

**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 Project**

**MINNESOTA CENTER FOR
ENVIRONMENTAL
ADVOCACY'S POST-
HEARING REPLY BRIEF**

June 4, 2008

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INTRODUCTION

This post-hearing reply brief is filed on behalf of the Minnesota Center for Environmental Advocacy (“MCEA”). MCEA made its primary points in its initial briefing in this matter, and will address just a few items from the post-hearing briefs of the applicant Enbridge Energy Limited Partnership and Enbridge Pipelines LLC (hereinafter collectively “Enbridge”) and the Office of Energy Security (“OES”). As set forth in MCEA’s initial post-hearing brief, Enbridge has not demonstrated and OES has not properly considered all the legal requirements for a Certificate of Need (“CON”) for the Alberta Clipper/Southern Lights pipeline project. (the “Clipper project”).

I. REGARDLESS OF WHETHER MCEA DEMONSTRATES AN ALTERNATIVE, ENBRIDGE MUST BEAR THE BURDEN OF PROVING THE UNDERLYING NEED FOR THE CLIPPER PROJECT.

The Minnesota Court of Appeals case, *In the Matter of City of Hutchinson*, 2003 WL 22234703 (Minn. Ct. App. 2003) (attached to Enbridge’s brief), does not alter the status of the law and does not shift the burden the statute squarely places on Enbridge in this case. The *Hutchinson* case is an unpublished decision of the Court of Appeals with no precedential value. Importantly, Enbridge glosses over the fact that the *Hutchinson* court affirmed that the burden to show need is on the applicant, even with the rule language that another party may demonstrate a more reasonable and prudent alternative to the proposed pipeline. *Hutchinson*, at *7. Whether or not a party can and does demonstrate an alternative does not relieve the applicant of the ultimate obligation to prove the underlying need for the project, something that Enbridge has not done here. Unlike in this case, the actual need for the natural gas in question in the *Hutchinson* case was unquestioned, and the court reaffirmed that the language regarding alternatives does not relieve the applicant from demonstrating the actual need for the project as proposed. The

Hutchinson case involved a dispute over a natural gas pipeline for the City of Hutchinson, proposed by the municipal utility, Hutchinson Utilities Commission. *Hutchinson*, at *1. The existing pipeline owner and provider was the opposing party---making the case a contract dispute over who would supply what magnitude of new capacity, not as in this case, whether increased capacity was even needed in the first instance. *Id.*¹ Therefore, the *Hutchinson* case has little value or instruction for the Clipper project matter currently under review.

Enbridge incorrectly attempts to use the *Hutchinson* case to claim that MCEA has not carried its burden of demonstrating alternatives to the LSr and therefore MCEA's arguments must fail and a CON be granted. In doing so, Enbridge asks the Administrative Law Judge ("ALJ") and the Public Utilities Commission (the "Commission") to essentially skip over the statutory requirements for demonstrating actual need for the crude oil to be carried by the Clipper project, a request that should be denied.

As noted in MCEA's initial post-hearing comments, MCEA challenges the very foundation of Enbridge and the OES's need argument. Neither Enbridge nor OES has demonstrated need for more Canadian crude oil in Minnesota or the region. The arguments of increased demand are based on shaky estimates that are mere extrapolations of the immediate past. The supply, pricing, and energy security arguments are not supported by the basic economics of petroleum and the OES's testimony was conflicting and muddled. Moreover, more petroleum at lower prices is contrary to all the goals and policies regarding climate change and energy use coming from other government agencies, the Minnesota Legislature, the Governor's office and Congress. Rather, it appears that the real motivating force behind Enbridge's Clipper

¹ The *Hutchinson* case also concerned, in significant part, a legal issue not relevant here regarding the pipeline's character as an intrastate pipeline and the Public Utilities Commission's consideration of it in that context.

project proposal is Enbridge and Canadian producers' desires to reach new, lucrative markets for their product. MCEA sees no need for it to propose an alternative method of delivery for Canadian crude petroleum to Gulf Coast or Chicago refineries, that MCEA believes is absolutely not needed and contrary to public policy and broader environmental protection. The lack of an alternative delivery method for a commodity that is not needed and not desired by various policy-makers absolutely does not mean that a CON is therefore automatically granted---such an interpretation is ludicrous. The *Hutchinson* case clearly does not shift the burden to demonstrate the CON requirement from Enbridge when Enbridge has failed to make the requisite showing regarding need and OES has failed to consider all elements under the CON law. To allow Enbridge a CON under those circumstances would render the statutory requirements meaningless.

