

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION**

**In the Matter of Application of Enbridge Energy,  
Limited Partnership and Enbridge Pipelines  
(Southern Lights) LLC for a Certificate  
Of Need for the Alberta Clipper/Southern Lights  
Pipeline Projects**

(  
(  
(  
(  
(  
(  
(  
(  
(  
(  
(

**OAH Docket No.: 8-2500-19094-2  
MPUC Docket No. PL9/CN-07-465  
(Cert. of Need)**

**MCEA'S EXCEPTIONS  
TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS  
OF THE ADMINISTRATIVE LAW JUDGE**

**FRIDAY, AUGUST 1, 2008**

**TABLE OF CONTENTS**

	<b>Page</b>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>LEGAL STANDARD .....</b>	<b>1</b>
<b>ARGUMENT.....</b>	<b>1</b>
<b>I. THE ALJ’S REPORT ERRONEOUSLY CONCLUDES THAT THE APPLICANT HAS DEMONSTRATED A NEED FOR THE PROJECT .....</b>	<b>1</b>
<b>A. Pursuant To Statute, The Commission Cannot Authorize The Construction Of The Pipelines Unless They Are <i>Necessary</i> .....</b>	<b>2</b>
<b>B. The Applicant Has Not Satisfied The Assessment Of Need Criteria Provided In Minn. R. 7853.0130.....</b>	<b>3</b>
<b>1. Denial of the certificate of need will not adversely affect the future adequacy, reliability or efficiency of the energy supply .....</b>	<b>3</b>
<b>2. The “no action” alternative is more reasonable and prudent .....</b>	<b>7</b>
<b>3. The consequences to society of granting the certificate of need are not more favorable than the consequences of denying it.....</b>	<b>7</b>
<b>4. The construction and operation of the pipeline fails to comply with other policies, rules and regulations .....</b>	<b>8</b>
<b>II. THE ALJ’S REPORT ERRONEOUSLY CONCLUDES THAT THE ENVIRONMENTAL REVIEW FOR THE PROJECT WAS ADEQUATE....</b>	<b>9</b>
<b>A. The Commission Must Determine The Adequacy Of The Environmental Review Prior To Authorizing The Pipelines .....</b>	<b>9</b>
<b>B. The ALJ Appears Not To Have Considered The Full Record .....</b>	<b>9</b>
<b>C. MCEA Submits That The Environmental Review Complies Neither With The Pipeline Permitting Rules Nor With The Minnesota Environmental Policy Act (“MEPA”) .....</b>	<b>11</b>
<b>III. MCEA WITHDRAWS ITS OBJECTION TO APPLICANTS SUBMISSION OF TRADE-SECRET DOCUMENTS.....</b>	<b>12</b>
<b>CONCLUSION .....</b>	<b>12</b>

## INTRODUCTION

Pursuant to Minn. Stat. § 14.61 and Minn. R. 7829.2700, Minnesota Center for Environmental Advocacy (“MCEA”) files the following exceptions to the Administrative Law Judge’s (“ALJ’s”) recommendations in the above-captioned matters. MCEA urges the Commission to reject the ALJ’s recommendations because the Applicant has failed to establish a need for the proposed new pipelines as required by Minn. Stat. § 216B.243 and because the Commission has not yet prepared the detailed environmental impact statement Minn. Stat. § 116D.04, subd. 2a requires prior to authorizing the project.

MCEA will not reiterate the arguments and analysis already provided and part of the record of this matter. MCEA refers the Commission to its Post-Hearing Brief and its Post-Hearing Reply Brief for lengthier analysis and arguments already made to the ALJ. Rather, MCEA summarizes its position on the two issues identified and sets out the main reasons that adoption of the ALJ’s findings and recommendations would result in a Commission decision that would be affected by error of law, be unsupported by substantial record evidence, or be arbitrary and capricious.

## LEGAL STANDARD

The Commission has the legal duty to undertake an independent review of the entire record and reach its own conclusion. While the ALJ’s report is part of the record for the Commission to consider, it is the Commission, based on its independent review of the record the ALJ has compiled as well as the legal and factual issues raised by the parties, that must determine whether to grant the Applicant’s request for a Certificate of Need and Pipeline Routing Permit. *See* George A. Beck, *Minnesota Administrative Procedure*, 239 (Oct 2003 Suppl.) (“[Commission] officials render the final decision under the Administrative Procedures Act. The [Commission] must conduct its own review of the record and reach its own independent determination of all issues, whether legal or factual. It may not rubberstamp the finds and conclusion of the ALJ . . .”) (citations omitted). The Minnesota Supreme Court has “consistently stressed the importance of agencies employing their expertise to reach independent decisions and not to ‘rubber stamp’ the findings of a hearing examiner.” *City of Moorhead v. Minnesota Pub. Util. Comm’n*, 343 N.W.2d 843, 846 (Minn. 1984).

