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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 _____)
SIERRA CLUB, INC., MINNESOTA)
20 CENTER FOR ENVIRONMENTAL)
ADVOCACY, NATIONAL WILDLIFE)
21 FEDERATION, and INDIGENOUS)
ENVIRONMENTAL NETWORK,)
22)
Plaintiffs,)
23)
v.)
24 UNITED STATES DEPARTMENT OF)
STATE, HILLARY CLINTON, in her official)
25 capacity as Secretary of State, JAMES)
STEINBERG, in his official capacity as Deputy)
26 Secretary of State, and the UNITED STATES)
ARMY CORPS OF ENGINEERS,)
27)
28 _____)
Defendants.

Civ. No. 09-4086 (JCS)

NOTICE OF MOTION, MOTION, AND
MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

NOTICE OF MOTION AND MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	1
MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	2
I. INTRODUCTION	2
II. STATEMENT OF FACTS	3
A. ENBRIDGE’S PIPELINE EXPANSION PROPOSAL	3
B. FEDERAL REVIEW AND PERMITTING	4
III. ARGUMENT	6
A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.	6
1. The State Department’s Issuance of the Alberta Clipper Presidential Permit Violates the National Environmental Policy Act.	6
a. The failure to include the Southern Lights and LSr Pipelines in the EIS violates the requirement to assess connected and cumulative actions.	6
i. The Alberta Clipper and Southern Lights and LSr pipelines are connected actions.	7
ii. The Alberta Clipper, Southern Lights and LSr pipelines are cumulative actions.	9
b. The failure to assess the reasonably foreseeable indirect and cumulative impacts of the Alberta Clipper project violates NEPA.	10
i. EIS fails to consider significant indirect impacts.	10
ii. The EIS fails to consider significant cumulative impacts.	11
c. Failure to adequately evaluate the risks, impacts, and mitigation measures associated with spills, operational leaks and abandonment violates NEPA.	13

d. The failure to take a hard look at the project’s stated purpose and need, or to consider a reasonable range of alternatives, violates NEPA.	13
2. The State Department’s Issuance of the Presidential Permit is Unconstitutional.	15
a. The President has no constitutional or statutory authority to issue presidential permits for international tar sands crude pipelines.....	15
b. Although Congress has delegated limited powers to specific agencies to regulate aspects of international pipelines, it has not delegated authority over international tar sands oil pipelines to the State Department.....	17
B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.....	19
C. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF PLAINTIFFS.	21
D. THE PUBLIC INTEREST FAVORS ISSUANCE OF A PRELIMINARY INJUNCTION.	22
IV. TEMPORARY RESTRAINING ORDER	22
V. CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

<i>Am. Trucking Ass'ns v. City of Los Angeles</i> , 559 F.3d 1046 (9th Cir. 2009).....	6
<i>Cal. Bankers Association v. Shultz</i> , 416 U.S. 21 (1974).....	16
<i>Center for Biological Diversity v. National Highway Traffic Safety Admin.</i> , 538 F.3d 1172 (9th Cir. 2008).....	13
<i>Citizen's Alert Regarding Env't v. U.S. Dep't of Justice</i> , 1995 WL 748246, *11 (D.D.C. 1995)	22
<i>City of Carmel-by-the-Sea v. U.S. Department of Transport</i> , 123 F.3d 1142 (9th Cir.1997)	14
<i>Earth Island Institute v. Forest Serv.</i> , 442 F.3d 1147 (9th Cir. 2006).....	22
<i>Friends of Southeast's Future v. Morrison</i> , 153 F.3d 1059 (9th Cir. 1998)	14
<i>Geertson Seed Farms v. Johanns</i> , 570 F.3d 1130 (9th Cir. 2009).....	21
<i>Gibbons v. Ogden</i> , 22 U.S. 1 (1824).....	16
<i>Great Basin Mine Watch v. Hankins</i> , 456 F.3d 955 (9th Cir. 2006)	7
<i>Greater Yellowstone Coal. v. Timchak</i> , 2009 WL 971474, at *1 (9th Cir. 2009)	6
<i>Idaho Sporting Congress, Inc. v. Alexander</i> , 222 F.3d 562 (9th Cir. 2000).....	21, 22
<i>Illinois Commerce Commission v. ICC</i> , 848 F.2d 1246 (D.C. Cir. 1988).....	11
<i>Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management</i> , 387 F.3d 989 (9th Cir. 2004)	7, 12
<i>Kootenai Tribe of Idaho v. Veneman</i> , 313 F.3d 1094 (9th Cir. 2002).....	21
<i>Lands Council v. McNair</i> , 537 F.3d 981 (9th Cir. 2007).....	22
<i>Mid-States Coal. for Progress v. Surface Transport Board</i> , 345 F.3d 520 (8th Cir. 2003)	11
<i>Muckleshoot Indian Tribe v. U.S. Forest Serv.</i> , 177 F.3d 800 (9th Cir. 1999).....	13
<i>National Parks & Cons. Association v. Babbitt</i> , 241 F.3d 722 (9th Cir. 2001).....	21

Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002)6, 7, 10

Oregon Natural Resource Council Fund v. Brong, 492 F.3d 1120 (9th Cir. 2007)9, 12

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Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).....7, 10

United States v. Clark, 435 F.3d 1100 (9th Cir. 2006)16

United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.C.P.A. 1975)17

U.S. v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953)16

Warner Brothers, Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120 (2d Cir. 1989)23

Winter v. Natural Resource Defense Council, 129 S. Ct. 365 (2008)6

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)17

STATUTES

3 U.S.C. § 30116

5 U.S.C. § 706.....2

15 U.S.C. § 717 *et seq.*.....18

33 U.S.C. § 535(b) (1972)18

42 U.S.C. § 4321 *et seq.*.....2

42 U.S.C. § 7111 *et seq.*.....18

43 U.S.C. § 1651 *et seq.*.....18

43 U.S.C. § 2001 <i>et seq.</i>	18
47 U.S.C. § 34 <i>et seq.</i>	18
49 U.S.C. § 60,134 <i>et seq.</i>	18
49 U.S.C. § 112 <i>et seq.</i>	18
Pub. L. No. 59-3337, § 1, 34 Stat. 584 (1906).....	17
Pub. L. No. 96-129 (1979).....	18
Pub. L. No. 102-508 (1992).....	18
U.S. Const. art. I, § 8, cl. 3.....	16
U.S. Const. art. II.....	16

RULES AND REGULATIONS

40 C.F.R. § 1502.....	13, 14, 15
40 C.F.R. § 1508.....	6, 7, 8, 9, 13
Fed. R. Civ. P. 65(b).....	22

FEDERAL REGISTER NOTICES

33 Fed. Reg. 11741 (1968).....	16
69 Fed. Reg. 25299 (2004).....	15
72 Fed. Reg. 41381 (July 27, 2007).....	5
72 Fed. Reg. 41383 (July 27, 2007).....	5
73 Fed. Reg. 32620 (June 9, 2008).....	5

1 **NOTICE OF MOTION AND MOTION FOR A TEMPORARY RESTRAINING**
2 **ORDER AND PRELIMINARY INJUNCTION**

3 Plaintiffs Sierra Club, Minnesota Center for Environmental Advocacy, National Wildlife
4 Federation, and Indigenous Environmental Network (“Plaintiffs”) hereby move for a temporary
5 restraining order (“TRO”) and preliminary injunction. This motion is being filed in the
6 above-captioned case presided over by Magistrate Judge Joseph C. Spero, and a hearing date has not
7 yet been set. A copy of this motion and all supporting papers were served on Eric Holder of the
8 United States Department of Justice; Joseph Russoniello United States Department of Justice;
9 Hillary Clinton of the United States Department of State (“State Department”); James Steinberg of
10 the State Department; and Ralph Augustin of the United States Army Corps of Engineers (“Army
11 Corps” or “ACE”) by electronic mail and/or fax on September 3, 2009.