II. THE PREDICTIONS OF INCREASED PETROLEUM DEMAND NECESSITATING THE CLIPPER PROJECT ARE THIN AND UNSUPPORTABLE.

Enbridge and OES continue to rely on a few broad-brush claims that demand will somehow increase to a degree that the Clipper project will be needed, but those broad brush claims have little by way of actual support. As set forth in MCEA's initial post-hearing brief, the estimates of increased demand based upon the Annual Energy Outlook ("AEO") are very shaky and the AEO is often wrong due to the simple extrapolation methods that it uses. The most recent estimate of demand for liquid fuels at .4%, Ex. 316, attachment AJH-R-7, p. 4; T. 228, is so small as to be almost nonexistent. In their post-hearing briefs, both Enbridge and OES cite less to the AEO and more to increasing "world demand" as a primary reason for increased demand that must be met by the Clipper project. Yet such increasing world demand shows the flawed arguments for what they are.

As clearly set forth in Dr. Durkin's testimony, Ex. 350, p. 2,² a single pipeline through northern Minnesota will have zero impact on world demand such that it will benefit Minnesota or Midwestern consumers of petroleum products. As Dr. Durkin notes, "Enbridge makes no claim that the increased crude supplies are destined for the Minnesota market" and indeed, Enbridge clearly intends to extend its capacity well past the Minnesota market. *Id.* and p. 3. It is precisely because the market for petroleum is so large and diverse that the Clipper project will not have the impact desired by OES.

In fact, the increased world demand and tapping into that demand, is plainly the real reason that Enbridge seeks to have the Clipper project, and all of the connections to it through Wisconsin and Illinois, approved. Ex. 314, p. 5; T. 41-43, 62. The demand that Enbridge seeks to fulfill in this CON proceeding is not demand from the State of Minnesota or even the Upper Midwest, but the demand from fast-growing economies that are competing for petroleum worldwide. The evidence is clear from numerous witnesses that petroleum prices are high due all, or at least in large part, to increased demand from countries like China. This is making petroleum transport and refining very lucrative right now and Enbridge, like anyone else in the business, clearly wants to take advantage of that. As was admitted by numerous witnesses for Enbridge and OES, the current situation is that in the Enbridge system, at current capacity, is more than Minnesota refineries can physically handle and that those refineries currently refine more product than Minnesota needs. Ex. 312, pp. 4 and 14. T. 38-39, 46-47, 49. There is capacity to serve what little limited increase in demand might actually happen here, even if the AEO predictions turn out to be true. Taking the record as a whole, it is clear that this desire to reach

² Enbridge inexplicably asserts that Dr. Durkin's testimony is un-sworn. Exhibit 350 is a sworn affidavit, Ex. 350, p. 8.

and sell to new markets and the Gulf Coast, and not increased demand in Minnesota or Upper Midwest, is the driving force behind the Clipper project.

Moreover, Enbridge and OES continue to essentially ignore important policies set forth by our legislature and Governor that are working to reduce demand for petroleum and which will likely have an impact on demand.³ Neither OES nor Enbridge, contrary to the dictates of Minn. Stat. § 216B.243, subd. 3 (2006) and Minn. R. 7853.0130 (2007), considered the actions by the Minnesota Legislature in the NextGen Energy Act of 2007, Minn. Stat. § 216C.05 (2007). to set goals for greenhouse gas emissions reductions as recommended by the Intergovernmental Panel on Climate Change (“IPCC”) in order to avoid the most catastrophic effects of climate change; did not consider the work of the Minnesota Climate Change Advisory Group (“MNCCAG”), 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 much considered, and certainly gave no effect to, any of the policy or legislative items set forth in Mr. Dayton’s testimony, apparently, in Mr. Heinen’s case, because he simply was as comfortable with those predictions and goals as he was with the shaky predictions of the AEO. T. 249.

Finally, Enbridge splits hairs on the demand issue in its brief demonstrating just how marginal evidence of the alleged need to serve increased demand is. In ¶ 172 of its brief, Enbridge agrees that technology will indeed slow growth in demand for petroleum, but that it

³ High petroleum prices, as acknowledged by Mr. Heinen, will and currently are depressing demand for petroleum. T. 209-211. *See also*, <http://www.dot.gov/affairs/fhwa1108.htm> (where the U.S. Department of Transportation is indicating that Americans are currently driving at historic lows.) More importantly, as it relates to the policy items that Mr. Dayton identifies and that should be taken into account herein, that depressed petroleum demand has led to a reduction in greenhouse gas emissions of *9 million tons in the U.S. during the first quarter of 2008*. *Id.* Demand, high prices and reductions of greenhouse gas emissions that are the goal of our Governor and Legislature are real and directly linked.

