

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CIVIL NO. 09-2622 (DWF / RLE)**

SIERRA CLUB, INC., MINNESOTA)
CENTER FOR ENVIRONMENTAL)
ADVOCACY, NATIONAL)
WILDLIFE FEDERATION, and)
INDIGENOUS ENVIRONMENTAL)
NETWORK,)

Plaintiffs,)

v.)

HILLARY CLINTON, in her official)
capacity as Secretary of State,)
JAMES STEINBERG, in his official)
capacity as Deputy Secretary of State,)
UNITED STATES DEPARTMENT)
OF STATE, Lieutenant General)
ROBERT L. VAN ANTWERP, in his)
official capacity as U.S. Army Chief)
of Engineers and Commanding)
General of the U.S. Army Corps of)
Engineers, Colonel JON L.)
CHRISTENSEN, in his official)
capacity as District Engineer and)
Commander of the U.S. Army Corps)
of Engineers, the UNITED STATES)
ARMY CORPS OF ENGINEERS,)
TOM TIDWELL, in his official)
capacity as Chief of the United States)
Forest Service, ROB HARPER, in his)
official capacity as Forest Supervisor)
for the Chippewa National Forest, and)
the UNITED STATES FOREST)
SERVICE,)

Defendants,)

and)

ENBRIDGE ENERGY, LIMITED)
PARTNERSHIP,)

Intervenor.)

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

Hearing Date: August 9, 2010

Time: 9:00 a.m.

Hon. Donovan W. Frank
U.S. District Judge

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
FACTUAL BACKGROUND	1
LEGAL BACKGROUND	3
I. SUMMARY JUDGMENT STANDARD	3
II. ADMINISTRATIVE PROCEDURE ACT	3
III. NATIONAL ENVIRONMENTAL POLICY ACT	4
ARGUMENT	5
I. THE COURT LACKS JURISDICTION OVER THE NEPA CLAIMS AGAINST THE STATE DEPARTMENT	5
II. THE STATE DEPARTMENT, THE CORPS, AND THE FOREST SERVICE COMPLIED WITH NEPA	5
A. The EIS Contains a Valid Purpose and Need Statement and Considered a Reasonable Range of Alternatives (Fourth Claim)	6
1. The Purpose and Need Statement Is Valid	6
a. The Purpose and Need Statement Was Appropriately Crafted Based Upon Enbridge’s Goals and the State Department Goals	7
b. The Purpose and Need Statement Is Supported by the Record	8
2. The EIS Appropriately Analyzes a Reasonable Range of Alternatives, Including the No Action Alternative	11
B. The Statement Department, the Corps, and the Forest Service Did Not Improperly Segment the Analysis of the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline (First Claim)	14
1. The Southern Lights Diluent Pipeline Has Independent Utility and Therefore the State Department Was Not Required to Include It Within the Scope of the EIS	14
2. The Corps and the Forest Service Analyzed Both the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline in Their NEPA Analyses	17
C. The EIS and the Additional NEPA Documents Prepared by the Corps and the Forest Service Adequately Analyzed the Potential Impacts of Leaks and Spills from the Pipelines (Third Claim)	18

	PAGE
D. The EIS Adequately Analyzes Indirect and Cumulative Impacts (Second Claim)	22
1. The Agencies Did Not Need to Analyze the Impacts of Developing Canadian Oil Sands	22
2. The State Department Adequately Analyzed the Potential Indirect Impacts on Development of Renewable Energy Sources	26
3. The State Department’s EIS Adequately Analyzes the Abandonment of the Pipelines	28
CONCLUSION	28

INTRODUCTION

Defendants United States Department of State (“State Department”), United States Army Corps of Engineers (“Corps”), United States Forest Service (“Forest Service”) *et al.* (collectively “Defendants” or “Agencies”) hereby move for summary judgment and oppose the Motion for Summary Judgment (Dkt. No. 214) and Memorandum in Support (Dkt. No. 215) (“Plf. Mem.”) filed by Plaintiffs Sierra Club, Inc., Minnesota Center for Environmental Advocacy, Indigenous Environmental Network, and National Wildlife Federation (“Plaintiffs”). Plaintiffs allege that the State Department’s issuance of a Presidential Permit, pursuant to Executive Order 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004), allowing Enbridge Energy, Limited Partnership (“Enbridge”) to construct a pipeline crossing the international border between the United States and Canada, violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* Plaintiffs also allege that the Corps’ issuance of permits to Enbridge under the Clean Water Act, 33 U.S.C. § 1344, and the Rivers and Harbors Act, 33 U.S.C. § 401, violated NEPA. And, finally, Plaintiffs allege that the Forest Service’s issuance of special use permits to Enbridge allowing construction of the pipeline in the Chippewa National Forest violated NEPA. Summary judgment should be granted for Defendants because the Court lacks jurisdiction over Plaintiffs’ NEPA claims against the State Department, and, even assuming that the Court has jurisdiction, the Agencies have fully satisfied their obligations under NEPA.

FACTUAL BACKGROUND

The project at issue in this case is the U.S. portion of the Alberta Clipper Pipeline, which will extend from Hardisty, Alberta, Canada to Superior, Wisconsin, and is designed to transport up to 450,000 barrels per day (“bpd”) of crude oil. ACP 119 (EIS). The pipeline will be 1000 miles total in length. *Id.* It will extend 673 miles within Canada, cross the U.S./Canadian border at Neches, North Dakota, and extend approximately 327 miles into the U.S. *Id.* The Canadian portion of the pipeline is under the jurisdiction of Canadian governmental agencies, which found the pipeline to be in compliance with Canadian law and

approved the pipeline. ACP 136. The U.S. portion of the pipeline required extensive approval processes at the federal and state levels. See ACP 136-43.

The State Department issued a Presidential Permit allowing the Alberta Clipper Pipeline to cross the U.S./Canadian border. See Notice of Issuance of Presidential Permit, 74 Fed. Reg. 43212 (Aug. 26, 2009); ACP 18 (Presidential Permit). Pursuant to Executive Order 13337, Deputy Secretary of State James Steinberg signed a Record of Decision and National Interest Determination (“ROD”) finding that issuance of the permit would serve the national interest. See ACP 49 (ROD). Prior to issuing the permit, the State Department, conducted an environmental review of Enbridge’s permit application, which included the preparation of an environmental impact statement (“EIS”) under NEPA. ACP 25, 34-46.

The St. Paul District for the Corps issued permits for the project because portions of the pipeline involve work in jurisdictional waters and wetland areas in Minnesota. In considering those permits, the Corps coordinated its NEPA analysis with the State Department and also conducted additional NEPA analysis in conjunction with its review of Enbridge’s permit applications. See COE 7379 (“Corps ROD”). The Corps’ review of the permit applications was based on the information and analysis in the EIS, additional information submitted by Enbridge, and the Corps’ analysis. COE 7380. The Corps approved the issuance of the permits on August 11, 2009. COE 7410-11.

The Forest Service issued permits to Enbridge allowing Enbridge to construct, operate, and maintain 34 additional miles of the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline through the Chippewa National Forest in Minnesota and the Leech Lake Reservation. See DOS 9068-69, 9075 (Forest Service ROD). The Forest Service coordinated its NEPA analysis with the State Department and prepared its own Environmental Analysis of its actions. See ACP 2520 (EIS App. U). The Forest Service issued its decision on June 29, 2009. DOS 9063. The Forest Service rejected an administrative appeal filed by the Plaintiffs on September 28, 2009. DOS 11620.

