How much money should be included in the Decommissioning Trust?
 - Should there be an initial startup payment and what is the schedule for payments?
 - How often should the Decommissioning Trust be reviewed?

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Relevant Documents	Document ID	Date
Enbridge Certificate of Need Modifications	20187-144948-01	07/16/2018
Compliance Filing with Attachments 3A, 3B, and 3C	20187-144948-04	
Department of Commerce Letter Regarding Enbridge's Decommissioning Trust Fund Proposal	20187-145103-01	07/20/2018
Dept. of Commerce Recommendations Regarding Enbridge's July 16, 2018 Compliance Filing	20187-145374-01	07/30/2018
Enbridge Reply to Department of Commerce July 20, 2018 Letter	20187-145372-01	07/30/2018
Order Granting Certificate of Need as Modified and Requiring Filings (Reissued 05/01/2020)	20205-162795-02	09/05/2018

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

Relevant Documents	Document ID	Date
Enbridge Compliance Filing Update Letter	<u>20189-146299-02</u> ¹	09/07/2018
Enbridge Compliance Filing with Attachment C	<u>201810-147100-01</u> <u>201810-147100-04</u>	10/16/2018
Department of Commerce Letter Restating Recommendations	<u>201811-147613-02</u> ²	11/05/2018
Order Approving Compliance Filings as Modified and Denying Motion (Reissued 05/01/2020)	<u>20205-162795-05</u>	01/23/2019
Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified	<u>20205-162795-01</u>	05/01/2020
Honor the Earth Petition to Open Docket for Line 3 Replacement Project Abandonment Trust Fund	<u>202112-180453-01</u> <u>202112-180453-02</u> <u>202112-180453-03</u> <u>202112-180453-04</u> <u>202112-180453-05</u> <u>202112-180453-06</u>	12/01/2021
Department of Commerce Letter Concerning Specialized Expert and Comment Period Extension	<u>20221-181889-01</u>	01/24/2022
Department of Commerce Initial Comments	<u>20225-185915-02</u>	05/19/2022
Enbridge Initial Comments	<u>20225-185918-02</u>	05/19/2022
Friends of the Headwaters Initial Comments	<u>20225-185923-01</u>	05/19/2022
Dyrdals Initial Comments	<u>20225-185925-01</u>	05/19/2022
Honor the Earth Initial Comments	<u>20225-185926-01</u>	05/19/2022
Public Employees for Environmental Responsibility Comments	<u>20225-185887-01</u>	05/19/2022
Department of Commerce Reply Comments	<u>20226-186741-02</u>	06/17/2022
Enbridge Reply Comments	<u>20226-186765-01</u>	06/20/2022
Friends of the Headwaters Reply Comments	<u>20226-186764-01</u>	06/22/2022
Honor the Earth Reply Comments	<u>20226-186914-01</u>	06/27/2022
Department of Commerce Supplemental Comments	<u>20227-187633-01</u>	07/20/2022
Enbridge Supplemental Comments	<u>20227-187645-01</u>	07/20/2022
Friends of the Headwaters Supplemental Comments	<u>20227-187636-01</u>	07/20/2022

¹ Also filed as Trade Secret, Document ID 20189-146299-01.

² Also filed as Trade Secret, Document ID 201811-147613-01.

Relevant Documents	Document ID	Date
Dyrdals Supplemental Comments	<u>20227-187649-01</u>	07/20/2022
Canadian Association of Petroleum Producers Comments	<u>20227-187647-01</u>	07/20/2022
Department of Commerce Letter Concerning Consulting Expert	<u>20229-188945-01</u>	09/09/2022
PUC - Order – Directing Enbridge to Draft Trust	<u>202211-190435-01</u>	11/4/2022
Enbridge Energy - Letter Comments Draft Trust	<u>20231-191784-01</u>	01/03/2023
Enbridge Energy - Accompanying Draft Trust	<u>20231-191784-02</u>	01/03/2023
Public Comments (PC) - Alice and Randy Peterson	<u>20232-193261-01</u>	02/17/2023
PC – Friends of the Headwaters	<u>20233-193918-01</u>	03/13/2023
DOC DER – Reply Comments	<u>20233-193904-02</u>	03/13/2023
PC - Batch Comments	<u>20233-193952-01</u>	03/14/2023
PC - Sharon Natzel	<u>20233-193939-01</u>	03/14/2023
Enbridge Energy – Letter	<u>20233-194019-01</u>	03/15/2023
PC - Deanna Johnson	<u>20233-194078-01</u>	03/17/ 2023
Enbridge Energy - Filing Letter	<u>20234-194737-01</u>	04/12/2023
Enbridge Energy - Reply Comments	<u>20234-194737-02</u>	04/12/2023
Enbridge Energy - Attachment A Revised Trust	<u>20234-194737-03</u>	04/12/2023
Enbridge Energy - Attach. B Table Review of Revisions	<u>20234-194737-04</u>	04/12/2023
Enbridge Energy - Attachment C Revised Agreement	<u>20234-194737-05</u>	04/12/2023
Friends of the Headwaters – Reply Comments	<u>20234-194731-01</u>	04/17/2023
DOC DER – Independent Review Letter	<u>20234-194841-02</u>	04/17/2023
DOC DER – Decommission Cost Estimate Review	<u>20234-194841-01</u>	04/17/2023
DOC – Comments Filing Letter	<u>20234-194979-02</u>	04/19/2023
DOC – Comments Supplemental	<u>20234-194979-01</u>	04/19/2023
Enbridge Energy, L.P.	<u>20234-194977-01</u>	04/19/2023
Friends of the Headwaters	<u>20234-194963-01</u>	04/19/2023