12 Plaintiffs request that this Court: i) temporarily enjoin the State Department from issuing a
13 presidential permit for the Alberta Clipper project (“the Project”); ii) temporarily enjoin the ACE
14 from issuing permits for the Alberta Clipper and Southern Lights projects pursuant to section 404 of
15 the Clean Water Act and section 10 of the Rivers and Harbors Act; and iii) temporarily enjoin any
16 activity in furtherance of construction or operation of the Alberta Clipper and Southern Lights
17 projects until this Court has decided Plaintiffs’ pending request for a preliminary injunction.

18 Plaintiffs also request that this Court issue an injunction: i) prohibiting the State Department
19 from issuing a presidential permit for the Alberta Clipper project; ii) prohibiting the ACE from
20 issuing permits for the Alberta Clipper and Southern Lights projects pursuant to section 404 of the
21 Clean Water Act and section 10 of the Rivers and Harbors Act; and iii) prohibiting any activity in
22 furtherance of construction or operation of the Alberta Clipper and Southern Lights projects, until
23 this Court has issued a decision on the merits of Plaintiffs’ claims.

24 These motions are based upon the Memorandum of Points and Authorities in Support of
25 Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction, the Declarations and
26 Exhibits accompanying the Motion, the pleadings, the record, and any other evidence or argument as
27 may be presented at any hearing on these motions.
28

1 **MEMORANDUM OF POINT AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

3 **I. INTRODUCTION**

4 Plaintiffs request this Court to maintain the status quo in this case by issuing a temporary
5 restraining order and a preliminary injunction prohibiting the State Department from permitting the
6 construction and operation of a pipeline known as the Alberta Clipper. The U.S. portion of the
7 Alberta Clipper project involves the building of 384 miles of pipeline, from the connection to
8 Canada in Neches, North Dakota, across Minnesota, to a terminal in Superior Wisconsin.

9 The Project, proposed by Enbridge Energy, Limited Partnership and its affiliates (collectively
10 “Enbridge”), would transport heavy tar sands crude oil from Canada to terminals and refineries in
11 the United States, which would spur refinery expansions and modifications that will lead to
12 increased air and water pollution for residents of the Midwest and other states. Construction of the
13 pipeline would involve 80 perennial and 123 intermittent water-body crossings and would impact
14 1,254.5 acres of upland forested lands, 655.4 acres of open lands, and 1,346.16 acres of wetlands.
15 Refining and other industrial activities resulting from the pipelines would also increase emissions of
16 air pollutants and greenhouse gases that contribute to global warming and related harmful effects on
17 human health and the environment. Enbridge has already begun construction in some areas.

18 Plaintiffs are likely to prevail on their claim that the State Department violated the National
19 Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure
20 Act (“APA”), 5 U.S.C. § 706, because it: a) improperly restricted the scope of the environmental
21 impact statement (“EIS”) to omit connected and cumulative actions; b) failed to assess all reasonably
22 foreseeable environmental impacts of the Project, including direct, indirect, and cumulative effects;
23 and c) failed to take a hard look at the Project’s stated purpose and need or to consider a reasonable
24 range of alternatives. Plaintiffs are also likely to prevail on their claim that the State Department’s
25 permitting of the Project is unconstitutional or contrary to constitutional right, power, privilege or
26 immunity because the President has no constitutional or statutory authority to regulate the Alberta
27 Clipper project. For all these reasons, the State Department’s issuance of the presidential permit for
28 the Alberta Clipper project was not in accordance with law.

1 This Court should issue a TRO and preliminary injunction to preserve the status quo and
2 prevent immediate and irreparable harm to the Plaintiffs and their members who live, work, and
3 recreate in areas that would be affected by the clearing, cutting and destruction of rare wetlands and
4 wildlife habitat during pipeline construction, by the increased air and/or water pollution from the
5 pipeline, related facilities and refineries, and by the impacts of greenhouse gases resulting from the
6 refining and use of tar sands crude oil.

7 II. STATEMENT OF FACTS

8 A. ENBRIDGE'S PIPELINE EXPANSION PROPOSAL

9 Enbridge proposes to expand significantly the existing pipeline system it owns and operates
10 between Alberta, Canada and United States. This expansion includes the Alberta Clipper project and
11 the related Southern Lights project. *See* Map of Alberta Clipper and Southern Lights Projects
12 (“Map”), Exh. 1.

13 The Alberta Clipper pipeline is a 992-mile long, 36-inch diameter pipeline running from
14 Hardisty, Alberta, Canada, crossing the border near Neche, North Dakota, and continuing through
15 northern Minnesota to a terminal in Superior, Wisconsin. The Alberta Clipper pipeline will carry
16 approximately 450,000 barrels per day (“bpd”), with an ultimate capacity of 880,000 bpd, of heavy
17 crude oil, or “bitumen,” from the Canadian tar sands fields to refineries throughout the midwestern
18 United States. At Superior, the Alberta Clipper pipeline will connect to a mainline to Chicago,
19 Illinois.

20 The Southern Lights project would transport “diluent” from Midwestern refineries to the
21 Alberta tar sands. The Southern Lights project has two components: the Line 13 Reversal/New
22 Diluent pipeline (“diluent pipeline”) and the LSr Capacity Replacement pipeline (“LSr pipeline”).
23 Because bitumen crude from the Canadian tar sands is too viscous to be pumped through a pipeline,
24 it must be diluted with lighter liquid hydrocarbons, known as “diluent,” in order to be transported by
25 pipeline. Enbridge proposes to construct a new 678-mile, 20-inch pipeline from Manhattan, Illinois,
26 to Clearbrook, Minnesota, where it would connect with Enbridge’s existing “Line 13.” Enbridge
27 proposes to reverse the flow of Line 13, which currently transports light sour crude from Alberta,
28 Canada to Clearbrook, to create a dedicated diluent delivery system from refineries in Illinois to the

1 tar sands production centers in Alberta. The 188-mile segment of diluent pipeline from Clearbrook,
2 Minnesota to Superior, Wisconsin would be constructed at the same time and in the same right-of-
3 way as the Alberta Clipper.

4 The LSr Capacity Replacement pipeline is a new 313-mile 20-inch pipeline being
5 constructed between Cromer, Manitoba, Canada, and Clearbrook, Minnesota to transport light sour
6 crude. According to Enbridge, diversion of the capacity of Line 13 to the diluent pipeline
7 necessitates the construction of the LSr pipeline to replace that capacity.

8 **B. FEDERAL REVIEW AND PERMITTING**

9 Because Enbridge's proposed expansion would involve construction on the U.S.-Canada
10 border and the import and export of crude oil and refined petroleum products, Enbridge applied to
11 the State Department for presidential permits for the import of heavy crude and construction of the
12 Alberta Clipper pipeline, for the import of light sour crude and construction of the LSr pipeline, and
13 for the export of diluent in Line 13.