LEGAL BACKGROUND

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the evidence presented by the moving party indicates that there is no genuine issue as to any material fact. See Fed. R. Civ. P. 56(c); Luigino's Inc. v. Peterson, 317 F.3d 909, 911 (8th Cir. 2003); Duffy v. McPhillips, 276 F.3d 988, 991 (8th Cir. 2002). In cases involving challenges to agency action, the court is not called upon to make factual findings. Rather, the court should determine, based upon the agency's administrative record, whether the action was arbitrary, capricious, an abuse of discretion, or otherwise in violation of the law. See United States v. Massey, 380 F.3d 437, 440 (8th Cir. 2004); Sierra Club v. Davies, 955 F.2d 1188, 1192-93 (8th Cir. 1992). The party challenging the agency's decision bears the burden of proving that the agency's action was arbitrary or capricious. Massey, 380 F.3d at 440; Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342-43 (8th Cir. 1986).

II. ADMINISTRATIVE PROCEDURE ACT

Because NEPA does not create a private right of action, Plaintiffs' claims must be brought under judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 376-77 (1989); Lockhart v. Kenops, 927 F.2d 1028, 1032 (8th Cir. 1991). The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Moore v. Custis, 736 F.2d 1260, 1262 (8th Cir. 1984). "This standard of review is a narrow one and the court is not permitted to substitute its judgment for that of the agency." Massey, 380 F.3d at 440. The court's review is limited to the administrative record before the agency decision maker. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Camp v. Pitts, 411 U.S. 138, 143 (1973); Massey, 380 F.3d at 440.

III. NATIONAL ENVIRONMENTAL POLICY ACT

NEPA serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and insuring that relevant information is made available to the public so that they “may also play a role in both the decisionmaking process and the implementation of that decision.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA’s mandate to the agencies is “essentially procedural.” Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978). “It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” Robertson, 490 U.S. at 350; see also Goos v. Interstate Commerce Comm’n, 911 F.2d 1283, 1293 (8th Cir. 1990). Thus, a court may not require agencies “to elevate environmental concerns over other, admittedly legitimate, considerations.” Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 228 n.2 (1980). “Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action.” Robertson, 490 U.S. at 351.

NEPA requires federal agencies to consider the environmental impacts of any major federal action and to prepare an environmental impact statement for all “major Federal actions significantly affecting the quality of the human environment.” Sierra Club v. U.S. Forest Serv., 46 F.3d 835, 837 (8th Cir. 1995) (quoting 42 U.S.C. § 4332(2)(C)). An environmental impact statement should not “merely catalog environmental facts, but also explain fully its course of inquiry, analysis and reasoning.” Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1128 (8th Cir. 1999) (citation omitted). “The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” Id. (citation omitted). The Court cannot substitute its judgment for that of the agency. Id. Nor should the Court “fly speck’ an EIS for inconsequential or technical deficiencies.” Id. (citation omitted).

ARGUMENT

Defendants are entitled to summary judgment on Claims One through Four because the Court lacks jurisdiction over the claims against the State Department and because the State Department, Corps, and Forest Service have prepared thorough NEPA analyses of their respective actions relating to the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline.

I. THE COURT LACKS JURISDICTION OVER THE NEPA CLAIMS AGAINST THE STATE DEPARTMENT

As a preliminary matter, the Court lacks jurisdiction over the NEPA claims against the State Department. As explained in Defendants' Memorandum in Support of Motion to Dismiss (Dkt. No. 74) and Reply (Dkt. No. 157), which are incorporated by reference, the State Department's decision to issue a Presidential Permit was not a typical agency action taken pursuant to statutory or regulatory authority. Rather, the decision to issue the Presidential Permit was made pursuant to Executive Order 13337, which delegates the President's authority over this foreign affairs function to the Secretary of State, thus authorizing the State Department to issue a permit as the President's delegate. See Exec. Order 13337. As such, the action of the State Department in issuing the Presidential Permit to Enbridge was Presidential in nature and therefore not subject to review under the APA. Therefore, for the reasons stated in our prior briefing in support of Defendants' Motion to Dismiss, the Court should issue a judgment in favor of the State Department on the grounds that it lacks jurisdiction over those claims.^{1/}

II. THE STATE DEPARTMENT, THE CORPS, AND THE FOREST SERVICE COMPLIED WITH NEPA

Summary judgment should be granted to Defendants on the merits of the NEPA claims against the State Department, the Corps, and the Forest Service. Plaintiffs allege that the Agencies violated NEPA on four grounds: (1) the EIS contains an invalid purpose and

^{1/} Defendants recognize that the Court denied their Motion to Dismiss Claims One through Four against the State Department on jurisdictional grounds. See Feb. 24, 2010 Order at 9-14 (Dkt. No. 185).

need statement and analyzes an insufficient range of alternatives (Fourth Claim), (2) the Agencies' NEPA analyses improperly segmented the analyses of the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline (First Claim), (3) the Agencies' NEPA analyses failed to adequately address the potential environmental impacts of leaks and spills from the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline (Third Claim), and (4) the Agencies' NEPA analyses failed to adequately analyze the indirect and cumulative effects of the Alberta Clipper Pipeline (Second Claim). See First Amend. Comp. at 27-35 (Dkt. No. 57). As shown below, each of these allegations is without merit.

A. The EIS Contains a Valid Purpose and Need Statement and Considered a Reasonable Range of Alternatives (Fourth Claim)

In accordance with the requirements of NEPA, the EIS contains a valid purpose and need statement and analyzes a reasonable range of alternatives. See 40 C.F.R. §§ 1502.13, 1502.14. Plaintiffs allege that the purpose and need statement is invalid because it relies upon inaccurate assumptions regarding the need for additional pipeline capacity. Plaintiffs further allege that the analysis of the no action alternative was insufficient. Finally, Plaintiffs allege that the range of alternatives considered was inadequate because the EIS insufficiently analyzed alternatives involving alternative sources of energy. Plaintiffs' arguments are without merit.

1. The Purpose and Need Statement Is Valid

An EIS must include a statement of the underlying purpose and need for the proposed action. See 40 C.F.R. § 1502.13. Agencies are afforded considerable discretion in defining the purpose and need of the proposed action. Westlands Water Dist. v. U.S. Dep't of the Interior, 376 F.3d 853, 866 (9th Cir. 2004). An agency's statement should not be unreasonably narrow or overly broad. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). In considering the appropriateness of a purpose and need statement, a court should consider whether the agency considered relevant factors in developing the statement. Id. In crafting the purpose and need statement, the agency should consider the goals of the project applicant and any applicable guidance from Congress. Id.

The purpose and need statement complied with the requirements of NEPA. The EIS states as follows:

The overall purpose of the Alberta Clipper Project is to transport additional crude oil into the United States and eastern Canada from existing Enbridge facilities in western Canada to meet the demands of refineries and markets in those areas. Enbridge has proposed the Project to (1) meet the increased demand for heavy crude oil by refineries in the United States and offset the decreasing domestic crude oil supply from some regions of the United States that have traditionally served refineries in U.S. Petroleum Administration for Defense District II (PADD II - the U.S. Midwest); (2) reduce U.S. dependence on oil obtained from sources outside of North America by increasing access to more stable and secure Canadian crude oil supplies; and (3) meet demonstrated shipper interest in an overall Enbridge system expansion.