I. ISSUES

- How should the Decommissioning Trust be structured?
 - Traditional Trust vs Noncharitable Trust?
 - Who should be designated the benefactor?
- How much money should be included in the Decommissioning Trust?
- Should there be an initial startup payment and what is the schedule for payments?
- How often should the Decommissioning Trust be reviewed?

II. BACKGROUND

On June 28, 2018, the Minnesota Public Utilities Commission (Commission) met and approved Enbridge Energy, Limited Partnership's (Enbridge) application for a certificate of need (CN) for the Line 3 replacement pipeline. As a condition of the CN, the Commission required Enbridge to establish a trust to fund decommissioning of the new pipeline (Line 93) when it reaches the end of its economic useful life. The Commission directed Enbridge to use the decommissioning trust that the Canadian National Energy Board directed Enbridge, Inc. to fund for the decommissioning of its pipelines in Canada as a model for decommissioning.

On July 16, 2018, Enbridge filed proposed terms for the Decommissioning Trust Fund.

On July 20 and 30, 2018, the Minnesota Department of Commerce-Division of Energy Resources filed comments opposing Enbridge's proposed terms and recommending changes.

On September 7, 2018, Enbridge filed revised terms for its Decommissioning Trust Fund, as well as a discussion regarding the process of developing these terms.

On September 11, 2018, the Commission met to consider Enbridge's July 16 filing and the parties' comments and took no action.

On October 16, 2018, Enbridge further revised its proposed terms for the trust fund.

On November 5, 2018, the Department filed a letter stating grounds for opposing Enbridge's proposal.

On January 23, 2019, the Commission issued an order that: A) accepted Enbridge's various filings as complying with the Commission's orders, B) authorized a new docket for establishing the terms of the Decommissioning Trust Fund, C) directed Enbridge to consult with the Department on its proposed revisions, and D) directed Enbridge to evaluate modeling the trust fund on examples promulgated by the federal Environmental Protection Agency, the federal Bureau of Land Management rules, and the Canadian National Energy Board's provisions.

On December 1, 2021, Honor the Earth filed a petition to initiate proceedings in the current docket. By July 20, 2022, the Commission had received initial, reply, and/or supplemental comments from:

- the Department,
- Enbridge,
- Friends of the Headwaters (FOH),
- Honor the Earth,
- Public Employees for Environmental Responsibility (PEER),
and various members of the public.

On September 9, 2022, the Department filed a letter stating that it had retained a consultant to assist with issues relating to establishing and operating a trust.

On November 4, 2022, the Commission directed Enbridge, within two months and after coordinating with the Department, the Fond du Lac Band of Lake Superior Chippewa, and other affected tribal governments, to file a draft trust agreement for notice and comment, including the following:

- A. An independently reviewed cost estimate for the total contribution amount to be included in the trust, and supporting documents—or, if not, a proposal and timeframe for the independent review of the cost estimate.
- B. A proposed monthly contribution amount and supporting documents.
- C. A proposed initial contribution amount to be made upon establishment of the trust.
- D. An identification of who or what entities should be the beneficiary.
- E. A proposed trustee and information explaining the process used to select the proposed trustee.
- F. Provisions that address modifications to the terms of the trust, regular Commission review, and an investment policy.
- G. An explanation of Enbridge’s choice to designate South Dakota as the situs for the trust and choice of law for the draft trust—providing a thorough discussion comparing application of Minnesota and South Dakota law, and how to maintain Minnesota as the venue for any judicial actions regarding the trust.
- H. A list of the differences between Enbridge’s proposal, the requirements of the Canada Energy Regulator, and the trust requirements under Minnesota Pollution Control Agency rules (Minn. R. ch. 7035.2805)—and the reasons for the differences.

On January 3, 2023, Enbridge posted a draft a trust agreement.

On January 11, 2023, the Commission issued a Notice of Comment Period. The initial comment period closed on March 13, 2023, the reply comment period closed on April 12, 2023, and the supplemental comment period closed on April 19, 2023.

On January 19th, 2023, the Commission received comments from Sophia Keller and April Reinhard.

On February 17, 2023, the Commission received comments Alice and Randy Peterson.

On March 13, 2023, the Commission received comments from Friends of the Headwaters (FOH) and Minnesota Department of Commerce, Division of Energy Resources (DOC DER or the Department).

On March 14, 2023, the Commission received comments from Maurice Spangler and Sharon Natzel.

On March 15, 2023, the Commission received a letter from Enbridge.

On March 17, 2023, the Commission received a comment from Deanna Johnson.