14 Enbridge also applied to: i) the U.S. Army Corps of Engineers for permits to dredge and fill
15 wetlands and place structures in or under water-bodies pursuant to section 404 of the Clean Water
16 Act and section 10 of the Rivers and Harbors Act; ii) the U.S. Forest Service for a special use permit
17 to site and construct the pipeline through the Chippewa National Forest; iii) the U.S. Environmental
18 Protection Agency for wastewater discharge permits pursuant to section 402 of the Clean Water Act;
19 and iv) the Bureau of Indian Affairs for approval to cross certain Indian lands. Each agency decision
20 on these permit requests is a major federal action triggering NEPA.

21 The State Department claimed to be the lead federal agency on the project for purposes of
22 NEPA and assumed responsibility for conducting the environmental review for the expansion
23 project. While the other agencies cooperated with the Department of State, no other federal agency
24 conducted an independent NEPA review. Each agency relies on the State Department's EIS to
25 satisfy their NEPA obligations. Instead of preparing one EIS for the entire expansion, as NEPA
26 requires, the State Department segregated the component parts of Enbridge's proposal and
27 conducted its environmental review in separate pieces.

28 On July 27, 2007, the State Department issued Notices of Intent to prepare separate

1 Environmental Assessments (“EAs”) for the LSr pipeline and the Alberta Clipper pipeline. Alberta
2 Clipper Notice of Intent to Prepare an EA, 72 Fed. Reg. 41381 (July 27, 2007); LSr Project Notice of
3 Intent to Prepare an EA, 72 Fed. Reg. 41383 (July 27, 2007). The State Department did not issue a
4 Notice of Intent to prepare an EA for the diluent pipeline and to date no federal agency involved in
5 permitting this project has conducted an environmental review for the diluent pipeline.

6 The State Department then determined it would proceed with an EA for the LSr pipeline, but
7 prepare an EIS for the Alberta Clipper pipeline. Plaintiffs, in comment letters sent to the State
8 Department in December 2007, pointed out that all three pipelines were part of one project and that
9 NEPA required the State Department to evaluate all three in one environmental impact statement.
10 *See* MCEA Scoping Comments, (Dec. 7, 2007), Exh. 2. Over Plaintiffs’ objections, the State
11 Department proceeded with separate environmental reviews for the Alberta Clipper and LSr
12 pipelines and no review of the diluent pipeline.

13 The State Department’s EA for the LSr pipeline did not evaluate environmental impacts from
14 the Alberta Clipper pipeline or the diluent pipeline. In its final EA and Finding of No Significant
15 Impact (“FONSI”) for the LSr pipeline, the State Department represented that the diluent pipeline
16 would be evaluated in the NEPA analysis for the Alberta Clipper project. Southern Lights LSr
17 FONSI, 73 Fed. Reg. 32620 (June 9, 2008) (“The Alberta Clipper pipeline ... and the construction
18 by Enbridge of another pipeline that would bring diluent north to the oil sands project, will be
19 addressed in a separate Environmental Impact Statement that is being prepared for the Alberta
20 Clipper project by the DOS working with other agencies.”).

21 The State Department issued its final EIS (“FEIS”) for the Alberta Clipper project on June 8,
22 2009. However, the Department excluded both the LSr and diluent pipelines from its definition of
23 the project under review, asserting that they were not connected actions for NEPA purposes.¹ FEIS,
24 Exh. 3 at 1-17, 1-26.

25 _____
26 ¹ The EIS claims in the introduction that the 188-mile segment of the diluent pipeline that extends
27 between Clearbrook, Minnesota and Superior, Wisconsin, is included in its cumulative impacts
28 analysis, FEIS, Exh. 3 at 1-26, but the environmental analysis in Chapter 4 of the final EIS does not
address the significant environmental impacts of the diluent pipeline. The LSr pipeline, the Line 13
reversal project, and the remaining 490 miles of new construction of the Southern Lights diluent
project between Superior and Manhattan Illinois are completely omitted.

1 On August 20, 2009, the State Department issued its Record of Decision (“ROD”) to issue a
 2 presidential permit for the Alberta Clipper pipeline, and issued the Alberta Clipper presidential
 3 permit. The permit allows the transport of tar sands crude oil from Canada into the United States
 4 across the U.S.-Canada border; authorizes the construction, connection, operation and maintenance
 5 of pipeline facilities at the border; and contains other terms and conditions as set forth in the permit.
 6 *See* ROD, Exh. 4.

7 III. ARGUMENT

8 Plaintiffs satisfy the four factors that a district court must consider when deciding whether to
 9 grant a preliminary injunction. “A plaintiff seeking a preliminary injunction must establish that he is
 10 [1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of
 11 preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the
 12 public interest.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)
 13 (citing *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008)). *Winter* did not disturb the
 14 Ninth Circuit’s alternative formulation of the test for preliminary injunctive relief, the “sliding scale”
 15 approach, which requires that “serious questions [going to the merits] are raised and the balance of
 16 hardships tips sharply in [the plaintiff’s] favor.” *See Greater Yellowstone Coal. v. Timchak*, 2009
 17 WL 971474, at *1 (9th Cir. 2009) (observing viability of alternative formulation). The same
 18 standard governs temporary restraining orders. *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*,
 19 240 F.3d 832, 839 n.7 (9th Cir. 2001).

20 A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

21 1. The State Department’s Issuance of the Alberta Clipper Presidential Permit 22 Violates the National Environmental Policy Act.

23 a. **The failure to include the Southern Lights and LSr Pipelines in the EIS** 24 **violates the requirement to assess connected and cumulative actions.**

25 NEPA requires that decision-makers address in a single EIS all “connected,” “cumulative,”
 26 and “similar” actions. 40 C.F.R. § 1508.25(a); *Native Ecosystems Council v. Dombeck*, 304 F.3d
 27 886, 893-94 (9th Cir. 2002). Actions are connected if they: “(i) [a]utomatically trigger other actions
 28 which may require environmental impact statements; (ii) [c]annot or will not proceed unless other

1 actions are taken previously or simultaneously; [or] (iii) [a]re interdependent parts of a larger action
2 and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a). Cumulative actions
3 are those with “cumulatively significant impacts and should therefore be discussed in the same
4 impact statement.” *Id.* Actions are “similar” if they have “similarities that provide a basis for
5 evaluating their environmental consequences together, such as common timing or geography.” *Id.*
6 Analysis should be done in a single document when the record raises “substantial questions about
7 whether there will be significant environmental impacts from the collection of anticipated projects.”
8 *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 999 (9th Cir. 2004).

9 Courts have routinely held that agencies may not break a project or activity into components
10 to avoid the full range of environmental analysis and that cumulative impacts analysis is necessary
11 for all reasonably foreseeable results of the action under consideration. *See, e.g., Great Basin Mine*
12 *Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006); *Native Ecosystems Council*, 304 F.3d 886. The
13 purpose of this requirement is “to prevent an agency from dividing a project into multiple ‘actions,’
14 each of which individually has an insignificant environmental impact, but which collectively have a
15 substantial impact.” *Great Basin*, 456 F.3d at 969.

16 i. The Alberta Clipper and Southern Lights and LSr pipelines are connected
17 actions.

