

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Katie J. Sieben	Chair
Valerie Means	Commissioner
Matthew Schuerger	Commissioner
Joseph K. Sullivan	Commissioner
John A. Tuma	Commissioner

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

ISSUE DATE: May 1, 2020

DOCKET NO. PL-9/CN-14-916

REISSUANCE NOTICE

On January 23, 2019, the Commission issued its Order Approving Compliance Filings as Modified and Denying Motion (January 2019 CN Order). The January 2019 CN Order was later nullified by the decision of the Minnesota Court of Appeals in *In re Applications of Enbridge Energy, Limited Partnership, for a Certificate of Need and a Routing Permit for the Proposed Line 3 Replacement Project in Minnesota from the North Dakota Border to the Wisconsin Border*.¹

As explained in the Commission's Order Finding Environmental Impact Statement Adequate, Granting Certificate of Need as Modified, and Granting Routing Permit as Modified, filed in this docket on this date, the Commission has reissued the January 2019 CN Order attached to this Reissuance Notice.

This order shall become effective immediately.

BY ORDER OF THE COMMISSION



Will Seuffert
Executive Secretary

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¹ 930 N.W.2d 12 (Minn. Ct. App. 2019), *cert. denied*, (Minn. 2019).

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Dan Lipschultz
Matthew Schuerger
Katie J. Sieben
John A. Tuma

Commissioner
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Commissioner

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

ISSUE DATE: January 23, 2019

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ORDER APPROVING COMPLIANCE FILINGS AS MODIFIED AND DENYING MOTION

PROCEDURAL HISTORY

On April 24, 2015, Enbridge Energy, Limited Partnership (Enbridge) filed an application for a certificate of need for a 338-mile pipeline, along with associated facilities, extending from the North Dakota–Minnesota border to the Minnesota–Wisconsin border to replace the existing Line 3 pipeline.

On June 28, 2018, the Commission held a public agenda meeting and voted unanimously to grant Enbridge’s certificate of need for the new Line 3 pipeline contingent upon a number of modifications regarding a parental guaranty for environmental damages, a Landowner Choice Program, a Decommissioning Trust Fund, a Neutral Footprint Program, and general liability and environmental impairment liability insurance. The Commission ordered Enbridge to submit a compliance filing by July 16, 2018, that described the components of each of those modifications.

On July 11, 2018, the Commission issued a Notice of Compliance Filing Requirements and Comment Period on Certificate of Need Modifications for the Proposed Line 3 Replacement Project, setting July 30, 2018 as the deadline for responses to Enbridge’s July 16 compliance filing.

On July 16, 2018, Enbridge submitted its compliance filing containing details of the certificate of need modifications.

On July 20, 2018, the Minnesota Department of Commerce, Division of Energy Resources (DER) filed a letter recommending that the Commission not approve Enbridge’s July 16 filing concerning the Decommissioning Trust Fund.

On July 30, 2018, the following parties filed comments regarding Enbridge’s July 16 filing:

- DER
- Enbridge
- Fond du Lac Band of Lake Superior Chippewa (Fond du Lac Band)

- Friends of the Headwaters
- Honor the Earth
- Mille Lacs Band of Ojibwe (Mille Lacs Band)
- Minnesota Department of Natural Resources (MDNR)
- Minnesota Pollution Control Agency (MPCA)
- White Earth Band of Ojibwe and Red Lake Band of Chippewa (White Earth and Red Lake Bands)

On August 10, 2018, DER filed supplemental recommendations regarding Enbridge's July 16 filing.

On August 31, 2018, DER submitted a supplemental filing regarding specific deficiencies of Enbridge Inc.'s currently effective general liability insurance policies.

On September 5, 2018, the Commission issued its Order Granting Certificate of Need as Modified and Requiring Filings.

On September 6, 2018, Honor the Earth filed a Motion to Disclose Insurance Exclusion Clauses.

On September 7, 2018, Enbridge filed a letter and attachment containing updates to Enbridge's July 16 filing along with certain DER responses to Enbridge's information requests.

On September 10, 2018, Enbridge made a filing replacing Enbridge's September 7 filing with respect to certain designations of nonpublic data.

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

On September 20, 2018, Enbridge filed a response to Honor the Earth's Motion to Disclose Insurance Exclusion Clauses.