On April 12, 2023, the Commission received a revised trust agreement proposal from Enbridge.

On April 12, 2023, the Commission received reply comments from FOH.

On April 17, 2023, DOC DER filed an independent review letter along with a decommissioning cost estimate completed by WSP USA.

On April 19, 2023, Department, Enbridge Energy, and Friends of the Headwaters each filed comments with the Commission.

III. Summary of Comments

Staff has reviewed the initial, reply, and supplemental comments received and provided the summary below by topic of concern. The topic of the January 11, 2023 Notice of Comment was, “What action should the Commission take with respect to the Draft Decommissioning Trust Fund Agreement filed by Enbridge Energy, Limited Partnership on January 3, 2023?”

A. Public Comments

Comments submitted by individuals centered on several areas of concern:

- Taking Line 3, now Line 93, offline immediately until verified safety measures can be utilized.³
- Enbridge will default on its obligation to the decommissioning trust fund requiring Minnesotans to absorb the cost.⁴
- State of Minnesota should be the beneficiary and ensuring Enbridge has no control over the Trust.⁵
- The trust should be in Minnesota, not South Dakota.
- Locating the non-charitable purpose trust in South Dakota.⁶

³ Keller ([20231-192327-01](#))

⁴ Reinhard ([20231-192326-01](#)); Petersons ([20232-193261-01](#)); Spangler ([20233-193952-01](#)); Johnson ([20233-194078-01](#))

⁵ Johnson ([20233-194078-01](#))

⁶ Natzel ([20233-193939-01](#))

- Other abandoned lines will not have the necessary resources for proper decommissioning. Resources should be used on the oldest lines first.⁷
- The safety of using lines past recommended timelines and property rights.⁸
- Enbridge's environmental record, as it relates to trees being replanted on a specific landowner's property.⁹

B. Trust Location

Enbridge

Enbridge prefers the Trust to be in South Dakota. Enbridge states, "...because the Trust assets will be used to satisfy Enbridge's decommissioning liabilities, if the Trust were a Minnesota trust, regardless of who is named as the beneficiary in the Trust Agreement, under Minnesota law, the assets could potentially be subject to claims of all of Enbridge's creditors. However, under South Dakota law, assets irrevocably transferred to a trust may be protected from creditor claims."¹⁰

Enbridge argues that the length of time a noncharitable trust can operate in Minnesota is limited to 90 years, or 21 years after the death of the individual who created the trust. Enbridge also wrote the duration of a trust that is noncharitable and has no ascertainable beneficiary is limited to 21 years. The laws of South Dakota authorize perpetual trusts.¹¹

Additionally, Enbridge argues that South Dakota has a framework for a trust that has no beneficiaries but instead achieves a purpose. It also allows for the trust to benefit people without naming each individual property owner.¹²

Friends of the Headwaters/Public Comment

Friends of the Headwaters states, "...the Decommissioning Trust should not be set up as a "non-charitable purpose trust" under South Dakota or any other state's law."¹³

A public comment submitted also argues for it to be located in Minnesota. The public comment states, "South Dakota's laws are different from the State of Minnesota laws. A continuous task force in the State of South Dakota devoted to trust issues...implies that there are potential issues that will arise in South Dakota."¹⁴

C. Trust Structure

Enbridge

⁷ Petersons ([20232-193261-01](#))

⁸ Ibid.

⁹ Ibid.

¹⁰ *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, Enbridge Comments Accompanying Draft Trust Agreement, p.22 ([20231-191784-02](#))

¹¹ Ibid., p. 22

¹² Ibid., p. 23

¹³ *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, Friends of the Headwaters, p.1 ([20234-194731-01](#))

¹⁴ Petersons ([20232-193261-01](#))

In its January 3, 2023 filing Enbridge suggested the use of a non-charitable trust. The purpose of the trust shall be enforced by the enforcer. Enbridge is suggesting in the filing that the Commission or its designee be declared the trust enforcer. The enforcer is entitled reasonable information (including periodic accounting).¹⁵

Below is a copy of the table Enbridge submitted in its filing establishing a trust.¹⁶

Topic	Description	§
Purpose and nature of trust	Established pursuant to Commission order requiring establishment of a decommissioning trust fund for the purpose of funding decommissioning expenses for Line 93.	1.2
Settlor	Enbridge Energy, Limited Partnership.	Preamble
Trustee	A corporate trustee with presence in South Dakota (or another state with favorable trust laws) and Minnesota (in order to allow any court proceedings involving the trust to be held in Minnesota).	Preamble
Enforcer	Organization or individual designated to enforce the trust, to be appointed by the Commission. The role of the “Enforcer” is similar to the role of the beneficiary under a traditional trust. The Enforcer has the right to receive information and accountings from the trustee, and to hold the trustee accountable for any deviations from the trustee’s duties under the trust document or applicable law.	3.5
Trust Type	Non-charitable purpose trust (SDCL §§ 55-1- 20—55-1-22.6)	1.3
Beneficiaries	The trust will benefit the environment, the people of the United States, the State of Minnesota and the tribal nations that share its geography, the landowners whose property is traversed or otherwise affected by Line 93, Enbridge, its customers, and their respective successors. However, it is the Enforcer (and not the people and entities benefited by the trust) who will have the legal right to receive accountings and enforce the trust.	1.3
Governing Laws Situs	South Dakota	7.1
Venue for Court Proceedings	Minnesota unless Enforcer consents to different venue	4.1
Contributions	Source of Contributions: Contributions to the trust will be made by the settlor (Enbridge) and those	N/A