18 The Alberta Clipper and diluent pipeline are “inextricably intertwined” and thus connected
19 actions within the meaning of the CEQ regulations. *See Thomas v. Peterson*, 753 F.2d 754, 759 (9th
20 Cir. 1985). The function of the diluent is to be mixed with tar sands crude to enable transportation
21 of this crude by the Alberta Clipper pipeline. FEIS, Exh. 3 at 1-28. The Alberta Clipper pipeline’s
22 additional 450,000 bpd capacity necessitates increased supplies of diluent along the identical route as
23 the Alberta Clipper pipeline. *Id.* (noting that production from Alberta’s tar sands will require
24 316,000 bpd by 2015 to serve pipeline expansions). The interdependence of the Alberta Clipper and
25 diluent pipelines is highlighted by Enbridge’s assertion that access to diluents from U.S. refining
26 centers will “facilitate increased production of growing supplies of crude oil for delivery to the
27 United States from Canada.”² Diluent is an integral part of the tar sands extraction process and a

28 _____
² Enbridge Website, <http://www.enbridge->

1 necessary part of the Alberta Clipper project. FEIS, Exh. 3 at 1-28 (“Crude oil produced in western
2 Canada is generally too heavy and viscous to transport via pipeline. To allow transport of heavy
3 crude oil from Canada to the United States via pipeline, lighter hydrocarbons (diluent) need to be
4 blended into the crude oil before introducing it into the pipeline.”). Actions related to the diluent
5 pipeline are thus connected actions for purposes of NEPA and 40 C.F.R. § 1508.25(c) requires the
6 State Department to fully assess the Alberta Clipper and Southern Lights pipelines in a single EIS.

7 Enbridge itself treats the pipelines as one project. It applied for presidential permits for each
8 pipeline together, referencing the other pipelines in each application. *See, e.g.*, Alberta Clipper
9 Presidential Permit Application, Exh. 7 at 13. Enbridge plans to construct the Alberta Clipper and
10 diluent pipelines simultaneously and in the same corridor. FEIS, Exh. 3 at 2-14. Enbridge applied
11 for a certificate of need and routing permit for both pipelines together from the Minnesota Public
12 Utilities Commission (“MPUC”) and the MPUC accepted Enbridge’s single application and opened
13 a single docket for consideration of the pipelines together. *See* MPUC Notice of Permit Application
14 Acceptance, Exh. 8. Enbridge likewise applied for permits from the Army Corps of Engineers and
15 special use permits from the U.S. Forest Service for the two pipelines jointly. Both the Army Corps
16 and the Forest Service evaluated the permit applications for both pipelines together. *See* Forest
17 Service ROD, Exh. 9.

18 Similarly, the LSr pipeline and the Southern Lights diluent pipeline are connected actions
19 that should have been considered in a single EIS with the Alberta Clipper pipeline. Enbridge has
20 acknowledged that the Southern Lights project “will require the construction of [the LSr pipeline] to
21 replace the capacity of an exiting Enbridge pipeline that will be converted to diluent service.”³ If
22 Line 13 were not being diverted to transport diluent to Canada there would be no reason to construct
23 the LSr pipeline. Because the new LSr pipeline is an interdependent part of the larger expansion
24 project and depends on the diluent pipeline for its justification, it meets the definition of a connected
25

26 expansion.com/expansion/main.aspx?id=1216&tmi=290&tmt=4, (last visited Sept. 3, 2009), Exh. 6,
27 at 1.

28 ³ Enbridge Website, <http://enbridgeexpansion.com/expansion/main.aspx?id=1216&tmi=290&tmt=4>
(Nov. 14, 2007), Exh. 6, at 2. (Enbridge has since amended this page of its website. For the current
version of the webpage see Exh. 6, at 1.)

1 action under 40 C.F.R. § 1508.25(a)(1).

2 ii. The Alberta Clipper, Southern Lights and LSr pipelines are cumulative
3 actions.

4 Where “several actions have a cumulative environmental effect, this consequence must be
5 considered ... regardless of what agency or person undertakes such other actions.” *Oregon Natural*
6 *Res. Council Fund v. Brong*, 492 F.3d 1120, 1132-33 (9th Cir. 2007); *see also*, 40 C.F.R. §
7 1508.25(a) (actions with “cumulatively significant impacts” must be considered “in the same impact
8 statement”).

9 The Alberta Clipper, the Southern Lights diluent pipeline and the LSR pipeline will have
10 cumulatively significant impacts and thus must be considered comprehensively in a single EIS. The
11 Alberta Clipper and Southern Lights diluent pipeline will be constructed side by side in the same
12 right of way at approximately the same time. FEIS, Exh. 3 at 2-14. This will require widening the
13 trench along which the pipelines will be laid, *Id.* at 2-17 to 18, disturbing more soil and wetlands,
14 and increasing heavy equipment traffic and related harms, including increased soil compaction and
15 contamination, sedimentation of water-bodies, noise, and air pollution from GHG, engine and
16 fugitive dust emissions. *Id.* at 2-19, 4-20, 4-45 to 47, 4-69, 4-96; ROD, Exh. 4 at 6-7, 15. The threat
17 of operational leaks and spills that would contaminate soil and water resources is also dramatically
18 increased along the pipeline route. May Decl., Exh. 5 at ¶¶ 8, 23. Operation of the Southern Lights
19 pipeline requires additional pump stations, which increases operational noise and GHG emissions.
20 FEIS, Exh. 3 at 1-29. With the addition of the LSr pipeline in the same right of way between Neche
21 and Clearbrook, these impacts are further compounded.

22 Moreover, the section of the Southern Lights diluent pipeline explicitly excluded from the
23 Alberta Clipper EIS – the portion extending from Superior, Wisconsin to Manhattan, Illinois –
24 would require clearing trees and vegetation, removing topsoil, and filling wetlands along an
25 additional 490 miles beyond the terminus of the Alberta Clipper. *Id.* at 1-28. This would result in
26 additional loss of vegetation, habitat and wetlands, and cause additional harms to soil, water and air
27 similar to those described above. When added to the impacts of the Alberta Clipper project, these
28 additional impacts are cumulatively significant and must be included in the EIS.

1 Finally, refining the tar sands crude delivered by the Alberta Clipper pipeline will affect air
2 and water quality, as well as the climate due to increased GHG emissions. May Decl., Exh. 5 at ¶¶
3 42-47. These impacts are cumulatively significant when added to the impacts of processing
4 increased quantities of crude oil into diluent (which is highly refined) for transport through the
5 Southern Lights pipeline. These cumulative impacts must also be considered in the EIS.

6 The State Department's piecemeal approach leaves a major component of the project
7 unanalyzed and minimizes the project's true cumulative impact in violation of NEPA. *See Thomas*,
8 753 F.2d at 758; *Native Ecosystems Council* 304 F.3d at 895. The State Department violated
9 NEPA's mandate to evaluate all connected, cumulative, and similar actions in one EIS. Because of
10 this plain error, Plaintiffs are likely to prevail on the merits.

11 **b. The failure to assess the reasonably foreseeable indirect and cumulative**
12 **impacts of the Alberta Clipper project violates NEPA.**

13 An EIS must include a "full and fair discussion" of the significance of all "direct," "indirect,"
14 and "cumulative" effects of the action. 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c). "Indirect
15 effects" are reasonably foreseeable effects caused by the action, but later in time or farther removed
16 in distance. *Id.* § 1508.8(b).

17 **i. The EIS fails to consider significant indirect impacts.**

18 First, the EIS fails to include any analysis of the impacts in the United States caused by
19 increased exploitation and development of Canadian tar sands driven by the Alberta Clipper project.
20 These impacts include those related to greenhouse gas emissions and impacts on migratory species.
21 *See* May Decl., Exh. 5 at ¶¶ 62-65.