ACP 120. This statement of the purpose and need for the project was valid because it appropriately considered the needs of the project applicant as well as the goals of the State Department and is supported by record evidence establishing the need for additional pipeline capacity to transport heavy crude from Canada to the United States.

a. The Purpose and Need Statement Was Appropriately Crafted Based Upon Enbridge's Goals and the State Department's Goals

Plaintiffs argue that, because the purpose and need statement is based on Enbridge's goals, it was overly narrow and invalid under NEPA. See Plf. Mem. at 7-8. Plaintiffs are incorrect. It is was appropriate for the State Department to consider Enbridge's application in formulating its purpose and need statement. See Citizens Against Burlington, 938 F.2d at 196 ("When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application.") (internal citation and quotations omitted); Alliance for Legal Action v. FAA, 69 Fed. Appx. 617, 622 (4th Cir. 2003) ("In this situation, the project sponsor's goals play a large role in determining how the purpose and need is stated."); see also La. Wildlife Fed'n, Inc. v. York, 761 F.2d 1044, 1048 (5th Cir. 1985). Accordingly, it was appropriate for the State Department to consider Enbridge's stated goals in proposing the pipeline.

Further, it was appropriate for the State Department to consider in its purpose and need statement the increased demand for heavy crude among refineries in PADD II and the increased shipper demand for increased pipeline capacity for Canadian heavy crude. See

Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1067 (9th Cir. 1998) (finding that a purpose and need statement based upon the "market demand for timber in Southeast Alaska" was reasonable); City of Angoon v. Hodel, 803 F.2d 1016, 1021 (9th Cir. 1986) (finding that it was error for a district court to reject the Corps' purpose and need statement in authorizing a permit for a timber harvest and redefine it more broadly as "commercial timber harvesting"). Accordingly, it was reasonable for the State Department to incorporate the market demand for the pipeline in its purpose and need statement.

Moreover, the purpose and need statement considers, not just Enbridge's goals, but also the State Department's goals. One of the components of the purpose and need statement is to "reduce U.S. dependence on oil obtained from outside of North America by increasing access to more stable and secure Canadian crude oil supplies." ACP 120. This goal is closely tied to the national interest determination, in which the Deputy Secretary of State found that approval of the Presidential Permit would serve the national interest because it "increases crude oil supplies from a major non-Organization of Petroleum Exporting Countries producer which is a stable and reliable ally and trading partner of the United States, with which we have a free trade agreements which augment the security of the energy supply." ACP 47 (ROD). Such determinations regarding foreign policy and national security fall within the discretion of the Executive Branch and generally are not reviewable in court. See Dep't of the Navy v. Egan, 484 U.S. 518, 528-29 (1988) (whether granting security clearance would be "clearly consistent with the interests of national security" was unreviewable); Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, 104 F.3d 1349, 1353 (D.C. Cir. 1997) ("By long-standing tradition, courts have been wary of second-guessing executive branch decision[s] involving complicated foreign policy matters.").

b. The Purpose and Need Statement Is Supported by the Record

Plaintiffs claim that the purpose and need statement relies on inaccurate information. See Plf. Mem. at 8-13. To the contrary, the State Department's finding that there was a need for additional pipeline capacity is supported by the record and is entitled to deference. The

EIS analyzes the demand for crude oil in the United States, the world oil supply and the Western Canadian Sedimentary Basin (“WCSB”) crude oil supply, and the available pipeline capacity from the WCSB to refineries in the Midwest (PADD II). ACP 122-25. These factors fully support the need for the project.

First, the EIS discusses the demand for crude oil in the United States, relying largely on the U.S. Energy Information Administration’s (“EIA”) Annual Energy Outlook 2009 (“AEO 2009”). ACP 122. The AEO 2009 Report establishes that, despite increased reliance on renewable energy sources, the domestic demand for oil is expected to be fairly constant over the next 30 years. *Id.*; ACP 41486 (AEO 2009). And, although demand is expected to be fairly flat overall, Canadian heavy crude is expected to supply an increasing amount of that demand. Canadian production of heavy crude is expected to increase from 1.5 million bpd to 4.3 million bpd by 2030. ACP 122; ACP 41632 (“Other North America” in Table A21 refers to Canadian production). Plaintiffs argue that this figure is not a good indicator of the amount of oil that will be exported to the U.S. Plf. Mem. at 11. But according to the latest report issued by the Canadian National Energy Board (“CNEB”), Canada exports 70% of the Canadian heavy crude produced in the WCSB to the United States. ACP 125; ACP 31589 (CNEB 2006). Therefore, it was reasonable to expect that a large portion of crude oil produced in the WCSB will continue to be exported to the U.S. Furthermore, the EIS explains that U.S. refineries are currently being retrofitted to process heavy crude in anticipation of processing additional heavy Canadian heavy crude. ACP 122; ACP 664-73; ACP 19402; see also ACP 29201-02 (increased shipper demand).

Plaintiffs argue, based on a chart provided in an early release presentation of the AEO 2009 Report, that U.S. dependence on imported oil will decrease. Plf. Mem. at 10. But the chart does not provide any information about imports of crude oil from Canada. Plaintiffs also argue that imports of crude oil from Canada are expected to decrease and rely on a chart that they created using data from Table 127 of the Internet version of the AEO 2009 Report. Plf. Mem. at 10-11. The figures that Plaintiffs reference, however, include both conventional crude and heavy crude from oil sands. ACP 43349-52 (AEO 2009, Table 127). The data in

the AEO report show that, while Canadian production of conventional crude will decline from 2.06 million bpd in 2006 to 1.02 million bpd in 2030, Canadian production of unconventional crude will increase from 1.23 million bpd to 4.31 million bpd during the same time period. ACP 41632 (AEO 2009). Plaintiffs also argue that the EIS incorrectly assumes that domestic supply will decline. Plf. Mem. at 11-12. But the EIS makes no such assumption. Rather, the EIS explains that certain regions have experienced decreased supply due to declines in offshore production and waterborne imports and are turning to other sources, particularly Canadian heavy crude. ACP 120, 125; ACP 19401-02.

Second, after discussing the domestic demand, the EIS describes the world supply of oil and the oil supply from the WCSB. ACP 123-25. World oil supply overall is expected to be hampered due to shortages of personnel and equipment, regulatory delays, higher costs, and lower production at existing sites. Id. In addition, several oil suppliers to the U.S., including Nigeria, Venezuela, Algeria, Ecuador, and Iraq, are experiencing political instability which makes their supply of oil potentially unreliable. Id. On the other hand, the WCSB contains 174 billion barrels of proven oil reserves, which makes Canada the holder of the second largest recoverable oil reserves in the world, behind only Saudi Arabia. ACP 124. In 2006, the CNEB reported 46 existing and proposed oil sands development projects. Id.; ACP 31578 (CNEB 2006). On the basis of those projects and the rapid growth of oil sands production, the CNEB projects that production will increase from 2.4 million bpd in 2007 to 3.9 million bpd by 2015. ACP 124; ACP 31581.

Third, the EIS explains that existing pipeline capacity is insufficient to meet the expected growth in the production of Canadian heavy crude, a large portion of which will be exported to the U.S. ACP 125. According to the Canadian Association of Petroleum Producers (“CAPP”), the pipeline capacity for shipping heavy crude to PADD II and III, where most of the heavy crude is shipped, is 1.3 million bpd. Id.; ACP 41451 (CAPP 2007). In 2006, approximately 1.1 million bpd was shipped to PADD II and III through those pipelines. ACP 125; ACP 41443 (CAPP 2007). In 2006, the CNEB projected that by 2009, exports of heavy crude to the U.S. will exceed available pipeline capacity. ACP 125; ACP

31595, 31600 (CNEB 2006). Based on the CNEB's projections, an additional 1.1 million bpd in capacity would be needed by 2015. ACP 125; ACP 31581 (CNEB 2006). The Keystone Pipeline, constructed in 2009, provides only 450,000 bpd of additional capacity. ACP 125.

