

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CIVIL CASE 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 TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

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

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”) hereby move, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss the First Amended Complaint (Docket No. 57) filed in this action 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 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the U.S. Constitution. 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.

As confirmed by two recent court decisions, Plaintiffs’ NEPA claims against the State Department should be dismissed for lack of jurisdiction because the issuance of the Presidential Permit was a Presidential action not subject to judicial review under the APA. See The Sisseton Wahpeton Oyate v. U.S. Dep’t of State, Civ. No. 08-3023, 2009 WL 3153655, *6-*8 (D. S. Dakota Sept. 29, 2009); Natural Res. Def. Council, Inc. v. U.S. Dep’t of State, Civ. No. 08-1363 (RJL), 2009 WL 3153702, *3-*6 (D.D.C. Sept. 30, 2009). Plaintiffs’ constitutional claim against the State Department should be dismissed for failure to state a claim because it is contrary to well-established precedent governing the issuance of cross-border permits. And Plaintiffs’ remaining claims against the Corps

and Forest Service should be dismissed because Plaintiffs have failed to articulate any cognizable claims against those agencies.

BACKGROUND

On August 3, 2009, Deputy Secretary of State James Steinberg signed a Record of Decision and National Interest Determination (“ROD”) and Presidential Permit, indicating the State Department’s intention to issue a Presidential Permit to Enbridge. See ROD, Def. Ex. 1; Pres. Permit, Def. Ex. 2.^{1/} On August 20, 2009, pursuant to Executive Order 13337, the Presidential Permit was issued to Enbridge. See Notice of Issuance of Presidential Permit, 74 Fed. Reg. 43212 (Aug. 26, 2009); First Amend. Comp. ¶ 41. The Presidential Permit allows Enbridge to construct and maintain pipeline facilities at the international border between the United States and Canada. ROD at 1.

The authority to issue a permit for a border-crossing facility, such as the permit at issue in this case, derives solely from the President’s constitutional authority over foreign affairs. For over a century, Presidents have exercised that inherent authority without action by Congress. See A. Hackworth, Digest of International Law, Vol. IV, § 350, pp. 247-56 (1942); John Bassett Moore, A Digest of International Law, Vol. II, § 227, pp. 452-66 (1906), Def. Exs. 5 & 6; see also, e.g., 38 U.S. Op. Atty. Gen. 163 (1935) (gas pipeline); 30 U.S. Op. Atty. Gen. 217 (1913) (electrical power); 24 U.S. Op. Atty. Gen. 100 (1902) (wireless telegraphy); 22 U.S. Op. Atty. Gen. 514 (1899) (submarine cables); 22 U.S. Op. Atty. Gen. 408 (1899) (same); 22 U.S. Op. Atty. Gen. 13 (1898) (same).^{2/}

^{1/} “Def. Ex.” refers to the exhibits to the Declaration of Luther L. Hajek filed with Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary Injunction.

^{2/} Congress has passed legislation regarding certain types of border crossing facilities. None of this legislation is relevant to the permit at issue here. Further, these congressional acts affirm the President’s authority to approve such facilities. See Submarine Cable Landing Licensing Act of 1921, 47 U.S.C. § 35 (recognizing the President’s authority to grant or revoke licenses for the landing of cables if such action

In 1968, President Johnson delegated to the Secretary of State the authority to grant or deny permits for certain types of border crossing facilities, including oil pipelines. See Exec. Order 11423 § 1(a), 33 Fed. Reg. 11741 (Aug. 16, 1968). Foreign policy implications are an important consideration in the issuance of a Presidential Permit. Id. at 1. Permits are issued at the discretion of the Secretary based on a determination that the approval or disapproval would “serve the national interest.” Id. § 1(d)-(e).

In 2001, President Bush issued Executive Order 13212, stating that it was the Administration’s policy, “to the extent consistent with applicable law, to expedite projects that will increase the production, transmission or conservation of energy.” Exec. Order 13212, 66 Fed. Reg. 28357 (May 18, 2001). And, in 2004, in furtherance of this policy, President Bush issued Executive Order 13337, the executive order at issue in this case, which puts the approval of border facilities for the importation or exportation of petroleum products or other fuels on a different administrative track from the approval process for other border facilities. See Exec. Order 13337. Like its precursor, Executive Order 11423, Executive Order 13337 authorizes the Secretary to approve or deny permits based on a determination of whether the project would “serve the national interest.” Exec. Order 13337 § 1(g)-(h). On February 13, 2009, the Secretary of State delegated broad authority, including the authority to issue Presidential Permits, to the Deputy Secretary of State and the Deputy Secretary of State for Management and Resource. See 74 Fed. Reg. 8835 (Feb. 26, 2009).