## ARGUMENT

### **I. THE ALJ’S REPORT ERRONEOUSLY CONCLUDES THAT THE APPLICANT HAS DEMONSTRATED A NEED FOR THE PROJECT.**

MCEA submits that the ALJ report and recommendations suffers from two errors. First, its analysis relies exclusively on the certificate of need assessment factors enumerated in the Minn. R. 7853.0130, ignoring the ultimate requirement of the statute which is that the Applicant demonstrate necessity. Second, MCEA disagrees with the ALJ’s interpretation of the evidence and requirements of the 7853.0130 assessment of need factors.

**A. Pursuant To Statute, The Commission Cannot Authorize The Construction Of The Pipelines Unless They Are *Necessary*.**

This Commission's decision is governed by the Certificate of Need statute, Minn. Stat. § 216B.243. The statute requires that, prior to authorizing pipelines like those proposed by the Applicant, the Commission must *determine* that the pipelines are *needed*. While the statute mandates that the Commission adopt, through rules, assessment of need criteria, those criteria supplement rather than displace the ultimate question: Are these pipelines necessary? *See* Minn. Stat. § 216B.243, subds. 1, 2. The statute prohibits granting a certificate of need unless the Applicant both demonstrates that demand cannot be met more cost-effectively through conservation and load-management measures *and* that it "has otherwise justified its need." Minn. Stat. § 216B.243, subd. 3. It is the Applicant's burden to show the necessity of its proposed new pipelines. *Id.*

That Minnesotans would *need* additional capacity to carry tar sands oil to refineries in the Midwest is incompatible with Minnesota's express statutory goals to reduce emissions of greenhouse gases. The Minnesota Legislature enacted and Governor Pawlenty signed into law the goal of reducing

statewide greenhouse gas emissions across all sectors producing those emissions to a level at least 15 percent below 2005 levels by 2015, to a level at least 30 percent below 2005 levels by 2025, and to a level at least 80 percent below 2005 levels by 2050.

Minn. Stat. § 216H.02, subd. 1. There is simply no way to square the "need" for additional pipelines to carry additional tar sands oil, which has an especially high level of greenhouse gas emissions associated with its lifecycle, with the goal to reduce greenhouse gas emissions. (Even if the statute did not refer to achieving reductions in "all sectors," it would be impossible to reach the statutory goals without reductions in petroleum use because 39% of statewide emissions come from burning petroleum. ALJ Record Exh. 351, tab 7.) If the Commission were to determine that this additional pipeline were necessary, it would be expressly defying the will of state lawmakers and the public which have made a commitment to *reducing* emissions. Thus, in light of the State's express policy to *reduce* the amount of fossil fuel consumption in the state, the Commission must take an especially cautious approach and view with skepticism requests such as this based on allegations that there is a *necessity* to *increase* the availability of fossil fuels.

Demonstrating necessity to increase fossil fuel availability in the face of Minnesota's express goals to dramatically reduce fossil fuel consumption would require an extraordinary record. The record offered by Applicants in this matter does not suffice. Minnesota already refines more fuel than it consumes. (Hrg T. p.192, ln 19 – 24) Indeed, the main argument offered to establish the *necessity* of the additional pipelines comes from the Office of Economic Security, not the Applicant, and it is based on *price*. The OES alleged that the additional supply of crude the pipelines offer would "mitigate" price increases in the event of market disruptions. (ALJ FOF 172.) (citing OES testimony). Even if the pipeline had a mitigating effect on price (which is questionable given that there is a global market for refined fuels), that benefit of the pipeline project does not make it a *necessity*.

Moreover, the Certificate of Need statute specifically prohibits authorization of construction of these pipelines unless the applicant shows that whatever increased demand there may be for these fuels cannot be met through conservation or load management measures. Minn. Stat. § 216B.243, subd. 3. The Applicant failed to make any showing with regard to this requirement. The ALJ noted that “Enbridge’s conservation programs are limited to internal corporate efforts to reduce the amount of resources that its operations consume.” (FOF ¶ 126.) Further, the ALJ found that “[a]s a common carrier of petroleum products, it does not have a conservation program that impacts or influences the broader demand for the materials that it transports.” *Id.* Again, however, the ALJ ignores the mandate of the statute: No certificate of need can be issued unless *the applicant can show* that demand cannot be met more cost effectively through conservation and load management. There is simply no such analysis or demonstration in this record.

In sum, there is not sufficient evidence in this record for the Commission to conclude, as required by *statute*, that the Applicant has demonstrated the necessity of additional pipelines to carry tar sands crude to and through Minnesota. The proposal is wholly contrary to the express goals of the State. The Applicant has not met its burden.

