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POST-HEARING MEMORANDUM OF DONOVAN AND ANNA DYRDAL
INTRODUCTION

Donovan and Anna Dyrdal submit this memorandum in opposition to Enbridge Energy’s applications for a certificate of need and route permit for the Line 3 Replacement Project. Both applications should be denied because the detrimental effects of the Project on farm properties and operations like the Dyrdals’, together with many other negative effects, outweigh the alleged need for the project and proposed right-of-way. Even if a certificate of need were recommended, in-trench replacement is a reasonable and prudent alternative to using new right-of-way, considering the effect of the proposed facility upon natural and socioeconomic environments like the Dyrdal farm.

BACKGROUND

Donovan and Anna Dyrdal are farmers in Norden Township, Pennington County, Minnesota (“Dyrdal Farm”). They have farmed their land for over 40 years, primarily raising small grain and row crops. Their farm property is already heavily burdened by Enbridge’s Mainline Corridor of pipelines. There are seven pipelines that run through the Dyrdals’ farm property, including existing Line 3. The Dyrdals intervened in this matter to oppose the construction and operation of yet another oil pipeline on their property—the proposed Line 3 Replacement Project.

Enbridge, Inc., a Canadian Corporation, owns and operates petroleum pipelines throughout Canada and the United States through its subsidiaries and affiliates. Enbridge affiliates applied to the Minnesota Public Utilities Commission for a certificate of need and route permit for the siting and construction of a 36-inch pipeline to replace existing Line 3.

ARGUMENT

I. A CERTIFICATE OF NEED SHOULD NOT BE GRANTED.
A. **Enbridge has not shown that it is entitled to a certificate of need under Minn. R. § 7853.130 (C)(2).**

Minn. R. § 7853.130 (C)(2) provides in relevant part as follows:

> [A] certificate of need shall be granted to the applicant if it is determined that: . . . (C) the consequences to society of granting the certificate of need are more favorable than the consequences of denying the certificate, considering: . . . (2) the effect of the proposed facility upon the natural and socioeconomic environments compared to the effect of not building the facility . . .

Kate O’Connell, Manager of the Energy Regulation and Planning Unit of the Minnesota Department of Commerce (DOC-DER) concluded in her direct testimony that “the [Public Utilities] Commission could determine that the high socioeconomic costs outweigh the minimal benefits to Minnesota of the proposed Project.” (Ex. DER-1 at 93-94 (O’Connell Direct)). In her testimony, Ms. O’Connell reviews the natural and socioeconomic costs associated with the Line 3 Replacement Project. Ms. O’Connell relies, in part, on the Final Environmental Impact Statement and information provided by Enbridge. Ms. O’Connell notes the Project’s natural environmental costs, which include risk of accidental oil release, potential damage to forests, risks to contributions to climate change, and environmental justice impacts. (Id. at 80-85) Ms. O’Connell also identifies projected socioeconomic costs, which include a passing reference to “property” and “cropland.” (Id. at 85 and 124). The negative costs of the project on cropland, and the farming socioeconomic, are not adequately addressed in the FEIS and Enbridge documents.¹ Mr. Dyrdal, who has lived with Enbridge Mainline Corridor oil pipelines for 40 years, is uniquely positioned to provide such testimony and evidence and fill in the gap in the record. So, while the Dyrdals agree with Ms. O’Connell’s conclusion that the high

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¹ Mr. Dyrdal filed objections to the Adequacy determination of the FEIS. See Exceptions of Donovan and Anna Dyrdal to Report of Administrative Law Judge on Determination of Adequacy of Final Environmental Impact Statement (Nov. 22, 2017) (eDocket No. 201711-137661-01(R))
socioeconomic costs of Line 3 Replacement outweigh minimal benefits to Minnesota, Ms. O’Connell’s conclusion is greatly strengthened by consideration of the Dyrdals’ experience with Enbridge.

The consequences of granting the certificate of need will include detrimental negative effects on socioeconomic environments like the Dyrdal Farm, which costs will not be mitigated. The Dyrdals’ experience with previous Enbridge pipeline projects, particularly the Alberta Clipper Pipeline and Southern Lights Diluent Project (herein after “Alberta Clipper Project”) which was constructed across the Dyrdal Farm in 2008-2009. The Alberta Clipper Project employed agricultural and environmental mitigation plans that are similar to those proposed in the Line 3 Replacement Project. Despite these plans, the Dyrdals experienced repeated and ongoing disruption to their farm operations from the installation of the Alberta Clipper. The L3 Replacement Project agricultural and environmental protection plans will likely be similarly ineffective in protecting the Dyrdal Farm from damage caused by Enbridge.