The Deputy Secretary of State exercised the authority delegated to him and signed the Presidential Permit for the Alberta Clipper Pipeline Project. See Pres. Permit, Def.

will maintain “the rights or interests of the United States . . . or will promote the security of the United States”); International Bridge Act of 1977, 33 U.S.C. § 535b (recognizing the President’s authority to approve the construction of bridges at U.S. borders).

Ex. 2. The decision to issue the permit was made only after the State Department conducted a full environmental review of Enbridge's Presidential Permit application, including the preparation of an environmental impact statement ("EIS"). ROD at 3, 12-24. During that process, the State Department consulted with numerous federal and state agencies and American Indian tribes and accepted comments from the public. Id. at 23. The State Department completed its EIS on June 8, 2009. Id.

After considering the information obtained during the preparation of the EIS and the strategic interests of the United States, the Deputy Secretary of State made a determination, pursuant to Executive Order 13337, that issuance of the permit to Enbridge would serve the "national interest." ROD at 25-26. The Deputy Secretary's decision was based on his findings that the construction of the Alberta Clipper Pipeline would serve the national interest by increasing the diversity of oil supplies available to the United States, shortening the transportation pathway for a portion of crude oil imports, increasing oil supplies from a stable and reliable trading partner, and making up for the declining imports from other suppliers. Id. at 25.

In conjunction with the State Department's review of Enbridge's Presidential Permit Application, the Corps conducted a review of Enbridge's applications for permits under the CWA and the Rivers and Harbors Act. See First Amend. Comp. ¶ 43. The permits were issued in August 2009. Id. The Forest Service also conducted a review of applications for special use permits allowing Enbridge to construct the pipeline in the Chippewa National Forest. Id. ¶ 44. The Forest Service issued the permits on June 29, 2009. Id. Plaintiffs filed an administrative appeal challenging the permits, and the Forest Service rejected the appeal on September 28, 2009. Id.

On September 3, 2009, Plaintiffs filed a Complaint challenging the issuance of the Presidential Permit and the issuance by the Corps of permits under Section 404 of the CWA and Section 10 of the Rivers and Harbor Act. Complaint ¶¶ 76-113 & Prayer for

Relief. On the same date, Plaintiffs filed a motion requesting a temporary restraining order (“TRO”). The Northern District of California denied Plaintiffs’ Motion for a TRO (Docket No. 35), and subsequently granted Defendants’ Motion to Transfer venue to the District of Minnesota (Docket No. 54). On October 1, 2009, Plaintiffs filed a First Amended Complaint, adding the Forest Service as a Defendant (Docket No. 57).

Plaintiffs’ First Amended Complaint contains six claims for relief. Plaintiffs first four claims are brought against the State Department, the Corps, and the Forest Service: (1) violation of NEPA for failure to evaluate a full range of actions, (2) violation of NEPA for failure to adequately analyze indirect and cumulative impacts, (3) violation of NEPA for failure to adequately evaluate risks, impacts, and mitigation measures associated with spills and operational leaks, and (4) failure to adequately analyze the no action alternative. See First Amend. Comp. ¶¶ 77-104. Plaintiffs’ final two claims are pled solely against the State Department: (5) violation of NEPA for failure to adequately evaluate the environmental impacts of the Southern Lights LSr Pipeline (a separate pipeline) and (6) violation of the United States Constitution by issuing the Presidential Permit for the Alberta Clipper Pipeline.

STANDARD OF REVIEW

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges the court’s jurisdiction to hear the case. Osborn v. United States, 918 F.2d 724, 729 (8th Cir. 1990). A court has broad authority to determine whether it may hear a case, and it may inquire into both legal and factual issues in making that determination. See id. It is the Plaintiffs’ burden to establish that jurisdiction exists. Id. at 730. In reviewing a Rule 12(b)(1) motion, the court may consider materials outside of the pleadings. Drevlow v. Lutheran Church, Mo. Synod., 991 F.2d 468, 470 (8th Cir. 1993). “[N]o presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material

facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” Osborn, 918 F.2d at 730.

