

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

**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**

**MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY
POST-HEARING BRIEF**

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INTRODUCTION AND BACKGROUND

This case arises as a result of Enbridge Energy Limited Partnership and Enbridge Pipelines LLC's (hereinafter collectively "Enbridge"), applications for routing permits and certificates of need for petroleum pipelines between the Canadian border in North Dakota and Superior, Wisconsin. The matters are currently pending before the Minnesota Public Utilities Commission (the "Commission"), one of which is the subject of the above-captioned contested case proceeding before the Honorable Eric L. Lipman, Office of Administrative Hearings. ("ALJ").¹ The Alberta Clipper pipeline will transport tar sands heavy crude petroleum that originates in northern Alberta to Superior, Wisconsin for either refining there or for further transport in Enbridge pipelines to refineries in the Chicago area and beyond. The Southern Lights pipeline will carry diluent back along the same route from Chicago refineries to the tar sands region of Alberta, Canada for use in future extraction and transport. *See* Enbridge Certificate of Need Applications for the Alberta Clipper and Southern Lights Diluent Projects, accepted by the Commission by order dated July 30, 2007.

The Alberta Clipper and Southern Lights pipelines (hereinafter collectively referred to as the "Clipper" project²) falls under the definition in Minn. Stat. § 216B.2421, subd. 2 (4) (2006) of a large energy facility. Such facilities are required to obtain a certificate of need ("CON") from the Commission prior to construction. Minnesota Statutes §216B.243, subd. 2 (2006)

¹ A companion project is the recently-approved LSr pipeline at issue in the PL9/CN-07-464 docket will carry crude oil petroleum from Canada to a tank farm in Clearbrook, Minnesota. *See* Enbridge Certificate of Need Applications for the LSr, Alberta Clipper and Southern Lights Diluent Projects, accepted by the Commission by order dated July 30, 2007 and Order dated May 22, 2008.

² The Alberta Clipper and Southern Lights project are linked and MCEA treats them, as do all of Enbridge's materials, as a single project. MCEA makes its arguments herein as to both pieces of the project.

authorizes the Commission to issue a CON to Enbridge only if Enbridge demonstrates that there is a need for the proposed pipelines.

The Minnesota Center for Environmental Advocacy (“MCEA”) is a Minnesota-based, nonprofit environmental organization that works in the courts, the legislature and state agencies to protect Minnesota’s wildlife, natural resources and the health of its people. MCEA’s five program areas include an Energy Program, which focuses on advancing the pursuit of environmentally sustainable sources of energy and on climate change issues. MCEA argues that Enbridge and the Office of Energy Security (“OES”)³ have failed to demonstrate that Enbridge is entitled to a CON for the Clipper project under the applicable statutes and rules.

As set forth in detail below, MCEA argues four main points. The requirements for issuance of a CON for the Clipper project have not been met because (1) the arguments and evidence regarding increased demand for oil in Minnesota are poorly supported, hardly more than “best guess” estimates, and fail to take into account mitigating factors such as other regulatory and policy activities that could impact demand and the need for conservation and efficiency; (2) the arguments and evidence concerning protecting Minnesota and regional consumers from oil price and supply volatility are unsupported and lacking in sound economic analysis; (3) the evidence and testimony from Enbridge and the OES failed, contrary to the statutory and rule requirements for CON, to consider and analyze conservation and efficiency measures and activities, especially as it relates to other agency or government policy goals, initiatives or regulation; and (4) the evidence concerning, and considerations of, environmental impacts from the project and related projects are completely lacking, erroneously constrained to the extent they are present at all, and fail to comply with the applicable statute and rule

³ The OES has been assigned the duties under the Certificate of Need analysis formerly carried out by the Department of Commerce.

requirements. Therefore, on the basis of the record as a whole and the arguments contained herein, MCEA requests that the ALJ recommend denial and the Commission deny the Certificate of Need for the Clipper project. At a bare minimum, MCEA requests more thorough, adequate environmental review prior to final consideration of the Clipper project.

LEGAL REQUIREMENTS

Minnesota Statutes § 216B.243 (2006) sets forth the requirements for obtaining a CON. Specifically, subdivision 3 provides that no proposed large energy facility (the definition of which includes pipelines⁴) shall be certified for construction unless the applicant can show that demand for electricity (or obviously in the case of a pipeline, the product carried by the pipeline) cannot be met more cost-effectively through energy conservation and load or demand management measures and unless the applicant has otherwise justified the need. Minn. Stat. § 216B.243, subd. 3 (2006). In assessing the “otherwise justified the need” component of this requirement, the Minnesota Legislature has directed the Commission to evaluate:

- (1) *the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based;*
- (2) *the effect of existing or possible energy conservation programs under sections 216C.05 to 216C.30 and this section or other federal or state legislation on long-term energy demand;*
- (3) *the relationship of the proposed facility to overall state energy needs as described in the most recent state energy policy and conservation report prepared under section 216C.18.....;*
- (4) *promotional activities that may have given rise to the demand for the facility;*
- (5) *benefits of this facility, including its uses to protect or enhance environmental quality and to increase reliability of energy supply in Minnesota and the region;*

⁴ Minn. Stat. § 216B.2421 (2006). It should be noted that it appeared, during testimony at hearing, that OES’s Mr. Minder was uncertain of the CON statute’s application to pipelines, despite this clear statutory definition that includes pipelines as large energy facilities. *See e.g. T. 160-161.*

(6) possible alternatives for satisfying the energy demand or transmission needs including but not limited to *potential for increased efficiency* and upgrading of existing energy generation and transmission facilities...;

(7) *the policies, rules, and regulations of other state and federal agencies and local governments...*

Minn. Stat. § 216B.243, subd. 3 (2006) (emphasis added.)

The Commission promulgated rules regarding CON and assessment thereof. The rule primarily applicable to this proceeding is Minn. R. 7853.0130 (2007). The portions of Minn. R. 7853.0130 (2007) applicable in this proceeding, provide that a CON shall be granted to the applicant if it is determined that:

A. the probable result of denial would adversely affect the future adequacy, reliability or efficiency of energy supply to the applicant, the applicant's customers, or to the people of Minnesota and neighboring states, considering:

(1) *the accuracy of the applicant's forecast of demand* for the type of energy that would be supplied by the proposed facility;

(2) the effects of the applicant's existing or expected conservation programs and *state and federal conservation programs*;

(3) *the effects of the applicant's promotional practices that may have given rise to the increase in the energy demand...*;

(4) the ability of current facilities and planned facilities not requiring certificates of need, and to which the applicant has access, to meet the future demand;

(5) the effect of the proposed facility or a suitable modification of it, in making efficient use of resources;...

