

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 LSr Pipeline Project**

**MINNESOTA CENTER FOR  
ENVIRONMENTAL ADVOCACY  
POST-HEARING COMMENTS;<sup>1</sup>  
CERTIFICATE OF NEED**

**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 ("PUC"), one of which is the subject of the above-captioned contested case proceeding before the Honorable Eric L. Lipman, Office of Administrative Hearings. ("ALJ"). The 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 PUC by order dated July 30, 2007.<sup>2</sup> Enbridge states that the LSr will, in at least the foreseeable future, carry

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<sup>1</sup> Minnesota Center for Environmental Advocacy ("MCEA") submits this document as post-hearing comments as opposed to a formal brief because, at the time of the hearing on January 22, 2008 and the date for briefing, MCEA's Petition To Intervene was pending and MCEA was not yet a formal party. MCEA files these Post-Hearing Comments within the time allotted for post-hearing briefing as set by the Administrative Law Judge on January 22, 2008.

<sup>2</sup> MCEA understands that the matter upon which it is submitting post-hearing comments concerns only the CON for the LSr pipeline and that later deadlines for hearing and comment have been set for the Alberta Clipper and Southern Lights CON applications. Similar to the hearing on January 22, 2008, these post-hearing comments address only the LSr project.

conventional crude oil from Canada, not tar sands crude oil that originates in the tar sands area of northern Alberta.<sup>3</sup>

The LSr pipeline 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 PUC prior to construction. Minnesota Statutes §216B.243, subd. 2 (2006) authorize the PUC 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 Minnesota Department of Commerce (“DOC”) have failed to demonstrate that Enbridge is entitled to a CON for the LSr 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 LSr project have not been met because (1) the arguments and evidence concerning protecting Minnesota and regional consumers from oil price and supply volatility are unsupported and lacking in sound economic analysis; (2) the arguments and evidence regarding increased demand for oil in Minnesota are poorly supported 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; (3) the evidence and testimony from Enbridge and the

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<sup>3</sup> The LSr pipeline could carry tar sands at some point in the future. Testimony of Mark Sitek, January 22, 2008, Hearing Transcript, pages 12-16. (Hearing Transcript citations will hereinafter be referred to as “T.”)

DOC 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 regulations; and (4) the evidence concerning and considerations of environmental impacts from the project and related projects are erroneously constrained, and fail to comply with the applicable statute and rule requirements. Therefore, on the basis of the record as a whole and the arguments contained herein, MCEA requests that the ALJ recommend denial and that the PUC deny the Certificate of Need for the Enbridge LSr pipeline project.

### **LEGAL REQUIREMENTS**

Minnesota Statutes § 216B.243 (2006) set forth the requirements for obtaining a CON. Specifically, subdivision 3 provides that no proposed large energy facility (the definition of which includes pipelines<sup>4</sup>) 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 PUC 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...;

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<sup>4</sup> Minn. Stat. § 216B.2421 (2006).

- (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;
- (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...; 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 PUC promulgated rules regarding CON and assessment thereof. The rule primarily applicable to this proceeding is Minn. R. 7853.0130 (2007). The portion of Minn. R. 7853.0130 (2007) applicable to MCEA's argument 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 of 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 PUC to review the potential for significant environmental effects from the proposed project, Minn. Stat. § 116D.04 (2006). While MCEA notes that Enbridge, and to an extent, DOC, 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, DOC or the PUC 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 more comprehensive review of the impacts from the LSr project, including connected, phased, indirect

and cumulative impacts, than the review performed to date. *See* MCEA comments dated December 14, 2007 and December 21, 2007. The obligation to conduct that review falls on the Responsible Governmental Unit, in this case PUC. As set forth in MCEA's prior comments and to an extent below, PUC 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 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 evidence from DOC (subscribed to by Enbridge with no original evidence from Enbridge)<sup>5</sup> claims that the LSr pipeline will bring stability to Minnesota oil supply and prices is unsupported and internally inconsistent. In fact, in accordance with standard petroleum supply and demand economics the LSr pipeline will have absolutely no impact on Minnesota, or even regional, oil supply, and prices, bringing no particular benefit to Minnesota or regional consumers. Enbridge has not demonstrated and cannot demonstrate the requirements set forth in Minn. Stat. § 216B.243, subd. 3(5) (2006) and Minn. R. 7853.0130 A. (2007).<sup>6</sup>