¹⁵ 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, Enbridge Comments Accompanying Draft Trust Agreement, p.11. ([20231-191784-02](#))

¹⁶ Ibid, p. 7-8. ([20231-191784-02](#))

	<p>amounts will be recovered from shippers as decommissioning charges, pursuant to prior agreement between Enbridge and shippers.</p> <p>Commencement: May 10 of the year following Commission approval of the Trust.</p> <p>Account: Annual contribution amounts to be calculated to ensure the total amount in the trust fund by October 1, 2051 is the decommissioning cost estimate approved by the Commission.</p>	
Investment Policy	To be Drafted by Trustee	N/A
Distributions	<ul style="list-style-type: none"> Trust expenses (trustee fees, costs, administrative expenses, etc.); Taxes imposed on and payable by the trust, liability of the Settlor; Distributions to Settlor to pay any tax resulting from trust income; and To the Responsible Party or third parties engaged by the Responsible Party to pay Decommissioning Expenses, after submission of Certificate of Payment of Decommissioning Expense, which requires approval of Enforcer. 	5
Surplus Funds	Distribution to a Minnesota abandoned pipeline fund that will be established and maintained for the purpose of funding reclamation of any other abandoned pipelines in Minnesota.	5.3
Reporting and Record Keeping	<ul style="list-style-type: none"> Enforcer may demand from Trustee reasonable information related to administration of trust, including periodic accounting. Trustee provides annual and quarterly trust accountings to Enforcer and Responsible Party. 	5.2, 6.1
Term of Trust	Perpetual to the extent permitted by law. "Termination Date" defined as completion of Line 93 decommissioning	7.4
Revocability	Irrevocable	1.8
Periodic Commission Review	Every five years.	N/A

On March 13, 2023, FOH stated they are not supportive of Enbridge utilizing of a noncharitable purpose trust in their filing. To their knowledge, no US agency has accepted this type of arrangement because Enbridge would retain control over the disbursements from the trust leaving the money within reach of creditors. Instead, FOH would prefer a traditional trust with the state being designated the benefactor. Enbridge and other contractors could be reimbursed out of the Trust at the discretion of the State.¹⁷

DOC DER

By using the non-charitable purpose trust, the Department argued that Enbridge would be an indirect beneficiary of the Trust as the Trustee would pay Enbridge as it incurs decommissioning costs. The purpose of the trust is not to reimburse Enbridge for costs but provide assurance that Enbridge fulfills its obligations. The Department stated:

“The Trust is analogous to bonding or insurance, as it is designed to ensure 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.”¹⁸

As a result, the Department recommended that the Commission be the beneficiary of the Trust. They argued that the Commission is in the best position to ensure that decommissioning obligations are satisfied. The Department recommended a traditional trust, with a Trustee, Beneficiary, and Trust Protector.¹⁹

Enbridge

In response to the comments submitted by FOH and the Department, Enbridge proposed a separate fiduciary designated as the “Trust Protector,” rather than a corporate trustee. Enbridge also argued that the draft Trust Agreement submitted in January is the best option to accomplish the goals of the Commission outlined in its Order.²⁰

Enbridge indicated that it drafted a Trust Agreement that is representative of the record. This includes the understanding that Enbridge would be able to use the funds to decommission the project. Enbridge stated:

“...DER recommended that Enbridge be required to establish a decommissioning trust fund “based on the decommissioning trust that the Canadian National Energy Board directed Enbridge, Inc. to fund for the decommissioning of its pipelines in Canada,” and the Commission adopted DER’s recommendation. 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

¹⁷ *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, Friends of the Headwaters – Comments, p. 2 ([20233-193918-01](#))

¹⁸ *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, DOC DER – Reply Comments, p. 2 ([20233-193904-02](#))

¹⁹ *Ibid.* p.2

²⁰ *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, Enbridge – Reply Comments, p.2 ([20234-194737-02](#))

of removing the pipe from service.”²¹

Additionally, Enbridge claimed the revisions the Department suggested would further expose the Trust to creditor claims if Enbridge or its successor became insolvent. Enbridge stated:

“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.”²²

While the Department would like the beneficiary of the Trust to be the Commission, Enbridge is not clear whether the Commission or the Department has the authority to receive or distribute funds from the Decommissioning Trust. Enbridge also disagreed with the Trust Protector being designated as the Department because a lack of clarity regarding its authority to be in that role as well as having the resources and necessary expertise. Enbridge argued that the Trust Protector should have experience administering trusts and not be under the control of any interested parties. Additionally, Enbridge proposed that it nominate the Trust Protector and approved by the Commission.²³