The analysis in the EIS and the administrative record amply support the purpose and need statement, and therefore it is entitled to deference. See Alliance for Legal Action, 69 Fed. Appx. at 623 (“Because the agency’s determination is supported by substantial evidence, we defer to it.”); Stop the Pipeline v. White, 233 F. Supp. 2d 957, 970 (S.D. Ohio 2002) (“[A]gencies are entitled to considerable deference in their definition of purpose and need.”); Surfrider Found. v. Dalton, 989 F. Supp. 1309, 1327 (S.D. Cal. 1998) (“[C]ourts generally defer to plausible agency determinations about the purpose and need of a given project.”). Therefore, the Court should find that the EIS provides sufficient information to support the need for additional pipeline capacity to transport heavy Canadian crude to the United States. See Stop the Pipeline, 233 F. Supp.2d at 971 (rejecting an argument that the data did not support the need for a new oil pipeline).²

2. The EIS Appropriately Analyzes a Reasonable Range of Alternatives, Including the No Action Alternative

The State Department considered a reasonable range of alternatives in the EIS. In an EIS, an agency must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives that were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a); see also City of Bridgeton

² In support of their arguments regarding the EIS’s purpose and need statement and range of alternatives analyzed, Plaintiffs rely on a petition filed by Suncor Energy Marketing, Inc., with the Federal Energy Regulatory Commission on January 13, 2010. See Plf. Mem. at 12-13, 16-17. The Court should not consider the information in the petition because it is not part of the administrative record. See Def. Opp. to Plf. Request for Judicial Notice (Dkt. No. 222) and Def. Memo. in Suppt. of Mot. to Strike Extra-Record Evidence (Dkt. No. 225). If the Court considers the petition, it should note that FERC has since denied Suncor’s Petition. See Order on Tariffs and Petition for Declaratory Order, 130 FERC P 61270, 2010 WL 1236356 (F.E.R.C. Mar. 31, 2010).

v. FAA, 212 F.3d 448, 455 (8th Cir. 2000). A court should “review the agency’s choice of which alternatives to discuss and the extent to which the EIS must discuss them under the ‘rule of reason.’” Friends of the Boundary Waters, 164 F.3d at 1128 (citation omitted). In this case, the State Department conducted a thorough analysis of several alternatives, including alternative systems and alternative routes. See ACP 209-74. Plaintiffs allege that the range of alternatives considered was inadequate because it failed to adequately consider the no action alternative and alternatives involving sources of renewable energy. These arguments are without merit because neither of these alternatives would meet the purpose and need of the project.

Contrary to Plaintiffs’ claims, the no action alternative was adequately examined in the EIS. See Plf. Mem. at 13-18. The EIS explains that the no action alternative would not meet the purpose and need for the project because it would not meet the demand for additional pipeline capacity, reduce U.S. dependence on unreliable sources of foreign oil, or meet the demonstrated shipper interest in increased pipeline capacity. ACP 210. Because the no action alternative clearly would not meet the purpose and need stated in the EIS, the State Department was not required to further analyze the no action alternative. Friends of Southeast Future, 153 F.3d at 1065 (“[A]s this court has recognized on a number of occasions, ‘merely because a “no action” proposal is given a brief discussion does not suggest that it has been insufficiently addressed.’”) (quoting Headwaters, Inc. v. BLM, 914 F.2d 1174, 1181 (9th Cir. 1990)). Accordingly, Plaintiffs have provided no evidence that the no action alternative was not sufficiently considered. See Headwaters, 914 F.2d at 1181.

In addition, reliance on energy conservation and sources of renewable energy sources alone would not meet the purpose and need for the project. ACP 211. As explained in the EIS, “Energy conservation alone cannot reasonably offset the demand for oil or other forms of energy for end users that ultimately would be served by the proposed Project.” Id. The EIS further explains that “[r]enewable energy sources, including wind and solar power, will increasingly play an important role in power generation for the Midwest market, especially as it relates to electrical demand. However, these sources represent a small fraction of the

projected energy demands for this market for the foreseeable future, especially related to providing refined petroleum projects for the transportation sector.” Id. This analysis is supported by the AEO Report 2009, which finds that energy from renewable sources will grow by roughly 3.3% annually but will still supply a relatively small fraction of the U.S. energy demand. ACP 41487-88, 41593 (AEO 2009). Because reliance on energy conservation and renewable sources of energy would not meet the purpose and need, the EIS was not required to analyze this alternative in more detail. See City of Richfield v. FAA, 152 F.3d 905, 907 (8th Cir. 1998) (“An alternative is unreasonable if it does not fulfill the purpose of the project.”) (citation omitted); see also Sierra Club No. Star Chapter v. LaHood, Civ. No. 07-2593 (MJD/SRN), 2010 WL 890984, *26 (D. Minn. Mar. 11, 2010) (“NEPA does not require an agency to consider, in an EIS, ‘unreasonable’ alternatives that do not meet a project’s purpose and need.”) (citation omitted).³⁷

Plaintiffs further argue that the State Department’s national interest determination was in error because it relied on a faulty interpretation of the EIA data. Plf. Mem. at 14-16. As shown above, the State Department did not rely on faulty data and, in fact, thoroughly considered the available data demonstrating a need for additional pipeline capacity to transport heavy crude from Canada. ACP 122-25.⁴⁷ The Agencies’ interpretation of this data is entitled to deference. See Friends of Boundary Waters, 164 F.3d at 1130 (rejecting an argument that the Forest Service relied on inaccurate data in preparing an EIS). In addition,

³⁷ Contrary to Plaintiffs’ assertions (Plf. Mem. at 17 n.9), the EIS also explains that the need for the project could not be met with existing pipelines because existing pipeline capacity is insufficient. ACP 212. In addition, the excavation required to replace existing pipelines with larger diameter pipe raises concerns regarding equipment, safety, and the environment and would not be environmentally preferable to the proposed project. ACP 212-13.

⁴⁷ Plaintiffs’ argument that the State Department failed to verify information regarding the need for additional pipeline capacity is without basis. See Plf. Mem. at 18 (citing Utahns for Better Transp. v. U.S. Dep’t of Transp., 305 F.3d 1152, 1165 (10th Cir. 2002)). Here, the State Department confirmed the need for additional pipeline capacity from multiple sources, including reports issued by EIA, CNEB, and CAPP. ACP 122-25.

the State Department's determination as to what actions are in the national interest to ensure a stable and secure supply of oil to the United States may not be second-guessed by Plaintiffs. See, e.g., Egan, 484 U.S. at 528-29. Moreover, the requirements of NEPA are procedural, not substantive, and do not require any substantive outcome. Robertson, 490 U.S. at 350; Goos, 911 F.2d at 1293. Further, the State Department has fully satisfied its obligation to respond to the comments of Plaintiffs and the Wisconsin Department of Natural Resources. See Plf. Mem. at 15-16. The State Department responded to those comments directly, referencing the discussion of the final EIS which was updated to explain in more detail the need for additional pipeline capacity and which specifically references the need for additional sources of heavy crude to make up for the loss of production from the Gulf Coast and waterborne imports. ACP 125, ACP 858 (EIS App. A).

B. The State Department, the Corps, and the Forest Service Did Not Improperly Segment the Analysis of the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline (First Claim)

Plaintiffs argue that the Agencies improperly segmented the analysis of the Alberta Clipper Pipeline from the analysis of the Southern Lights Diluent Pipeline (“Diluent Pipeline”). Plf. Mem. at 22. Plaintiffs’ argument is without merit because the Diluent Pipeline is part of the Southern Lights Project, a separate pipeline project from the Alberta Clipper Project, and did not require approval by the State Department because the Diluent Pipeline does not cross an international border. Further, the Corps and the Forest Service, which issued permits pertaining to the Diluent Pipeline, included the Diluent Pipeline within the scope of their respective NEPA analyses.