22 Second, the EIS does not adequately consider the impacts of the refineries in the United
23 States that will cause additional air, water and climate pollution. Refining heavy sour (sulfurous)
24 crude oil extracted from tar sands requires more energy inputs than refining conventional crude due
25 to the energy needed to crack the heavy, long hydrocarbon molecules into final products and remove
26 the high levels sulfur contaminants. *Id.*, ¶ 41, 44-45. This process yields significant increases in
27 emissions of pollutants including heavy metals such as mercury, conventional air pollutants (in
28 particular sulfur dioxide and carbon monoxide) and carbon dioxide. *Id.*, ¶¶ 42, 44, 59-60. Permits

1 issued for these refinery expansions will result in significant increases in the discharge of water
2 contaminants to local water-bodies, including the Great Lakes. *Id.*, ¶ 42, 56-58. The increased
3 emissions of air pollution and discharges of water contaminants have serious implications for public
4 health in local communities near the refineries being upgraded.

5 The EIS dismisses the cumulative impacts of refining more heavy crude in the United States
6 on air quality and water quality by asserting that such pollution will be regulated under the Clean Air
7 Act and Clean Water Act. FEIS, Exh. 3 at 4-394, 4-400. However, that is no substitute for a full
8 analysis of the environmental impacts of those increased emissions or discharges. An agency cannot
9 ignore the environmental impacts of a project on the basis of an expectation that other federal
10 agencies will address them. *See Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir.
11 1988).

12 Third, the EIS does not adequately address the air quality and climate change impacts of
13 increased consumption of liquid petroleum-based fuels that would result from the Project. In *Mid-*
14 *States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), the court held that
15 the agency examining the environmental impacts of a railroad intended to deliver coal to Midwestern
16 and Northeastern utilities must analyze the indirect impacts from increased use of coal resulting from
17 the railroad construction. The court noted that the increased coal use was a likely and foreseeable
18 result of the project and therefore the EIS must include the environmental effects of burning more
19 coal. *Id.* at 549. Similarly, the Alberta Clipper pipeline will add 450,000 bpd into the energy
20 markets for refining into liquid fuels, and the EIS should have examined the full suite of
21 environmental effects of use of the product.

22 ii. The EIS fails to consider significant cumulative impacts.

23 A “cumulative impact” is defined as the “impact on the environment which results from the
24 incremental impact of the action when added to other past, present, and reasonably foreseeable
25 future actions, regardless of what agency ... or person undertakes such other actions.” *Id.* § 1508.7.
26 Cumulative impacts “can result from individually minor but collectively significant actions taking
27 place over a period of time.” *Id.* “A proper consideration of the cumulative impacts of a project
28 requires some quantified or detailed information; general statements about possible effects and some

1 risk do not constitute a hard look absent a justification regarding why more definitive information
2 could not be provided.” *Klamath-Siskiyou*, 387 F.3d at 993. A cumulative effects analysis has two
3 critical features: “First, it must not only describe related projects but also enumerate the
4 environmental effects of those projects. Second, it must consider the interaction of multiple
5 activities and cannot focus exclusively on the environmental impacts of an individual project.”
6 *Oregon Natural Resources*, 492 F.3d at 1133 (quotations omitted).

7 The Alberta Clipper EIS does not meet these standards in at least three respects. First, the
8 EIS describes the possibility of future upgrades to the Alberta Clipper pipeline to increase its
9 capacity from 450,000 barrels per day to 800,000 barrels per day, and notes this increase in capacity
10 would require new pumps or upgrades to existing pumps at seven stations in the United States.
11 FEIS, Exh. 3 at 2-50. However, the EIS does not assess the impacts of installing and operating these
12 more powerful pumps, the increased energy that would be required to operate at this increased
13 capacity and the corresponding increases in GHG emissions, or the impacts of refining an additional
14 350,000 bpd of tar sands crude.

15 Second, the EIS does not analyze the cumulative impacts of increased importation, refining
16 and use of tar sands crude oil in light of the combined increases in heavy crude supply from similar
17 pipeline construction projects. Nor does the EIS examine the reasonably foreseeable expansion in
18 tar sands production, transport, and refining that will be a consequence of providing a new source of
19 diluent to the tar sands industry. The incremental impacts of the Alberta Clipper pipeline are
20 significant when added to other existing and reasonably foreseeable pipeline expansion projects
21 including the Southern Lights diluent pipeline; the Keystone and Keystone XL pipelines, which will
22 also import tar sands crude from Alberta for refining in the United States; and other oil pipeline
23 expansion projects such as the North Dakota Expansion Project, the Southern Access projects, and
24 the MinnCan pipeline expansion. Although these expansion projects are briefly described in the
25 introduction of the FEIS, Exh. 3 at 1-30 to 31, there is no quantitative analysis of their cumulative
26 impacts.

27 Third, the EIS does not adequately analyze the cumulative impact of greenhouse gas
28 emissions. “The impact of greenhouse gas emissions on climate change is precisely the kind of

1 cumulative impacts analysis that NEPA requires agencies to conduct.” *Center for Biological*
2 *Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). While the
3 EIS quantifies GHG emissions from construction and operation of the pipeline, and generally
4 discusses the additional GHG emissions that can be expected from increased refining of tar sands
5 crude, FEIS, Exh. 3 at 4-401 to 402, it does not evaluate the cumulative impacts of the Alberta
6 Clipper’s GHG emissions in connection with similar emissions from the other tar sands pipelines
7 under construction or seeking permits.

8 **c. Failure to adequately evaluate the risks, impacts, and mitigation measures**
9 **associated with spills, operational leaks and abandonment violates NEPA.**

10 The EIS does not adequately address the impact that spills and operational leaks from the
11 Alberta Clipper pipeline would have on the environment or on human health. Nor does it discuss the
12 risks and impacts of a diluent leak or spill. The EIS fails to identify the chemicals that the diluent
13 will contain, and offers the public and public officials no understanding of the unique environmental
14 consequences of leaks and spills of diluent along the diluent pipeline.⁴

15 The EIS is also silent on end-of-life impacts, and does not evaluate mitigation measures, such
16 as financial assurance, that should be required of Enbridge to ensure restoration upon abandonment,
17 which the EIS projects will occur in approximately 50 years. FEIS, Exh. 3 at 2-51. The Southern
18 Lights diluent pipeline and the other pipelines in Enbridge’s corridor have a similar lifespan. Yet the
19 EIS does not discuss the process for or impacts of abandonment. *Id.* The EIS must assess these
20 impacts. *See* 40 C.F.R. § 1508.20.

21 **d. The failure to take a hard look at the project’s stated purpose and need, or to**
22 **consider a reasonable range of alternatives, violates NEPA.**

23 An EIS must “specify the underlying purpose and need to which the agency is responding in
24 proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. An agency cannot
25 define a project’s purpose and need so as to preclude consideration of reasonable alternatives.

26 *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812-14 (9th Cir. 1999). The

27 ⁴ Because diluent is composed of light hydrocarbons with different chemical and physical properties
28 than heavy crude oil, it reacts differently when released into the environment. For example, it is
more volatile and more highly flammable than crude oil. *See* May Decl., Exh 5, ¶¶ 33-25.

1 alternatives analysis is the “heart” of an EIS. 40 C.F.R. § 1502.14. The EIS must “provide full and
2 fair discussion of significant environmental impacts and ... inform decision-makers and the public of
3 the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of
4 the human environment.” *Id.* § 1502.1. An agency must “rigorously explore and objectively
5 evaluate all reasonable alternatives,” including the “alternative of no action,” and must “devote
6 substantial treatment to each alternative ... so that reviewers may evaluate their comparative merits.”