Enbridge stated it has drafted the Trust agreement as a hybrid asset protection/purpose trust under South Dakota law to ensure decommissioning expenses are paid. Enbridge stated:

“...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.”²⁴

Friends of the Headwaters

In its April 12, 2023 reply comments, FOH indicated it is agreement with the Department in the following areas:

²¹ Ibid. p. 3

²² Ibid. p. 9

²³ Ibid. p. 10

²⁴ Ibid. p. 18

- Decommissioning Trust should not be a non-charitable purpose trust under South Dakota law or any law but Minnesota,
- Enbridge's proposed contribution amount and schedule are insufficient,
- Periodic reviews of the Trust balance must occur on a frequent basis.²⁵

FOH argued that the purpose of the Trust is to remove money from the control of Enbridge and transfer the control to an independent Trustee and single beneficiary, the State of Minnesota. The Trust as constructed by Enbridge would be little more than an internal "escrow" or "reserve" that a company can alter. Additionally, Enbridge's intention or agreements will be of little matter to its creditors relative to the Trust. If the Trust is not truly separate, they argue, the state will not have the necessary resources to complete the decommissioning work in the event of a bankruptcy.²⁶

FOH stated the ideal situation would have Enbridge able and willing to do the decommissioning work. However, if that doesn't come to fruition because Enbridge is unable or unwilling to do the work the State needs to be able to hire third parties.²⁷

In the response, Enbridge stated the following, "Overall, Enbridge's proposed Trust Agreement provides creditor protection to the extent possible, and FOH has not identified an alternative mechanism or trust structure that would accomplish the same goals under existing law."²⁸

In its latest filing, Enbridge updated the trust agreement it submitted on January 3, 2023 with the following:²⁹

Milestone/Topic	Description
Establishment of Trust	Within 60 days of the Commission's order requiring establishment of the Trust, Enbridge will submit a compliance filing with its trustee selection and the final Trust Agreement. The Trust Agreement will be consistent with the terms and conditions identified in Attachment A to Enbridge's April 12, 2023 Reply Comments.
Commencement of Contributions	<ul style="list-style-type: none"> • Within 90 days after receiving the Commission order requiring establishment of the Trust, Enbridge will file the Facilities Surcharge Mechanism ("FSM") with FERC, which will include the collection of decommissioning funds to be deposited in the Trust. • The FSM becomes effective 30 days after it is filed. • Enbridge makes its first monthly contribution to the Trust within 30 days after the FSM becomes effective.

²⁵ *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, Friends of the Headwaters, p.1 ([20234-194731-01](#))

²⁶ *Ibid.* p. 2

²⁷ *Ibid.* p. 2

²⁸ *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, Enbridge – Supplemental Comments, p. 2 ([20234-194977-01](#))

²⁹ *Ibid.* p. 3

Amount of Contributions	Total contribution of \$1.249 billion by October 1, 2051, unless revised by Commission order based on subsequent decommissioning cost estimate. Monthly contributions to be calculated using the formulas in Attachment C to Enbridge's January 3, 2023 Comments.
Compliance Filings	Enbridge will submit compliance filings upon: <ul style="list-style-type: none"> • Trustee selection and finalization of Trust Agreement; • Initial funding of Trust; and, • Annually with Trust accounting.
Periodic Commission review	Every five years

DOC DER

The Department disagrees with the assertion made by Enbridge that it does not have the authority or expertise to be the Trust Protector. The Commissioner of Commerce "is responsible for the enforcement of chapters 216A, 216B, and 237 and the order issued by the Commission is pursuant to those chapters."³⁰

The Department is also deeply concerned with using a purpose trust instead of a traditional form of trust. The Department also challenged Enbridge's interpretation of the record used to develop the trust agreement. As an example, DOC stated:

"Enbridge incorrectly claims that "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." In fact, the Commission has not rigidly bound itself to the specific requirements or structure dictated by a foreign government, nor any specific timeframe for funding the decommissioning. ...The Commission should not accept Enbridge's invitation to rewrite history in a way that would confine the Commission to following Enbridge's hand-picked provisions of the Canadian framework. Instead, the Commission should continue its practice of seeking the most robust information possible to develop the best way forward to protect Minnesota for decades to come."³¹

Additionally, the Department argued that it is not under the control of any interested party and is able to act as an independent fiduciary on behalf of Minnesotans as the Trust Protector. It also stated that if independence of the Trust Protector is what is truly desired by Enbridge, then they should not be entitled to select the Trust Protector.³²

The Department also questioned Enbridge's decision to omit its suggested language that specifies Enbridge's obligation to fund the trust. DOC stated:

³⁰ *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, Department Commerce, p. 4 ([20234-194979-01](#))

³¹ *Ibid.*, p. 2

³² *Ibid.*, p. 5

“It is troubling that, after agreeing to the establishment of a decommissioning trust fund and a rough estimate of the contribution needed in order to obtain the necessary permits to build its pipeline, Enbridge now seeks to avoid having those terms included into a legally binding contract establishing such fund. The trust agreement must set out Enbridge’s responsibilities – including the responsibility to fund the trust in the manner ordered by the Commission – to assure that the purposes of the trust are accomplished.