On October 16, 2018, Enbridge filed additional information regarding the Parental Guaranty and Decommissioning Trust Fund, including accidental release cost model results and decommissioning cost estimate.

On October 29, 2018, the Commission issued a Notice of Comment Period on Line 3 Project Accidental Release Cost Model Results, Decommissioning Cost Estimate, and Revised Parental Guaranty Filing.

On November 5, 2018, the following parties filed comments in response to Enbridge's October 16 filing:

- DER
- Donovan and Anna Dyrdal (the Dyrdals)
- Friends of the Headwaters
- Northern Water Alliance of Minnesota

On November 19, 2018, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Certificate of Need Modifications

In its September 5 order, the Commission granted to Enbridge a certificate of need for the new Line 3 contingent upon modifications that provide for a parental guaranty for environmental damages, a Landowner Choice Program, a Decommissioning Trust Fund, a Neutral Footprint Program, and general liability and environmental impairment liability insurance. The Commission required Enbridge to make a compliance filing describing the implementation of these modifications, which Enbridge submitted on July 16, 2018. Enbridge's proposed implementation of these modifications was challenged by parties and will be addressed individually and modified below.

A. Parental Guaranty

The Parental Guaranty required by the September 5 order will obligate Enbridge's parent company, Enbridge Inc. (Guarantor), to pay for environmental damages arising out of the construction or operation of the new Line 3 if Enbridge is unable to pay. This includes damages caused by any failure by Enbridge to follow the requirements under the route permit or certificate of need for the new Line 3, such as failure to remove the pipeline at the end of its service life. The September 5 order also requires ongoing reporting and spill modeling so that the Commission can ensure that Enbridge has sufficient financial resources and insurance to cover a worst-case-scenario spill.¹ The State of Minnesota and Minnesota American Indian tribes are designated beneficiaries under the guaranty.

1. Parties' Comments

In its November 5 comments, DER acknowledged that Enbridge's October 16 filing had addressed several of DER's concerns with the Parental Guaranty, including the definition of "occurrence," Enbridge's ability to raise latent defenses to avoid performance, and the Commission's ability to require additional financial assurances. DER continued to recommend a complete waiver by the Guarantor of all defenses, language requiring the Guarantor to provide financial information upon request from the Commission or DER, and the Guarantor's consent to suit in state district court.

Fond du Lac Band recommended several changes to the Parental Guaranty extending protection to Minnesota American Indian tribes, clarifying that the guaranty covers maintenance of the new Line 3 and removal of the existing Line 3, broadening the definition of "occurrence" to include pipeline leaks, and waiving all defenses by the Guarantor. Fond du Lac Band also had recommendations relating to Enbridge's ongoing reporting and modeling of a full-bore rupture that will be used to determine the adequacy of Enbridge's financial resources to cover the damages from a spill.

Friends of the Headwaters and Northern Water Alliance of Minnesota also argued that Enbridge's ongoing reporting and modeling of a full-bore rupture was flawed and recommended

¹ The Parental Guaranty and financial assurance information is contained in Attachment 1 to Enbridge's July 16 filing, Attachment A to Enbridge's September 7 filing, and Attachments A and B to Enbridge's October 16 filing.

several changes to the parameters of the model. Friends of the Headwaters objected to the proposed Parental Guaranty because it did not set specific minimum financial standards for Enbridge to meet, did not provide consideration for the guaranty, did not adequately ensure that Enbridge, Inc. consents to suit in state district court, and did not provide for joint and several liability among Enbridge entities.

Honor the Earth argued for changes to the definition of “obligations” in the Parental Guaranty, specification of the term of the guaranty, and a requirement that the Commission must approve any assignment of the guaranty to a non-affiliated entity.

Mille Lacs Band argued that the Parental Guaranty should specifically list the Minnesota American Indian tribes protected by the guaranty, and that Enbridge clearly consent to the jurisdiction of the tribal courts.

MDNR recommended requiring the State of Minnesota’s consent to an assignment of the guaranty to a parent or affiliate of the Guarantor, clarification of the term “non-appealable” with respect to the Guarantor’s liability, and a provision for handling emergency situations.

The Dyrdals argued for expanding the definition of “beneficiary” in the guaranty.