will “not reduce the demand below currently [sic] levels.” *Reduction in demand from current levels* is not the issue. Enbridge’s own witness indicated current pipeline capacity is oversupplying Minnesota and the Upper Midwest’s current needs. Ex. 312, pp. 4 and 14; T. 38-39, 46-47, 49. Rather, Enbridge has an obligation to demonstrate solid and reliable predictions of *increased* demand for petroleum (along with other factors under the statute and rules) such that the Clipper project is needed. Enbridge’s attempt to divert attention with reliance on arguments regarding lack of predictions for reductions in current demand suggests exactly what MCEA has been saying; that an increase in demand for petroleum is thin at best and lacking in support in the record .

The evidence in this record simply does not support a prediction of large increased demand for petroleum driving the need for the Clipper project. If any “demand” is driving the Clipper project, it is Enbridge’s desire to transport to more distant and possibly more lucrative markets. Further, additional considerations, required under the CON statute and rules would indicate that demand will likely decrease due to a variety of factors.

III. ARGUMENTS REGARDING THE PRICE EFFECT OF INCREASED SUPPLY OF TAR SANDS CRUDE PETROLEUM AMOUNT TO NOTHING MORE THAN ‘IF THERE IS MORE, THE PRICE WILL LIKELY BE LESS’, FINDING LITTLE, IF ANY, SUPPORT IN THE RECORD OF ACTUAL FACT.

Enbridge and OES continue to base the case for the Clipper project on what they claim is ‘basic economic theory’, a claim that is so oversimplified and inconsistent with the facts, it amounts to nothing more than a catch-phrase from an introductory economics lecture. It appears that only by employing such extreme and inaccurate oversimplification, can Enbridge and OES make even a marginal case for the Clipper project.

A. The Evidence Does Not Support An Assumption That More Petroleum Will Stay In An Already Oversupplied Market Driving Down Price.

This weak argument is conspicuously demonstrated by the quote from Mr. Heinen on page 11 of OES' brief: "Basic economic theory states that greater supply tends to decrease price, *all else being equal.*" The big problem for using that simplistic statement to support the Clipper project, is all else is not equal. As noted in MCEA's initial brief, the situation with respect to the petroleum market is much more complicated with many more players than Mr. Heinen or Enbridge would have the Commission believe. Petroleum may flow through Minnesota, but won't necessarily stop here, nor, for that matter, in markets within the Upper Midwest. Mr. Earnest was clear that moving Canadian crude to the Gulf Coast is happening and will continue to happen. T. 37-39. *See also*, Sitek, Ex. 314, p. 5. He also agreed the Canadian producers are working on transport routes to the West Coast in order to ship to Asia. T. 41-43, 62. It is amply apparent that Canadian producers and transporters like Enbridge are interested in making sure that their current oversupply to the Upper Midwest finds markets, and higher prices, elsewhere.

OES's arguments about the need to increase supply to bring down or control the price of oil simply doesn't make sense in that the evidence demonstrates that Minnesota and the Upper Midwest are currently oversupplied. In making its arguments, the OES makes many assumptions, none of which are supported by evidence in the record:

Over the past six years, between 25 and 30 percent of heavy crude volumes entering Minnesota were used by local refineries. *If* this relationship holds true over the economic lifespan of the pipeline, an incremental increase in crude volumes between 110,000 and 135,000 barrels per day refined in Minnesota can be expected. This incremental increase would represent roughly one quarter of the state's current refinery capacity. *Assuming* that these volumes stay within the Minnesota market, this increase would assure greater supply, and reduced priced volatility for Minnesota consumers than would otherwise be the case without the increase.

OES Brief, pp. 14-15 (emphasis added.) This is simply assumptions on top of unfounded assumptions. There is nothing in the record to support an assumption that Minnesota refineries can or will increase the share of Canadian crude that they refine given that that are currently at

capacity. Even more unlikely is the assumption that, *if* the Minnesota refineries increased their output that increase, in the same volume, would stay in the Minnesota market, again a market that is currently not using all the product refined in Minnesota. If Minnesota refineries were interested in keeping produce in an oversupplied state and settling for the reduced prices that Mr. Heinen and OES claim will result, there is no reason that they wouldn't be doing it now. Except for the very real reason that businesses simply don't conduct themselves in that fashion. Again, the oversimplified position of more petroleum from Canada transported across Minnesota will bring supply and prices benefits to Minnesota consumers just makes no sense on the record that has been made in this case.