1. The Southern Lights Diluent Pipeline Has Independent Utility and Therefore the State Department Was Not Required to Include It Within the Scope of the EIS

Plaintiffs argue that the State Department was required to analyze the Southern Lights Diluent Pipeline and the Alberta Clipper Project in one EIS because they are “connected” or “cumulative” actions. See Plf. Mem. at 24 (citing lying on 40 C.F.R. § 1508.25(a)). In analyzing whether actions are so closely related that a single NEPA analysis is required, “[t]he critical question is whether the actions are essentially independent or interdependent

and whether each action involves an irretrievable commitment of resources beyond what is actually expended on each project.” Minn. Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1306 (8th Cir. 1976); see also Sierra Club v. Froehlke, 534 F.2d 1289, 1297-98 (8th Cir. 1976). The record shows that the Southern Lights Project is an independent project that has an independent purpose and utility, and therefore it was not required to be analyzed in the same EIS as the Alberta Clipper Project.

The Southern Lights Project is a separate Enbridge pipeline project that was approved separately by the appropriate agencies. As explained in the EIS, Enbridge’s Southern Lights Project consists of three components: (1) the Diluent Pipeline, (2) the Reversal Pipeline, and (3) the LSr Pipeline. ACP 144 (EIS). The Diluent Pipeline involves the construction of an approximately 669-mile pipeline from Manhattan, Illinois to Clearbrook, Minnesota. ACP 146. Two stages of the pipeline have already been constructed and only the third stage stretching from Superior, Wisconsin to Clearbrook, Minnesota (approximately 183 miles) remains to be constructed along the same route as the Alberta Clipper Pipeline. ACP 145 (map), 146-47. The Reversal Pipeline is an existing Enbridge Pipeline (Line 13) stretching across the international border from Clearbrook, Minnesota to Hardisty, Alberta, which will connect to the end of the Diluent Pipeline. ACP 147. And the LSr Pipeline is a pipeline stretching from Cromer, Manitoba to Clearbrook, Minnesota that has been permitted and fully constructed and has been in operation since April 2009. Id.

The Diluent Pipeline is being constructed for the purpose of transporting diluent to Canada, which will be blended with heavy crude in order to transport the crude by pipeline. ACP 146. But the diluent from the Diluent Pipeline is not dedicated to the Alberta Clipper Pipeline. Rather, the diluent may be used to transport crude oil from the oil sands through other pipelines in North America. See id. (“Portions of the Alberta heavy crude oil that will be diluted with the diluent from the Southern Lights Diluent Project will be transported to other regions in North America via existing Enbridge pipelines and other existing, planned, and proposed pipelines.”); see also ACP 18619-20. Indeed, the CNEB and the CAPP consider the projects to be separate. In its 2006 report, the CNEB discusses the two projects

separately, explaining that the purpose of the Southern Lights Project would be to supply diluent to Canada from refineries in the Midwest and to expand the capacity to transport light crude oil to the U.S., while the Alberta Clipper Pipeline, which was a later project, would provide additional capacity for transporting crude oil. ACP 31598-99 (CNEB 2006). Similarly, the CAPP discusses the two projects separately. See ACP 41455 (“Enbridge Clipper”), ACP 41461 (“Enbridge Southern Lights”) (CAPP 2007). Thus, the record shows that the Alberta Clipper Project and Southern Lights Project are separate projects that have independent utility.

Because the Alberta Clipper and Southern Light Projects were separate projects and had independent utility, a single NEPA analysis of both projects was not required. See Froehlke, 534 F.2d at 1298 (finding that two planned dam projects in the same watershed had independent utility); Watersheds Assocs. Rescue v. Alexander, 586 F. Supp 978, 993-95 (D. Neb. 1982) (finding that separate levees on the Missouri River had independent utility and were not required to be analyzed in a programmatic NEPA document); see also Great Basin Mine Watch v. Hanksins, 456 F.3d 955, 970 (9th Cir. 2006) (finding that two gold mines within 20 miles of each other were not interdependent and were not required to be analyzed in the same environmental impact statement); Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 1000-01 (9th Cir. 2004) (finding that the U.S. Forest Service was not required to analyze the impacts of two timber sales in the same watershed in one NEPA document). Further, the Southern Lights Project could reasonably have been completed without the Alberta Clipper Pipeline. See Great Basin Mine Watch, 456 F.3d at 969 (“When one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not ‘connected’ for NEPA’s purposes.”) (citation omitted).

Finally, the State Department was not required to analyze the Southern Lights Diluent Pipeline as a “similar” action. See 40 C.F.R. § 1508.25(a)(3). While the projects may be similar in some respects, the regulations specifically do not require analysis of similar actions. Rather, the regulations state: “An agency *may wish* to analyze these actions in the

same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” *Id.* (emphasis added). Here, the State Department chose not to include the Diluent Pipeline in the scope of its analysis because the Diluent Pipeline does not cross an international border and therefore does not require approval by the State Department. ACP 135. Accordingly, the State Department was not required to include the Southern Lights Project within the scope of its review in the EIS.

Plaintiffs are mistaken, however, that the Diluent Pipeline has escaped NEPA review. See Plf. Mem. at 29-30. The EIS includes the impacts of constructing the Diluent Pipeline alongside the Alberta Clipper Pipeline in its analysis of cumulative impacts. ACP 654 (“[T]he associated acreage impacts of the Diluent Project pipeline have been incorporated into the environmental review described throughout Section 4.0 of this EIS.”); ACP 657-61 (analyzing the potential cumulative effects on geology, soils, water resource, and other resources of constructing the Alberta Clipper Pipeline and the Diluent Pipeline at the same or similar time). Further, as explained below, the Corps and the Forest Service analyzed the Diluent Pipeline in their additional NEPA analyses.

2. The Corps and the Forest Service Analyzed Both the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline in Their NEPA Analyses

Unlike the State Department, the Corps and the Forest Service each issued permits for both the Alberta Clipper Pipeline and the Diluent Pipeline. The Corps and the Forest Service were cooperating agencies during the EIS process. ACP 127-28. As cooperating agencies, they were permitted to rely on the EIS prepared by the State Department and also were required to make an independent determination as to whether the EIS satisfied the their own NEPA obligations. 40 C.F.R. § 1506.3(c). The Corps and the Forest Service each conducted independent NEPA analyses, and because Alberta Clipper Pipeline and the Diluent Pipeline were being reviewed simultaneously and would occur in the same area, the Corp and the Forest Service analyzed the two projects together in their NEPA analyses.

Following its review of Enbridge’s permit applications and comments submitted

during the Corps' NEPA and permitting process, the Corps prepared a Record of Decision, in which it stated that the scope of its review included both the Alberta Clipper Pipeline and the Diluent Pipeline. COE 7379 (Corps ROD) ("The Alberta Clipper pipeline and the Southern Lights Diluent pipeline are the subject of a Department of the Army, Clean Water Act and Rivers and Harbors Act permit application to discharge dredged and fill material into waters of the U.S. and to cross navigable waters, respectively, for construction of the pipelines in Minnesota and Wisconsin."); see also COE 7381. The Corps analyzed the effects of both pipelines pursuant to its regulations. COE 7390-7408.