C. the consequences to society or granting the certificate of need are more favorable than the consequences of denying the certificate, considering:

(1) the relationship of the proposed facility or a suitable modification of it to overall state energy needs;

(2) the effect of the proposed facility, or a suitable modification of it, upon the *natural and socioeconomic environments* compared to the effect of not building the facility;

(3) the effects of the proposed facility or a suitable modification of it, in inducing future development;

(4) socially beneficial uses of the output of the proposed facility, or a suitable modification of it, including its uses to protect or enhance environmental quality; and

D. it has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply *with those relevant policies, rules and regulations of other state and federal agencies and local governments.*

Minn. R. 7853.0130 (2007) (emphasis added.)

Finally, in addition to the need to assess effects on the natural environment as set forth in the above rule, Minnesota law imposes an independent obligation on the Commission to review the potential for significant environmental effects from the proposed project, Minn. Stat. § 116D.04 (2006). While MCEA notes that Enbridge and OES argue that the obligation to comply with the plain language of the Minnesota Environmental Policy Act (“MEPA”) Minn. Stat. § 116D.04 (2006) has somehow been narrowed or done away with by rule, rules cannot exempt parties from the application of statutes absent statutory authority to do so. There is no language in Minn. Stat. ch. 116D that allows the Environmental Quality Board, OES or the Commission to exempt pipelines or any other project from the full environmental review required by MEPA. In fact, MEPA itself allows, but also constrains, so-called alternative environmental review in Minn. Stat. § 116D.04, subd. 4a (2006) which provides that any alternative review process developed by EQB must still address “the same issues and utilize[s] similar procedures as an environmental impact statement.” An environmental impact statement (“EIS”) requires much broader and much more comprehensive review of the impacts from the Clipper project, including connected, phased, indirect and cumulative impacts, than the review performed to date. *See* MCEA comments dated December 14, 2007, December 21, 2007, and April 21, 2008. The obligation to conduct that review falls on the Responsible Governmental Unit, in this case the

Commission. As set forth in MCEA's prior comments and to an extent below, the Commission has yet to conduct the proper level of environmental review and until environmental review is complete, cannot grant a CON. Minn. Stat. § 116D.04. (2006).

DISCUSSION AND ARGUMENT

I. THE CLAIMS OF INCREASED DEMAND FOR PETROLEUM IN MINNESOTA ARE INADEQUATELY SUPPORTED.

The purported evidence of increasing need or demand for oil in Minnesota, to be served by the Clipper project, is thin at best and when taken with the large amount of activity at the policy and regulatory levels regarding curbing such demand, fails to demonstrate a need for the Clipper project under applicable statute and rule.

Mr. Heinen was the primary witness on the side of favoring the Clipper project to offer testimony on this point. Enbridge relied on the OES for this portion of the CON analysis.⁵ Mr. Heinen seemed ill-equipped to back up his broad-brush claim of increased petroleum demand driving the need for the Clipper project. Testimony from Mr. Heinen demonstrated that the evidence of increased demand was based almost entirely upon information that was not necessarily particular to Minnesota or the immediate region, originally based upon the 2007 Annual Energy Outlook ("AEO") from the Energy Information Administration. Ex. 308, p.18 et seq. Upon rebuttal, Mr. Heinen took the opportunity to review the draft 2008 Annual Energy Outlook which clearly predicts slower rates of increase for demand across all sectors other than the refining sector. Ex. 316, p. 5 et seq. and attachment AJH-R-5 and 6. The newer predictions, while quite a bit lower, did not change Mr. Heinen's opinions regarding the Clipper as Mr.

⁵ It must be emphasized that the CON statute expressly provides that the burden to demonstrate entitlement to a CON is on the *applicant*, not on the OES. Minn. Stat. § 216B.243, subd. 3.

Heinen did not appear to engage in a critical, independent review, of what is generally a weak predictor of energy demands.

A. The AEO's Methods Mean That Its Demand Forecasts Reflect Limited Scenarios With Attendant Limited Accuracy.

John T. Durkin, Ph.D.⁶ testifies that the AEO, for any year, does not analyze what he refers to as the “true low” case, which in turn can impact the accuracy of its demand predictions. Ex. 350, p. 5-6. *See also*, T. 209-210. The AEO makes predictions regarding energy demands for the short and long-term by examining three different case scenarios: the so-called reference case (which is the case the AEO deems most likely), a high demand case, and a low demand case. *See, generally*, AEO materials attached to Mr. Heinen’s direct and rebuttal testimony and Ex. 316, pp. 14-15. Each of the case scenarios is in turn based upon three components and assumptions about those components. *Id.* For the AEO’s predictions regarding petroleum demand, one component assumption is the price of oil. *Id.* and T. 209-211. Higher prices tend to dampen demand. *Id.* The second component is economic growth as reflected by income. *Id.* Higher growth/higher income tends to drive demand up. Ex. 350, p.6. The third component assumption is adoption of technology that might affect demand. *Id.* This component assumption could go “either way”, that is, some technologies will require more energy, some will conserve energy.

Obviously, if any of the component assumptions is wrong, the prediction for energy demand can be wrong. For example, predicted income/demand elasticity can be right over a

⁶ Dr. Durkin, the only experienced economist in this proceeding, is Vice President with Chicago Partners LLC, an economics consulting firm that specializes in the application of economic theory to legal and regulatory issues, working in the Midwest region and nationally. Dr. Durkin holds a Ph.D. in economics from the University of Chicago and, in addition to his work with Chicago Partners, is a lecturer at the Harris Graduate School of public Policy Studies at the University of Chicago. *See*, copy of Dr. Durkin’s curriculum vitae included with his testimony.

long term, but be very wrong over as long as a 25 year period. Ex. 350, p. 5-6. Dr. Durkin also points out that the three case scenarios only change one of these component assumptions at a time, meaning that if two or even three of them vary from the AEO's predictions, the entire prediction is wrong. *Id.* This is further complicated by the fact that the three factors interact. *Id.* That is, the predictions can move one of the factors and predict changes in outcome, but uncertainties and interactions between two or three of the factors can easily throw the entire prediction into question.⁷

The possibility of an inaccurate prediction from the AEO is heightened by its failure to examine or test the "true low" case. The true low case is when petroleum prices are high, the economy is weak/incomes are low, and adoption of conservation technologies is high. Ex. 350, pp. 5-6; T. 212-213. Mr. Heinen agrees that the AEO does not test or predict the "true low" case and that if the true low case occurred, the AEO demand estimates "would be biased". T. 214. While Mr. Heinen declined to opine whether the true low case is happening now, T. 214, factors clearly are present indicate it might be happening right now⁸ and that there is no evidence to which he can point that would indicate whether the current situation will continue long term or not. Ex. 316, p. 18; T. 211; 249.