Similarly, Enbridge's arguments regarding apportionment are not borne out by the evidence. The argument assumes that areas outside Minnesota, served by Enbridge, cannot turn elsewhere for crude petroleum. This is not supported in that Enbridge's own witness, Mr. Earnest, acknowledged that refineries in the Chicago area are also supplied by pipelines from the Gulf Coast. T. 36. Minnesota refineries receive a majority of their supply from the existing Enbridge system, but not all of it. T. 33-34. And, Enbridge's arguments, like those above by OES, don't match the evidence about oversupply to Minnesota with crude oil passing Minnesota by. T. 38-43. The equation doesn't balance. And again, it appears that the only way to read Enbridge's claims of getting to full capacity due to increased demand and instituting apportionment is if the increased demand is growth in markets outside Minnesota that Enbridge and the Canadian producers really want to supply.

B. Even If, As Applied By OES, OES's "Basic Economic Theory" Happens To Come True, It Raises Further Questions Under The CON Requirements.

Even if some of Enbridge's increased supply stays here, it raises additional questions and considerations under the CON requirements that OES has failed to acknowledge or address

involving questions of induced demand. Mr. Heinen testified that demand for petroleum is currently down, at least in part, due to high oil prices.⁴ Overall, Mr. Heinen, and the AEO predictions upon which he heavily relies, agrees that high oil prices depress demand. T. 209-211. In Mr. Heinen's and Enbridge's simplified view of the economic world, supplying Minnesota and the Upper Midwest with more petroleum will drive down prices and likely increase demand. This should in turn lead to an examination of the extent to which inducing demand with oversupply is contrary to the express policies of the Minnesota Legislature and the MCCAG to reduce petroleum use and the emissions from it. However, OES and Enbridge failed (or refused) to connect the dots between induced demand and their simplistic supply arguments, leaving a portion of the CON requirements unexamined and unsatisfied.

C. Enbridge And OES's Arguments Regarding A "Secure" Petroleum Supply Fail To Recognize Basic World Market Realities.

Enbridge and OES continue to argue, again simplistically, that a single pipeline through northern Minnesota will help secure Minnesota and the Upper Midwest from disruptions to other, "less secure" supplies of crude petroleum. A simple example demonstrates this principle is based on flawed reasoning. Suppose that the Clipper project and even other pipelines that are in the works such as TransCanada's Keystone project, are built bringing more "secure" Canadian crude to the U.S. And suppose that the increased Canadian crude reduced U.S. reliance on crude from "less secure" parts of the world such as Nigeria or the Middle East. And suppose a crisis happened in the Middle East, disrupting the supply of crude, significantly decreasing the overall supply. All other parts of the world that are reliant on the Middle East supply, for example Europe and Japan and India, will quickly turn in the market for supplies that have not been

⁴ Mr. Heinen noted that the weak economy could also be a contributor, but he further agreed the two causes of decreased petroleum demand affect each other. T. 209-211.

disrupted, such as Canada. As has been amply demonstrated the supply is not “guaranteed” to anyone. That means that in the event of a Middle East crisis, demand for Canadian crude shoots up and the price along with it. And that price shoots up not just for Europe or Japan or India, but also for the U.S., Upper Midwest and Minnesota. Again, the petroleum market is a world market and a pipeline across northern Minnesota, a crisis in the Middle East will not avert.

Minnesota’s CON requirements require more sophisticated analysis than simple textbook statements. Such thorough analysis in this case quickly reveals that the CON requirements have not been met in this case and the benefits for Minnesota are absent.

IV. PROPER ENVIRONMENTAL ANALYSIS CANNOT BE DEFERRED TO LATER REGULATORY ACTIONS SUCH AS PERMITTING OR LATER NONSPECIFIC INTENTIONS TO MITIGATE.

The obligation to conduct thorough environmental review in this case arises under both the Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. ch. 116D (2006), and under the obligations to consideration impacts to natural resources in the CON statute and rules. Enbridge, with OES’s permission, seeks to circumvent the obligation to disclose and analyze the true extent and specifics of the environmental impacts of the Clipper project, direct, indirect, and cumulative, by arguing first that the law doesn’t require it and second, that any environmental effects don’t need to be disclosed to the public and analyzed because they will be subject to permitting by various regulatory authorities later or they will be “mitigated” later. Under the applicable law and the facts of this case, these arguments do not constitute a valid excuse to avoid thorough disclosure and analysis of specific environmental impacts of the Clipper project through preparation of an Environmental Impact Statement (“EIS”).