Similarly, the Forest Service prepared an Environmental Analysis, in which it clearly analyzed the environmental impacts of both the Alberta Clipper Pipeline and the Diluent Pipeline. ACP 2531 (EIS App. U) (describing the project under review as "two new pipelines, referred to as the Alberta Clipper Project and the Southern Lights Diluent Project"); see also ACP 2533; DOS 9063 (Forest Service ROD).⁵⁷ In its Environmental Analysis, the Forest Service analyzed the potential environmental effects of both pipelines. ACP 2531-2654. Thus, as they were permitted to do by NEPA, the Corps and the Forest Service each analyzed the Alberta Clipper Project and the Southern Lights Project together as similar projects. See 40 C.F.R. § 1508.25(a)(3).

C. The EIS and the Additional NEPA Documents Prepared by the Corps and the Forest Service Adequately Analyzed the Potential Impacts of Leaks and Spills from the Pipelines (Third Claim)

The potential effects of leaks and spills from the Alberta Clipper and Diluent Pipelines and mitigation measures to prevent and mitigate such spills were adequately analyzed in the EIS and in the additional NEPA analyses of the Corps and the Forest Service. In addition, Enbridge has submitted emergency response plans for both pipelines that are subject to

⁵⁷ The Forest Services' Environmental Analysis does not demonstrate that the projects are interdependent. See Plf. Mem. at 25. Indeed, the two projects are discussed separately, and, as indicated in the Forest Service's analysis and Enbridge's application, diluent will enable transport of heavy crude to the U.S. generally, not just through the Alberta Clipper Pipeline. See ACP 2532-33 (EIS App. U); DOS 59 (Enbridge Application).

approval by the U.S. Department of Transportation (“DOT”), Pipeline and Hazardous Materials Safety Administration (“PHMSA”), Office of Pipeline Safety (“OPS”). The Agencies’ analyses comply with NEPA.

The EIS contains an analysis of the potential risks and impacts of leaks and spills of crude oil and other petroleum products during the construction and operation of the pipeline. ACP 621-51. Based on information provided by PHMSA, the EIS discusses Enbridge’s safety record in North Dakota, Minnesota, and Wisconsin. ACP 623-30. The EIS discloses that Enbridge was responsible for 32 crude oil spills of 5 gallons or more from 1998-2008. ACP 628-29. The EIS explains the types of spills that may occur, the expected frequency and volume of potential spills, and the potential impacts on the environment of spills. ACP 630-47. The analysis is not limited to spills of crude oil, but rather includes refined oil products, including gasoline. ACP 633. The EIS explains that crude oil and refined oil products behave differently in the environment. For example, due to the fact that they are less viscous, refined oil products are more likely to penetrate surface soil than crude oil and “could infiltrate through the vegetation, debris, and litter cover.” ACP 640. Refined oil products are also more likely to “percolate downward toward the water table” and “become dispersed in the groundwater, contaminating the groundwater for agricultural or domestic drinking uses.” ACP 641. In addition, “[r]efined oil products tend to be more toxic than crude oil.” ACP 642.

As explained in the Agencies’ NEPA documents, crude oil and diluent are both hydrocarbons, but the diluent is lighter and is mixed with heavy crude to facilitate transport by pipeline. ACP 146 (EIS); ACP 2561 (EIS App. U); COE 7383 (Corps ROD); see also ACP 1084 (EIS App. A) (“[C]onventional oil and diluent are both hydrocarbons.”). “Diluent is expected to have a similar composition and physical characteristics to gasoline. Therefore, if released into the environment, diluent will behave in a similar manner to gasoline.” ACP 2561. Because diluent would pose similar risks to the environment as gasoline and the EIS analyzes the potential effects of a gasoline spill, the Agencies adequately disclosed and considered the nature of the diluent and the potential risks associated with a spill. See Ark.

Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 431 F.3d 1096, 1100 (8th Cir. 2005) (A court's role in reviewing a NEPA claim is to "ensure that the agency has adequately considered and disclosed the environmental impacts of its actions.") (quoting Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 534 (8th Cir. 2003)).

Further, the EIS adequately discussed mitigation to prevent oil spills and to mitigate environmental harm if a spill occurs. OPS regulates pipeline safety and establishes the applicable standards. ACP 621-22; see also 49 C.F.R. §§ 190, 194, 195, 198, 199. In order to prevent leaks and spills, Enbridge is required to construct the pipeline in accordance with industry standards established by OPS. ACP 623, 647. Enbridge has in place a monitoring system to minimize the impacts of any leak. ACP 198, 648. The system includes pipeline sensing devices to measure pipeline pressure, temperature, and flow and automated alarms that inform operators when thresholds have been exceeded. ACP 198. Mainline valves are installed along the pipeline to limit the volume of any spill. ACP 157. Enbridge also has an existing Emergency Response Plan ("ERP") for its pipeline system which has been approved by PHMSA. ACP 199, 622. Enbridge has submitted an ERP for the Alberta Clipper Pipeline and Diluent Pipeline, which is subject to review and approval by OPS before the pipelines can become operational. Id. The requirements of the ERP are summarized in EIS Appendix Q. ACP 1980 (EIS App. Q) (Pipeline Integrity and Emergency Response Measures); see also ACP 1578-87 (EIS App. E) (Spill Prevention, Containment, and Control Plan); ACP 1798 (EIS App. J) (Petroleum-Contaminated Soil Management Plan).

The Corps and the Forest Service also discussed the potential risks of leaks and spills from both pipelines in their analyses. The Corps deferred to the OPS's expertise regarding pipeline safety and found that "the Project does not pose a significant threat to public safety if constructed and operated within the oversight of the national regulatory program to ensure the safe transportation of hazardous liquids by pipeline." COE 7404 (Corps ROD), see also COE 7458 (Corps ROD App. D) ("The Enbridge diluent pipeline is subject to the U.S. Department of Transportation Standards under 49 USC Chapter 601 and the Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation

of hazardous liquids by pipeline.”). Similarly, in its analysis of potential leaks and spills from the Alberta Clipper Pipeline and Diluent Pipeline, the Forest Service deferred to OPS’s expertise in regulating pipeline safety. ACP 2561, 2564, 2566 (EIS App. U); see also DOS 9070 (Forest Service ROD). In addition, the length of the pipelines in the Chippewa National Forest and Leach Lake Reservation are considered high consequence areas (HCAs), meaning that additional inspections, evaluation, and mitigation are required to prevent harm to environmentally sensitive areas. ACP 2566.

The Agencies’ reliance on Enbridge’s compliance with OPS regulations and approvals was appropriate. Indeed, OPS was an assisting agency and provided technical expertise in assessing pipeline safety issues and determining appropriate mitigation measures during the NEPA process for the Alberta Clipper Pipeline. ACP 130 (EIS); ACP 43497-505 (Transcript of public meeting in which a PHMSA representative describes OPS’s role in the Alberta Clipper Project); see also ACP 43532-39; ACP 43565-72. Enbridge is required to obtain approval from OPS before its pipelines can become operational, and OPS will have continuing regulatory responsibility over the pipelines. ACP 139. Pipeline construction and operation is highly regulated by OPS, and the Agencies were entitled to rely on OPS’s expertise in that area. See Stop the Pipeline v. White, 233 F. Supp.2d 957, 969-70 (S.D. Ohio 2002) (finding that the Corps appropriately deferred to OPS in its NEPA analysis for an oil pipeline); see also Edwardsen v. U.S. Dep’t of the Interior, 268 F.3d 781, 789 (9th Cir. 2001) (“It was not unreasonable for the [Minerals Management Service] to rely upon compliance with the [National Ambient Air Quality Standards].”); Pub. Citizen v. Nat’l Highway Traffic Safety Admin., 848 F.2d 256, 268 (D.C. Cir. 1988) (“[W]e decline to indict as arbitrary and capricious the agency’s decision, made in view of time and resource constraints, to ignore in this case possible increases in emissions *within* the Clean Air Act limits.”) (emphasis in original). Therefore, the Agencies have adequately analyzed the potential risks and impacts of leaks and spills from the pipelines.