As acknowledged by the testimony of Adam Heinen, oil is a fungible commodity, (T. 55-56); (*see also*, Sitek, T. p. 24), which is easily transported to regional, national and even international markets. (T. 57-58). Mr. Heinen further acknowledged that oil can and does flow to wherever the demand and prices are high. *Id.* States and common carrier transporters like Enbridge cannot "reserve" capacity or oil for local refineries nor would they if they could receive

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<sup>5</sup> Because Enbridge chose to rely almost entirely on the analysis and testimony of Messrs. Heinen and Minder to comply with the requirements for a CON, most of MCEA's criticism and argument regarding the evidence of CON goes to the testimony of those gentlemen.

<sup>6</sup> The requirements of Minn. R. 7853.0130A 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.

a higher price elsewhere. (T. 22-24; 57). Therefore, Mr. Heinen's later assertions upon leading on redirect that the LSr pipeline will somehow insulate Minnesota consumers from the effects of higher demand and/or prices in the Chicago area, (T. 95), are without foundation and contrary to the basic economics of oil supply and demand. As pointed out by John T. Durkin, Ph.D. in an Enbridge pipeline proceeding before the Illinois Commerce Commission ("ICC"), docket no. 07-446, oil supply and price is not insulated within a particular state or even region.<sup>7</sup> Rather, as demonstrated by the two graphs that are part of his filed sworn testimony, oil prices in a state or region, which includes Minnesota, move almost in lock-step with national oil prices. Therefore, a pipeline in northwest Minnesota that is a piece of a much larger network<sup>8</sup> has zero impact on supply and prices in Minnesota when something happens in Chicago. Mr. Heinen's bare statements that the LSr will do so are entirely unsupported and inconsistent with his own testimony regarding the economics of petroleum supply and demand.

In fact, the LSr will have zero impact on supply and price in Minnesota, even looking beyond the borders of the U.S. into the international oil market. Mr. Heinen acknowledges that current high oil prices are driven in large part by the increasing demand in fast-developing countries like China and India. (Exhibit 208, p. 35; T. 58-59). He agrees that should the transport infrastructure be available, Enbridge could ship the crude oil to be carried by the LSr through and past the entire Midwest market, and into the international market. (T. 55). It should be noted that Enbridge is proposing a pipeline through the center of Illinois, the subject of the

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<sup>7</sup> Dr. Durkin is a 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. In addition, he 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 filed before the ICC.

<sup>8</sup> *See*, maps included in Enbridge's applications, referenced in the January 22, 2008 hearing as Exhibit B to the Enbridge application.

ICC docket cited above, (a fact that Mr. Heinen did not know despite his work on this matter and his concern with oil supply staying in the Midwest) (T. 93-94), and is preparing to extend their pipeline network all the way to Houston, a refining center and an international port. *See* copy of articles, news releases, and Enbridge website information regarding Enbridge efforts to connect entire Enbridge system to Houston and to access Asian markets through British Columbia pipelines.<sup>9</sup> The reality is that Enbridge, along with all other components of our oil supply system, can move and supply crude oil and refined products to wherever the national and international demand is the highest. There is little to no insulation for Minnesota, regardless of the existence of LSr. Mr. Heinen's statements in this regard are simply not supported by the facts or basic petroleum economics theory.