**B. The Applicant Has Not Satisfied The Assessment Of Need Criteria Provided In Minn. R. 7853.0130.**

The ALJ’s report errs in its analysis and consideration of the evidence relevant to the criteria in Minn. R. 7853.0130 which are designed to assist the Commission in determining whether a project is necessary. *See* Minn. Stat. 216B.243, subd. 1 (directing commission to adopt assessment of need criteria). Consideration of the criteria weighs against determining that additional pipelines to carry tar sands crude are a necessity.

**1. Denial of the certificate of need will not adversely affect the future adequacy, reliability or efficiency of the energy supply.**

The first criterion relates to “future adequacy, reliability, or efficiency of energy supply.” Minn. R. 7853.0130(A). It provides for consideration of “the accuracy of the applicant’s forecast of demand,” and the effect of “conservation programs,” as well as additional considerations less relevant to this proceeding. Minn. R. 7853.0130(A)(1)(2). MCEA refers the Commission to its post-hearing memoranda for extensive discussion of the inadequacies of the demand projections and consideration of conservation programs in addition to the arguments offered here. With regard to the ALJ’s conclusions, MCEA specifically points the Commission’s attention to the ALJ’s failure to consider future conservation programs that may not yet exist. (*See* ALJ Concl. ¶ 6). The Rule directs the Commission to consider not just existing but also *expected* conservation programs. Minn. R. 7853.0130(A)(2) (“effects of the applicant’s existing or expected conservation programs and state and federal conservation programs”)<sup>1</sup>. The state has an express

---

<sup>1</sup> While the reference to “expected” programs is modified by “applicant,” the reference, in light of the overall intent and purpose of the criteria, is clearly meant to apply broadly. The entire exercise is rooted in making predictions about what will be – there would be no reason to exclude from consideration state and federal conservation programs that are “expected.” Moreover, including consideration of the likelihood of such future programs would be consistent with the State’s preference for conservation as expressed in Minn. Stat. §216C and incorporated by

preference for conservation and the use of renewable resources, Minn. Stat. § 216C.05, as well as an express goal of implementing measures that will achieve significant reductions in emissions from fossil fuels over the short- and long-term, Minn. Stat. § 216H.02. Despite this, the ALJ dismissed as irrelevant the expectation that state conservation programs will affect demand, finding that the methods of achieving state goals “have yet to be determined.” (ALJ Concl. ¶ 6) While the methods for reducing emissions from fossil fuels like tar sands oil may be “yet to be determined” they certainly qualify as “expected.”

That state programs to reduce fossil fuel use *are, in fact, expected* is aptly demonstrated in the testimony of Mr. Dayton and exhibits which describe the many recommendations of Governor Pawlenty’s Minnesota Climate Change Advisory Group. (ALJ Record Exh. 351.) It is incorrect and contrary to the intent and purpose of the Certificate of Need statute that the Commission would have to wait for enactment and implementation of regulations requiring reductions in GHG before considering such policies when reviewing demand forecasts. This Commission is well aware of the ability, indeed the necessity, of those requesting permission to add infrastructure for increased energy production to account for likely changes in state, regional and federal policies that will affect price and demand for their energy product. The Big Stone II docket, which the Commission is now considering, provides an apt example. Here, the Applicant, OES, and the ALJ completely ignored these considerations.

In addition to the state-based policies that will be required to meet the statutory goals set out in Minn. Stat. § 216H, Governor Pawlenty has committed the state to regional efforts also aimed at reducing carbon-intensive fuel consumption. In November 2007, Governor Pawlenty entered into the *Energy Security and Climate Stewardship Platform for the Midwest* (the “*Midwest Platform*”) and the *Midwestern Greenhouse Gas Accord* (“the *GHG Accord*”). See Reuther Aff., Exh. 1, 2, 5-7. With other Midwest Governors (Indiana, Iowa, Kansas, Michigan, Ohio, South Dakota, Wisconsin and the Canadian Province Manitoba), Governor Pawlenty *agreed and committed to* pursuing a number of objectives with specific strategies which are directly targeted at *reducing* the demand for fuel from fossil fuels like tar sands crude. For example, Governor Pawlenty “endorse[d] and commit[ed his] respective state to implementation of a comprehensive, multi-pronged approach that includes the following integrated strategies: \* \* \* **4. Expand on existing biofuels production through the development of a bio-refinery industry** that minimizes GHG emission and produces liquid fuels, biogas, electricity, heat and bio-products from cellulosic biomass; **5. Establish a secure, domestic transportation fuel supply and infrastructure** that relies on the region’s sustainable production of electricity, biofuels, hydrogen and other low- or zero-carbon fuels. \* \* \* **7 Support the regional development and manufacturing of highly efficient and lower-carbon technologies** in vehicles and equipment, renewable and fossil energy production . . .” *Midwest Platform*, p. 5.