1. The installation of Line 3 Replacement will likely cause the loss of valuable topsoil. The Dyrdals’ experience demonstrates that they can expect to lose valuable topsoil if Enbridge installs the Line 3 Replacement. The cultivation of grain crops requires a suitable layer of topsoil, which contains elements of fertilizer, nutrients and moisture for the plants’

2 See order granting Pipeline Routing Permit Docket No. PL-9/PPL-07-361, adopting an Agricultural Mitigation Plan and Environmental Mitigation Plan as part of the Route permit for the Alberta Clipper pipeline project, issued December 29, 2008.

The Enbridge Environmental Mitigation Plan for the Alberta Clipper and Southern Lights Diluent Projects is filed with the Minnesota PUC in Docket PPL/07-361 as document number 20097-39778-09. The Enbridge Agricultural Mitigation Plan is filed with the Minnesota PUC in Docket PPL/07-361 as document number 20097-39778-07. The Dyrdals request that the ALJ take judicial notice of these documents.
nourishment and growth.\textsuperscript{3} Enbridge will likely carelessly mix valuable topsoil with subsoil, reducing crop production. (Ex. DY-1 at 2, lines 12-13 (Dyrdal Direct)). Mr. Dyrdal’s testimony was buttressed by photographic evidence showing how Enbridge left clay soils on the surface after the construction of the Alberta Clipper Project (Ex. DY-3 at 12 (Dyrdal Photographs Supporting Testimony)); see also Ex. DY-6 at 8, photograph showing soil mixing (Merjent Inspection Report by Lorentz); Ex. DY-7, at 2, 6, 7, photographs and notes showing topsoil mixing (Mergent Inspection Report by Toman); Ex. DY-8 at 3-7 (Dyrdal Complaint to Enbridge), Complaint of Mr. Dyrdal dated October 3, 2011, reporting mixing of “fat clay” along pipeline corridor and deep tilling by Enbridge of subsoil, mixing it with topsoil, photos 3-4). In addition, a 2010 letter from the University of Minnesota Extension Service noted that “[t]he entire area had not been finished well as there were numerous potholes holding water along the pipeline area and the topsoil appeared to be mostly clay.” (Ex. DY-4 at 2, (Howard Person Letter)).

More evidence of improper topsoil mixing was provided in a letter dated July 21, 2010, from Kathy Fillmore, District Conservationist, Natural Resources Conservation Service, U.S. Department of Agriculture, which noted that “Much of the soil in the corridor has been mixed .... I see a lot of clay and gravel along the pipeline corridor which is noticeably different in color and texture from the field surrounding the corridor. The results of mixed top – and subsoil may include poor infiltration, poor fertility, lower productivity and so forth”. (Ex. DY-5 at 1 (Kathy Fillmore Letter)).

As Mr. Dyrdal noted in his surrebuttal testimony, Enbridge has consistently failed to reestablish the topsoil conditions to his property, resulting in productivity losses. (Ex. DY-15 at 2, lines 4-5 (Dyrdal Surrebuttal)). This has occurred despite agricultural and environmental plans in place. (Id., lines 5-7). As a July 1, 2011, FSA aerial photograph shows, Enbridge has left a corridor of white, unproductive soil where the pipeline crosses the Dyrdal Farm. (Ex. DY-15A (Dyrdal Surrebuttal))

Not only has Enbridge left the Dyrdals with unproductive top soils, it has failed to timely remove large rocks unearthed by its installation work. (Ex. DY-3, at 13-14 (Dyrdal Photographs Supporting Testimony)). These photos show rock left by Enbridge after trenching work; see also Ex. DY-6 at 7 (Merjent Inspection Report by Lorentz) showing large rock left in EQIP area.

2. **The installation of Line 3 Replacement will likely cause subsidence to the Dyrdal Farm.** Enbridge’s trenching work will likely result in soil settling or subsidence issues around the pipe. These problems occurred on the Alberta Pipeline Project. (Ex. DY-3 at 15-16 (Dyrdal Photographs Supporting Testimony)). A June 28, 2010, letter from the University of Minnesota Extension Educator Howard Person, notes that “I can only assume the soil had settled around the pipeline or the company filling the area back in had failed to complete their work at the site.” (Ex. DY-4 at 2 (Howard Person Letter); see also, Ex. DY-6 at 5, photo showing unfilled pothole; at 8, 9, 11 showing subsidence on trench line (Merjent Inspection Report of Lorentz)). (Ex. DY-7 at 2, 4, 7 (Merjent Inspection Report of Toman).