The LSr similarly will do little to insulate Minnesota or the Upper Midwest from accidents or disasters. Mr. Heinen's testimony on this was muddled, internally conflicting, and unsupported. In his written testimony, confirmed during cross examination, Mr. Heinen noted that immediately following the accidents on the Enbridge pipeline in Northwestern Minnesota in late November 2007, there was no apparent impact locally, but prices on the West Texas Intermediary ("WTI") spiked. (Exhibit 211, pp. 2; 4-5; T. 60-61.) Mr. Heinen's surrebuttal testimony also suggests a connection by stating: "This price volatility is well illustrated in the hours directly following the recent Enbridge pipeline incidence, when world WTI crude oil prices increased over \$4 to a price per barrel of \$95.17 in a few hours..." and "...the fact that the

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<sup>9</sup> The latest pipeline proposal announced will be from Patoka Illinois and Midwest refiners to the Texas Gulf Coast, called "Texas Access Pipeline". "[T]he new pipeline system would provide shippers with the added flexibility of moving onto different crude oil distribution pipelines." "The Texas Access Pipeline will expand pipeline infrastructure to increase the reliable supply of crude oil to U.S. refineries." Enbridge News Release, dated December 19, 2007, and pages from Enbridge website, copies enclosed. *See also*, enclosed copies of Enbridge website pages regarding Gateway project from Alberta to British Columbia coast for shipment of crude oil to Asian markets.

explosion triggered short-term price volatility....” (Exhibit 211, p. 4). While Mr. Heinen confirmed this testimony on cross examination, on redirect he suggested, contrary to the direct connection drawn in his written testimony, that he couldn’t state whether the spike in WTI was connected to the accident in northwest Minnesota as there could be many factors. (T. 95; 103).

Mr. Heinen then tried to suggest that what he meant was the LSr would insulate against mishaps like the November accident or incidents like Hurricanes Katrina and Rita, testifying “[i]f the recent disruption had lasted weeks, or months, like the events surrounding Hurricanes Katrina and Rita, this event [the November accident] would likely have led to sustained upward pressure on crude oil and refined product prices,” but that too is simply unsupported by what little evidence there is in the record. The Hurricanes affected prices nationwide, not just in Minnesota or the Midwest region. (T. 56.)

In fact, after redirect and recross on the issue, it is unclear which version of Mr. Heinen’s testimony regarding the accidents in northwest Minnesota and/or Hurricanes Rita and Katrina is the version he is currently sponsoring. A specific exchange during the hearing on this topic is particularly illuminating: Mr. Heinen’s surrebuttal testimony is that the LSr will help alleviate “such effects,” from a nonspecific accident. That testimony immediately followed a series of questions and answers about the accident in northwest Minnesota and the WTI price spikes. (Exhibit 211, p. 4-5). Mr. Heinen was asked what effects from the Minnesota accident he referred to in his surrebuttal testimony, because contrary to his written testimony, Mr. Heinen testified on redirect that the spike in the WTI may, or may not, have been related to the Minnesota accident. (T. 63-64). Mr. Heinen testified that he was not referring to the WTI spike effect, but he couldn’t point to any other effect to which his testimony referred. He then switched gears and claimed that his surrebuttal testimony was referring more to the kinds of

effects from something like the hurricanes. (T. 64). Upon more specific follow-up to how the LSr would help alleviate the effects of a large hurricane, Mr. Heinen ultimately answered “To be honest, I don’t know how to answer that question, because my testimony was not addressing the effects of a hurricane in other areas, this is strictly from a regional standpoint of refineries in the area.” (T. 66). This statement was nonsensical in light of the series of questions and answers preceding it.

Mr. Heinen basically concludes with testifying that “we have no way of knowing” whether price spikes and recoveries are due to the accident or not. (T. 103). Precisely. Given that, it is clear that many factors affect prices and supply, and the presence, or not, of the LSr pipeline in northwestern Minnesota will have no impact on oil supply or prices in Minnesota regionally or nationally. Rather, the reality, as agreed to by Mr. Heinen is that oil prices are “extremely volatile” and the LSr will not affect that volatility. (T. 103.)