Enbridge submitted revisions to the Parental Guaranty on September 7, 2018, and October 16, 2018, incorporating various changes advocated by parties. For example, Enbridge clarified that Minnesota American Indian tribes are beneficiaries under the guaranty, that the State must approve any assignment, and that the definition of “occurrence” includes environmental damages resulting from the construction or operation of Line 3. Enbridge also clarified when Enbridge, Inc. can raise defenses in an action regarding its obligations under the guaranty, and Enbridge added a provision acknowledging that the Commission has the authority to require additional financial assurances in the event that the current assurances are insufficient.

Enbridge also submitted its Assessment of Highest Potential Consequence Locations for [Line 3 Replacement] in Minnesota (Spill Cost Assessment), an analysis showing that a full-bore oil spill at the “highest potential consequence location” would cost approximately \$1.4 billion, and asserted that Enbridge’s at-the-ready financial resources and insurance coverage more than covers this amount. With these changes to the Parental Guaranty, along with the spill analysis, Enbridge argued that the Parental Guaranty complied with the September 5 order.

2. Commission Action

The Commission finds that the revised Parental Guaranty submitted by Enbridge needs some additional revisions in order to comply with the requirements of the September 5 order. The Commission will require Enbridge to add the following language to Section 10 of the Parental Guaranty as presented in Enbridge’s October 16 filing:

- “Upon request of the Commission or the Department of Commerce, the Guarantor will, within 90 days after the end of each fiscal year of the Guarantor, deliver to the Commission and the Department of Commerce a copy of Guarantor’s consolidated and consolidating financial statements for such fiscal year, audited by independent certified public accountants (including a balance sheet, income statement, statement of cash flows,

statement of shareholder's equity, and, if prepared, such accountants' letter to management)."

- "Guarantor acknowledges and consents to suit in the courts of the State of Minnesota for specific performance or other relief by Beneficiary State of Minnesota upon any breach or failure of Guarantor to comply with the terms of Section 10."

B. Landowner Choice Program

The Landowner Choice Program allows the landowners along the existing Line 3 to choose to either have the decommissioned pipe removed from their land (so long as it is feasible and the required permits can be obtained) or accept compensation from Enbridge in exchange for allowing the pipe to be decommissioned in place.² The program will include an independent liaison to ensure that the program requirements are met, and landowners will have access to engineering consultation at Enbridge's expense.

1. Parties' Comments

DER made the following recommendations regarding the Landowner Choice Program: (1) the independent liaison should coordinate with landowners and oversee the independent engineer; (2) Enbridge should describe the processes for selecting the independent liaison and engineer, the development proposal, and implementation; (3) the program should include an enforceable completion date; (4) the program should include a dispute resolution process; (5) Enbridge should clarify that the program does not alter existing property rights; and (6) the term "landowners" should be clearly defined.

The Dyrdals recommended that the Landowner Choice Program should be opt-out rather than opt-in, that Enbridge's determination of infeasible removal be reviewable by the Commission, that the independent liaison have expanded responsibilities, and that communications with landowners be sent by certified mail.

Fond du Lac Band recommended that the program clarify that reservation lands are subject to federal and tribal law, and that Enbridge should be required at a tribe's request to compensate landowners on reservations for removal of the pipeline in order to incent removal rather than decommissioning in place. Fond du Lac Band also recommended that the tribes have access to the independent engineer, the program be available indefinitely, and that Enbridge submit a contaminated site management plan to the Commission for approval.

Fond du Lac Band and Mille Lacs Band recommended that the Minnesota American Indian tribes be consulted on the hiring of a Tribal Monitor.

Honor the Earth recommended that Enbridge wait until a final Commission decision before contacting landowners, provide a description of all mitigation possibilities, and provide draft permits to landowners and their neighbors.

MDNR recommended a number of changes to the Landowner Choice Program, including ensuring that landowner interests would be represented by an independent engineer and

² The Landowner Choice Program is described in Attachment 2 to Enbridge's July 16 filing and Enbridge's September 7 letter.

landowners have access to no-cost legal advice, clarification of the 5-year decision period and landowner compensation, acknowledgment that the program does not abridge the state's rights under existing permits and licenses, acknowledgment that removal must follow all applicable laws, and a requirement that Enbridge take certain precautions to avoid rare resources during removal.

MPCA questioned whether Enbridge has the legal authority under the landowner easements to carry out the program as proposed. MPCA also recommended that Enbridge clarify the role of its representatives in providing information to landowners, explain how the program dates coincide with construction and decommissioning timelines, describe the compensation to landowners, and possibly include a dispute resolution process in the program.