7 *Id.*

8 The State Department’s alternatives analysis is insufficient for three reasons. First, the stated
9 purpose and need for the Alberta Clipper and diluent projects is based on an unexamined and
10 erroneous premise: that the project is needed to meet a projected increase in demand for Canadian
11 petroleum-based fuels in either the Midwest or nation-wide.

12 According to the EIS, “the demand for crude oil in the United States is expected to rise
13 slightly until about 2030.” FEIS, Exh. 3 at 3-2. This conclusion is based on the inaccurate statement
14 that “[t]he current EIA [U.S. Energy Information Agency] projection is that meeting domestic
15 demand will require the ‘unconventional’ oil supply from Canada, which is predominately heavy
16 crude from reserves in western Canada, and that the Canadian oil supply will grow from
17 approximately 1.5 million bpd in 2008 to over 4.3 million bpd in 2030.” FEIS, Exh. 3 at 3-2.
18 Because of this, the EIS concludes that “[i]mplementation of the no action alternative would not alter
19 the increasing need for Canadian crude oil in the United States.” *Id.* at 3-3. However, the EIA – the
20 federal government’s expert on energy supply, demand and price – has projected that crude oil
21 imports from Canada will *decline* between now and 2030. EIA Annual Energy Outlook 2009
22 (AEO), Table 127, (attached hereto as Appendix 2 to Plaintiffs Comments on FEIS (“Comments”),
23 Exh. 11); *see also* Comments, Exh. 11 at 5-7. There is no evidence of any increasing need for
24 Canadian crude oil in the United States. The State Department cannot reject the no action alternative
25 based on statements that are contradicted by the very sources on which the EIS relies. *See Friends*
26 *of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998); *City of Carmel-by-the-Sea*
27 *v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997).

28 Without an adequate assessment of the purpose and need for the project, the entire EIS is

1 deficient – the State Department cannot take a “hard look” at alternatives and balance costs and
2 benefits of the project unless it has first established that there is a legitimate need for the project.
3 The failure to adequately assess purpose and need has led to the State Department’s erroneous
4 summary dismissal of the “no action” alternative without adequate justification.

5 The second flaw in the State Department’s alternatives analysis is that, even if there were
6 reliable forecasts of a future energy shortfall, the EIS assumes that construction of a new pipeline is
7 the only feasible alternatives for filling this perceived need. Although other alternatives, such as
8 energy efficiency, renewable energy, clean technologies, and demand-side management, are feasible
9 alternatives to the Alberta Clipper, *see* Comments, Exh. 11 at 8, the FEIS rejects this in a one-
10 paragraph addition asserting that “the projected energy demands for this market” could not be met
11 by conservation or renewable sources. FEIS, Exh. 3 at 3-3. Such a conclusory statement does not
12 meet NEPA’s requirement that agencies “rigorously explore and objectively evaluate all reasonable
13 alternatives.” 40 C.F.R. § 1502.14(a). Moreover, NEPA regulations specifically require
14 consideration of energy requirements and conservation in environmental review documents. 40
15 C.F.R § 1502.16(e).

16 The third flaw in the alternatives analysis is the failure to adequately evaluate the alternative
17 of increasing supply capacity without new line construction, taking into consideration the enormous
18 expansion in transport capacity that has already been added to the pipeline systems that serve U.S.
19 refineries. Upgrades and expansions already under construction will increase crude oil transport
20 capacity from Canada into the Midwest by an additional 1 million barrels per day. Comments, Exh.
21 11 at 8-9. This additional capacity will more than satisfy any increase in U.S. demand for tar sands
22 crude, and the failure to assess this possibility violates NEPA’s “hard look” requirement.

23 **2. The State Department’s Issuance of the Presidential Permit is Unconstitutional.**

24 **a. The President has no constitutional or statutory authority to issue**
25 **presidential permits for international tar sands crude pipelines.**

26 The State Department claims its authority to issue the Alberta Clipper permit comes from
27 Executive Order 13,337, 69 Fed. Reg. 25299 (May 5, 2004), Exh. 12, issued by President George W.
28

1 Bush in 2004.⁵ ROD, Exh. 4 at 8. That order is based on “the authority vested in me as President by
2 the Constitution and the laws of the United States of America, including section 301 of title 3,
3 United States Code.” *Id.* However, the President has neither Constitutional nor statutory authority
4 to regulate international oil pipelines.

5 International oil pipelines are matters of foreign commerce. *See, e.g., State v. Brown*, 850 F.
6 Supp. 821, 827 (D. Alaska 1994) (crude oil transported through the Trans-Alaskan Pipeline System
7 is “foreign commerce” despite not crossing any international borders.) As such, the power to
8 regulate these pipelines falls under the exclusive and plenary constitutional authority of Congress to
9 “regulate commerce with foreign nations.” U.S. Const. art. I, § 8, cl. 3; *see also Cal. Bankers Ass’n*
10 *v. Shultz*, 416 U.S. 21, 46 (1974); *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824); *United States v. Clark*,
11 435 F.3d 1100, 1109 (9th Cir. 2006); *U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir.
12 1953) (invalidating an executive agreement with Canada regarding the importation of potato seeds
13 because “the power to regulate interstate and foreign commerce is not among the powers incident to
14 the Presidential office, but is exclusively vested by the Constitution in Congress” and “[i]mports
15 from a foreign county are foreign commerce subject to regulation, so far as this county is concerned,
16 by Congress alone.”); *Target Sportswear Inc. v. U.S.*, 875 F.Supp. 835, 838 n.2 (Ct. Int’l Trade
17 1995) (“Fundamentally, under the U.S. Constitution the authority to regulate foreign commerce and
18 trade with other nations lies exclusively with the Congress.”). Therefore, the President has no
19 constitutional authority to regulate the tar sands pipelines.⁶

20 Nor does the President have statutory authority to regulate the pipelines. The only statute
21 cited in Executive Order 13,337, 3 U.S.C. § 301, does *not* grant the President authority to issue
22 permits for oil pipelines (or any other activity), but is instead simply Congress’s general
23

24 ⁵ Executive Order 13,337 amended the original grant of authority by President Johnson to the State
25 Department in 1968, in Executive Order 11,423, 33 Fed. Reg. 11741 (Aug. 16, 1968), Exh. 13. The
26 1968 order invoked “the authority vested in me as President of the United States and Commander in
27 Chief of the Armed Forces of the United States and in conformity with the provisions of Section 301
28 of Title 3, United States Code.” *Id.*

⁶ The Constitution grants to the President the Commander-in-Chief powers, the power to make
treaties and appoint ambassadors with the advice and consent of the Senate, and the power to receive
ambassadors and other public ministers, and see that the laws are faithfully executed. U.S. Const.
art. II. The Constitution grants the President no power to regulate “foreign commerce.”

1 authorization for the President to delegate functions vested in the President by other laws.

2 In the seminal case of *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the
3 Court held that the Secretary of Commerce's seizure of steel mills in the Korean War under an
4 executive order exceeded the President's constitutional power. Like the executive orders in the
5 instant case, President Truman claimed authority for his action as the Nation's Chief Executive and
6 Commander in Chief. *Id.* at 582. The Court held that President Truman's executive order was
7 invalid because, as in the instant case, no express constitutional language authorized the President's
8 action, nor did any statute or other act of Congress expressly or implicitly authorize such action. *Id.*
9 at 585–87.