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6) motion, the court should evaluate whether the complaint sets forth non-speculative factual allegations supporting its claims for relief. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964–65 (2007). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. (citations and brackets omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” Id. See also Benton v. Merrill Lynch & Co., Inc., 524 F.3d 866, 870 (8th Cir. 2008) (“The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief.”) (citing Twombly, 127 S.Ct. at 1964-65).

ARGUMENT

Plaintiffs’ First through Fourth claims for relief against the State Department should be dismissed for lack of jurisdiction because the issuance of the Presidential Permit to Enbridge is a Presidential action not subject to judicial review under the APA. Two courts have recently addressed whether a Presidential Permit issued by the State Department to TransCanada Keystone Pipeline, LP for the Keystone Pipeline, a different cross-border pipeline that will transport oil extracted from Canadian tar sands to the United States, is subject to review under the APA. Both courts independently found that the Presidential Permit issued by the State Department was not reviewable. See Sisseton Wahpeton, 2009 WL 3153655, at *8 (“The court finds that the actions taken pursuant to Executive Order 13337 are presidential in nature, and therefore, do not confer upon the plaintiffs a private right of action under the APA.”); Natural Res. Def. Council, 2009 WL

3153702, at *3 (“[B]ecause the State Department is acting for the President in issuing presidential permits pursuant to Executive Order 13,337, it too cannot be subject to judicial review under the APA.”). Because the issuance of the Presidential Permit is Presidential in nature, the Court lacks jurisdiction for two reasons: (1) Plaintiffs lack standing because a ruling from this Court will not necessarily redress their injuries, and (2) judicial review of Presidential actions is unavailable under the APA. Accordingly, Plaintiffs’ NEPA claims against the State Department should be dismissed for lack of jurisdiction.^{3/}

Plaintiffs’ Fifth Claim for relief, which challenges a Presidential Permit issued to Enbridge for the Southern Lights LSr Pipeline should also be dismissed because it was a Presidential action. This claim should be dismissed for the additional reason that the permit in question was issued over a year ago and construction of the pipeline has now been completed, and therefore the claim is moot. Accordingly, this claim should be dismissed for lack of jurisdiction.

Plaintiffs’ Sixth Claim for relief alleging that the issuance of the Presidential Permit violated the U.S. Constitution should be dismissed for failure to state a claim because it is well established that the President has the constitutional authority to issue such permits. Presidents have exercised such authority for over a century, and acts of Congress have affirmed the Presidential authority in this area. Therefore, the claim should be dismissed for failure to state a claim upon which relief can be granted.

^{3/} Because case law in the D.C. Circuit interprets provisions of the APA as non-judicial, the D.C. court addressed the availability of APA review under Fed. R. Civ. P. 12(b)(6). See Natural Res. Def. Council, 2009 WL 3153702, at *2. The S. Dakota Court, relying on Eight Circuit law, considered the issue as a jurisdictional one under Fed. R. Civ. P. 12(b)(1). See Sisseton Wahpeton, 2009 WL 3153655, at *2. Therefore, in this circuit, dismissal is appropriate under Fed. R. Civ. P. 12(b)(1).

Plaintiffs' First through Fourth claims against the Corps and the Forest Service should be dismissed for failure to state a claim because Plaintiffs fail to allege with any particularity the purported shortcomings of the agencies' NEPA analyses. While Plaintiffs mention the Corps and the Forest Service in a few paragraphs of the First Amended Complaint, they allege no specific wrongful actions by these agencies. Accordingly, these claims should be dismissed for failure to state a claim upon which relief can be granted.

I. Plaintiffs' First through Fourth Claims for Relief Against the State Department Should Be Dismissed for Lack of Article III Standing Because Plaintiffs Cannot Show That Their Alleged Injury Would Be Redressed By a Favorable Decision of the Court

Because the issuance of the Presidential Permit is, by its nature, a Presidential action, Plaintiffs cannot show that their alleged injuries are likely to be redressed by a favorable ruling of this Court on their NEPA claims. Therefore, Plaintiffs lack standing to pursue those claims. As the parties invoking federal jurisdiction, Plaintiffs bear the burden of demonstrating that the standing requirements of Article III of the Constitution have been satisfied. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Campbell v. Minneapolis Pub. Housing Auth., 168 F.3d 1069, 1073 (8th Cir. 1999). In order to demonstrate standing, Plaintiffs must show: (1) that they have suffered an injury-in-fact, (2) "a causal relationship between the injury and the challenged conduct," and (3) "that the injury will likely be redressed by a favorable decision." Pucket v. Hot Springs School Dist., 526 F.3d 1151, 1157 (8th Cir. 2008) (quotations omitted). In cases such as this one, where the alleged injuries are, in part, procedural in nature, the redressability standard is relaxed such that Plaintiffs need not show that a different decision would have been reached by the State Department if further reviews were conducted. See Lujan, 504 U.S. at 573 n.7.