In its September 7 filing, Enbridge cautioned against requiring an agency or third-party contractor to administer the program, but will support and fund an agency liaison and independent engineer.

2. Commission Action

The Commission finds that Enbridge's Landowner Choice Program satisfies the requirements of the September 5 order once the following modifications are included:

- Landowners must indicate their decision regarding their participation in the Program by July 1, 2024.
- Enbridge will file a plan by July 1, 2022, outlining steps to be taken to contact landowners who have not responded with their decision regarding their participation in the Program.
- Any landowner whose request for removal cannot be honored for any reason, even after July 1, 2024, shall be offered compensation for allowing the pipe to be decommissioned in-place on the same terms as all other landowners who choose decommissioning in-place.
- All landowners shall be provided on request a preliminary written removal plan prior to their decision that identifies the extent of removal work, needed staging areas, anticipated reimbursable damages, anticipated permits and approvals needed, and the process for contacting the independent liaison, the independent third-party engineer, and the company during the decision process.
- Enbridge shall provide a final written removal plan to landowners that choose removal prior to commencing removal.
- Enbridge shall allow landowners or groups of landowners to select a different independent engineer to consult on removal options. Enbridge is only obligated to reimburse a landowner-selected third-party engineer up to the same terms and rates as those established in the contract that selected the third-party engineer arising out of the request for proposal process. Enbridge is only obligated to reimburse a landowner-selected third-party engineer if the landowner receives prior written approval from the independent liaison that the engineering consultant has shown that they are competent in pipeline removal or environmental damage remediation.

- The program description, notices to landowners, and documents filed in the Recorder’s office of each county shall state that receiving compensation and entering into this program where the landowner allows all or a portion of the pipe to be decommissioned in-place does not alter the obligation of Enbridge to remove exposed pipe as they committed to do in obtaining the certificate of need, nor does it alter Enbridge’s responsibility to address any environmental or safety law violations of any applicable federal, state, or local law regarding Enbridge’s pipe.
- For any disputes arising between landowners and Enbridge regarding the operation of the program that cannot be resolved through the use of the independent liaison and third-party engineer, Enbridge shall offer an independent mediation at Enbridge’s expense. If mediation is unsuccessful, only matters relating to the operation of the program established as a modification to the certificate of need may be brought to the Commission. The Commission will not resolve any property rights issues.

C. Decommissioning Trust Fund

The Decommissioning Trust Fund will be established to cover the costs of decommissioning and removing the new Line 3 at the end of the pipeline’s operation.³ The National Energy Board of Canada requires pipeline customers to pay additional tolls to raise the necessary funds to cover anticipated removal costs at the end of the pipeline’s service life. In the United States, funds have been established to cover closure costs of hazardous, solid waste, and mining facilities.

1. Parties’ Comments

DER recommended that the Decommissioning Trust Fund should:

- Be consistent with, and require no changes to, existing Minnesota and federal law;
- Include collections over the expected 50-year life of Line 3 project in Minnesota to equal approximately \$1.5 billion (USD) at least, as adjusted for inflation;
- Not be controlled by Enbridge Inc. or any present or future affiliated entity;
- Be established only for the purpose of deactivating, monitoring, and removing the pipeline together with remediation of the soil at the time Line 3 is taken out of service in Minnesota; and
- Include other provisions as required by the Commission.⁴

Friends of the Headwaters proposed that the Decommissioning Trust Fund be modeled after similar funds used in the United States rather than strictly following the National Energy Board of Canada’s model in order to avoid any conflict with federal or state law.

³ The Decommissioning Trust Fund is described in Attachment 3 to Enbridge’s July 16 filing, Enbridge’s September 7 letter, and Attachment C to Enbridge’s October 16 filing.

⁴ See DER November 5 Comments at 4.

Enbridge submitted a decommissioning cost estimate in its October 16 filing indicating that the cost to remove the new Line 3 would be approximately \$983 million. Enbridge also stated in its September 7 filing that it had continued to make progress in establishing a fund.