10 **b. Although Congress has delegated limited powers to specific agencies to**
11 **regulate aspects of international pipelines, it has not delegated authority over**
12 **international tar sands oil pipelines to the State Department.**

13 Where Congress has granted limited authority to the Executive Branch over an aspect of
14 foreign commerce, that grant establishes the limits of the President's power. In *United States v.*
15 *Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.C.P.A. 1975), the court held that a congressional delegation
16 gave the President the authority to impose import duties on zippers, but stated that “no undelegated
17 power to regulate commerce, or to set tariffs, inheres in the Presidency.” *Id.* at 572. Without a
18 delegation of power to the executive branch, Congress has not “abdicat[ed] its constitutional power
19 to regulate foreign commerce. It remains the ultimate decision maker and the fundamental reservoir
20 of power to regulate commerce.” *Id.* at 582; *see also Target Sportswear Inc. v. U.S.*, 875 F. Supp.
21 835, 841 (Ct. Int'l Trade 1995) (President's regulation of foreign commerce cannot exceed authority
22 delegated by Congress).

23 In this case, Congress delegated limited powers to regulate certain aspects of international oil
24 pipelines to specific Executive agencies, but there is no delegation to the State Department. For
25 instance, in the Hepburn Act of 1906, Congress expanded the Interstate Commerce Act of 1877 to
26 apply to international oil pipelines, and authorized the Interstate Commerce Commission (ICC) to set
27 rates that pipeline operators can charge for the transport of oil by pipelines. Pub. L. No. 59-3337, §
28 1, 34 Stat. 584 (as amended). Congress transferred the ICC's jurisdiction to the Federal Energy

1 Regulatory Commission (FERC) in the Department of Energy Organization Act, 42 U.S.C. § 7111 *et*
2 *seq.* (1977), and amended FERC's authority in the Energy Policy Act of 1992, 49 U.S.C. § 112 *et*
3 *seq.* In the Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. No. 96-129, and in an amendment
4 in the Pipeline Safety Act of 1992, Pub. L. No. 102-508, Congress delegated limited authority to the
5 Department of Transportation to regulate pipeline safety. In the 2006 Pipeline Inspection,
6 Protection, Enforcement, and Safety Act, 49 U.S.C. § 60,134 *et seq.*, Congress addressed the
7 authority of the Pipeline and Hazardous Materials Safety Administration. In these statutes or others,
8 Congress could have authorized the State Department to issue permits allowing transport of crude oil
9 between the United States and Canada and for pipeline construction, connection and operation, but it
10 did not.

11 Congress's retention of authority over international pipelines is also evident from its practice
12 of authorizing specific pipeline systems. In 1973, Congress authorized construction of the Trans-
13 Alaska Pipeline System ("TAPS"). 43 U.S.C. § 1651 *et seq.* (1973). The TAPS was a matter of
14 "foreign commerce" for Congress despite the fact that it crossed no international borders. *State v.*
15 *Brown*, 850 F. Supp. at 827-28. In the Public Utility Regulatory Policies Act, 43 U.S.C. § 2001 *et*
16 *seq.*, Congress delegated to the President the authority to choose the preferred route of an east-west
17 pipeline and to give it preferential treatment in the permitting process. These statutes demonstrate
18 that Congress reserved ultimate authority over oil pipelines and required the passage of specific
19 legislation, with specific grants of authority to the Executive Branch, before specific pipelines could
20 be built. There is, however, no such grant of authority for the Alberta Clipper pipeline.

21 In addition, Congress's reservation of authority over pipelines crossing the Canadian border
22 is evident in its grants of authority for other border crossings. For example, Congress delegated to
23 the Executive authority over transboundary natural gas pipelines in the Natural Gas Act, 15 U.S.C. §
24 717 *et seq.* (1938); transboundary bridges in the International Bridge Act, 33 U.S.C. § 535(b) (1972);
25 and international telegraph cables in the Kellogg Act, 47 U.S.C. § 34 *et seq.* (1921). By contrast,
26 there is no congressional act authorizing border crossings for tar sands crude oil pipelines.

27 In sum, the State Department's issuance of the Alberta Clipper permit was not based on any
28 constitutional authority or any explicit or implicit congressional grant of power. Without such

1 authority, the State Department's issuance of the Alberta Clipper presidential permit was
2 unconstitutional.

3 **B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF**
4 **PRELIMINARY INJUNCTION.**

5 The construction of the Alberta Clipper pipeline involves the installation of 327 miles of new
6 36-inch-diameter pipeline in the United States, with attendant clearing of trees and vegetation,
7 removing topsoil, and filling wetlands ranging from 140 to 440 feet wide. FEIS, Exh. 3 at 2-19, 4-
8 20, 4-69, 4-96; ROD, Exh. 4 at 6. This will harm 6,402 acres of land (including 1,255 acres of
9 forest, 655 acres of open lands, and 1,346 acres of wetlands), and will damage at least 80 perennial
10 and 123 intermittent waterbodies. FEIS, Exh. 3 at 4-45 to 47; ROD, Exh. 4 at 7, 15. The FEIS
11 documents significant harm to soils and sediments, surface water and groundwater, wetlands,
12 vegetation, wildlife, fisheries, threatened, endangered and sensitive species, land use, recreation and
13 special interest areas, visual areas, air quality and noise, risks from spills, and cumulative impacts.
14 Excerpts of these FEIS sections are collected in Exh. 14. On September 1 a portion of Highway 2 in
15 Bemiji, Minnesota collapsed during boring for the Alberta Clipper pipeline. *See Bemidji Pioneer*,
16 Exh. 15.

17 Many of the impacts to vegetation would be long-term or permanent. FEIS, Exh. 3 at 4-96.
18 More than 820 acres of wetlands will be permanently destroyed. ROD, Exh. 4 at 7. The permitted
19 route alignment cuts through a calcareous fen, one of North America's most rare wetland habitats.
20 *See Plaintiffs' Letter to DOS*, Exh. 16. Construction would adversely modify wildlife habitats,
21 including through habitat fragmentation and widening of existing rights-of-way. FEIS, Exh. 3 at 4-
22 120 to 122. It could harm fisheries resources through loss or alteration of habitat, reduced spawning
23 success, direct and indirect mortality, adverse health effects, and loss of individuals and habitats due
24 to hydrostatic testing and exposure to toxic materials. *Id.* at 4-146. Pipeline construction would also
25 result in concrete and irreparable harm to water-bodies and aquatic ecosystems, including increased
26 sedimentation, degradation and alteration of aquatic habitat, increased runoff and erosion, changes in
27 channel morphology and stability, temporary reductions in flow, and temporary to short-term surface
28 water degradation during or after construction. *See FEIS*, Exh. 3 at 4-20, 4-46 to 49, 4-67 to 69.