Plaintiffs cannot establish redressability, however, where the redress of their alleged injury is dependent upon actions outside the control of the State Department. See Lujan, 504 U.S. at 571 (finding that the redressability prong of standing was not met because it was “entirely conjectural whether the nonagency activity that affects [plaintiff] will be altered or affected by the agency activity they seek to” overturn). In order for redressability to exist where the actions of a third party are in question, “the defendant must have control over the third party’s (case-relevant) behavior.” Ashley v. U.S. Dep’t of Interior, 408 F.3d 997, 1003 (8th Cir. 2005).

Here, the State Department has no such control over the actions of the President, who has the ultimate authority over the issuance of Presidential Permits for border crossing facilities. As noted by the D.C. Court, “the President has complete, unfettered discretion over the permitting process. No statute curtails the President’s authority to direct whether the State Department, or any other department for that matter, issues a presidential permit.” Natural Res. Def. Council, 2009 WL 3153702, at *5. So even if this Court were to vacate the Presidential Permit issued by the State Department and order the agency to conduct additional analysis under NEPA, it is entirely conjectural whether Plaintiffs’ injuries would be redressed because the President could simply authorize the border crossing under his inherent Constitutional authority rather than allowing the executive order process to continue. Therefore, Plaintiffs cannot demonstrate redressability and the APA claims against the State Department should be dismissed for lack of standing. See Sisseton Wahpeton, 2009 WL 3153655, at *4 (finding that the plaintiffs lacked standing to challenge the Presidential Permit for the Keystone Pipeline);^{4/}

^{4/} The D.C. Court found that the plaintiffs did have standing to challenge the Presidential Permit for the Keystone Pipeline because “agencies always act pursuant to delegated authority, whether from Congress or from the President, that can be subsequently withdrawn.” Natural Res. Def. Council, 2009 WL 3153702, at *2 n.4. The delegation of authority through congressional enactments is different, though, because Congress retains

see also Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1227-29 (9th Cir. 2008) (holding that environmental groups lacked standing to sue the State Department and other agencies regarding alleged violations of the Endangered Species Act for failure to demonstrate redressability because a decision to withdraw from certain treaty obligations was committed to the discretion of the Executive Branch).

Accordingly, Plaintiffs' First through Fourth Claims for relief against the State Department should be dismissed for lack of standing.

II. Plaintiffs' First Through Fourth Claims for Relief Against the State Department Should Be Dismissed Because Plaintiffs Have Not Identified a Waiver of Sovereign Immunity or Private Right of Action Which Would Allow the Court to Review Their Claims

The Court lacks jurisdiction over Plaintiffs' NEPA claims against the State Department because they have not identified a viable waiver of sovereign immunity or private right of action necessary to pursue their claims. Plaintiffs purport to rely upon the waiver of sovereign immunity and right of action in the APA. For the reasons explained below, however, APA review is unavailable with respect to the NEPA claims against the State Department. Therefore, the Court lacks jurisdiction over those claims.

A. The Court's Jurisdiction over Plaintiffs' NEPA Claims Against the State Department is Dependent Upon the Applicability of the Waiver of Sovereign Immunity and Private Right of Action in the APA

NEPA does not confer a private right of action allowing a private party to bring suit. See, e.g., Cent. S. Dakota Coop. Grazing Dist. v. USDA, 266 F.3d 889, 894 (8th Cir. 2001) (finding that NEPA does not contain a private right of action). Nor does NEPA contain a waiver of the United States' sovereign immunity from suit. See, e.g., United States v. Mitchell, 463 U.S. 206, 212 (1983) ("[T]he United States may not be sued without its consent and . . . the existence of consent is a prerequisite for

no authority to act on its own and any withdrawal of the authority would be subject to a lengthy legislative process. In contrast, the President may act at any time under his inherent authority over foreign affairs.

jurisdiction.”). Rather, Plaintiffs must rely on the APA to supply these necessary prerequisites to suit. See Sabhari v. Reno, 197 F.3d 938, 943 (8th Cir. 1999) (stating that, in cases against the United States, subject matter jurisdiction under 28 U.S.C. § 1331 is dependent on a waiver of sovereign immunity, which may be found in the APA). Indeed, Plaintiffs seek review of their NEPA claims under the APA. First Amend. Comp. ¶¶ 10, 81, 90, 95, 104.