2. Commission Action

The Commission will accept Enbridge's July 16, 2018 compliance filing and Attachments 3A, 3B, and 3C as further modified by Enbridge's July 30, September 7, and October 16, 2018 filings relating to the Decommissioning Trust Fund. However, the Commission believes that additional work is needed to develop the Decommissioning Trust Fund. The Commission will open a docket with filing deadlines and comment periods set by the Executive Secretary for the purpose of establishing the terms and conditions of the Decommissioning Trust Fund. Enbridge shall consult with DER regarding its recommendations that the Decommissioning Trust Fund should:

- Be consistent with, and require no changes to, existing Minnesota and federal law;
- Include collections over the expected 50-year life of Line 3 project in Minnesota to equal approximately \$1.5 billion (USD) at least, as adjusted for inflation;
- Not be controlled by Enbridge Inc. or any present or future affiliated entity;
- Be established only for the purpose of deactivating, monitoring, and removing the pipeline together with remediation of the soil at the time Line 3 is taken out of service in Minnesota

Enbridge shall analyze for Commission consideration the benefits of establishing the trust consistent with the Environmental Protection Agency and Bureau of Land Management rules for financial assurances for decommissioning trust funds, as well as the Canadian National Energy Board's provisions.

D. Neutral Footprint Program

The Neutral Footprint Program requires Enbridge to (1) purchase renewable energy credits (RECs) to offset the incremental increase in nonrenewable energy consumed by the new Line 3, and (2) establish a tree replacement program for the trees removed during construction of the new Line 3.⁵ This program seeks to mitigate the environmental impacts caused by the construction and operation of the new Line 3.

1. Parties' Comments

DER recommended that the calculation of incremental energy to determine required REC purchases "should be the difference between the baseline annual energy used for the existing Line 3 and the annual energy used for the new Line 3."⁶

⁵ The Neutral Footprint Program is discussed in Attachment 4 to Enbridge's July 16 filing and Enbridge's September 7 letter.

⁶ *Id.* at 5.

The Dyrdals argued that private landowners should have access to any Tree Fund established to facilitate tree replacement.

Fond du Lac argued that Enbridge should be required to consult with the Minnesota American Indian tribes regarding the location of tree replacement and other mitigation, and provide copies to the tribes of any reports provided to the Commission.

MDNR and MPCA opposed Enbridge's proposal limiting trees eligible for replacement to "merchantable timber" because "there is significant vegetation and tree loss beyond the merchantable timber category."⁷ Both agencies also recommended that Enbridge clarify how the "net zero standard" will be calculated for purposes of tree-for-tree replacement.

Enbridge argued in its September 7 filing that its calculation methodology for determining required REC purchases comports with the September 5 order because it provides for Enbridge to purchase RECs to offset the difference between electric usage on the Enbridge Mainline System before and after the new Line 3 goes into service. Enbridge indicated that it was open to using a different standard than merchantable timber for the tree replacement program as recommended by MDNR.

2. Commission Action

The Commission will approve the Neutral Footprint Program described in Enbridge's July 16 compliance filing with the following modifications:

- The calculation of incremental energy and RECs to be purchased by Enbridge shall be based on the difference between a representative baseline level of electricity use for the existing Line 3 and the annual electricity use for the new Line 3.
- Enbridge shall consult with the MDNR to determine a tree-for-tree net zero impact. This net zero calculation shall not be limited to merchantable timber. Trees removed from private land shall be replaced on private land in consultation with the landowner. Trees removed from tribal reservation land shall be replaced on tribal reservation land or other land as directed by the tribal government. Trees removed from public land (state, county, or municipal) shall be replaced within the same jurisdiction to the extent practicable and upon consultation with the unit of government that has jurisdiction over the removal.
- Enbridge shall annually file on April 1 the results of the Neutral Footprint Program.

The Commission approves the Neutral Footprint Program with the understanding that MDNR will consult with tribal governments regarding the tree replacement program.

E. General Liability and Environmental Impairment Liability Insurance

The September 5 order adopted DER's recommendations regarding general liability and environmental impairment liability insurance policies that Enbridge must acquire and maintain in order to cover potential environmental pollution costs caused by the construction and operation

⁷ MDNR Comments at 4.

of the new Line 3.⁸ These recommendations include annual reporting requirements to confirm that coverage is maintained.

1. Parties' Comments

DER made a number of recommendations relating to Enbridge's general liability and environmental impairment liability insurance. These recommendations relate to the efforts Enbridge must make to obtain the requisite insurance coverage, the level of coverage, the terms of coverage, and required filings.

Fond du Lac recommended that the Minnesota American Indian tribes be listed as additional insureds under the general liability and environmental impairment liability policies.