1 Plaintiffs' members have attested to the significant and irreparable harm they will suffer if
2 the project is allowed to proceed. *See* Exhs. 17-23. For example, Sierra Club members Lois
3 Norrgard and Joshua Davis describe how the pipeline's crossing of the Chippewa National Forest in
4 Minnesota would interfere with their use and enjoyment of the forest. Declaration of Lois Norrgard
5 ("Norrgard Decl."), Exh. 17 at ¶¶ 4-5, 7, 10-11; Declaration of Joshua Davis ("Davis Decl."), Exh.
6 18 at ¶ 10. Mr. Davis describes impacts to public lands he uses downwind of the refinery that would
7 process the tar sands crude. Davis Decl., Exh. 17 at ¶7. Mary Johnson, who lives near the refinery,
8 describes her concerns over increased air pollution. *See* Declaration of Mary Smith-Johnson
9 ("Johnson Decl."), Exh. 19 at ¶¶ 6, 8. Minnesota Center for Environmental Advocacy member Ami
10 Aalgaard has already lost enjoyment of mature oak and other trees in her yard and neighboring
11 property. *See* Declaration of Ami Aalgaard ("Aalgaard Decl."), Exh. 20, App.1. She describes the
12 adverse effects of strong diesel smells and noise both inside and outside her home, as well as her fear
13 of living next to a pipeline transporting highly volatile liquid fuels. *Id.* at ¶ 7. Shelley Steva, an
14 MCEA member, teacher and avid birder, describes the irreparable impacts the pipeline will have on
15 specific areas that she frequents for bird watching. *See* Declaration of Shelley Steva, ("Steva
16 Decl."), Exh. 21 at ¶¶ 4-11. She also describes projects she has planned with her high school science
17 class that she is prevented from pursuing because of the pipelines. *Id.* at ¶¶ 13-17. MCEA member
18 Steve Caron has been a sport hunter for 45 years and frequents forests and grasslands traversed by
19 the pipelines. His ability to hunt during the fall hunting season will be prevented or severely
20 diminished by construction of the pipelines. Declaration of Steve Caron ("Caron Decl."), Exh. 22 at
21 ¶¶ 4-7.

22 Plaintiffs have also submitted the declaration of two expert witnesses, Julia May and Phyllis
23 Fox, who describe the environmental impacts of the Canadian processing of tar sands crude oil on
24 the climate and migratory birds in the United States, the increased air emissions and greenhouse
25 gases from refining tar sands crude, and other harms associated with the operation of the pipeline
26 and the Superior Terminal. *See* May Decl. Exh. 5; Declaration of Phyllis Fox ("Fox Decl.") Exh. 24.
27 In particular, May concludes that the Alberta Clipper and Southern Lights pipeline projects will
28 result in: damage to soils, vegetation, wetlands and wildlife habitat due to pipeline construction;

1 increased greenhouse gas emissions due to extraction and refining of tar sands crude oil; increased
2 emissions of hazardous air pollutants due to refining, flaring, and fugitive emissions sources such as
3 tanks, valves, flanges; and increased water pollution including mercury, selenium, vanadium, and
4 others contaminants. May Decl. Exh. 5 at ¶¶ 8, 42.

5 These impacts are precisely the kind of irreparable injury that justifies an injunction. As both
6 the Supreme Court and the 9th Circuit Court of Appeals have repeatedly said, “Environmental
7 injury, by its nature, can seldom be adequately remedied by money damages and is often permanent
8 or at least of long duration, i.e., irreparable.” *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d
9 562, 569 (9th Cir. 2000) (quotation omitted); *see also Geertson Seed Farms v. Johanns*, 570 F.3d
10 1130, 1137 (9th Cir. 2009).

11 **C. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF PLAINTIFFS.**

12 While Plaintiffs will suffer irreparable harm in the absence of an injunction, the issuance of a
13 preliminary injunction will not harm the State Department. The Department alleges a general
14 interest in securing increased access to Canadian tar sands oil due to projected increases in demand
15 for energy and the desire to reduce reliance on oil from countries considered unstable or unfriendly
16 to U.S. interests. However, as the Ninth Circuit recognized in *Kootenai Tribe of Idaho v. Veneman*,
17 313 F.3d 1094, 1125 (9th Cir. 2002), “restrictions on human intervention are not usually irreparable
18 in the sense required for injunctive relief.” The Ninth Circuit explained: “Unlike the resource
19 destruction that attends development, and that is bound to have permanent repercussions, restrictions
20 on forest development and human intervention can be removed if later proved to be more harmful
21 than helpful.” *Id.* Similarly, a preliminary injunction against the Department of State’s issuance of a
22 presidential permit for the Alberta Clipper Project is not irreparable and will not significantly harm
23 the State Department’s long-term interests in securing increased access to Canadian tar sands oil.

24 Moreover, any economic harm that Enbridge might incur due to a temporary delay in
25 construction of the pipeline is far outweighed by the irreparable environmental harms that pipeline
26 construction and operation would cause. As the Ninth Circuit has often held, potential monetary
27 damage either to an agency or to a private litigant weighs only lightly, if at all, on the scales of
28 equity in environmental cases. *See, e.g., National Parks & Cons. Ass’n v. Babbitt*, 241 F.3d 722,

1 738 (9th Cir. 2001) (loss of anticipated revenues to tour boat operator “does not outweigh the
2 potential irreparable damage to the environment”); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d
3 at 569 (Although “a preliminary injunction could present a financial hardship to the Forest Service,
4 the appellees-intervenors, and the communities in and around the [national forest], this possible
5 financial hardship is outweighed by the fact that ‘[t]he old growth forests plaintiffs seek to protect
6 would, if cut, take hundreds of years to reproduce.’”) (quoting *Portland Audubon Soc’y v. Lujan*, 884
7 F.2d 1233, 1241 (9th Cir. 1989)).

8 **D. THE PUBLIC INTEREST FAVORS ISSUANCE OF A PRELIMINARY**
9 **INJUNCTION.**

10 “The preservation of our environment ... is clearly in the public interest.” *Earth Island Inst.*
11 *v. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). Moreover, the public has an interest in
12 preventing Defendants from acting in a manner inconsistent with the applicable law. As the court
13 stated in *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d*, 952
14 F.2d 297 (9th Cir. 1991), “[t]his invokes a public interest of the highest order: the interest in having
15 government officials act in accordance with the law.” “Such compliance is especially appropriate in
16 light of the strong public policy expressed in the nation's environmental laws.” *Citizen's Alert*
17 *Regarding Env't v. U.S. Dep't of Justice*, 1995 WL 748246, *11 (D.D.C. 1995) (citation omitted).

18 Plaintiffs expect that the State Department will argue that a preliminary injunction would
19 cause not only economic harm to Enbridge but would also prevent the creation of jobs and harm the
20 economy more generally. However, as described above, the Ninth Circuit has “held time and again
21 that the public interest in preserving nature and avoiding irreparable environmental injury outweighs
22 economic concerns.” *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2007). In short, any
23 alleged economic harms are not sufficient to outweigh the likelihood of environmental harm in this
24 case.

25 **IV. TEMPORARY RESTRAINING ORDER**

26 Plaintiffs respectfully requests a temporary restraining order pending the Court’s
27 consideration of their request for a preliminary injunction. A temporary restraining order is
28 appropriate if Plaintiffs will otherwise suffer “immediate and irreparable injury.” Fed. R. Civ. P.

1 65(b). A court should issue a temporary restraining order to preserve the status quo until there can
2 be a hearing on the merits of the demand for a preliminary injunction. *Warner Brothers, Inc. v. Dae*
3 *Rim Trading, Inc.*, 877 F.2d 1120, 1124 (2d Cir. 1989). As discussed above, and as demonstrated in
4 the FEIS, *see* Exh. 14, and in the attached declarations, *see* Exhs. 5, 17-24, absent a temporary
5 restraining order pending resolution of Plaintiffs' request for a preliminary injunction, Plaintiffs and
6 the public will suffer immediate and irreparable injury.

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request this Court to issue a temporary
9 restraining order and a preliminary injunction against the issuance of a presidential permit for the
10 construction and operation of the Alberta Clipper Project to preserve the status quo pending a
11 resolution of the merits of this case.

12 Respectfully submitted,

13 Dated: September 3, 2009

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