3. **The installation of Line 3 Replacement will likely cause pernicious weed problems on the Dyrdal Farm.** Based on Mr. Dyrdal’s experience with Enbridge, he can expect to be left with pernicious weed problems. (Ex. DY-1; lines 14-15 (Dyrdal Direct)). The weed issues after the Alberta Clipper installation are evidenced by photographs provided by Mr.
Dyrdal. (Ex. DY-3 at 17-20, at 24-30 (Dyrdal Photographs Supporting Testimony)). Eventually, Mr. Dyrdal was able to eliminate some of the Enbridge weed issues, but only after great effort to obtain Enbridge’s cooperation.

After the Alberta Clipper Project installation, Mr. Dyrdal complained about weed issues, along with topsoil mixing and other issues, and Enbridge sent out its agent, Mergent, Inc., to inspect. These inspections showed the weeds and the failure to reestablish cover, which contributed to the weed problem. (Ex. DY-6 at 4, 9, 10 (Merjent Inspection Report of Lorentz); Ex. DY-7, at 2, 4, 12, 13 (Merjent Inspection Report of Toman)). Mr. Person, University of Minnesota Extension Educator, noted in 2010 that some perennial weeds were flowering and beginning to head out. (Ex. DY-4 at 1 (Howard Person Letter); see also Ex. DY-3 at 26-29 (Dyrdal Photographs Supporting Testimony)). Mr. Person notes also that Enbridge destroyed the Dyrdals’ EQIP filter strip, and as of June 28, 2010, had not restored it. (Ex. DY-4 at 1).

4. The installation of Line 3 Replacement will likely cause drainage problems on the Dyrdal Farm. Based on Dyrdals’ experience, Enbridge will likely leave the Dyrdal Farm with drainage and ponding problems. Mr. Dyrdal noted in his direct testimony that Enbridge has created drainage problems on his property. (Ex. DY-1 at 1, lines 18-19 (Dyrdal Direct)). Some drainage problems are caused by shallow or exposed pipes. (Id., a5 2, lines 1-9). But even the Alberta Clipper/LSr pipes, supposedly installed at proper depth has caused drainage and ponding problems. Ms. Fillmore observed, “I am also concerned about the effect mixed or disturbed soils have on subsurface natural drainage. From my observations, these corridors appear to hold back subsurface moisture; acting as a ‘dam’ or ‘limiting’ subsurface drainage.” (Ex. DY-5 at 1, Fillmore letter). The more recent drainage problems occurred when Enbridge left straw bales that blocked drainage ditches (Ex. DY-3, at 1, 3, 4), and silt fences (Ex. DY-5 at 1, Fillmore
letter) resulting in uneven terrain (Ex. DY-4 at 1, Person Letter), or subsoil/topsoil mixing, which blocks subsoil drainage. (Ex. DY-5 at 1). Mr. Dyrdal provided photographs showing ponding on either side of the pipeline corridor. (Ex. DY-3 at 5, 7 (Dyrdal Photographs Supporting Testimony).

B. The negative effects of the installation and maintenance of the line are unlikely to be properly mitigated.

Mr. Dyrdal testified that it took constant vigilance to compel Enbridge to partially correct problems Enbridge has left on his property. (Ex. DY-15 at 2, lines 7-10 (Dyrdal Surrebuttal)). Enbridge has assured Mr. Dyrdal that it would correct drainage problems, for example, but Enbridge has not followed through on its commitments to do so. (Ex. DY-1 at 2, lines 9-11 (Dyrdal Direct)).

1. The testimony of Britta Bergland is not convincing. The Dyrdals have no reason to believe that the L3 Replacement Project environmental and agricultural protection plans\(^4\) will protect the Dyrdal Farm. Britta Bergland, Senior Analyst and Chief Operating Officer of Mergent, Inc., who sponsored the protection plans, testified that the primary impacts of an oil pipeline that should be considered are those associated with pipeline construction and operation. (Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 52, lines 20-25; at 53, lines 109 (Bergland)) (Id., at 53, lines 13-15). If Ms. Bergland is correct, her testimony is no comfort to the Dyrdals.