The waiver of sovereign immunity and right of action authorized in the APA are limited and subject to the requirements of the APA. See 5 U.S.C. §§ 702, 704; Sierra Club v. U.S. Army Corps of Eng’rs, 446 F.3d 808, 813 (8th Cir. 2006) (“[J]urisdiction is limited to judicial review under the APA.”). In order to bring a valid claim under the APA, the plaintiff must challenge a “final agency action” which adversely affected it. 5 U.S.C. § 704; Sierra Club, 446 F.3d at 813. The “final agency action” necessary for APA review is not merely the preparation of a NEPA document; rather, APA review is triggered when the agency issues a decision to take a particular action. See Sierra Club, 446 F.3d at 813 (holding that a finding of no significant impact was a final agency action because it was the culmination of the agency’s decisionmaking process); see also Public Citizen v. U.S. Trade Rep., 5 F.3d 549, 551-52 (D.C. Cir. 1993) (rejecting argument that the issuance of an environmental impact statement was a final agency action reviewable under the APA). In this case, the action of the State Department challenged by Plaintiffs was the decision to issue a Presidential Permit for the Alberta Clipper Pipeline pursuant to Executive Order 13337. See First Amend. Comp. ¶¶ 1-9, 81, 90, 95, 104 & Prayer for Relief. As shown below, the issuance of the permit is not subject to judicial review under the APA.

B. The State Department's Issuance of a Presidential Permit Pursuant to Executive Order 13337, Which Delegated the President's Constitutional Authority to Issue Such Permits, Is Not Judicially Reviewable Under the APA

The State Department's issuance of a Presidential Permit granting Enbridge the right to construct a pipeline across the international border between the United States and Canada is not an agency action subject to judicial review under the APA. As a general rule, private parties may not enforce compliance with executive orders issued by the Executive Branch. Chai v. Carroll, 48 F.3d 1331, 1339 (4th Cir. 1995); Zhang v. Slattery, 55 F.3d 732, 747-48 (2d Cir. 1995). Executive orders are generally viewed "as a managerial tool for implementing the President's personal . . . policies and not as a legal framework enforceable by private civil action." Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975); see also In re Surface Mining Regulation Litig., 627 F.2d 1346, 1357 (D.C. Cir. 1980). Like the executive orders in these cases, Executive Order 13337 is a "device for managing the President's decision-making process." Natural Res. Def. Council, 2009 WL 3153702, at *5. Courts have long rejected attempts to enforce executive orders implementing executive branch policies through private lawsuits. Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993); Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632-33 (5th Cir. 1967); Farmer v. Phila. Elec. Co., 329 F.2d 3, 9-10 (3d Cir. 1964).

Although actions taken pursuant to executive orders typically are not subject to judicial review, in certain limited circumstances courts have reviewed such actions under the rubric of the APA. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1166 (9th Cir. 1997) ("As a threshold matter we consider whether these Executive Orders are subject to judicial review."). In particular, executive orders may be judicially reviewable if the following criteria are met: (1) the executive order is based upon statutory authority, (2) there is a legal standard or "law to apply" by which the agency's

action may be judged, and (3) the executive order does not expressly disclaim the creation of a private right of action. See City of Albuquerque v. U.S. Dep't of the Interior, 379 F.3d 901, 913-14 (10th Cir. 2004) (discussing these three criteria); City of Carmel-by-the-Sea, 123 F.3d at 1166. As explained below, none of these criteria is met here.

First, in issuing the Presidential Permit for the Alberta Clipper Pipeline, the Deputy Secretary of State acted pursuant to the President's inherent constitutional authority, not statutory authority. The Presidential Permit was issued pursuant to Executive Order 13337, which delegates to the Secretary of State the President's authority to issue permits for the construction of facilities for the "the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country" when doing so would "serve the national interest." Exec. Order 13337 § 1(a), (g); see also Natural Res. Def. Council, 2009 WL 3153702, at *5 ("The State Department acts solely at the behest of the President in accordance with the President's guidance as set forth in Executive Order 13,337."). The President delegated the authority to issue such permits "[b]y the authority vested in me as President by the Constitution and the laws of the United States of America."^{5/} Exec. Order 13337 at 1.