Finally, the claims by Enbridge and Mr. Heinen that the LSr will somehow contribute to national oil security is farfetched and fail to adhere to Mr. Heinen’s own testimony, which states oil moves on an international market. (T. 59). Dr. Durkin gives a simple example in his Illinois testimony of how a pipeline connecting to other pipelines in the U.S. will have no positive effect on insulating U.S. oil supply from turmoil in overseas markets. Even if one were to assume that the U.S. obtained none of its oil from the Middle East, many other buyers on the world market do and will. If turmoil in the Middle East upsets the supply or OPEC sharply reduces supply, the U.S. will be impacted because other world buyers, for example Japan, India, or China, which supply from the Middle East has been cutoff, will turn to supplies such as Canada, driving up the demand and price for the Canadian supply. This is simply supply and demand economics of a commodity that trades internationally. Minnesota, the region and the nation will not be insulated

from that simply because Enbridge has a network of pipelines, some in Minnesota. In fact, that network of pipelines can easily send Canadian oil to wherever demand and prices are the greatest, with no reservation of supply to ensure or enhance “U.S. Security.”

The record in this matter contains no evidence that the LSr pipeline will positively affect oil supply or price in Minnesota or in the region of the Upper Midwest. 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.

**II. THE ARGUMENTS OF INCREASED DEMAND FOR OIL IN MINNESOTA ARE POORLY SUPPORTED AND FAIL TO TAKE INTO ACCOUNT FACTORS SUCH AS OTHER REGULATORY AND POLICY ACTIVITIES THAT COULD IMPACT DEMAND AND THE NEED FOR CONSERVATION AND EFFICIENCY.**

The purported evidence of increasing need or demand for oil in Minnesota, to be served by the LSr, 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 LSr under applicable statute and rule.

First, testimony from Mr. Heinen demonstrates that the evidence of increased demand was based almost entirely upon information that was not necessarily particular to Minnesota or the immediate region. Mr. Heinen’s evidence regarding demand was primarily based upon the 2007 Annual Energy Outlook from the Energy Information Administration. (Exhibit 208, p. 18-19; T. 67). However, Mr. Heinen acknowledged that he had not taken the opportunity to update his knowledge and opinion by reviewing the draft 2008 Annual Energy Outlook (“AEO”), which clearly predicts slower rates of increase for demand across all sectors other than the refining sector. (T. 67 and MCEA public exhibit number 601). Moreover, the draft 2008 AEO clearly

warns that it does not take into account recent developments regarding fuel efficiency standards and biofuels required through the Energy Independence and Security Act (“H.R. 6”) signed into law in December of 2007. (Exhibit 601, p. 1).

Closer to home, evidence demonstrates significantly reduced demand in Minnesota based upon real data. As indicated in the attached information from the Minnesota Department of Transportation (“MnDOT”), submitted during the Minnesota Climate Change Advisory Group (“MNCCAG”),<sup>10</sup> processed in an article published in the *Star Tribune* just days after the LSr CON hearing, vehicle miles traveled in Minnesota have hit a plateau and declined.<sup>11</sup> The article and statements therein show clear data that the reduction in miles traveled is not necessarily just a “blip” and is expected to continue into the future. (See, graph of projections on third page of MNCCAG document, enclosed herewith, marked, not introduced, as public exhibit number 602). Yet, Mr. Heinen indicated that he was only vaguely aware of the work of the MNCCAG, (despite the leading and instrumental role played by his employer, the Department of Commerce, in the MNCCAG) and had not discussed his assumptions regarding vehicle miles traveled or oil demand in Minnesota with anyone at his fellow agency, MnDOT. (T. 76). Similarly, Mr. Heinen testified that he has formed “no opinion” regarding the potential impact of Minnesota’s ethanol production and use on petroleum demand. (T. 85). Clearly, the evidence of increased

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<sup>10</sup> The MNCCAG commenced its work in the spring of 2007, about the time that Enbridge filed its applications herein. The Governor and the Legislature have played an instrumental role in convening the MNCCAG and many members of state agencies sit on the MNCCAG and its various technical working groups. *In fact, Mr. Heinen’s agency, Department of Commerce, is in charge of the MNCCAG process.* The MNCCAG’s work has been highly publicized and its formal findings and recommendations were released on January 24, 2008, also a fact that has been highly publicized in advance.