...Enbridge, in its proposed revision of the Department’s draft trust agreement, stripped out key language regarding its obligation to fund the trust, arguing that such language is “unclear,” “unnecessary,” and “potentially confusing.” How the inclusion of such a key provision of the trust could be unnecessary or confusing is baffling and Enbridge has provided no evidence to support such a bold claim. The Commission should reject Enbridge’s proposed revisions and require the inclusion of this fundamental tenet in the trust agreement.”³³

Friends of the Headwaters

FOH expressed concerns with Enbridge being designated as a Beneficiary of the Trust. FOH argued the trustees have a fiduciary responsibility to the beneficiaries increasing the risk Enbridge could successfully claim an entitlement to the money and creditors could argue Enbridge has effective control of the funds.³⁴

Enbridge does not have to be a beneficiary to be compensated for decommission costs. The Trustee could still distribute funds to Enbridge in these instances. FOH states that if Enbridge doesn’t exist or is in a dispute with creditors having them designated the beneficiary may create problems.³⁵

FOH believes it would be best to give the Department or its designee the sole authority to decide how and when the trust assets should be distributed. FOH argued the state often receives funds from the federal government and through litigation settlements and is routinely able to see the money directed to its intended purpose without a new statutory enactment.³⁶

D. Trust Amount

WSP USA Inc.

On May 19, 2022, Enbridge filed an updated decommissioning cost estimate for Line 93 that totaled \$1,203,000,000.³⁷ WSP USA Inc. (WSP) was retained by the Department and Enbridge to complete an independent review of Enbridge’s Line 93 decommissioning cost estimates.

³³ Ibid., p. 6 -7

³⁴ *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, Friends of the Headwaters, p. 2 ([20234-194963-01](#))

³⁵ Ibid., p. 2-3

³⁶ Ibid., p. 3

³⁷ *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, Enbridge – Line 93 Initial Comment Decommissioning Trust Fund and Attachment A, p. 9 ([20225-185918-02](#))

WSP's review concluded with the following:

"WSP reviewed Enbridge's use of the NEB/CER methodology to develop the 2022 Cost Estimate, as well as individual components, assumptions, factors, and contractor information considered by Enbridge in estimating the Line 93 removal costs. Based on this review and evaluation, WSP believes that, except with respect to the correct rate of inflation, the 2022 Cost Estimate approach and methodology used by Enbridge is reasonable, and that Enbridge furnished sufficient information to demonstrate their methodology and assumptions. WSP believes that the 2022 Cost Estimate is underestimated due to Enbridge's use of an inflation rate that is not current. It is also recommended that Enbridge consider the observations provided above to adjust the 2022 Cost Estimate, and to make adjustments as needed during the cost estimate review process established by the Commission."³⁸

In several areas, WSP made recommendations on things that should continue to be monitored in a cost estimate review process established by the Commission. As an example, Enbridge uses a contingency factor of 13% based on its own Systematic Contingency Estimation Tool. The National Energy Board typically approves contingency estimates for abandoned pipelines as submitted by the pipeline companies. However, WSP noted that the level of detail that Enbridge included in its estimate typically calls for a contingency range of 20% - 50%. WSP reported:

"...If the 2022 Cost Estimate contingency was set at 20%, this would result in an estimated cost increase of approximately \$71 million. Based on this, the current contingency factor should be reviewed for adjustment during the cost estimate review process established by the Commission."³⁹

Enbridge

In response to the independent review by WSP, Enbridge agreed to the updated inflation rate of 14.53%. As a result, Enbridge agrees to newly adjusted decommissioning cost estimate of \$1.249 billion and requested the Commission accept that cost estimate.⁴⁰

Friends of the Headwaters

FOH believes the trust should be funded at a level that would be appropriate for the state to do the reclamation work.⁴¹

E. Review Schedule

³⁸ *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, DOC DER, Decommissioning Cost Estimate Review, p. 5. ([20234-194841-01](#))

³⁹ *Ibid.*, p. 5.

⁴⁰ *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, Enbridge Supplemental Comments, p. 2. ([20234-194977-01](#))

⁴¹ *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, Friends of the Headwaters – Comments, p. 4-6 ([20233-193918-01](#))

Enbridge

Enbridge suggested a review schedule for every five years. They argued this aligns with the process in Canada as well as other Commission decommissioning processes. Enbridge stated:

“Enbridge proposes that every five years, the Commission and Enbridge would review the decommissioning cost estimate to determine whether it is still reasonable or needs to be revised. This review would also include evaluating whether the estimated trust and investment fees, taxes, rate of return, and inflation were correct or resulted in an overcollection or under-collection for that period. Enbridge would then revise the contribution amounts going forward based on that review. This is consistent with the process in Canada. Again, including the contribution amount in Commission orders rather than the Trust Agreement allows the Commission to update the contribution amounts without amending the Trust Agreement.”