First, MCEA strongly disputes the claim that the Clipper project, as a pipeline, is somehow exempt from having to meet the basic requirements of MEPA or that the review that

has been conducted by OES satisfies the obligations under the CON statute and rules. MCEA has fully addressed this in its initial brief and relies on those arguments.

Second, Minnesota law is clear that Enbridge and OES cannot avoid proper environmental review on the claim that ‘all those environmental issues will be dealt with in permitting’. In part, this is simply false assurance because Enbridge claimed in testimony that some of its activities that clearly have an environmental impact, are not subject to permitting. For example, Enbridge appears to believe that it does not need permission from the Department of Natural Resources (“DNR”) for work in public waters, only a “crossing” permit. And yet, the minimal disclosures that have been made by Enbridge in this matter demonstrate that the course, current, and cross section of a number of rivers, streams, and public water wetlands, will be altered or affected temporarily or possibly permanently by the Clipper project, normally requiring a permit and/or formal permission from the DNR. Moreover, there are significant environmental impacts in this case, such as permanent habitat fragmentation and alteration due to right of way maintenance, that are not covered by an particular environmental permit from any particular government agency. Indirect and cumulative effects such as increased refining or increased global warming emissions related to increased tar sands extractions are also not “regulated” by permit. Therefore, the claim that environmental disclosure and analysis can be avoided on the promise of permitting is simply false on its face as it appears Enbridge disputes that it needs permits that will cover or address all of the environmental impacts involved.

The statement that an EIS or more in-depth consideration of natural resource impacts is not necessary due to later permitting is also legally incorrect. Minnesota courts have consistently ruled that project proponents and responsible government agencies cannot use later permitting as an excuse to avoid disclosure and analysis of environmental effects. *Trout Unlimited v.*

Minnesota Dept. of Agriculture, 528 N.W.2d 903, 908-909 (Minn. Ct. App. 1995). *See also*, *Dead Lake Ass'n v. Otter Tail County*, 2005 WL 221773, at *5 (Minn. Ct. App. 2005) (copy attached).

Third, any mitigation of environmental effects, must, in order to avoid an EIS, be specific and subject to ongoing public regulatory authority. *Pope County Mothers and Others v. Minnesota Pollution Control Agency*, 594 N.W.2d 233, 239 (Minn. Ct. App. 1999); *Trout Unlimited*, at 907. Mitigation measures must be more than vague statements of good intentions. *Iron Rangers for Responsible Ridge Action v. IRRRB*, 531 N.W.2d 874, 881 (Minn. Ct. App. 1995) (*citing Audubon Soc'y v. Dailey*, 977 F.2d 428, 435-36 (8th Cir. 1992)). The mitigation plan included with Enbridge's application materials, the table of contents for which Mr. Minder read into the record as something on which he relied to avoid analyzing the impacts to natural resources from the Clipper project, is not specific as to what the environmental impacts are to be mitigated, is not specific as to which impacts will be mitigated in which fashion, and much of the so-called mitigation is nothing more than statements of good intention with no regulatory control behind it. Mr. Minder was unable, during his testimony, to even identify specific wetlands or streams that are crossed by the Clipper project, much less what the specific impacts of the crossing would be and what specific mitigation methods would be used to mitigate those impacts or to what degree the mitigations are proven to work and are regulated. T. 166, 172-177. Mr. Minder didn't even know or realize that Enbridge itself admits that a number of impacts will not be mitigated but will be permanent, for example clearing of the right of way or impacts to streamside vegetation. T. 150-151. The argument that disclosure and analysis of environmental impacts can be skipped in this case based upon Enbridge's wholly-inadequate mitigation plan is without foundation in the record or in Minnesota law.

CONCLUSION

The evidence in this case shows that this is not about Minnesota or Midwestern citizens. The evidence does not support the arguments about “stable prices and supply”. Moreover, the evidence demonstrates that there has yet to be a proper consideration of policies of other state and federal agencies, policies that are something in addition to statutes and regulation, regarding whether supplying more cheap petroleum may induce demand is consistent with Minnesota policy-makers trying to move petroleum consumption and attendant greenhouse gas emissions in the opposite direction. Rather, this case is about profits for refineries, oil companies, and oil transporters. The Minnesota CON statute and rules and the important process of considerations contained within those requirements, is not to protect the profit motives of these businesses but to ensure orderly development of energy systems in a manner that is truly in the greater public interest. That has not been demonstrated in this case and MCEA requests that the Alberta Clipper/Southern Lights CON be denied.

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Respectfully submitted,

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