Among the policies Governor Pawlenty committed Minnesota to implementing is one geared at achieving a goal of having 50% of the transportation energy consumed in the region

---

reference in the Certificate of Need statute. See Minn. Stat. § 216B.243, subd. 1 (“The commission shall, pursuant to chapter 14 and sections 216C.05 to 216C.30 and this section, adopt assessment of need criteria. . .”); Minn. Stat. § 216C.05, subd. 1 (“The legislature finds and declares that continued growth in demand for energy will cause severe social and economic dislocations, and that the state has a vital interest in providing for increased efficiency in energy consumption [and] the development and use of renewable energy resources wherever possible . . .”).

come from “regionally produced biofuels and other low-carbon advanced transportation fuels” by 2025. *Midwest Platform*, p. 10. Neither the Applicants nor OES made any attempt to account for these commitments and goals when forecasting the demand for the carbon-intensive tar sands oil the Applicant proposes to deliver to the region.

In addition to the specific references in the *Midwest Platform* to agreements and commitments to policies that will affect demand for refined fuels from tar sands, the Governor also committed Minnesota to a Midwest regional effort to establish a “market-based and multi-sector cap-and-trade mechanism to help achieve GHG reduction targets” and to “develop and implement other associated mechanisms and policies as needed to achieve the GHG reduction targets, such as a low-carbon fuel standard . . . “ *GHG Accord*, p. 3. Participating states include Illinois, Iowa, Kansas, Michigan, Minnesota, Wisconsin, and the Province of Manitoba. *Id.*, p. 4. The commitment to a Midwest cap-and-trade that caps and lowers GHG emissions over time obviously will impact demand for fuel from tar sands crude. Tar sands crude leads to carbon-intensive fuel. According to one researcher, production of synthetic oil from tar sands results in 23% greater GHG emissions over conventional crude oil. Another report noted that production of tar sands oil releases approximately three times more GHG’s than pumping conventional oil. (MCEA Dec 14, 2007 Comment Letter, p. 6 and attachments.) Obviously, a cap and trade program, along with other policies targeted at *reducing* GHG emissions from fossil fuels, will lower demand for carbon-intensive fuels like those derived from tar sands.

In addition to Midwestern commitments to establishing a regional cap and trade system to reduce GHG emissions, federal legislation aimed at the same goal is becoming more and more likely. There were seven cap-and-trade bills introduced during the 110<sup>th</sup> Congress, and each one included transportation fuels in its scope. Reuther Aff., Exh. 3. Both of the current major party candidates for U.S. President support a cap and trade system to lower GHG emissions. According to his website, John McCain proposes a broad-based program that would include transportation fuels: “The cap-and-trade system would encompass electric power, transportation fuels, commercial business, and industrial business - sectors responsible for just under 90 percent of all emissions. Small businesses would be exempt.” <http://www.johnmccain.com/Informing/Issues/17671aa4-2fe8-4008-859f-0ef1468e96f4.htm> (last visited July 31, 2008).

The Applicants have provided no analysis or response in the face of this evidence. The OES completely disregarded Minnesota Statutes Section 216H which set steep reductions goals for state-wide GHG emissions across all sectors. Hrg Trans., p. 243 (OES witness Heinen stating that the statutory goals “gave me no clear guidance. Therefore, I decided to leave it out of my analysis.”) Although Governor Pawlenty, seven other Midwest governors and the premier of Manitoba “endorse[d] and commit[ed their] respective states to implementation” of specific policy recommendations that will clearly have an impact on demand for tar sands fuel, OES ignored the Governor’s commitments as well.

Moreover, changes are already occurring that, even in the absence of enacted policies and regulations requiring reduced fossil fuel use, are, in fact, having the effect of reducing demand for tar sands fuel. For example, based on information from the Minnesota Department of Transportation, the State last year cut its forecast for increases in vehicle miles traveled under the *business as usual* scenario from 1.9% per year to 0.8% per year through 2025. (ALJ Record

Exh. 351, tab 6D, p. 2-10.) The “business as usual” scenario reflects conditions *if the state did nothing* to encourage fewer vehicle miles traveled. Fewer vehicle miles traveled obviously impacts the demand forecasts relied on here, but they have not been accounted for by the Applicant or OES. Moreover, the Minnesota Department of Transportation’s business as usual projection was made *prior* to recent spikes in gas prices which have dramatically impacted vehicle miles traveled in Minnesota and the rest of the Midwest over the last year. According to the U.S. Department of Transportation’s most recent figures on vehicle miles traveled, there has been a **4.5% decrease** in miles traveled in the Midwest region in the last year. *See* US DOT, FHA, *Traffic Volume Trends*, May 2008, available at <http://www.fhwa.dot.gov/ohim/tvtw/08mayvt/08mayvt.pdf> and attached at Reuther Aff. Exh. 4.