⁷ The uncertainty built on uncertainty inherent in this process may be a given, but it stands in especially stark contrast to the OES's stubborn refusal to take into account other government policies and actions and the impact on demand, as well as environmental impacts outside the physical pipeline with the claim that such considerations are "too speculative". *See argument III below.* The uncertainty inherent in the demand/income prediction demonstrates the irrationality and potential predisposition in the OES's unwillingness to consider the regulatory and environmental aspects of the situation.

⁸ Mr. Heinen notes that it is almost impossible to tease apart whether the current dip in petroleum demand is due to high oil prices or a weak economy, or both, as they can both drive down demand. When questioned specifically on this point and how to identify the difference in light of the obvious interaction and connection between these factors, Mr. Heinen did not have the requisite expertise to answer the question: "It is difficult, but you can quantify the difference between the two...*I've never ran [sic] that type of model before, but I'm familiar with some people that have.*" T. 211.

The combined effect of limited case scenarios examined and complex interactions between assumptions behind those scenarios means that, while the AEO is doing the best it can with what it has, balanced against getting a forecast out in a reasonable period of time, the forecast is only in the grossest terms, on a national basis, and is of little value in demonstrating Minnesota citizens' (or the region's) need for, or benefits from, the Clipper project.

B. The AEO Is Generally A Poor Predictor Both Of Demand And Of The Underlying Assumptions For The Demand Forecasts.

The AEO has a poor track record of predicting the assumptions underlying demand forecasts and as a result, is not very reliable for the demand forecasts themselves. This was demonstrated at hearing when MCEA reviewed AEO assumptions and forecasts for the recent years, 2005 and 2006 with Mr. Heinen. The predictions from those years for oil prices were not even in the ballpark or reality. In one instance, the reference case came in at about half of where prices are today. T. 220-227 and Ex. 352 and 353.⁹ Similarly, the predictions for economic growth have been steadily revised downward each year. Ex. 352 and 353 and Ex. 316, attachments AJH-R-5 and 6. The AEO clearly has trouble getting its assumptions and forecasts right even in the short term, much less 10 or 20 years from now.

One significant reason for this lack of accuracy is identified by Dr. Durkin in his direct testimony. Dr. Durkin points out that the AEO makes its estimates of demand growth based upon assumptions that the future will be similar to the past, a practice that he states is “inherently

⁹ Mr. Heinen seemed to suggest that the AEO got better at predicting when the forecasts were smoothed out over a longer period of time. T. 223. The facts simply don't bear that out as a quick look at the official AEO government website shows that, for example, the 2003 forecast of oil prices was even way more off the mark than 2005 and 2006.
<http://www.eia.doe.gov/oiaf/archive/aeo03/index.html#prices>

unreliable”. Ex. 350, p. 6.¹⁰ One can see Dr. Durkin’s point in the steady downward revision of demand estimates and income growth estimates and the steady upward revision of oil prices over the last several years of AEO forecasts. Clearly, the AEO is revising its forecast based upon what just happened the year prior. The AEO is always playing catch-up.

Mr. Heinen, although he admitted that he knew and understood the inherent weaknesses in the AEO process, did nothing to bolster, double-check, or independently analyze the strength or reliability of the AEO predictions, using them as hard, reliable indicators of increased demand necessitating a huge new pipeline system. In particular, as set forth in more detail below, Mr. Heinen did not compare and contrast those predictions with what he knew, or should have known had he conducted some simple examination, was happening on the ground in Minnesota, both factually and in terms of policy.

Considering the weakness of the AEO’s ability to truly predict demand for petroleum with other factors such as policies and trends regarding reductions in energy and petroleum use at a level never before experienced, the predicted demand for the Clipper project is simply too ephemeral to support a CON.

C. The Predicted Increase In Liquid Fuel Consumption Is Very Small Raising A Serious Question About Whether It Will Be A Real Increase.

Part of Mr. Heinen’s testimony that there will be an increase in petroleum demand, necessitating building the Clipper project for Minnesota citizens, is the testimony of another individual, Mr. Caruso of the Energy Information Administration (“EIA”) (the organization that prepares the AEO), before Congress. Ex. 316, attachment AJH-R-7. Mr. Caruso states that the

¹⁰ This exact point was recently echoed by another economist in the Anchorage Daily News, Comment, May 25, 2008. David M. Reaume pointed out that the AEO can’t seem to get forecasts of oil prices right because “[p]ublished forecasts remain not much more than mere extrapolations of the current situation.” Copy of comment enclosed.

increase in demand for liquid fuel consumption, under the reference case (that is not the low demand case), is .4%---less than one-half of one percent. Ex. 316, attachment AJH-R-7, p. 4; T. 228.¹¹ Because the .4% number is so small, Mr. Heinen was queried on what the margin of error or statistical significance of that prediction might be. A margin of error of even a few tenths of a percentage point could obviously reduce the alleged increase in demand to near zero. T. 228-229. Mr. Heinen did not know the margin of error and had not looked for it apparently thinking it unimportant to his reliance on the small predicted increase, but he claimed in his testimony that he had seen a “significance level” on the EIA/AEO website somewhere—he just couldn’t remember what it was. T. 229. There is no such number. There is no margin of error. The EIA/AEO doesn’t use one because the numbers are simply, as noted above by Dr. Durkin, an extrapolation of past actual prices or economic growth numbers, not complex modeled calculation with regression analyses or similar statistical analysis. Plus, certain assumptions are made, such as a constant state of the law, that the AEO identifies as inherently inaccurate and something to which it cannot then assign a significance level or margin of error. Basically, just like all the other predictions by the AEO, the .4% predicted increase in liquid fuel demand is a best guess based upon past information and various assumptions and it is so small as to be practically nonexistent.

D. Consideration Of Information From Minnesota, Including Important Energy Policy Initiatives, Demonstrates The Further Weakness In Relying On The AEO Demand Forecasts As A Basis For The Clipper Project.

Closer to home, evidence demonstrates movement toward significantly reduced demand in Minnesota and that evidence should have been, but was not, considered by either Enbridge or OES. As indicated in Mr. Charles Dayton’s testimony regarding the work of the Minnesota

¹¹ Presumably the low demand case is even smaller. And again, the low demand case used by the AEO is typically not the “true low.”

Climate Change Advisory Group (“MNCCAG”), the Minnesota Department of Transportation (“MnDOT”) submitted information indicating that vehicle miles traveled in Minnesota have hit a plateau and maybe even declined. Ex. 351, p. 10 and attachments MCEA 6E and 6G. Mr. Dayton also outlined numerous examples of policy statements by the Minnesota Legislature, the Governor’s Office and the MCCAG regarding efforts to reduce energy consumption and demand across all sectors. One example was the effort to pass clean cars legislation in Minnesota similar to that of California. Ex. 351, pp. 12-13; T. 110.¹² Dr. Durkin and Mr. Dayton point out that the California law provides even greater efficiencies with faster phase-in than the recently-passed federal law. Ex. 350, p. 6; Ex. 351, p. 13. Yet, Mr. Heinen indicated that he disregarded the work of the MNCCAG, (despite the leading and instrumental role played by his employer in the MNCCAG), had not discussed his assumptions regarding vehicle miles traveled or oil demand in Minnesota with anyone at his fellow agency, MnDOT, T. 234 , and he believed, contrary to the information clearly set forth in Mr. Dayton’s and Dr. Durkin’s testimony, that the California vehicle emissions laws did not result in increased efficiency, information he gleaned from his college automotive classes at Minnesota State University, Mankato. T. 233.