<sup>11</sup> Attached are documents published on the MNCCAG website, Land Use and Transportation Technical Working Group, as public records. Also attached is a copy of an article referencing the MnDOT data published in the *Star Tribune*, January 24, 2008, titled “*Drivers Ease Up On The Odometer.*”

demand for oil from the LSr is conflicting and incomplete if not outright wrong. It cannot be relied upon.

Mr. Heinen's claims regarding income and increased oil demand are also oversimplified and not particularly supportive of a CON for the LSr. As noted in the enclosed memorandum from Dr. Durkin, Mr. Heinen's testimony regarding increased demand based upon increased income is in keeping with some empirical studies and with the EIA. However, Dr. Durkin clarifies that even the EIA admits the shakiness of the predictions---that changes in the various assumptions can drastically change the demand predictions. For example, predicted income/demand elasticity can be right over a long term, but be very wrong over as long as a 25 year period. Moreover, Dr. Durkin points out that there are three factors involved in the EIA predictions and that the predictions fail to account for inaccuracies in all three. 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.<sup>12</sup> Finally, the assumptions regarding income and increased oil demand are made in a vacuum that fail to consider real-world facts, such as increases in food and other goods prices that also likely eat up a consumer's income, leaving less for spending on gasoline. Again, this is demonstrated by the information from MnDOT, which suggests that high prices may in fact depress demand, given the close correlation to high prices and the timing of the vehicle miles

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<sup>12</sup> The uncertainty built on uncertainty inherent in this process may be a given, but it stands in especially stark contrast to the DOC'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". The uncertainty inherent in the demand/income prediction demonstrates the irrationality and potential predisposition in the DOC's unwillingness to consider the regulatory and environmental aspects of the situation.

traveled reductions. Mr. Heinen failed to consider any of these important facts in his statements regarding income and demand.

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 oil might have in driving down prices, inducing the very demand that Enbridge and DOC claim is driving the need for more oil. Likewise, there is no analysis or consideration by the DOC 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. (T. 22 and MCEA public exhibit 600). The 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 LSr will in fact 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 LSr dictates against granting the CON for the LSr under the requirements of Minn. Stat. § 216B.243, subd. 3 (1) (2006) and Minn. R. 7853.0130 A(1) (2007).

**III. CONTRARY TO THE REQUIREMENTS FOR A CON, ENBRIDGE AND THE DOC FAIL 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 DOC 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). As noted above, the evidence demonstrates that neither Enbridge nor the DOC witnesses have spent a moment looking at or considering what is going on with other agencies’ policies or regulations,

particularly greenhouse gas emissions, and what impact that will have on demand. Both Messrs. Minder and Heinen admit that they are only vaguely aware of the work of the MNCCAG---a group their agency leads at the direction of their Governor and the legislature. (T. 31-32; 76). 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;<sup>13</sup> did not consider Minnesota legislation regarding energy efficiency and greenhouse gas reduction goals mirroring the IPCC passed during the 2007 Legislative Session,<sup>14</sup> 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 broader implications of H.R. 6 regarding biofuels or Minnesota’s ethanol additive requirements. (T. 31-34; 70-72; 75; 85). 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. Clearly it is within the required scope of their analysis as the plain language of the statute and rule requires consideration of policies, as well as actual regulation. Moreover, the refusal to consider actual legislation and activities of the IPCC and MNCCAG, groups that post and release its recommendations based on the claim that it is speculative, reveals a glaring inconsistency in the DOC’s approach to this case. DOC readily forecasts into the future what will happen with

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<sup>13</sup> Mr. Heinen testified that he knew nothing of the IPCC other than that the group recently won the Nobel Peace Prize, despite the fact that news outlets, including local papers, have covered the release of the IPCC’s findings and reports. (T. 85).