The Applicant’s forecasted demand does not account for or reflect current reality. The only information supplied by the Applicant was a reference to the U.S. Energy Information Administration Annual Energy Outlook for 2007. (ALJ Record Exh. 300 § 7853.240, p. 6; ALJ Conl. ¶ 5.) The 2007 report did not take into account any of the policy objectives Midwestern governors have committed themselves to implementing, nor the reduction goals enacted into law in Minnesota. Demand for fuel, particularly carbon-intensive fuel from the tar sands, must and will decrease as the state, region and country address the reality of climate change. Goals, commitments and agreements are in place. It is unreasonable for the Applicants, OES and the ALJ to ignore this evidence and conclude that one national estimate for increased demand, which is based on a business-as-usual scenario, accurately reflects demand over the next 20 years. There is no evidentiary basis for the OES’s conclusion that the Annual Energy Outlook is a more accurate predictor than taking into account expected changes consistent with enacted goals. *See* Hrg. T. 249. (Mr. Heinen comparing the AEO predictions to the MCCAG policy recommendations: “I can’t say that one is more likely to happen or not.”)

Finally, the Commission should reject the ALJ’s recommendations because Applicant’s allegation of increasing future demand, to the extent it is accurate, would only affect price, not “adequacy, reliability, or efficiency.” This is clear from the OES witness’s testimony and the conclusion drawn in the ALJ’s recommendations. The ALJ, adopting OES testimony, finds that denial of the Certificate of Need would “constrain petroleum supply to Minnesota and surrounding regional markets, leading to higher petroleum prices . . . [which would] adversely affect the future adequacy, reliability, and efficiency of energy supply . . .” (ALJ Concl. ¶ 10) The criterion directs the Commission to consider *adequacy, reliability, and efficiency*. The OES witness whom the ALJ quotes conceded under cross examination that, at most, these pipelines would have a “mitigating” effect on rising prices in Minnesota and the region. But even if it were true, despite the existence of a global market for petroleum, that the absence of these pipelines could lead to higher regional prices, there has been no showing that the absence of the pipelines and the concomitant higher prices would impede the *adequacy, reliability, or efficiency* of energy supply. *See* Hrg. T. 195 (Mr. Heinen explaining that even if there were market disruptions or “shocks” elsewhere, in Minnesota the result could mean increased competition but “I don’t think you could say there would be a shortage.”) The price of fuel has doubled in the last year, but there are still adequate amounts, it is still available and reliable, and the increased price has actually led to increased efficiencies in fuel use, an explicit policy goal of the state.

## **2. The “no action” alternative is more reasonable and prudent.**

The only justification offered by the ALJ for rejecting the no action alternative is the OES witness’s conclusion, quoted above, that denial may “constrain petroleum supply” and lead to higher petroleum prices. OES’s conclusion of constrained supply is based on its assumption of increasing demand. If the Commission agrees with MCEA’s arguments regarding demand set out above and in its briefs, it must find that the conclusion of constrained supply is likewise fallacious.

Moreover, the Commission should reject any attempt to impose a bright line rule that increased costs would necessarily make an alternative unreasonable and imprudent. In fact, there may be instances where increased prices send market signals that *are* reasonable and prudent. Indeed, government decision makers routinely use consumer price signals to encourage and discourage consumer behavior based on benefits to the general welfare and public interest. Consider, for example, the cigarette tax. Appropriate price signals will be required to urge energy consumers to conserve and switch to low- and zero-carbon fuels – goals Governor Pawlenty has agreed to and committed the State of Minnesota to work toward. Thus, even if the OES’s conclusion with regard to constrained supply and increased price were accurate, it does not automatically follow that such a result is less reasonable and prudent. This is particularly true when, as the Commission is aware, the Applicant is proposing infrastructure that will *increase* the availability of carbon-intensive fuels which is in direct conflict with the goals of the Governor and the Legislature. The principle that increased costs alone do not justify environmentally damaging decisions is well established in Minnesota law. *See* Minn. Stat. § 116B.09, subd. 2 (no conduct causing or likely to cause pollution, impairment or destruction of the natural environment allowed so long as there is a feasible and prudent alternative and “[e]conomic considerations alone shall not justify such conduct”).

## **3. The consequences to society of granting the certificate of need are not more favorable than the consequences of denying it.**

The ALJ’s conclusions with regard to the third assessment of need criterion veer from the listed considerations. *Compare* ALJ Concl. ¶¶ 21 – 27 with Minn. R. 7853.0130(C).