The evidence in this case also indicates the possibility of induced demand, at least in part. As noted in the information from MnDOT, higher prices mean less demand for polluting petroleum. Yet there is no acknowledgement or examination of the impact that more petroleum might have in driving down prices and inducing the very demand that Enbridge and OES claim is driving the need for more oil. Likewise, there is no analysis or consideration by the OES witnesses of the statements of Enbridge themselves regarding the increased demand for pipelines due to the high demand for tar sands petroleum, a demand driven by the industry itself. The

¹² The Clean Cars legislation did not pass during the 2008 legislative session. Public statements by the bill authors indicate that a second effort is likely during the 2009 session.

circularity is immediately apparent which is why the statute and rule require full examination and analysis of induced demand. The evidence shows a very real possibility that the Clipper project will induce demand, not serve existing demand, a factor that weighs against granting a CON.

The unreliability and lack of completeness of the evidence regarding demand for the Clipper dictates against granting the CON for the Clipper under the requirements of Minn. Stat. § 216B.243, subd. 3 (1) (2006) and Minn. R. 7853.0130 A(1) (2007).

II. THE EVIDENCE AND ARGUMENTS REGARDING OIL SUPPLY AND PRICE VOLATILITY ARE UNSUPPORTED OR POORLY SUPPORTED AND FAIL TO CONSIDER ALL APPLICABLE REQUIREMENTS IN STATUTE AND RULE.

The supply side of Enbridge and OES's arguments in favor of the Clipper are also inadequately supported based upon oversimplified and inaccurate depictions of the petroleum market in Minnesota and the Upper Midwest. As set forth in the direct testimony of Dr. Durkin, the Clipper project will have no impact on local or regional supplies of petroleum or prices therefor. Ex. 350, p. 2. This is true for the basic reasons that the petroleum market is much bigger and more complex than Minnesota or the Upper Midwest and the one or two pipelines or refineries Mr. Heinen tried to use in his examples. Further, price for gas is not dictated by an oversimplified supply and demand analysis that goes no deeper than 'if more oil is flowing through Minnesota (or the Upper Midwest) then that is more supply, so therefore prices for the final consumer will come down.' As set forth in detail below, this is simple nonsense. The evidence from OES and Enbridge claiming the Clipper pipeline will bring stability¹³ to

¹³ Mr. Heinen clarified his testimony in rebuttal that he did not opine the Clipper project "on its own" would bring stability or "insulate" Minnesota from price and supply shocks, but that the Clipper would "mitigate" those effects on Minnesota. Ex. 316, p. 9; T. 197. However, Mr. Heinen was unable to explain a real difference in the choice of terms and his examples of how the Clipper will mitigate events that affect petroleum price in Minnesota were vague, unsupported and unenlightening. T. 251-252. MCEA submits that the wordsmithing is a

Minnesota oil supply and prices is simply unsupported and internally inconsistent. Enbridge has not demonstrated and cannot demonstrate the requirements set forth in Minn. Stat. § 216B.243, subd. 3(5) and Minn. R. 7853.0130 A. (2007).¹⁴

A. The Petroleum Market Is Not Just Minnesota And Chicago.

As acknowledged by Adam Heinen, Mr. Earnest¹⁵ and Dr. Durkin, petroleum is a fungible commodity, it is easily transported to regional, national and even international markets. Ex. 350, p. 3; Ex. 308, p. 17; Ex. 312, p. 4; T. 35-37; 89. Messrs. Heinen and Earnest further acknowledged that petroleum can and does flow to wherever the demand and prices are high. *Id.* Mr. Heinen and Mr. Earnest agreed that states and common carrier transporters like Enbridge cannot “reserve” capacity or crude for local refineries nor would they if they could receive a higher price elsewhere. T. 43, 195 and 36-37. Mr. Earnest testified that Canadian crude flows to the Gulf Coast, that the Gulf Coast actually sets the price for Canadian crude, T. 37-39, and that the Gulf Coast will continue to set the price, regardless of the presence or absence of the Clipper. *Id.* Mr. Sitek testified regarding the Texas Access Pipeline, an Enbridge pipeline proposal currently pending before the Illinois Commerce Commission (“ICC”), that will connect the Clipper, through Wisconsin, through Illinois and down to Houston on the Gulf Coast through the Texas Access Pipeline. Sitek, Ex. 314, page 5. Enbridge will be able to move Canadian crude all

distinction without a difference, but to the extent there is none, it is clear that MR. Heinen is being careful to say that any benefit to petroleum supply or price will be very moderate and not certain.¹⁴ The requirements of Minn. R. 7853.0130A (2007) also hinge on other components of the evidence, which, as MCEA argues in detail below, are also unsupported, poorly supported, or entirely absent from the evidence.

¹⁵ Mr. Earnest, by his own admission, is not an economist. T. 63. Mr. Earnest is an industry consultant who clearly knows how to move petroleum product place to place and where and how to build a pipeline. However, the analysis in this case, and necessary to the CON, is all about economics---the need for the product and/or the pipeline for Minnesota citizens, demand for the product by Minnesotans, prices, and supply for Minnesotans. For example, Mr. Earnest could not really speak to the Annual Energy Outlook, the primary economic document upon which the case for the Clipper project is based. T. 64.

the way to the Gulf Coast which, as Enbridge argues, will provide for a “healthy refinery business”. *Id.* Mr. Earnest made clear that pipelines bring petroleum and finished product from the Gulf Coast to the Upper Midwest, particularly the Chicago area as well, making arguments that there will be heated competition for Enbridge’s crude, to the detriment of Minnesota consumers, unlikely. T. Finally, Mr. Earnest agrees that shipping crude petroleum from the tar sands region of Alberta to northeast Asia (China, Korea, Japan) is desirable for Canadian oil companies and that should the transport infrastructure become more available, Enbridge could ship the Canadian crude there. T. 41-43, 62.