Because Executive Order 13337 is the sole source of authority for the issuance of the Presidential Permit to Enbridge, there is no statutory basis underlying the Deputy Secretary of State's issuance of the permit.^{6/} Therefore, there is no basis for judicial

^{5/} Executive Order 13337 contains a reference to 3 U.S.C. § 301, but that section merely provides the President the general authority to delegate to agencies or executive branch officials the performance of "any function which is vested in the President by law." Such delegations of authority are "revocable at any time by the President in whole or in part." Id.

^{6/} In a case challenging the issuance of a permit under Executive Order 11423 for the construction of a toll bridge across the Rio Grande River, the jurisdictional question was avoided because the plaintiffs amended their complaint to allege violations of both the executive order and the International Bridge Act. See Presidio Bridge Co. v. Sec'y of

review. See Indep. Meat Packers, 526 F.2d at 234-36 (an executive order without a statutory basis may not be enforced in a private lawsuit); In re Surface Mining, 627 F.2d at 1357 (“[E]xecutive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.”); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 456-57 (D.C. Cir. 1965).

Second, the issuance of the Presidential Permit is not reviewable because Executive Order 13337 imposes no standard by which the Court could conduct meaningful judicial review. The Secretary of State is instructed to issue a permit if doing so would “serve the national interest.” Exec. Order 13337 § 1(g)-(h). This language leaves no standard for the Court to apply in determining whether a permit has been properly issued. See City of Carmel-by-the-Sea, 123 F.3d at 1166 (judicial review of an executive order may be appropriate if “there is ‘law to apply’ [or] . . . objective standards” by which to judge the agency’s action).⁷¹

Third, Executive Order 13337, by its own terms forecloses the possibility of private lawsuits to challenge the issuance of Presidential Permits. Executive Order 13337 states:

This order is not intended to, and does not, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity by

State, 486 F. Supp. 288, 293 n.1 (W.D. Tex. 1978) (amendment of the complaint to allege “failure to comply with specific statutory guidelines remove(d) any question surrounding the jurisdiction”). Thus, unlike the case before this Court, the Presidio Bridge case involved a decision based on statutory authority, not just the President’s constitutional authority.

⁷¹ Even under the APA, review of the State Department’s substantive “national interest” determination is not available because that determination is “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2); see also Webster v. Doe, 486 U.S. 592, 600 (1988) (language permitting the Director of the Central Intelligence Agency to terminate an employee when such action is “necessary or advisable in the interests of the United States . . . fairly exudes deference to the Director and appears to us to foreclose the application of any meaningful standard of review”).

any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

Exec. Order 13337 § 6. Thus, judicial review of the issuance of Presidential Permits pursuant to Executive Order 13337 is barred by the express language of the executive order. See Indep. Meat Packers, 526 F.2d at 236 (“To infer a private right of action here creates a serious risk that a series of protracted lawsuits brought by persons with little at stake would paralyze the rulemaking functions of federal administrative agencies.”); Michigan v. Thomas, 805 F.2d 176, 187 (6th Cir. 1986) (“Given this clear and unequivocal intent that agency compliance with Executive Order 12,291 not be subject to judicial review, we hold that the Order provides no basis for rejecting the EPA’s final action.”); Chai, 48 F.3d at 1339 (“Furthermore, an executive order is privately enforceable only if it was intended to create a private cause of action.”).

In addition, finding an implied right of review in Executive Order 13337 would be contrary to the express reasons for its issuance. Executive Order 13337 was issued by President Bush to further his policy, as stated in Executive Order 13212, “to expedite further reviews of permits as necessary to accelerate the completion of energy production and transmission projects” Exec. Order 13337 at 1. Executive Order 13212 expressly states: “This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.” Inferring a right to privately enforce Executive Order 13337 would be contrary to the express intent in the executive order to expedite energy-related projects.

In sum, the issuance of a permit pursuant to Executive Order 13337 is not subject to judicial review under the APA review because the executive order: (1) has no statutory basis, (2) provides no standard for a court to apply, and (3) expressly disclaims the

creation of legally enforceable rights. See Natural Res. Def. Council, 2009 WL 3153702, at *5 (“Nor is this case like those in which courts have allowed APA review of actions pursuant to an executive order that was itself governed by statute and did not preclude judicial review.”). Accordingly, because all of Plaintiffs’ claims rely on the APA for a waiver of sovereign immunity and right of action, the Court lacks jurisdiction over those claims and they should be dismissed.