Friends of the Headwaters recommended that the Commission set up a standby trust if Enbridge is unable to procure any of the required policies in the marketplace.

Enbridge strongly disagreed with DER's analysis and recommendations regarding the insurance coverage required by the September 5 order.

2. Commission Action

The Commission will approve Enbridge's July 16 compliance filing related to general liability and environmental impairment liability insurance as modified by the following:

- Regarding insurance availability, the phrase "market availability of insurance on commercially reasonable terms" should be modified to mean "the type of insurance and terms that are available to pipelines generally in the marketplace; that insurance and its terms should be deemed to be terms that are commercially reasonable for the coverage available to any one pipeline risk generally in the marketplace and not just to Enbridge."
- In order for the Commission to conclude that minimum coverages of general liability and environmental impairment liability insurance are unavailable to Enbridge, Enbridge must show that insurance coverage is unavailable to its peer group of pipeline companies as benchmarked by an international insurance brokerage firm with experience in insuring a threshold number of pipeline companies.
- Carriers affiliated with any Enbridge entity may provide insurance coverage only up to \$50 million for general liability assuming the present \$940 million in total general liability coverage or 5 percent of the \$100 million minimums for both general liability and environmental impairment liability insurance, such that 5 percent of the \$100 million minimum would be up to \$5 million for general liability and environmental impairment liability insurance.
- Enbridge is permitted to use its general liability aggregate coverage to cover Line 3, as Enbridge presently intends to do, or choose to provide a reinstatement of a limits policy that would need only cover Line 3. Enbridge shall purchase an annual environmental

⁸ The insurance requirements are discussed in Attachment 5 to Enbridge's July 16 filing and Enbridge's September 7 letter.

impairment liability policy with aggregate coverage of \$200 million or demonstrate that this coverage is unavailable in the marketplace to Enbridge Inc.'s peer group of pipeline companies, as benchmarked by an international insurance brokerage firm with experience in insuring a threshold number of pipeline companies.

- Enbridge shall increase the amount of its insurance in the event that total available funding from the Oil Spill Liability Trust Fund falls below \$1 billion so as to maintain a total of \$1.2 billion (including insurance) available in the event of a spill on Line 3.
- Enbridge shall make a revised insurance filing consistent with this order. The general liability insurance policies shall provide coverage for damages arising out of oil spills, and not include requirements that would be impractical or impossible to implement. The \$50 million general liability self-insurance limitation assumes that Enbridge maintains its general liability umbrella coverage of \$940 million for its total operations.
- Enbridge is required to annually file a full copy of the lead general liability and environmental impairment liability insurance policies and endorsements applicable to Line 3, including any policies and restrictive endorsements that may diminish coverage for crude oil spills in any way including by other insurance carriers within the coverage stack.
- Enbridge must include the following Minnesota American Indian tribes as additional insureds on its policies:
 - Fond du Lac Band of Lake Superior Chippewa
 - Leech Lake Band of Ojibwe
 - Mille Lacs Band of Ojibwe
 - Red Lake Band of Chippewa
 - White Earth Band of Ojibwe
- Enbridge bears the burden to show that one or more of its insurance policies provide the insurance coverage described above and the language of other policies does not diminish or eliminate that coverage.

The Commission understands that Enbridge's current Canadian umbrella liability insurance policy may provide coverage for damages from crude oil spills in the United States that are excluded under its U.S. umbrella policy.

II. Honor the Earth Motion

The Minnesota Government Data Practices Act (MGDPA) "regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities."⁹ Any data collected and maintained by a government entity is presumed to be public unless federal or state law requires otherwise.¹⁰

⁹ Minn. Stat. § 13.01, subd. 3.

¹⁰ *Id.*; Minn. Stat. § 13.02, subd. 7.

The Protective Orders in each of the Line 3 proceedings before the Commission allow parties to designate information as nonpublic if it meets the definitions of “trade secret information,” “security information,” or “nonpublic data” under the MGDPA. The Protective Orders also allow any party to challenge the nonpublic designation of any data.

Honor the Earth filed a motion to make public certain exclusion clauses in Enbridge’s insurance policies. Enbridge has identified these policies as trade secret information, claiming that the information is economically valuable to Enbridge due to its secrecy and that Enbridge makes reasonable efforts to protect its secrecy.¹¹

Honor the Earth argues that Enbridge did not properly describe why the exclusion clauses should be considered trade secret, that public disclosure would not impact the economic interests of Enbridge or its insurers, that Enbridge’s insurance policies should not contain exclusions that limit coverage for oil spills, and that the exclusion clauses are not confidential because the Commission has already defined the scope of coverage.