As a result, Dr. Durkin correctly points out that the only way that the Clipper could have an impact on the supply and price of petroleum products *in Minnesota* is if the Clipper actually had an impact on the national and international supply of crude petroleum, which it clearly will not. Ex. 350, p. 3. Rather, as further pointed out by Dr. Durkin., petroleum supply and price is not insulated within a particular state or even region. The two graphs attached to Dr. Durkin’s testimony show that petroleum prices in the state or region, which includes Minnesota, move almost in lock-step with national oil prices. Ex. 350, attachments MCEA 2 and 3. This fact remains completely unchanged by Mr. Earnest attempting to “replot” the data from Dr. Durkin’s graphs. First, Mr. Earnest admitted that he didn’t really replot the graphs using a different scale, but rather he plotted the relative price differences. T. 57. Second, Mr. Earnest admitted that even with his graph the difference in price most often was less than 5 cents and the prices moved largely in tandem, the exact point of Dr. Durkin’s graphs and testimony about them, T. 56-57, with the price difference narrowing further in more recent years. T. 58.

Dr. Durkin is clear that constriction of the economic analysis of petroleum supply issues to Minnesota and the Chicago area (even the Upper Midwest) is simply not sound economics.

Ex. 350, p. 3-4. Further, Mr. Heinen's continued artificial constriction of the petroleum market to Minnesota/Chicago in an attempt to bolster his support of the Clipper, is contrary to the clear evidence, including from Enbridge's witness Mr. Earnest. *See e.g.*, T. 35-43. Mr. Earnest identified the Midwest as containing locations as far from Minnesota as Toledo and Detroit, even Ontario. T. 27. Mr. Heinen admitted that his graphs or "models" (really examples, not models in the sense that they are not computer-run models with real data inputs.) on pages 12 and 13 of his rebuttal testimony aren't representative of the Midwest and don't approximate the real world in that the real world is not comprised of only two refineries and one pipeline. T. 207-208. He also admitted that models that don't approximate the real world or that do not fit actual data well, are of limited value and not particularly accurate. T. 250-251.

The reason that Mr. Heinen engages in such a constrained analysis is it is the only way he can make even a marginal case about the Clipper project having an impact on petroleum supply and price in Minnesota or even the region. Only by pretending that the relevant market borders extend such a limited distance with only a few players can the situation be reduced to a hyper-simplified supply and demand model. Unfortunately for the Clipper project, such a constrained view of the world is not factual. The size and complexity of the petroleum market mean that the Clipper project will not affect supply and price of oil for Minnesota.

B. More Canadian Crude Petroleum Pushed Through Minnesota Does Not "Mitigate" For Anything As Minnesota Does Not Even Fully Utilize The Current Supply Of Canadian Crude And Minnesota Refineries Currently Produce More Finished Product Than Minnesotans Consume.

Mr. Earnest admitted that even under Enbridge's current "limited" capacity, the current supply of Canadian crude exceeds Minnesota and even Midwest, demand. Ex. 312, p. 4; T. 38; 49. Not to put too fine a point on it, Mr. Earnest testified that it is "not physically possible to process all the Canadian crude in Minnesota." T. 43. *See also* T. 47. Again, this means that the

Gulf Coast is the ultimate destination for many of the barrels, meaning again, the Gulf Coast sets the price. T. 39, 46. Similarly, Mr. Earnest testified and Mr. Heinen agreed, that Minnesota refineries currently, under the “limited supply” scenario, refine more petroleum product than is consumed in Minnesota. Ex. 312 p. 14; T. 61, 192. More crude traveling through Minnesota in a pipe will obviously have no impact on the Minnesota consumer.

Rather, this set of facts suggests that the ultimate goal is for the Canadian producers to reach new markets well beyond Minnesota’s and the Midwest’s borders. Mr. Earnest acknowledged as much when he testified that there is currently a significant oversupply of Canadian crude in the Upper Midwest because the industry can’t currently get a meaningful supply from Canada to the Gulf Coast. T. 40. The Clipper project clearly is not about Minnesota or the Upper Midwest needing access to more Canadian crude in order to have a stable supply at all. Such a suggestion borders on the disingenuous. The Clipper project is about the Canadian crude industry and its transporters getting access to new markets in order to increase the price they receive and get out of the oversupply situation in which they currently find themselves.

Mr. Heinen’s attempts to argue that the Clipper will help if there is a “shock” of some kind, say to a Chicago refinery, similarly do not bear up under scrutiny. This was demonstrated during cross-examination of Mr. Heinen in questioning regarding the approximately 5% of finished petroleum product that comes to Minnesota from the BP Whiting refinery in the Chicago area. Given that Minnesota receives such a small amount of finished product from Chicago, Mr. Heinen was asked whether losing that 5% would really make such a difference, especially as Minnesota refineries could turn around and apparently meet the demand. He agreed that Minnesota consumers would not go wanting and would not likely see “shock” to

prices, but Mr. Heinen then claimed that it wasn't so much the shock, but that distressed barrels of oil would now become available at a bargain price because the refinery in Chicago could not use the supply coming down the pipe. T. 203, 205-206. However, Mr. Heinen again had to admit that this was the case now and the Clipper would not really affect that. T. 206.

C. The Clipper Will Do Nothing To “Mitigate” Crises Or Disasters.

The Clipper similarly will do little to protect Minnesota or the upper Midwest from accidents or disasters or mitigate for them either. Mr. Heinen's testimony on this was muddled, internally conflicting and unsupported. In his direct testimony he alludes to the fact that Hurricanes Katrina and Rita led to higher prices that adversely affected Minnesota consumer, citing to someone else's testimony in an entirely different docket. Ex. 308, p. 17. Later, Mr. Heinen alludes to world instability in Nigeria or heightened demand in China or India as other factors that could affect Minnesota consumer. Ex. 308, pp. 35-36. Mr. Heinen fails to elaborate in either his direct or rebuttal testimony on just how this is supposed to happen as he agreed in cross examination that the issues he identifies created high prices throughout the nation, and in the global examples, throughout the world. Ex. 316, p. 17; T. 196-197, 221-222. In fact, *the current high prices are being experienced while Enbridge has excess capacity, while we are getting more Canadian crude than we can use and while Capline, a competing pipeline for the Upper Midwest, is party empty.* Ex. 312, pp. 4 and 14. T. 38-39, 46-47, 49, 61. Mr. Heinen's claims make no sense in light of current reality. The argument that we need additional capacity to mitigate disaster or crisis related price hikes in the future is ludicrous.

Further, on cross examination, when pressed with the specific example he gives, Mr. Heinen was unable to respond. Mr. Heinen was asked whether the presence of the Clipper would mean that prices in Minnesota would go up less if there were a crisis in an oil-producing region

like the Middle East (like his Nigerian example). Mr. Heinen, despite using this very example, could not, despite taking time to think about the question that was based on his own direct testimony, give a firm answer that yes, the Clipper would help mitigate prices increases in the Midwest, saying only that he thought Minnesota would be better off. T. 199. This is of course absurd and inconsistent with the real world. On the question of hurricanes, Mr. Heinen responded that the basis for his opinion that Minnesota would, with the Clipper, not suffer as much from hurricane-induced price increases as the rest of the nation, was his “understanding of basic economic theory”. T. 200. When asked what about basic economic theory he thought supported such an otherwise unfounded assertion (Dr. Durkin, clearly more qualified in “basic economic theory” than Mr. Heinen, thinks this is nonsense), Mr. Heinen answered only “supply”. *Id.* His answer is nonsensical and when asked to elaborate he simply answer “supply” again, but with a few more words. T. 201. Mr. Heinen appears unqualified to assess the need in this case.