<sup>14</sup> Minn. Stat. ch. 216H.

population, incomes, oil demand and supply, often with little real evidence to back it up or even contrary to the actual data that exists. 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, DOC suddenly and inexplicably loses its ability to make forecasts and abandons its obligations under the law. The approach leaves a hole in the required CON considerations and weighs against a CON for LSr, 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 PUC 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 FAIL TO COMPLY WITH THE APPLICABLE STATUTE AND RULE REQUIREMENTS.**

The evidence regarding impacts of the LSr 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 PUC 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 PUC 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 PUC 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 and includes indirect or induced actions and all cumulative impacts. Connected actions<sup>15</sup> and phased actions<sup>16</sup> 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 of this requirement 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

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<sup>15</sup> 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).

<sup>16</sup> 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).

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.

The witnesses in this proceeding all argued that to look to the larger environmental effects of the LSr or its sibling projects, the Alberta Clipper and the Southern Lights, was beyond the scope of the rules. This is simply an incorrect reading of the applicable law. As set forth above, it is 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 PUC's (and DOC'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.<sup>17</sup>

Moreover, restricting analysis of impacts on the natural environment to the physical circumference of the pipe itself, is contrary to the CON obligations to generally review impacts

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<sup>17</sup> The canons of statutory construction dictate that laws must be construed as a whole and so as to not render any portion of them superfluous or inconsistent with other laws. *See generally*, *Jay v. Boyd*, 351 U.S. 345, 360, 76 S.Ct. 919, 928 (1956) ("We must read the body of regulations. . .so as to give effect, if possible, to all of its provisions."). The Supreme Court has emphasized that "[o]ur cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the enactment." *Pa. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). Such canons of construction apply equally to interpretation of rules and guidance. *See e.g.* *BP Chemicals v. First State Ins. Co.*, 226 F.3d 420, 426-426 (6th Cir. 2000); *Apostolic Pentecostal Church v. Colbert*, 169 F.3d 409, 414 (6th Cir. 1999); *Sprague v. GM Corp.*, 133 F.3d 388, 405-406 (6th Cir 1998).

of the facility to the environment, particularly in conjunction with other energy efficiency and policy and regulatory goals. Right now those policies and goals obviously favor decreased petroleum use through fewer miles traveled and more efficiency. The evidence as argued by Mr. Heinen and Enbridge, supposedly demonstrates a connection between increased supply, prices, and increased oil use in the state and region. Yet neither Enbridge nor DOC spend any time examining the obvious environmental impacts from more and cheaper petroleum (supposedly) available to the region from the LSr in order that these impacts might be weighed and balanced against the alleged benefits of the project as dictated by the CON statute and rule. Likewise, there is no consideration or analysis of the increased refining and pollutants therefore, even though the evidence demonstrates that those very refineries are driving or inducing much of the demand for the LSr and related projects. (T. 22; 36-39; 44-45). Nor is there mention, much less consideration, of the connected environmental impacts of the tar sands mines and the increased global warming pollutants from their use, even though Enbridge testifies that the tar sands activities are driving their pipeline expansions and are connected to, and part of, the LSr project. (T. 22). The evidence fails to support a finding of no or little environmental impact and the environmental review requirements of MEPA cannot be met by the PUC on the record that currently exists. Environmental review of the LSr is incomplete and under the requirements of MEPA, the CON cannot be granted until environmental review is complete.

### **CONCLUSION**

A CON is not warranted on the evidence before the ALJ and the PUC. Enbridge and the DOC have failed to demonstrate the following: that the LSr project is warranted by increasing demand; that the LSr project will have any kind of impact, much less positive impact, on supply and price in Minnesota or the region; 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 to consider the environmental impacts of the LSr 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: February 1, 2008

Respectfully submitted,

/s/Janette K. Brimmer

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