C. The State Department’s Issuance of the Presidential Permit Was a Presidential Action Not Reviewable Under the APA

Aside from the fact that the Presidential Permit was issued pursuant to Executive Order 13337, APA review also is unavailable because the State Department’s issuance of the Presidential Permit was Presidential in nature. It is well-established that an action by a President is not one that can be challenged under the APA. Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (a decision by the President does not constitute “agency” action under the APA and therefore is not reviewable under the APA); see also Dalton v. Specter, 511 U.S. 462, 476 (1994); Public Citizen, 5 F.3d at 551-52. As stated in Franklin, “Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.” 505 U.S. at 800-01; see also 5 U.S.C. § 551(1). Furthermore, longstanding Supreme Court precedent recognizes that certain Presidential actions constitute “political matters beyond the competence of the courts to adjudicate.” Dalton, 511 U.S. at 475 (quoting Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 114 (1947)). Relying on the Waterman decision, one district court held that the President’s determination under the Public Utility Regulatory Policies Act that an oil pipeline would be in the “national interest” was not subject to judicial review. No Oilport! v. Carter, 520 F. Supp. 334, 352 (W.D. Wash. 1981).

Here, the President delegated the task of issuing Presidential Permits to the Secretary of State, a cabinet level official. However, that delegation does not change the fact that, as in Waterman, the issuance of the Presidential Permit is a constitutional power of the President that does not rely on an act of Congress. The President's constitutional powers are not subjected to judicial oversight merely because the President chooses to act through subordinates. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (President must rely on "agents in the form of diplomatic, consular and other officials"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) ("their acts are his acts"); see also Alaska v. Carter, 462 F. Supp. 1155, 1160 (D. Alaska 1978) ("The argument that the President cannot ask for advice, and must personally draw lines on maps, file the necessary papers, and the other details that are necessary to the issuance of a Presidential Proclamation in order to escape the procedural requirements of NEPA approaches the absurd."). Indeed, the Ninth Circuit has held specifically that the Secretary of State's exercise of the President's authority delegated through an executive order to approve fisheries regulations pursuant to a treaty was not subject to review under the APA. See Jensen v. Nat'l Marine Fisheries Serv., 512 F.2d 1189, 1191 (9th Cir. 1975) ("For the purposes of this appeal the Secretary's actions are those of the President, and therefore by the terms of the APA the approval of the regulation at issue here is not reviewable.").

Moreover, although the President has delegated the task of reviewing and issuing Presidential Permits to the Secretary of State, he retains the ultimate authority over the issuance of permits. Because the permitting process is not tied to any statute, Executive Order 13337 could be "withdrawn at any time for any or no reason," which would return to the President the sole authority to issue such permits. Manhattan Bronx, 350 F.2d at 456. In addition, a provision of Executive Order 13337 explicitly reserves to the President the right to make the ultimate decision regarding the issuance of a permit if

there is disagreement among agency heads as to whether a particular permit should issue. Exec. Order 13337 § 1(i). Thus, although the Deputy Secretary made the particular “national interest” determination regarding the permit for the Alberta Clipper Pipeline, the President retains the ultimate authority to grant or deny the permit.

In litigation involving the State Department’s issuance of a Presidential Permit for the Keystone Pipeline, both the D.C. Court and the South Dakota Court agreed with the State Department that the issuance of the permit was a Presidential action and therefore not subject to review under the APA. See Sisseton Wahpeton, 2009 WL 3153655, at *8; Natural Res. Def. Council, 2009 WL 3153702, at *3. The South Dakota court rejected the argument that the delegation to the State Department changed the nature of the action: “The President is free to delegate some of his powers to the heads of executive departments, as he has done here, and those delegation actions that are carried out create a presumption of being as those of the President.” Sisseton Wahpeton, 2009 WL 3153655, at *7 (citations omitted). Similarly, the D.C. Court found that, “to challenge the issuance of a presidential permit, whether by the President himself or by the State Department as the President’s delegee, is to challenge a presidential act, which is not reviewable under the APA.” Natural Res. Def. Council, 2009 WL 3153702, at *5. Further, the D.C. Court pointed out that an unusual asymmetry would result if delegated Presidential Permits were subject to APA review, but non-delegated Presidential Permits were not. Id. at *6. There are no legal differences between the Presidential Permit issued to Keystone and the one issued to Enbridge, and therefore the outcome should be the same in this case.