The first consideration is the relationship of the pipeline to the “overall state energy needs.” Again, the ALJ’s findings are all contingent on the accuracy of the forecast of increased future demand, and MCEA will not reiterate those arguments here. Arguably, the most pressing “overall state energy need” is to *conserve* and *reduce* the use of carbon-intensive fuels such as those refined from tar sands crude.

The second consideration is the effect of the proposal on the natural and socioeconomic environments as compared to the effect of not building the facility. As set out fully in MCEA’s comment letters and its briefs in both this and the LSr matter, the environmental review for this project is inadequate. As a result, neither the ALJ nor the Commission has an adequate record on which to evaluate the effects of the project on the natural environment. This issue is discussed below.

The third consideration is the effects of the project in inducing future development. MCEA submits, again, that the Commission take a nuanced approach to evaluation of the criteria and avoid an analysis based on bright-line rules. While induced developments may be beneficial, they may also be harmful. Here, the ALJ concluded that induced development in the form of expanded refinery of fossil fuels both in Minnesota and Superior, Wisconsin, are a benefit of increasing the supply of tar sands crude. (ALJ FOF ¶¶ 232 – 33.) MCEA submits that inducing refinery expansions for the purpose of refining additional carbon-intensive fuels is directly contrary to the express goals of the Minnesota Legislature and Governor and is certainly *not* a favorable consequence of granting the certificate of need.

The fourth consideration is the socially beneficial uses of the output of the project, including its “uses to protect or enhance environmental quality.” As set out at some length in MCEA’s comments, briefs and the testimony of Mr. Dayton, the entire lifecycle of the system the pipeline is intended to serve is extremely damaging to the environment. The mining of tar sands oil, the laying of the pipeline, the refining of the crude, and the burning of the fuels all come at great environmental and social expense.

In sum, even based on an inadequately developed record of environmental consequences from the project, it is clear from consideration of the relevant factors that the negative consequences of granting the certificate of need outweigh any benefits. The Legislature and Governor have spoken on behalf of the people of Minnesota. The ALJ, ignoring the policy makers, has substituted his own judgment about whether increasing GHG emissions is a favorable consequence to society, but this Commission should not do the same. Rather, the Commission should recognize that the Legislature, Governor and people of Minnesota are changing course. As a result, when the consequence of granting a certificate of need will mean an increase in the production and availability of carbon-intensive fuels, the mining, transport, and burning of which are all extremely damaging to our environment, that consequence is *not* favorable to society.

#### **4. The construction and operation of the pipeline fails to comply with other policies, rules and regulations.**

The ALJ’s report, like the analysis and evidence offered by the Applicant and OES, fails to address the project’s compliance with “relevant *policies*, rules, and regulation of other state and federal agencies and local governments.” Minn. R. 7853.0130(D) (emphasis added). Rather, the ALJ ignores all of MCEA’s evidence and argument in concluding that “there is no indication in the record” that the project will not comply with relevant policies, rules, and regulations.

In its Post Hearing Brief, MCEA set out at some length the policies that the proposal to increase supply of tar sands oil do not comply with. (See MCEA Post-Hearing Brief, pp. 21 – 25.) MCEA does not reiterate those claims here but rather refers the Commission to its argument set out in the Brief.

The Commission should not make the same error as the ALJ, OES and the Applicant. The Certificate of Need statute, in addition to the rule, specifically states: “In assessing need, the

commission *shall* evaluate . . . (7) the policies, rules, and regulations of other state and federal agencies and local governments.” Minn. Stat. 216B.243, subd. 3(7) (emphasis added). Authorizing construction of new pipelines to increase the supply of tar sands oil is clearly at odds with the state and regional policies noted above.

In sum, consideration of the assessment of need criteria does not weigh in favor of the Applicant. The Applicant has the burden to demonstrate the *need* for these additional pipelines and the additional tar sands crude they will carry. Minn. Stat. § 216B.243, subd. 3. It has failed to do so and the Commission should deny the request for a Certificate of Need.

## **II. THE ALJ’S REPORT ERRONEOUSLY CONCLUDES THAT THE ENVIRONMENTAL REVIEW FOR THE PROJECT WAS ADEQUATE.**

### **A. The Commission Must Determine The Adequacy Of The Environmental Review Prior To Authorizing This Pipeline.**

The Minnesota Environmental Policy Act (“MEPA”) prohibits the Commission from making a final governmental decision on the Certificate of Need and Routing applications until it has determined that the environmental review prepared for the project is adequate. Minn. Stat. 116D.04, subd. 2b. As with the decision on granting or denying the Certificate or Permit, the decision on adequacy of environmental review rests with the Commission. The Commission is the “responsible governmental unit” for purposes of environmental review for pipelines. Minn. R. 4410.4400, subp. 24. MCEA submits that the Commission must therefore make a specific determination on the adequacy of the environmental review for this proposal prior to taking up consideration of the Certificate of Need or Routing Permit. The ALJ failed to make any such determination.