In fact, both Mr. Heinen and Mr. Earnest agree that prices are high now and that fact has nothing to do with a pipeline in the Upper Midwest, being driven by much larger market forces. To claim that the Clipper project will keep prices somewhat lower in Minnesota than the rest of the Midwest, the rest of the nation or the world, when something like hurricanes or the Nigerian crisis happens, is absurd.

D. Enbridge And The OES’s Only Defenses In Support Of The Clipper Project Are Thin And Internally Conflicting.

Mr. Earnest’s whole discussion in his rebuttal testimony and on the stand, regarding the “transport cost” of a barrel of crude and how the cheaper transport cost for Minnesota gives it a competitive edge over Chicago, does not support the Clipper project. Just the opposite. Most damaging to his argument, Mr. Earnest admitted on the stand that the “Gulf Coast refiners don’t really care what the transportation cost is” and that those refiners will set the price for Canadian

crude. T. 39, 46-47. Therefore, it appears that the Gulf Coast wants that Canadian crude and will compete with Minnesota whether the Clipper is built or not. Again, the oil flows to the highest bidder. Also, Mr. Earnest noted that the Chicago area has other pipelines bringing crude to those refineries. T. 36, 48-49, 68-69. In that instance, they are less likely to compete with Minnesota, again regardless of the presence of the Clipper. Finally, Mr. Earnest agreed that many factors, in addition to transport cost go into the purchasing decisions of refineries, T. 36, further demonstrating that his and Mr. Heinen's oversimplified statements about increased supply from the Clipper being good for Minnesota consumer just don't fit the facts of the real market.

Mr. Heinen's rebuttal testimony contains some largely irrelevant information in yet another failed attempt to shore up his support for the Clipper project. Mr. Heinen describes situations with Minnesota refineries where they must choose between refining diesel or home heating fuel and gasoline. Ex. 316, p. 21. On cross-examination, Mr. Heinen had to admit that this entire discussion in his rebuttal testimony is really about refinery capacity and has nothing to do with pipeline capacity and the Clipper. T. 231. A CON for the Clipper will not change the situation with refining diesel fuel versus gasoline. *Id.*

The only remotely tenable argument that Mr. Earnest and Mr. Heinen have been able to make about benefits to Minnesota refineries and Minnesota consumers is the one about possible distressed barrels and that argument is so thin it cannot, standing alone, meet the requirements of the CON statute for showing a need and a benefit to Minnesota citizens. A distressed barrel of crude may periodically find its way to a Minnesota refinery at a reduced cost.¹⁶ As Mr. Heinen and Mr. Earnest admit, this is not a common occurrence, one that refineries and suppliers strive

¹⁶ One further cannot assume that a refinery that buys barrels of distressed crude will pass along the savings to the Minnesota citizen. T. 72.

to avoid, and there are no guarantees that a Minnesota refinery could even take advantage of it when it happens. T. 71-72, 203-206. It is ridiculous for Enbridge to think that the Commission and the State of Minnesota should give the Clipper project a CON merely on the basis of unusual or at least irregular events, that suppliers and refineries try to avoid, and that Minnesota refineries may not be able to take advantage of. Such a thin story simply does not demonstrate a need for this pipeline.

The record in this matter contains no evidence that the Clipper project will positively affect petroleum supply or price in Minnesota or in the Upper Midwest. A pipeline in northwest Minnesota that is a piece of a much larger network¹⁷ has zero impact on supply and prices in Minnesota when something happens in Chicago or elsewhere. In fact, such an assertion clearly runs counter to the basic economics of oil supply and demand. Therefore, the requirements of Minn. Stat. § 216B.243, subd. 3(5) (2006) and the basic premise of Minn. R. 7853.0130 A (2007) are not satisfied.

III. CONTRARY TO THE REQUIREMENTS FOR A CON, ENBRIDGE AND THE OES FAILED TO CONSIDER CONSERVATION AND EFFICIENCY MEASURES AND ACTIVITIES, ESPECIALLY AS RELATED TO OTHER GOVERNMENT POLICY GOALS, INITIATIVES OR REGULATION.

The evidence presented by Enbridge and OES fails to consider “the policies, rules, and regulations of other state and federal agencies and local governments...”. Minn. Stat. § 216B.243, subd. 3 (7) (2006). *See also*, Minn. R. 7853.0130 D (2007). The evidence in this case demonstrates that neither Enbridge nor the OES witnesses have looked at or considered what is going on with other agencies’ policies or regulations regarding, in particular, greenhouse gas emissions, and what impact that will have on demand.

¹⁷ *See*, maps included in Enbridge’s applications, Ex. 300.

Messrs. Minder and Heinen, contrary to the dictates of Minn. Stat. § 216B.243, subd. 3 (2006) and Minn. R. 7853.0130 (2007), did not consider the direction of the Intergovernmental Panel on Climate Change (“IPCC”) that 15-20% reductions in greenhouse gas emissions are absolutely necessary by 2020 in order to avoid the most catastrophic effects of climate change; did not consider Minnesota legislation regarding energy efficiency and greenhouse gas reduction goals mirroring the IPCC passed during the 2007 Legislative Session,¹⁸ did not consider the work of the MNCCAG which was convened as a direct result of the legislation and direction of the Governor; and did not consider Governor Pawlenty’s work with the Midwest Governors’ Association, Climate Initiative. T. 153-153, 236-237 . In fact, none of the witnesses considered any of the policy or legislative items set forth in Mr. Dayton’s testimony. The record is devoid of any evidence on the CON criteria of considering policies, rules, and regulations of other state and federal agencies and local government.

Messrs. Heinen and Minder, along with counsel for Enbridge, suggested that review of such policies and regulations was “speculative” or outside the required scope of their analysis. Both gentlemen claimed that none of the items set forth in Mr. Dayton’s testimony had become statute, and therefore they should not be considered under the CON statute and rules. T. 153-156, 163, 181, 236-237. Upon questioning both Mr. Heinen and Mr. Minder clearly stated that they would not consider such policies unless, at a minimum they were statutes, and even then, the statutes would need something other than stated policy preferences or goals (effectively eliminating the NextGen Act of 2007 from consideration). T. 156. Mr. Heinen even adds the requirement “only if they are enforced.” T. 249. This position is contrary to the express

¹⁸ Minn. Stat. ch. 216H. *See also* testimony of Mr. Charles Dayton.

language of the statute and rule. Therefore, the requirements for the CON have not yet been properly considered or demonstrated.