DOC DER

The Department recommended that a review of the Trust should be done every three years rather than every five as suggested by Enbridge. The Department argued regular reviews are necessary to ensure the appropriate level of Enbridge’s ongoing contributions. This will limit the possibility of any unexpected shortfalls in the Trust fund.⁴²

Friends of the Headwaters

FOH argued that the trust fund should be revisited on an annual basis. They write “Enbridge’s five-year idea is not sufficient. Construction costs can and will likely change dramatically in that amount of time, and the trust would be seriously underfunded during that interval. If there is a construction cost deflator or some similar device to make this job easier in some years, that is worth discussing, so long as a full reappraisal occurs regularly.”⁴³

Enbridge

Enbridge indicated that it prefers the Commission do a cost estimate every five years. They argued that an interval less than 5 years is unnecessary and inefficient as the Department does not state how a shorter interval would mitigate risk. They write, “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.”⁴⁴

F. Payment Schedule/Funding Source**Enbridge**

While the Commission ordered collections over the 50-year life of the pipeline, Enbridge

⁴² *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, Enbridge – Comments Accompanying Draft Trust Agreement, p. 10. ([20231-191784-02](#))

⁴³ *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, Friends of the Headwaters - Comments, p. 8. ([20233-193918-01](#))

⁴⁴ *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, Enbridge – Reply Comments, p. 12 ([20234-194737-02](#))

proposed making payments over 30 years. 30 years is the economic life of Line 93 per a contract Enbridge has with its shippers. As a result, collections should be done over that period. Enbridge argued that this is shorter than the approach taken by the Commission. However, an even shorter term is not supported by the record that may be argued for by others.⁴⁵

The source of the funds and schedule is as follows: Within 90 days after receiving the Commission order requiring establishment of the Trust, Enbridge will file the Facilities Surcharge Mechanism ("FSM") with FERC, which will include the collection of decommissioning funds to be deposited in the Trust. The FSM becomes effective 30 days after it is filed. Enbridge will make its first monthly contribution to the Trust within 30 days after the FSM becomes effective.⁴⁶

Friends of the Headwaters

FOH argued that the market for gasoline and diesel will erode over time shortening the lifespan of Line 93. If Enbridge files for bankruptcy, it will avoid regulatory costs, focusing on paying its creditors first. FOH believes that as the market demand erodes for gasoline and diesel so will the leverage the Commission has over Enbridge through its permitting authority. They write, "The State can sue, but the Enbridge entity left with Line 93 may well use the Bankruptcy Code either to abandon Line 93 under 11 U.S.C. § 554, and thereby avoid its reclamation obligations altogether, or treat those obligations as general unsecured claims dischargeable at no more than pennies on the dollar."⁴⁷

FOH cited several examples of companies avoiding reclamation obligations. They believe the pay-in-period for the trust should be as short as possible. If an extended pay-in-period is warranted, FOH recommended examining the timelines used by environmental agencies for other projects.⁴⁸

DOC DER

The Department states that a 30-year timeline for payments defeats the purpose of the Trust. They argued that if Enbridge faces financial difficulty in year 10 there will not be adequate resources for decommissioning. Additionally, how Enbridge plans on collecting the resources for the Trust has no bearing on how or when the Trust is made whole. The Department argued the Trust needs to be fully funded as soon as reasonably feasible.⁴⁹

Friends of the Headwaters

FOH agreed with the Department that the 30-year contribution schedule is insufficient. They argued that the "...cost of decommissioning Line 93 is at 100% today and has been at 100%

⁴⁵ *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, Enbridge – Comments Accompanying Draft Trust Agreement, p. 15. ([20231-191784-02](#))

⁴⁶ *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, Enbridge – Supplemental Comments, p. 3. ([20234-194977-01](#))

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, Comments submitted by FOH, p. 2. ([20233-193918-01](#))

⁴⁸ *Ibid*, 4 -5, 7

⁴⁹ *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, DOC DER – Reply Comments, p. 3 ([20233-193904-02](#))

since the new pipeline was put into service in 2021, and even before.” The funds should be made available immediately, or on similar schedule as the EPA allows for waste facilities (5 years).⁵⁰

Enbridge

In response to the Department, Enbridge stated:

“...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. 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.”⁵¹

G. Startup Payment

DOC DER

The Department argued that Enbridge has known of the requirement to establish a Trust since September 2018, and yet has not reserved any money for the Trust. Complicating the issue even further, Enbridge will not contribute towards the fund until May 2024 at the earliest given its proposal. To help offset the shortfall, the Department recommended that the Commission require a significant lump sum payment to the Trust.⁵²

Friends of the Headwaters

In its filing FOH stated, “...the trust needs to receive the full necessary amount immediately; indeed, the trust should have been fully funded before Enbridge was able to commence operations of Line 93.”⁵³

If the Commission determines that it is appropriate to give Enbridge a longer pay-in period, “FOH recommends again looking to the requirements for financial assurance used by the environmental agencies. For waste facilities, the pay-in period is the expected life of the facility, or five years, *whichever is shorter*. See 40 C.F.R. § 264.143(a).”⁵⁴

Enbridge

Enbridge argued that the Commission has considered and resolved the issue of it having to make contributions prior to the establishment of the Trust by statements of Commissioners