### **B. The ALJ Appears Not To Have Considered The Full Record.**

First, it appears that the ALJ failed to take into account or review extensive comments related to the environmental consequences of this project which MCEA filed in this docket. MCEA submitted numerous comments and arguments with regard to environmental impacts, but many of those comments, with attachments, were not filed by the ALJ with the record. In addition, the ALJ appears to only acknowledge one comment letter. (ALJ Report, p. 19.) And the ALJ’s report and attached memorandum confines its analysis to whether an environmental impact statement (“EIS”) is required for the project. (*See* ALJ Memorandum, p. 87.) MCEA takes exception to the ALJ’s findings related to issues of the effect of the project on the natural environment. (FOF ¶¶ 186 – 230.) The ALJ failed to consider the evidence supplied by MCEA and the DNR on the environmental impacts of the proposal, and, to the extent the ALJ made an adequacy determination at all, the Commission should not adopt it.

Before explaining in further detail MCEA’s position with regard to environmental review, MCEA submits that the record currently available on the e-docket system is incomplete and missing information MCEA submitted to the ALJ related to environmental review. Also, the “Master Exhibit List” compiled by the Applicant and e-filed is, as acknowledged by Mr. Gasele, limited to exhibits admitted during contested case hearings and does not, therefore, contain all

exhibits and comments that are part of the record. To ensure that the record for this matter is complete, MCEA lists here documents submitted to Judge Lipman for inclusion in the record and requests that staff ensure such documents are made available to the Commission.

1. 12/14/07 MCEA Comment letter to Judge Lipman.
2. 12/7/07 MCEA Comment letter to Betsy Orlando, State Department
3. Portion of AC Preliminary information package, Oct 2006
4. 11/14/07 printout from Enbridge website re North American solution to energy reliability and security of crude petroleum supply.
5. 11/14/07 printout from Enbridge website re projects in Minnesota
6. 5/9/07 Reuters article re Murphy Oil expansion
7. 9/13/07 Milwaukee Journal Sentinel article re Murphy Oil expansion
8. 12/7/07 printout from MPL website
9. Kealen Gell analysis of CO<sub>2</sub> in conventional vs. synthetic crude.
10. 12/5/07 printout of article from oilsandstruth.org
11. Polaris Institute, *A Dirty Little Secret: Canada's Global Warming Engine*
12. CCPA, *Fuelling Fortress America*
13. 12/5/07 printout from Sierra Club website re tar sands water.
14. January 1991 Report to the Minnesota Legislature, Carbon Dioxide Budgets . . .
15. 11/15/07 Midwestern GHG Accord
16. 12/27/07 printout of Annual Energy Outlook 2008 (early release)
17. 12/21/07 MCEA Comment letter to Judge Lipman
18. 12/28/07 MCEA Comment letter to Betsy Orlando, State Department
19. 2/1/08 MCEA Post-hearing comments in the LSr proceeding.
20. 1/23/08 Enbridge news release re Texas Access Crude Oil Pipeline
21. 1/23/08 printout from Texas Access Pipeline website
22. 1/10/08 Pending Policy Descriptions, MCCAG
23. 1/24/08 Star Tribune article re fewer vehicle miles traveled
24. 1/24/08 File Memo of Sean Durkin
25. 1/31/08 printout from Enbridge website re gateway project
26. 2/8/08 MCEA post-hearing reply comments in the LSr proceeding
27. 2/5/08 Star Tribune article re bus ridership
28. 4/21/08 MCEA Supplemental Comments to Judge Lipman
29. Map of summer breeding bird richness.
30. H. Andren, *Effects of Habitat Fragmentation...* in Oikos 1994.
31. L. Fahrig, *Effects of Habitat Loss and Fragmentation . . .* in Journal of Wildlife Management 1997.
32. D. Debinski and R. Holt, *Survey and Overview of Habitat Fragmentation Experiments*, in Conservation Biology 2000.
33. *Dead Lake Assoc v. Otter Tail Co*, unpublished MN Court of Appeals decision 2005.

**C. MCEA Submits That The Environmental Review Complies Neither With The Pipeline Permitting Rules Nor With The Minnesota Environmental Policy Act (“MEPA”).**

MCEA has two basic claims with regard to environmental review which will be summarized here, but, again, MCEA refers the Commission to its extensive comments and briefing in which these claims and arguments are much more fully developed.