Enbridge argues that it has negotiated with insurers to develop the language in the exclusion clauses and that no other entity has access to this information. It argues that other pipeline companies would gain a competitive advantage in the insurance market if they had access to this particular information, which could limit the insurance coverage available to Enbridge or raise the cost of such insurance.

The Commission agrees with Enbridge that disclosure of the exclusion clauses would harm Enbridge economically, which means that Enbridge derives economic value from the secrecy of the information. The Commission is also persuaded that Enbridge makes reasonable efforts to protect the secrecy of its insurance policies. For these reasons, the Commission will deny Honor the Earth’s Motion to Disclose Insurance Exclusion Clauses.

ORDER

1. The Commission approves the Parental Guaranty as presented in Enbridge’s October 16 filing with the following language added to Section 10 of the Parental Guaranty:
 - a. “Upon request of the Commission or the Department of Commerce, the Guarantor will, within 90 days after the end of each fiscal year of the Guarantor, deliver to the Commission and the Department of Commerce a copy of Guarantor’s consolidated and consolidating financial statements for such fiscal year, audited by independent certified public accountants (including a balance sheet, income statement, statement of cash flows, statement of shareholder’s equity, and, if prepared, such accountants’ letter to management).”
 - b. “Guarantor acknowledges and consents to suit in the courts of the State of Minnesota for specific performance or other relief by Beneficiary State of

¹¹ Minn. Stat. § 13.37, subd. 1(b).

Minnesota upon any breach or failure of Guarantor to comply with the terms of Section 10.”

2. The Commission approves the Landowner Choice Program described in Enbridge’s July 16 compliance filing with the following modifications:
 - a. Landowners must indicate their decision regarding their participation in the Program by July 1, 2024.
 - b. Enbridge will file a plan by July 1, 2022, outlining steps to be taken to contact landowners who have not responded with their decision regarding their participation in the Program.
 - c. Any landowner whose request for removal cannot be honored for any reason, even after July 1, 2024, shall be offered compensation for allowing the pipe to be decommissioned in-place on the same terms as all other landowners who choose decommissioning in-place.
 - d. All landowners shall be provided on request a preliminary written removal plan prior to their decision that identifies the extent of removal work, needed staging areas, anticipated reimbursable damages, anticipated permits and approvals needed, and the process for contacting the independent liaison, the independent third-party engineer, and the company during the decision process.
 - e. Enbridge shall provide a final written removal plan to landowners that choose removal prior to commencing removal.
 - f. Enbridge shall allow landowners or groups of landowners to select a different independent engineer to consult on removal options. Enbridge is only obligated to reimburse a landowner-selected third-party engineer up to the same terms and rates as those established in the contract that selected the third-party engineer arising out of the request for proposal process. Enbridge is only obligated to reimburse a landowner-selected third-party engineer if the landowner receives prior written approval from the independent liaison that the engineering consultant has shown that they are competent in pipeline removal or environmental damage remediation.
 - g. The program description, notices to landowners, and documents filed in the Recorder’s office of each county shall state that receiving compensation and entering into this program where the landowner allows all or a portion of the pipe to be decommissioned in-place does not alter the obligation of Enbridge to remove exposed pipe as they committed to do in obtaining the certificate of need nor does it alter Enbridge’s responsibility to address any environmental or safety law violations of any applicable federal, state, or local law regarding Enbridge’s pipe.
 - h. For any disputes arising between landowners and Enbridge regarding the operation of the program that cannot be resolved through the use of the

independent liaison and third-party engineer, Enbridge shall offer an independent mediation at Enbridge's expense. If mediation is unsuccessful, only matters relating to the operation of the program established as a modification to the certificate of need may be brought to the Commission. The Commission will not resolve any property rights issues.