D. The EIS Adequately Analyzes Indirect and Cumulative Impacts (Second Claim)

The EIS adequately analyzes the indirect and cumulative effects of the Alberta Clipper Pipeline. See 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. The Agencies did not need to analyze the impacts of developing Canadian oil sands because there is not a reasonably close causal relationship between the approval of the Agencies' permits and the development of the oil sands, which is under the authority of the Canadian government and is outside of U.S. jurisdiction. The effects of oil sands development were analyzed by Canada as part of its environmental review process, and the Agencies had no duty to duplicate that work in the EIS. In addition, the EIS adequately considered whether the Alberta Clipper Pipeline would have an indirect effect on the development of alternative sources of energy with potentially lesser effects on air quality. Finally, the EIS adequately considers abandonment of the pipeline.

1. The Agencies Did Not Need to Analyze the Impacts of Developing Canadian Oil Sands

Plaintiffs argue that the Agencies did not adequately consider the indirect effects *inside* the United States caused by the development and extraction of oil from oil sands in Canada. Plf. Mem. at 31. Specifically, Plaintiffs argue that the Agencies were required to consider the transboundary impacts on global climate change caused by increased greenhouse gas emissions from the extraction process and the effects on domestic species, which may migrate to Canada and become trapped in the oil sands. Id. at 31-32.

The Agencies were not required to analyze the transboundary impacts alleged by Plaintiffs because there is not a sufficiently close causal nexus between the issuance of the permits for the Alberta Clipper Pipeline and the Diluent Pipeline and the development of the Canadian oil sands. The Supreme Court has established that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." U.S. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004) (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)). The Court analogized the required causal connection to that of the "familiar doctrine of proximate cause from tort law."

Id. The Court emphasized that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.” Id.

Here, development of the oil sands is occurring independently of the Agencies’ decisions to issue their respective permits for Enbridge’s pipelines, and there is no reasonably close causal relationship between oil sands development and construction and operation of the pipelines. The development of Canadian oil sands is being conducted under the jurisdiction of the Canadian government, is subject to Canadian law, and underwent environmental review in Canada. ACP 124-25, 136 (EIS). The Agencies’ permits, along with numerous other approvals issued by various state agencies and the Canadian government, enables Enbridge to construct a pipeline for the purpose of transporting oil from Canada into the United States. ACP 119-20; ACP 27-29 (ROD); ACP 18 (Presidential Permit). But the Agencies are not involved in the separate actions of the Canadian government in approving oil sands development in Canada. See ACP 124, 136 (EIS); ACP 32 (ROD).

Further, the Agencies do not control the market forces spurring the development of the Canadian oil sands. Both the CNEB and the CAPP describe the expansion of development of the Canadian oil sands. ACP 31576-85 (CNEB 2006); ACP 41434-39 (CAPP 2007). According to the CNEB, the pace of development is being driven by “higher oil prices; concerns surrounding the global supply of oil; market potential in the U.S. and Asia; and stable generic fiscal terms for producers.” ACP 31569 (CNEB 2006). CNEB states that “the outlook is for a fairly quick ramp-up in oil sands production” and lists certain factors that could impede development: lower oil prices, the development of alternatives to using natural gas in the bitumen gasification process, and available infrastructure in Fort McMurry, Canada. ACP 31585 (CNEB 2006). Neither the availability of pipeline capacity nor the availability of diluent is listed as a factor driving or impeding the pace of development.

That is not to say that additional pipeline capacity is not necessary to transport heavy crude out of the WCSB – it is. ACP 31600 (CNEB 2006). Indeed, a number of pipeline

projects are planned to meet the need for such additional capacity. ACP 31596-601 (CNEB 2006); ACP 41450-62 (CAPP 2007). But it is the growth in oil sands development that is driving the pipeline projects, not vice versa. As explained by the CNEB, “Pipeline infrastructure will need to be addressed to accommodate the increase in supply and market requirements.” ACP 31596 (CNEB 2006). Further, there are multiple potential markets for increased oil sands production, including Asia. ACP 31592-93 (CNEB 2006); ACP 41448 (CAPP 2007). Thus, Plaintiffs are incorrect when they argue that the construction of the Alberta Clipper Pipeline will increase the pace of development of the oil sands. Plf. Mem. at 32-33. If additional pipeline capacity is not created for U.S. markets, the development of the oil sands will not stop, but the oil will be sent elsewhere. ACP 31586-87, 31592-94 (CNEB 2006).

Similarly, the supply of diluent is not a factor affecting the pace of development. Diluent availability is expected to affect supply costs. ACP 31575 (CNEB 2006). But there are a number of options for obtaining additional supplies of diluents, “such as offshore imports, long-haul recycle by truck or rail, diluent-return pipelines from the U.S., specifically refined diluents, and blending with light crude oil or SCO [synthetic crude oil].” ACP 31582. Plaintiffs argue that the CAPP reported a “strong connection” between the supply of diluent from the Midwest and increased extraction from the oil sands. Plf. Mem. at 34. But the document they cite is their own comment letter, not the CAPP report. See ACP 15171. The CAPP report discusses diluent and Enbridge’s Diluent Pipeline, but it does not say that there is a “strong connection” between the pipeline and the pace of development. ACP 41438 (CAPP 2007). As in the CNEB report, the CAPP report also discusses the alternative of using synthetic crude oil. Id.; ACP 31582 (CNEB 2006).

As the foregoing explanation shows, there is no reasonably close causal relationship between the issuance of the Agencies’ permits for Enbridge’s pipelines and the development of the oil sands. Oil sands development is independent of the pipelines, oil sands development is under Canadian jurisdiction, and oil sands development is driven by market forces, not by any particular pipeline project. Given the lack of causation, the EIS

appropriately left the environmental analysis of oil sands development to be handled by Canadian officials pursuant to Canadian law. See Pub. Citizen, 541 U.S. at 767; see also Consejo de Desarrollo Economico de Mexicali, AC v. United States, 438 F. Supp. 2d 1207, 1236-38 (D. Nev. 2006) (holding that the Bureau of Reclamation was not required to consider the potential transboundary effects caused by the lining of a canal near the Mexican border because the alleged impacts were not sufficiently causally related to the Bureau's action to require analysis under NEPA), vacated on other grounds, 482 F.3d 1157 (9th Cir. 2007).

The circumstances presented by this case are different from those presented in Border Power Plant Working Group v. Dep't of Energy, 260 F. Supp. 2d 997 (S.D. Cal. 2003). There, the court found that the Department of Energy ("DOE") was required to consider the environmental impacts in the United States of approving a Presidential Permit for electrical transmission lines to connect to a power plant in Mexico. Id. at 1017. The case is distinguishable, however, because there was a very close causal relationship between the power line at issue in that case and the construction and operation of a power plant in Mexico. Indeed, the court found that the cross-border power line was "the only current means evidenced by the record through which [the power company] could transmit its power" and, therefore, "the emissions resulting from the [power plant] are 'effects' of the [power line] that must be analyzed under NEPA." Id. at 1017. The same is not true of the Canadian oil sands. Oil produced from Canadian oil sands will not exclusively flow through the Alberta Clipper Pipeline. Rather, it may be transported to the United States through existing pipelines or transported to other countries. See ACP 124-25; ACP 31586-95 (CNEB 2006); ACP 41439-48 (CAPP 2007).