⁵⁰ *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, Comments submitted by FOH, p. 5 ([20234-194731-01](#))

⁵¹ *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, Enbridge – Reply Comments, p.11 ([20234-194737-02](#))

⁵² *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, DOC DER – Reply Comments, p. 3 ([20233-193904-02](#))

⁵³ *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, Friends of the Headwaters - Comments, p. 9. ([20233-193918-01](#))

⁵⁴ *Ibid.* p. 9

during past proceedings. 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.”⁵⁵

H. Notable Information

Per Commission Order, Enbridge sent a letter to the Fond du Lac Band of Lake Superior Chippewa (Fond du Lac Band) and the other federally recognized Tribal Nations that were parties in the Line 3 Replacement CN docket. Additionally, the Enbridge contacted the Fond du Lac Band separately. As of January 3, 2023, the first draft trust submission by Enbridge, none of the tribal governments had requested to meet with Enbridge, nor has Enbridge received any questions or concerns regarding this proceeding. No Tribal Nations submitted comments for the record.⁵⁶

IV. Decision Options

Trust Structure

1. Require Enbridge to establish a decommissioning trust consistent with the terms and conditions identified in Attachment 1A to the Minnesota Department of Commerce’s April 19, 2023, Supplemental Comments, subject to any modifications identified herein. (*Department of Commerce*)
2. Require Enbridge to establish a decommissioning trust consistent with the terms and conditions identified in Attachment A to Enbridge’s April 12, 2023, Reply Comments, subject to any modifications identified herein. (*Enbridge*)
3. Require Enbridge to establish a decommissioning trust consistent with the terms and conditions identified in Attachment C to Enbridge’s April 12, 2023, Reply Comments. (*Enbridge modified Department of Commerce Agreement*)

Trust Protector

4. Require the designation of the Department of Commerce as the Trust Protector. (*Department of Commerce*)
5. Require Enbridge to propose a Trust Protector for Commission approval pursuant to the process identified in Attachment A to Enbridge’s April 12, 2023, reply comments. (*Enbridge*)
6. Require Enbridge to propose a Trust Protector for Commission approval in a compliance filing within 60 days of the order. (*Staff alternative to Enbridge*)
7. Require the designation of the State of Minnesota as the Trust Protector. (*Friends of the Headwaters*)

Trust Fund Balance

⁵⁵ *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, Enbridge – Reply Comments, p.11 ([20234-194737-02](#))

⁵⁶ *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, Enbridge Comments Accompanying Draft Trust Agreement, p.6 ([20231-191784-02](#))

8. Accept the cost estimate of \$1.249 billion identified in Enbridge's Supplemental Comments filed on April 19, 2023. (*Enbridge*)
9. Require Enbridge, within 60 days of the order, to file a revised cost estimate reflecting the additional costs that would be incurred if the State of Minnesota did the decommissioning work. (*Friends of the Headwaters*)

Startup Payment

10. Require Enbridge to make a significant initial lump sum contribution to the decommissioning trust in an amount to be determined by the Commission. Within 60 days of the order, parties shall file recommendations for the specific amount and timing of the initial contribution. (*Staff modification of Department of Commerce*)
11. Do not require any payments prior to the establishment of the trust. Require Enbridge, within 90 days after issuance of the Commission order requiring establishment of the Trust, to file the Facilities Surcharge Mechanism ("FSM") with FERC, which shall include the collection of decommissioning funds to be deposited in the Trust. The FSM shall become effective 30 days after it is filed. Enbridge shall make its first monthly contribution to the Trust within 30 days after the FSM becomes effective. (*Enbridge*)

Payment Period

12. Request that the Department and any other party wishing to do so file a recommendation identifying a specific contribution timeline in which the trust should be fully funded and an explanation of why that timeline is reasonable within 30 days of order issuance. (*Staff modification of Department of Commerce*)
13. Require Enbridge to make monthly payments to the trust for a total contribution of \$1.249 billion by October 1, 2051, unless the contribution schedule is revised by Commission order based on a subsequent decommissioning cost estimate. Monthly contributions shall be calculated using the formulas in Attachment C to Enbridge's January 3, 2023, Comments. (*Enbridge*)
14. Require Enbridge to fully fund the trust fund immediately. (*Friends of the Headwaters*)
15. Require Enbridge to fully fund the trust fund within a pay-in period equal to the expected life of the facility or five years, whichever is shorter. (*Friends of the Headwaters*)

Cost Estimate Review

16. Require Enbridge to file an updated cost estimate for Commission review and approval every three years. (*Minnesota Department of Commerce*)
17. Require Enbridge to file an updated cost estimate for Commission review and approval on an annual basis; or *[this option may be selected together with the next, or on its own]*
18. Require that the cost estimate be adjusted each year by a construction cost index during the periods between reviews. (*Friends of the Headwaters*)
19. Require Enbridge to file an updated cost estimate for Commission review and approval every five years. (*Enbridge*)

Compliance Filing

20. Require Enbridge, within 60 days of the order, to make a compliance filing including the final trust agreement reflecting the Commission's decisions herein, along with any other information necessary for compliance with the Commission's order.