3. The Commission accepts Enbridge's July 16, 2018 compliance filing and Attachments 3A, 3B, and 3C as further modified by Enbridge's July 30, September 7, and October 16, 2018 filings relating to the Decommissioning Trust Fund. A docket shall be opened with filing deadlines and comment periods set by the Executive Secretary for the purpose of establishing the terms and conditions of the Decommissioning Trust. Enbridge shall consult with DER regarding the provisions on page 4 of DER's November 5, 2018 letter. Enbridge shall analyze for Commission consideration the benefits of establishing the trust consistent with the Environmental Protection Agency and Bureau of Land Management rules for financial assurances for decommissioning trust funds, as well as the Canadian National Energy Board's provisions.
4. The Commission approves the Neutral Footprint Program described in Enbridge's July 16 compliance filing with the following modifications:
 - a. The calculation of incremental energy and RECs to be purchased by Enbridge shall be based on the difference between a representative baseline level of electricity use for the existing Line 3 and the annual electricity use for the new Line 3.
 - b. Enbridge shall consult with the Minnesota Department of Natural Resources to determine a tree-for-tree net zero impact. This net zero calculation shall not be limited to merchantable timber. Trees removed from private land shall be replaced on private land in consultation with the landowner. Trees removed from tribal reservation land shall be replaced on tribal reservation land or other land as directed by the tribal government. Trees removed from public land (state, county, or municipal) shall be replaced within the same jurisdiction to the extent practicable and upon consultation with the unit of government that has jurisdiction over the removal.
 - c. Enbridge shall annually file on April 1 the results of the Neutral Footprint program.
5. The Commission approves Enbridge's July 16 compliance filing related to general liability and environmental impairment liability insurance as modified by the following:
 - a. Regarding insurance availability, the phrase "market availability of insurance on commercially reasonable terms" should be modified to mean "the type of insurance and terms that are available to pipelines generally in the marketplace; that insurance and its terms should be deemed to be terms that are commercially reasonable for the coverage available to any one pipeline risk generally in the marketplace and not just to Enbridge."

- b. In order for the Commission to conclude that minimum coverages of general liability and environmental impairment liability insurance are unavailable to Enbridge, Enbridge must show that insurance coverage is unavailable to its peer group of pipeline companies as benchmarked by an international insurance brokerage firm with experience in insuring a threshold number of pipeline companies.
- c. Carriers affiliated with any Enbridge entity may provide insurance coverage only up to \$50 million for general liability assuming the present \$940 million in total general liability coverage or 5 percent of the \$100 million minimums for both general liability and environmental impairment liability insurance, such that 5 percent of the \$100 million minimum would be up to \$5 million for general liability and environmental impairment liability insurance.
- d. Enbridge is permitted to use its general liability aggregate coverage to cover Line 3, as Enbridge presently intends to do, or choose to provide a reinstatement of a limits policy that would need only cover Line 3. Enbridge shall purchase an annual environmental impairment liability policy with aggregate coverage of \$200 million or demonstrate that this coverage is unavailable in the marketplace to Enbridge Inc.'s peer group of pipeline companies, as benchmarked by an international insurance brokerage firm with experience in insuring a threshold number of pipeline companies.
- e. Enbridge shall increase the amount of its insurance in the event that total available funding from the Oil Spill Liability Trust Fund falls below \$1 billion so as to maintain a total of \$1.2 billion (including insurance) available in the event of a spill on Line 3.
- f. Enbridge shall make a revised insurance filing consistent with this order. The general liability insurance policies shall provide coverage for damages arising out of oil spills, and not include requirements that would be impractical or impossible to implement. The \$50 million general liability self-insurance limitation assumes that Enbridge maintains its general liability umbrella coverage of \$940 million for its total operations.
- g. Enbridge is required to annually file a full copy of the lead general liability and environmental impairment liability insurance policies and endorsements applicable to Line 3, including any policies and restrictive endorsements that may diminish coverage for crude oil spills in any way including by other insurance carriers within the coverage stack.
- h. Enbridge must include the following Minnesota American Indian tribes as additional insureds on its policies:
 - i. Fond du Lac Band of Lake Superior Chippewa
 - ii. Leech Lake Band of Ojibwe
 - iii. Mille Lacs Band of Ojibwe

- iv. Red Lake Band of Chippewa
- v. White Earth Band of Ojibwe

- i. Enbridge bears the burden to show that one or more of its insurance policies provide the insurance coverage described above and the language of other policies does not diminish or eliminate that coverage.

- 6. The Commission denies Honor the Earth's Motion to Disclose Insurance Exclusion Clauses.
- 7. This order shall become effective immediately.

BY ORDER OF THE COMMISSION



Daniel P. Wolf
Executive Secretary



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