In response to the Dyrdals’ concerns about the effects of pipeline construction and operation, Ms. Bergland only referred to the environment protection plan and agricultural protection plans that she said would likely be a condition of a route permit. But the Dyrdals—or any farmer whose land will be used for the Line 3 Replacement Project—should have little

\(^4\) The proposed Environmental Protection Plan and Agricultural Protection Plan are attached to the direct testimony of Paul Eberth (Ex. EN-24, Sched. 2, Appendix F & G (Eberth Direct)).
confidence in this response, given Enbridge’s record. Enbridge has been required to comply before with agricultural and environmental protection plans, which has not prevented significant damage and distress for the Dyrdals and their farm. Ms. Bergland testified that she had no direct knowledge of Enbridge’s compliance with the agricultural and environmental mitigation plans for the Albert Clipper project. (Id., at 106, lines 11-15). She did not know whether her company, Mergent, acted as a monitor of those plans in connection with the Alberta Clipper Project. (Id., at 106, lines 8-15; at 108, lines 18-23; at 110, lines 9-16). The Agricultural Protection Plan and Environmental Protection Plan are largely the same as they were for the Alberta Clipper, and those plans did not protect the Dyrdal Farm. But Ms. Bergland could not say whether L3 Project line installers would be trained to avoid topsoil mixing problems any better than the Alberta Clipper line installers. The agricultural and environment protection plans will not likely protect the Dyrdals given Enbridge’s record on Alberta Clipper.

II. THE ROUTE PERMIT SHOULD NOT BE GRANTED.

The route permit Enbridge requests should not be granted under Minnesota Rules § 7852.1900, Subp. 3, in part, because of the detrimental impact of the Line 3 Replacement Project on agricultural economies within the route, Enbridge’s poor record of mitigation, and the potential use of existing right-of-way.

A. Considerations for a route permit set forth under Minn. Stat. § 216B.02 and Minn. R. 7852.1900, Subp. 3 weigh against the route permit.

5 As Exs. 7-8 showed, Mergent acted as the monitor and inspector for Alberta Clipper. Mergent should be acting as monitor/inspector while it is a consultant for Enbridge. The Dyrdals and other farmers need an independent inspector of installation and maintenance work carried out by Enbridge.

6 See, ante p.4, note 2.
Minn. Stat. § 216G.02, Subd. 3, provides that the PUC will establish rules that must:

(4) provide criteria that the Commission will use in determining pipeline routes, which must include the existence of populated areas … and the impact of the proposed pipeline on the natural environment; … [and]

(9) require that a person who has constructed a pipeline, to the extent possible, restore the area affected by the pipeline to the natural conditions that existed immediately before construction of the pipeline, provided that this restoration is compatible with the safe operation, maintenance and operation of the pipeline.

The PUC has established the following route selection criteria, in relevant part:

Subp.3. **Criteria.** In selecting a route for designation and issuance of a pipeline routing permit, the Commission shall consider the impact on the pipeline of the following:

A. human settlement, existence and density of populated areas, existing and future land use, and management plans; . . .

D. economies within the route, including agricultural . . . [and]

H. the extent to which human or environmental effects are subject to mitigation by regulatory control and by application of the pipeline conditions . . . for pipeline right-of-way preparation, construction, clean up, and restoration practices.

1. The proposed route of the Line3 Replacement Project will detrimentally affect farm economies. (Minn. R. 7852, 1900, Subp. 3(D)). The evidence the Dyrdals provided in opposition to the proposed certificate of need applies with equal force to the proposed route for the Line 3 Replacement Project, particularly with respect to the detrimental impact on farm economies like the Dyrdals’. Enbridge’s installation of Line 3 Replacement will likely cause in improper mixing of topsoil with unproductive subsurface soils, the introduction of invasive pernicious weeds, subsidence due to improper back filling and soil compaction, and drainage
problems. These detrimental impacts on the Dyrdal Farm have been costly for the Dyrdals and have only been addressed in part by Enbridge after repeated efforts by the Dyrdals to compel Enbridge’s cooperation. The costs to the Dyrdal Farm economy are only part of the cost to farmers like the Dyrdals, of course, who must spend countless uncompensated hours pressing Enbridge to get the issues corrected.