Citing Manitoba v. Salazar, Civ. No. 02-2057, 2010 WL 744713 (D.D.C. Mar. 5, 2010), Plaintiffs also argue that the State Department was required by NEPA to analyze impacts occurring wholly *outside* the U.S. on the basis that they are transboundary effects. Plf. Mem. at 35. At issue in that case was the Bureau of Reclamation's decision to withdraw water from a reservoir on the Missouri River and transfer it in a 45-mile pipeline for use in

North Dakota. 2010 WL 744713 at *1. The Canadian Province of Manitoba sued claiming that the Bureau had failed to consider the consequences of transferring biota from the Missouri River Basin to the Hudson Bay Basin in Canada. Id. On those facts, the court concluded that there was a causal relationship between the actions of the Bureau and the potential transboundary effects in Canada and therefore found that the Bureau was required to analyze those effects. See id. at *11. But, unlike this case, the alleged impacts clearly were causally connected to the federal project and the project was not subject to Canadian government approval.⁶⁷ Accordingly, the State Department did not need to consider the potential impacts of development of Canadian oil sands.

2. The State Department Adequately Analyzed the Potential Indirect Impacts on Development of Renewable Energy Sources

Plaintiffs argue that the EIS did not adequately consider the indirect effects of the Alberta Clipper Pipeline on the development of alternative sources of energy. Plaintiffs' theory is that the construction of the Alberta Clipper Pipeline will lower the price of oil, thus making refined oil products cheaper and inhibiting the development of renewable sources of energy. See Plf. Mem. at 35-36. The State Department addressed this concern during the comment period on the EIS and explained that the construction of the pipeline will not substantially alter the supply and demand for oil and thus will not significantly affect the price of oil. See ACP 1028 (EIS App. A). The State Department also revised the EIS in response to Plaintiffs' comment, thus satisfying its obligations under 40 C.F.R. § 1503.4.

⁶⁷ The Manitoba opinion relies on two cases which assume that the consideration of the transboundary effects at issue in those cases was required and did not involve actions subject to Canadian approval. See Swinomish Tribal Comty. v. FERC, 627 F.2d 499, 510-12 (D.C. Cir. 1980) (finding that FERC adequately considered the effects of building a dam on the upstream environment in Canada); Wilderness Soc'y v. Morton, 463 F.2d 1261, 1262-63 (D.C. Cir. 1972) (permitting Canadian environmental groups to intervene in a case involving the trans-Alaska pipeline). Further, in certain instances, courts have found that agencies are not required by NEPA to analyze the potential environmental effects of their action in other countries, particularly if foreign policy or the laws of other nations are implicated. See, e.g., Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1365-68 (D.C. Cir. 1981).

The State Department's conclusion that the construction of the Alberta Clipper Pipeline will not affect the demand for oil is supported by the AEO 2009 Report, which projects that demand for oil will remain constant based on a broad range of factors, including economic trends, oil prices, use of renewable energy, and market responses to restrictions on greenhouse gas emissions. ACP 122; ACP 41486-87 (AEO 2009). Furthermore, the AEO 2009 Report projects "a rapid growth in renewable sources of liquid fuels, a sharp increase in the sale of higher-efficiency vehicle technologies such as hybrid and diesel, and a significant decrease in sales of sport utility vehicles." ACP 122; see also ACP 41487-89 (AEO 2009). In other words, regardless of the construction of the Alberta Clipper Pipeline and other pipelines, rapid development of renewable energy sources is expected to occur. Thus, the development of broader economic and legislative trends will determine the price of oil, not the construction of a pipeline.

The circumstances in this case are not similar to the circumstances in the Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2004). There, the court stated in *dicta* that the Board was required to analyze the indirect effects of a new rail line for transporting coal to local power plants on the potential development of other sources of energy, such as nuclear power, solar power, or natural gas. Id. 549. The court reasoned that the access to cheaper coal, which the rail line would provide, would make it cheaper for local utilities to continue to use coal rather than switch to other sources of energy. Id. But the same concerns are not presented in this case because, unlike the energy prices in a particular region, the price of oil is determined by macroeconomic and social factors (discussed above). Moreover, unlike the utilities in the Mid-States case who could switch to other sources of energy, oil refineries are built for the specific purpose of refining crude oil. Thus, if oil from the Alberta Clipper Pipeline were not available, they would turn to other sources of oil.

Plaintiffs also argue that the EIS did not adequately analyze the end use impacts of oil derived from oil sands compared to other sources. Plf. Mem. at 37-38. As explained in the EIS, the crude oil transported through the Alberta Clipper pipeline will replace crude oil from other sources and will have no effect on consumer demand for refined petroleum

products. ACP 674. Because there will be no increase in demand for petroleum products, the demand for other sources of energy will not be effected. Moreover, refined products developed from crude oil from the oil sands will be the same as those developed from conventional oils, and therefore the potential impacts of the end use of the oil would be the same as from conventional sources of oil. Id. Therefore, the EIS adequately addresses end use impacts.

3. The State Department's EIS Adequately Analyzes the Abandonment of the Pipelines

Plaintiffs argue that the EIS is inadequate for failing to analyze the abandonment of the pipelines. Plf. Mem. at 38-39. As explained in the EIS, the Alberta Clipper Pipeline is expected to operate for 50 years or more. ACP 203. Plans for the abandonment of the pipeline will be submitted and reviewed by the appropriate agencies prior to the abandonment of the pipeline and related facilities. Id.; ACP 855 (EIS App. A). Abandonment procedures will be established based upon regulations in effect at the time of abandonment. Id. Current regulations require that abandoned pipelines be disconnected, purged of gas, and sealed. 49 C.F.R. § 192.727. These procedures would also apply to the Diluent Pipeline. See id. NEPA only requires that mitigation measures be developed “to a reasonable degree” when a proposal is considered. Wetlands Action Network v. U.S. Army Corp of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000). Accordingly, it was reasonable for the State Department to complete its NEPA analysis without a completed abandonment plan.

Finally, to the extent that Plaintiffs raised claims in their complaint that are not addressed in their summary judgment brief, summary judgment should be granted to Defendants on those claims because Plaintiffs have failed to meet their burden of proof. See Massey, 380 F.3d at 440. If the Court, nevertheless, considers such claims, Defendants incorporate by reference their responses to these allegations at the preliminary injunction stage. See Def. Opp. to Plf. Mot. for a Prelim. Inj. (Dkt. No. 82) & Surreply (Dkt No. 143).

CONCLUSION

For the foregoing reasons, Defendants request that the Court grant summary judgment

in favor of Defendants and deny Plaintiffs' request for summary judgment.

Respectfully submitted this 25th day of June, 2010.

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

/s/ Luther L. Hajek
LUTHER L. HAJEK, D.C. Bar No. 467742
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
Ben Franklin Station, P.O. Box 663
Washington, DC 20044-0663
Tel: (202) 305-0492
Fax: (202) 305-0274
E-mail: luke.hajek@usdoj.gov

B. TODD JONES
United States Attorney

CHAD A. BLUMENFIELD
Assistant U.S. Attorney
Attorney ID No. 387296
600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415
Tel: (612) 664-5600
E-mail: chad.blumenfield@usdoj.gov

Attorneys for Defendants

Of Counsel:

KEITH BENES
JOHN SCHNITKER
Attorney-Advisers
U.S. Department of State
2201 C Street NW
Washington, DC 20520

STEVEN P. ADAMSKI
Deputy District Counsel
DAMON ROBERTS
U.S. Army Engineer District, St. Paul
190 East 5th St., Suite 401
St. Paul, MN 55101

VINCENT VUKELICH
USDA - Office of General Counsel
626 E. Wisconsin, Ave., Suite 600
Milwaukee, WI 53202