The CON statute requires analysis of “(2) the effect of existing *or possible energy conservation programs* under sections 216C.05 to 216C.30 and this section *or other federal or state legislation on long-term energy demand*; and (7) *the policies, rules, and regulations of other state and federal agencies and local governments.....*” Minn. Stat. § 216B.243, subd. 3 (2006) (emphasis added.) The CON rule similarly requires that it “has not been demonstrated on the record that the design, construction, or operation of the proposed facility will fail to comply *with those relevant policies, rules and regulations of other state and federal agencies and local governments.*” Minn. R. 7853.0130 (2007) (emphasis added.) The statute and rule clearly require analysis of policies as well as rules and regulations, listing them separately.¹⁹ Under basic rules of statutory construction (also applicable to rules), Messrs. Heinen and Minder and not properly applying all components of the CON law.

The object of statutory construction is to give effect to the intent of the legislature. *Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 457 (Minn. 2006); *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 385-86 (Minn. 1999). *See also* Minn. Stat. § 645.16 (2006). In that regard, interpretation is to give meaning to all the words and phrases of a statute and it is to be read in the context of the surrounding language. “No word, phrase, or sentence should be deemed superfluous, void, or insignificant.” *Amaral*, 598 N.W.2d at 384 (*citing Owens v. Federated Mut. Implement & Hardware Ins.*, 328 N.W.2d 162, 164 (Minn. 1983)). *See also Minnesota Ins. Guar. Ass’n v. Integra Telecom, Inc.*, 697 N.W.2d 223, 226 (Minn. Ct. App. 2005) (*citing American Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277-78 (Minn. 2000))

¹⁹ The statutory CON requirements also require consideration of all legislation, not just that which sets a particular standard satisfactory for Messrs. Minder and Heinen.

and Minn. Stat. §§ 645.16 and 645.17(2) and (5) (2006). By including policies, in addition to the more formal legislation, rules, and regulation, it was clearly the intent of the legislature and the Commission, to require consideration of government actions and stated preferences or goals, other than those that were particularly passed into certain types of legislation. Interpreting the term policies as do Messrs. Minder and Heinen, would render is superfluous, an outcome contrary to basic rules of statutory interpretation and contrary to the expressed intent of the legislature and Commission.

Moreover, the refusal to consider actual legislation and activities of the IPCC and MNCCAG who post and release their recommendations based on the claim that it is speculative, reveals a glaring inconsistency in the OES's approach to this case. OES readily forecasts into the future what will happen with population, incomes, oil demand and supply, often with little real evidence to back it up or even contrary to the actual data that exists, including relying on the questionable predictions of the AEO. Yet when it comes to complying with the clearly expressed desires, regulation and goals of the Congress, the Minnesota Legislature, the Governor and the IPCC, OES suddenly and inexplicably loses its ability to make forecasts and abandons its obligations under the law. Mr. Heinen didn't disagree that the outcomes forecast by the AEO are no more certain than outcomes directed or sought through the NextGen Act of 2007, MCCAG or other policy initiatives of the Governor. Mr Heinen simply said that he was "more comfortable" with the AEO. T. 249. The approach leaves a hole in the required CON considerations and weighs against a CON for Clipper, based upon the requirements of Minn. Stat. § 216B.243, subd. 3 (2), (6), and (7) (2006) and Minn. R. 7853.0130 A (2) and (5) and D (2007).

At a minimum, analysis of a spectrum of possible outcomes, considering the very real policy and regulatory activities related to global warming that have a significant potential to

impact the demand for oil, must be prepared in order for the Commission to have a full understanding of the criteria set forth in its own rule for issuing a CON.

IV. THE EVIDENCE REGARDING ENVIRONMENTAL IMPACTS ARE ERRONEOUSLY CONSTRAINED AND FAILS TO COMPLY WITH THE APPLICABLE STATUTE AND RULE REQUIREMENTS.

A. The CON Statute And Rule And The Minnesota Environmental Policy Act All Require Much More Extensive Environmental Analysis Of The Clipper Project Than Has Been Performed To Date.

The evidence regarding impacts of the Clipper and connected projects to the natural environment, are constrained and not in keeping with either the requirements under the CON statute and rule or under MEPA. Under the requirements for granting a CON, the Commission is to evaluate whether the consequences to society of granting the CON are more favorable than denying it, including consideration of the effect of the proposed facility upon the natural environment compared to not building the facility. Minn. R. 7853.0130, C (2) (2007). The requirement does not limit consideration of environmental impacts from the facility to the physical space the pipeline occupies on the ground. Rather, the Commission is to consider the effect of the pipeline on the natural environment generally which cannot and should not be divorced from the impacts of what the pipeline will carry. This is reinforced by the many sections of the CON statute and rule, outlined and discussed above, that are concerned with efficiency, conservation, and policies or regulations of other government agencies. Read as a whole, it is clear that the Commission is to consider and does consider, the overall environmental impacts of the project, including the fact that it carries Canadian oil at a time when all of our efficiency, conservation, and environmental goals, policies and regulations are to use less oil.

This also comports with more generally applicable environmental law in MEPA. The stated purpose of MEPA includes:

...to promote efforts that will prevent or eliminate damage to the environment and biosphere and...to enrich the understanding of the ecological systems and natural resources important to the state and the nation.

Minn. Stat. § 116D.01 (2006). MEPA's statement of policy provides that the state recognizes the profound impact that humans, in all their endeavors, can have on the natural environment and the critical importance of restoring and maintaining environmental quality to the overall wellbeing of humans. To that end, MEPA provides that it is the continuing policy of the state to use all practicable means and measures in a manner calculated to create and maintain conditions under which humans and nature can coexist. Minn. Stat. § 116D.02, subd. 1(2006). In order to carry out that policy, MEPA sets state responsibilities to, among other things, "practice thrift in the use of energy and maximize the use of energy efficient systems for the utilization of energy, and *minimize the environmental impact from energy production and use*" and to "reduce the deleterious impact on air and water quality from all sources, *including the deleterious environmental impact due to operation of vehicles with internal combustion engines in urbanized areas.*" Minn. Stat. § 116D.02, subd. 2(9) and (16). (2006). (emphasis added.) As one of the tools to ensure that the purposes and policies of MEPA are met, MEPA requires the preparation of an environmental impact statement wherever there is the potential for significant environmental impacts from a major governmental action. Minn. Stat. § 116D.04, subd. 2a. (2006). An EIS must be prepared prior to such action and that the EIS must be analytical as opposed to encyclopedic. *Id.* While the EQB may provide for alternative forms of environmental review, those forms are to address the same issues and utilize similar procedures as an EIS. Minn. Stat. § 116D.04, subd. 4a. (2006). EQB cannot, by rule alone, negate the application of statute, set forth herein.