2. **The detrimental effects of the route of the proposed Line 3 Replacement Project** will not likely be mitigated effectively. (Minn. R. 7852.1900, Subp. 3(H)). As discussed above, Enbridge proposes to mitigate the detrimental effects of the proposed Line 3 Replacement Project route by implementing certain agricultural and environment protection plans. These mitigation plans largely replicate the plans Enbridge applied in connection with the Alberta Clipper Project, which included another 36-inch pipe in new right-of-way. The Dyrdals provided evidence demonstrating the ineffectiveness of these mitigation measures in preventing damages caused by Enbridge with the Alberta Clipper Project. Enbridge’s principal witness sponsoring these plans could provide no assurance that the Line 3 Replacement Project mitigation plans will be implemented more effectively than the Alberta Clipper Project mitigation plans.

3. **The existing right-of-way can be used for a replacement of Line 3.** Even if the Administrative Law Judge recommends that a certificate of need be granted, Enbridge has failed to show that new right-of-way is necessary throughout much of the project area. Enbridge argues for a route permit that allows it to acquire new right-of-way and abandon the existing line in place. With respect to the Dyrdal property, this position is not compelling for several reasons.

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7 Please refer to pages 3-8 of this brief for a recitation of the relevant evidence.
8 Please refer to pages 3-9 of this brief for a recitation of the relevant evidence.
First, while Enbridge maintains that there are risks associated with removing and replacing Line 3 in its current right-of-way, Enbridge’s witnesses also testified that the work can be accomplished without damaging adjacent pipelines. When Barry Simonson, Manager of Engineering and Construction for Line 3 Replacement Mainline Executor was asked, “[i]s it your testimony that Enbridge cannot safely remove that old pipeline if required to, Mr. Simonson answered: “No, my testimony is that there are inherent risks associated with pipeline removal … .” (Evid. Hrg. Tr. Vol. 2B (Nov. 2, 2017) at 12, lines 1-8 (Simonson)). Mr. Simonson added, “In my professional opinion, yes, we can manage the risks.” (Id. lines 24-25).

Second, while Enbridge concedes that Line 3 can be removed and replaced in the existing right-of-way, it asserts that the cost will be high.9 But, Enbridge admits that it can pay the cost to remove the old Line 3.10 And, cost to Enbridge should not drive the route locations. The use of new right-of-way may cost Enbridge less, but it will cost landowners like the Dyrdals more, who will have to address additional damage to their properties and farm operations. The “efficiency” considerations advanced by Enbridge are devoid of consideration of the costs to farmers like the Dyrdals, who have spent great amounts of time and money to compel Enbridge to restore their land and correct problems created by the pipeline.11

Third, replacing Line 3 in the existing right of way has the benefit of removing the now deteriorating existing Line 3. Abandoning Line 3 in-place may lead to additional problems for

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owners like the Dyrdals, particularly with respect to subsidence. Enbridge’s plan for keeping the abandoned line in place relies on continued cathodic protection, which in turn depends on the existence of polyethylene tape bonded to the pipe. This tape, however, is failing on Line 3 and is becoming unbonded, undermining cathodic protection. (Ex. EN-12 at 17 (Kenneth Direct))

If the existing Line 3 fails and collapses, the soil above the line is likely to subside, causing additional problems for farmers. Enbridge states that it will voluntarily continue to monitor abandoned Line 3, but will dispense with monitoring when it concludes that such monitoring is no longer effective. (Evid. Hrg. Tr. Vol 2A (11/2/17) at 103, lines 15-20).

Removing Line 3 has the additional benefit of relieving farmers from the exposed portions of existing Line 3. The Dyrdals must work around exposed pipes on their property. While Enbridge committed to removing exposed pipe, it is uncertain Enbridge will abide by its commitment. Replacing existing L3 with a new line in-place will ensure that the old exposed line will be removed, and that shallow portions are properly lowered providing adequate depth-of-cover. Enbridge is proposing to take more right-of-way than it says it needs. The Dyrdals face a future of continued loss of farm land while abandoned pipelines left in the ground. This is grossly unfair to the Dyrdals. As a condition of a route permit, if abandoned, Line 3 should be removed.

CONCLUSION

Based on the forgoing, and all the documents and testimony in the record, the Dyrdals respectfully request that the Administrative Law Judge recommend that the Enbridge’s requested certificate of need and route permit be denied by the Minnesota Public Utilities Commission.
Respectfully submitted,

MALKERSON GUNN MARTIN LLP

Dated: January 23, 2018

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