First, MCEA claims, and the Department of Natural Resources (“DNR”) agrees, that the environmental assessment prepared by Enbridge is flawed, lacks sufficient detail, and does not adequately address mitigation of the impacts the pipeline itself will have on the environment. *See, e.g.*, DNR 4/21/08 Comments, p. 1 (“DNR sees major problems with this document and does not feel it is an actual environmental analysis”); *Id.* (concluding that comparisons “are based on flawed methodology and are essentially completely unreliable”); *Id.*, p. 13 (stating that original mitigation plan was “essentially the same one they used 8 – 10 years ago on previous projects” and that mitigation is “entirely in the purview of the PUC, since Enbridge has rejected [DNR’s] proposals”). MCEA set out in detail the shortcomings of the analysis in its December 7, 2007, December 14, 2007, December 21, 2007, December 28, 2007, and April 21, 2008 comment letters and attachments as well as its post hearing memoranda in both the LSr and this proceeding. Thus, MCEA’s first complaint is that the Applicant failed to satisfy the requirements of the Certificate of Need and Routing permit rules with regard to environmental impacts from physically laying the pipelines.

Second, MCEA maintains that the PUC’s routing and certificate of need rules, at least as they have been interpreted and applied by the Applicant, the OES and the ALJ, do not satisfy the basic requirements of MEPA. While the Environmental Quality Board approved the pipeline permitting rules as alternatives pursuant to Minn. R. 4410.3600, its approval is grounded in a finding that the pipeline environmental analysis will be “the equivalent to the EIS review requirements.” Reuther Aff. Exh. 8 *In the Matter of the Approval of EQB Pipeline Routing Rules*, FOF ¶ 3. Indeed, the EQB could only approve the alternative rules if the rules “address the same issues and utilize similar procedures as an environmental impact statement.” Minn. Stat. § 116D.04, subd. 4a. Significantly, at the time the EQB approved the rules, the EQB itself was charged with determining the adequacy of the environmental review for pipeline decisions. It’s Findings indicate a broad interpretation of what could be considered, quite different from the narrow approach now taken by the Applicant, OES and the ALJ. *See id.*, FOF ¶ 5 (stating that impacts include “but are not limited to the impacts for which criteria are specified” and noting that “other environmental effects” could be identified by citizen advisors to the Board, public hearings and public meetings). Moreover, the environmental challenges confronting the State today are different from those in 1989 when the EQB approved the routing rules as an alternative. A cramped interpretation of those rules, as has been applied here, does not satisfy the mandates of MEPA.

Thus, MCEA alleges that the rules, as they are being applied in this proceeding, are insufficient and do not meet the legal requirements of MEPA. *Minnesota Ass’n of Homes for the Aging v. Department of Human Services*, 385 N.W.2d 65 (Minn. App. 1986) (rule as applied appropriately challenged in context of contested case proceeding). There are a number of

reasons for MCEA's allegation, again, laid out in detail in its comments and memoranda. Chief among MCEA's concerns are: (1) connected or phased actions are not considered; (2) there is no consideration of indirect effects; (3) there is no cumulative impacts analysis; (4) the scope of the review is impermissibly narrow; (5) no one from the RGU, which is the Commission, actively participated in preparing, overseeing or reviewing the environmental review; and (6) without the information required by an EIS, the Commission is unable to take the requisite "hard look" at the significant environmental effects of this project, its alternatives and mitigation measures.

### **III. MCEA WITHDRAWS ITS OBJECTION TO APPLICANTS SUBMISSION OF TRADE-SECRET DOCUMENTS**

On July 29, 2008, the ALJ certified a motion to the Commission on MCEA's objection to the filing of land owner information as "trade-secret." MCEA withdraws its objection<sup>2</sup> to the Applicant's filing and, therefore, the Commission need not consider the issue.

### **CONCLUSION**

MCEA submits that Applicants have failed to meet their burden for a Certificate of Need for the proposed new pipelines to carry a new additional supply of tar sands crude to Minnesota and beyond. MCEA further asserts that, even if the Applicants had demonstrated need, the Commission could not issue a Certificate or Routing Permit because no adequate environmental review has been prepared for the project. MCEA respectfully requests that the Commission reject the ALJ's recommendations and deny the application.

Dated: August 1, 2008

RESPECTFULLY SUBMITTED:

/s/ Kevin S. Reuther

---

Kevin S. Reuther (Atty. No. 266255)  
Minnesota Center for Environmental  
Advocacy  
26 E. Exchange Street, Ste. 206  
St. Paul, MN 55101  
651-223-5969  
kreuther@mncenter.org

ATTORNEY FOR MCEA

---

<sup>2</sup> MCEA, by withdrawing its objection to the trade-secret designation in this matter, in no way concedes the issue for purposes of future proceedings involving these or other parties.