Further, EQB's generally-applicable rules provide an EIS must include review of all connected, phased, or related actions, indirect or induced actions, and all cumulative impacts. Connected actions²⁰ and phased actions²¹ shall be considered a single project for purposes of the determination of need for an EIS. Minn. R. 4410.1700, subpt. 9 (2007). A project must not be segmented into smaller parts in order to, or in a way that would, avoid or minimize environmental review. See acknowledgement in *Pope County Mothers and Others v. Minnesota Pollution Control Agency*, 594 N.W.2d 233, 236-37 (Minn. Ct. App. 1999). The analysis of cumulative impacts has been reinforced by the decision of the Minnesota Supreme Court in *Citizens Advocating Responsible Development v. Kandiyohi County*, 713 N.W.2d 817 (Minn. 2006), wherein the court found that cumulative effects analysis requires a review of the surrounding geographically-relevant area for similar projects or similar environmental effects which may have an additive effect. *CARD*, 713 N.W.2d at 830-831. See, also, *Trout Unlimited v. Minnesota Department of Agriculture*, 528 N.W.2d 903 (Minn. Ct. App. 1995). And finally, of great significance here, EQB rules---still in effect---provide that preparation of at least an EAW is *mandatory* for a pipeline of this size and type. Minn. R. 4410.4300, subpt. 7 (2007). See, MCEA's comment letter submitted for the record, December 14, 2007.

B. Enbridge And The OES Have Failed To Adequately Consider The Potential Environmental Effects From The Clipper Under Either The CON Or The MEPA Requirements.

The obligation to conduct thorough environmental review is squarely with the responsible government agency, in this case, the Commission. Minn. Stat. § 116.04 (2006). At

²⁰ Connected actions are defined as actions related because (1) one project would directly induce the other; or (2) one project is the prerequisite for the other, or (3) neither project is justified by itself. Minn. R. 4410.0200, subpt. 9b (2005).

²¹ A phased action is defined as two or more projects to be undertaken by the same proposer that will have environmental effects on the same geographic area and are substantially certain to be undertaken sequentially over a limited period of time. Minn. R. 4410.0200, subpt. 60 (2005).

this juncture, neither Enbridge nor OES has supplied adequate environmental information or analysis upon which the Commission can satisfy the requirements of the CON or MEPA. Mr. Minder was designated by OES to conduct the analysis. However, Mr. Minder is unqualified and ill-prepared to conclude, from his almost non-existent review of the environmental and natural resource aspects of the Clipper project, that “effects on the natural environment would be minimal”. Ex. 307, pp. 15-17.

First, Mr. Minder has no background, education or training in any ecological sciences, either generally, such as ecological studies, or more specifically, such as biology, wetlands, air quality, or wildlife. T. 142-143. Mr. Minder was not even familiar with a number of the relevant environmental laws or regulations. T. 164-165. Mr. Minder is a rates analyst with the OES. Ex. 307, p. 1. Nor did Mr. Minder consult with anyone who might have had relevant expertise. T. 182.

Moreover, with or without the requisite expertise, Mr. Minder didn’t really do any examination of the environmental or natural resource impacts or health impacts of the Clipper project in order to bolster his opinion that the effects “would be minimal”. Mr. Minder did no examination of any air quality or global warming impacts that would be the indirect result of moving tar sands heavy crude to refineries in the Upper Midwest. T. 146-148. Mr. Minder did no analysis of stream or wetland crossings. T. 166. Mr. Minder did no analysis of trout streams or wild and scenic river impacts. *Id.* Mr. Minder did no analysis of habitat impacts, either specific to the corridor or cumulative. *Id.* In fact, Mr. Minder had taken such a cursory look (if any look at all) at the environmental and natural resource impacts of the project, he failed to realize that even Enbridge admitted that there would be permanent removal and clearing of larger

types of vegetation in the corridor and that there could be permanent impacts to stream vegetation. T. 150-151.

When pressed on whether he had any basis at all for his conclusion that effects to the environment would be minimal, the only thing he could come up with was the Enbridge environmental mitigation plan. T. 172-177. When asked what in the mitigation plan he believed supported his conclusion, he read the table of contents. T. 178-179. Pressed further on specific topics, Mr. Minder simply referred (he appeared to read them) to the very general statements, with no specificity on which streams or wetlands or habitat types or wildlife were involved, that Enbridge would “mitigate” for any environmental damage caused during construction. T. 179-180. Ultimately, Mr. Minder admitted he had done no analysis, but simply relied on the assumption (largely unfounded because he never talked to anyone at other agencies or even within his own agency about it), that other people in other agencies were looking at this. T. 168, 179-180. Mr. Minder never discussed or checked this assumption with any of the individuals in those agencies, including those working on the routing permit within his own agency. T. 182.

The witnesses in this proceeding all argued that to look to the larger environmental effects the Clipper project, was beyond the scope of the rules. This is simply an incorrect reading of the applicable law. As set forth above, the CON obligations to generally review impacts of the facility to the environment, particularly in conjunction with other energy efficiency and policy and regulatory goals. Mr. Minder, the person assigned at the OES to prepare this review, did not do the review. The failure to conduct environmental review and the arguments against it, are incorrect in terms of applicable environmental review under MEPA. While the EQB appears to have limited what a pipeline applicant must supply in terms of environmental information, *see generally*, Minn. R. 7853.0600 et seq., application guidelines are

distinct from the Commission's (and OES's) obligation to conduct a full environmental review of the project under MEPA and generally-applicable environmental review rules. The obligation to prepare an analytical EIS has always resided with the government entity, not the individual applicant. The applicant simply supplies the information required of it. Because EQB cannot act by rule outside the direction of MEPA, this is the only rational reading of the EQB pipeline rules that is consistent with MEPA. Again, in accordance with statutory interpretation requirements, the requirements for environmental review must be read to give full effect to the intent of the legislature, must be read as a whole, and must be read to ensure that all aspects of the law have meaning. Minn. Stat. §§ 645.16 and 645.17 (2006). *See also cases cited above.*

CONCLUSION

A CON is not warranted on the evidence before the ALJ and the Commission. Enbridge and the OES have not demonstrated that the Clipper project is warranted by increasing demand, and have not demonstrated that the Clipper project will have any kind of impact, much less positive impact, on supply and price in Minnesota or the region; have failed to consider and factor into the analysis, various policies and regulations of other government agencies, including the Minnesota Governor and Legislature, in striving for decreased use of oil; and have failed to consider the environmental impacts of the Clipper and related and connected actions as required by MEPA. The requirements of Minn. Stat. 216B.243 (2006) and Minn. R. 7853.0130 (2007) have not been met. The CON should be denied.

Dated: May 28, 2008

Respectfully submitted,

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