Accordingly, Plaintiffs’ First through Fourth Claims for relief against the State Department should be dismissed because they are not subject to APA review.

III. Plaintiffs' Fifth Claim for Relief Should Be Dismissed Because Plaintiffs Lack of Standing, Lack a Waiver of Sovereign Immunity and Private Right of Action, and the Claim is Moot

Plaintiffs' Fifth Claim for relief alleges that the State Department's issuance of a Presidential Permit to Enbridge for a different pipeline, known as the Southern Lights LSR Pipeline, violated NEPA. See First Amend. Comp. ¶¶ 105-111. For all of the reasons discussed in Sections I and II above, this claim should be dismissed for lack of standing, lack of a waiver of sovereign immunity, and lack of a private right of action.

In addition, this claim is moot because the LSR Pipeline has already been constructed. The State Department analyzed the LSR pipeline in an Environmental Assessment completed in 2008, issued a Presidential Permit at that time, and construction of the pipeline has since been completed. EIS at 1-17, 1-29, Plf. Ex. 3.^{8/} The LSR Pipeline has been operational since April 2009. EIS at 1-29. "A NEPA claim does not present a [live] controversy when the proposed action has been completed and no effective relief is available." One Thousand Friends of Iowa v. Mineta, 364 F.3d 890, 893 (8th Cir. 2004). Because the construction of the LSR Pipeline has been completed and there is no meaningful relief that can be afforded to Plaintiffs with respect to that pipeline, this claim should be dismissed as moot. See One Thousand Friends, 364 F.3d at 893-94 (holding that a NEPA challenge to a highway project was moot because the project had been completed); Neighborhood Tranp. Network, Inc. v. Pena, 42 F.3d 1169, 1172-73 (8th Cir. 1994) (same).

IV. Plaintiffs' Sixth Claim for Relief Should Be Dismissed Because the President's Authority to Issue Border Crossing Permits Is Well Established

Plaintiffs' Sixth Claim for Relief alleges that the State Department's issuance of a Presidential Permit to Enbridge was unconstitutional. First Amend. Comp. ¶¶ 112-115.

^{8/} "Plf. Ex." refers to the exhibits to Plaintiffs' Motion for a Preliminary Injunction (Docket No. 8).

They allege that Congress, not the President, has the authority over the issuance of permits for international pipelines due to its plenary authority over foreign commerce. Id. ¶ 113. Further, they allege that the only authority that Congress delegated to the Executive Branch regarding pipelines were certain limited grants of regulatory authority to the Federal Energy Regulatory Commission, the Department of Transportation, and the Pipeline and Hazardous Materials Safety Administration. Id. ¶¶ 74, 114. These allegations ignore the long history of President's authorizing border crossings of all kinds, including pipelines, and are therefore without merit.

The authority to issue a permit for a border-crossing facility, such as the permit at issue in this case, does not derive from a delegation of congressional authority under the Commerce Clause. Rather, it derives solely from the President's constitutional authority over foreign affairs and his authority as Commander in Chief. This authority has been well recognized for over a century. See A. Hackworth, Digest of International Law, Vol. IV, § 350, pp. 247-66 (1942); John Bassett Moore, A Digest of International Law, Vol. II, § 227, pp. 452-66 (1906), Def. Exs. 5 & 6; see also, e.g., 38 U.S. Op. Atty. Gen. 163 (1935) (gas pipeline); 30 U.S. Op. Atty. Gen. 217 (1913) (electrical power); 24 U.S. Op. Atty. Gen. 100 (1902) (wireless telegraphy); 22 U.S. Op. Atty. Gen. 514 (1899) (submarine cables); 22 U.S. Op. Atty. Gen. 408 (1899) (same); 22 U.S. Op. Atty. Gen. 13 (1898) (same); see also Natural Res. Def. Council, 2009 WL 3153702, at *3 ("Defendants have amply documented the long history of Presidents exercising their inherent foreign affairs power to issue cross-border permits, even in the absence of any congressional authorization.").

Accordingly, Plaintiffs' claim that the issuance of the Presidential Permit violates the U.S. Constitution is contrary to well established precedent and should be dismissed for failure to state a claim upon which relief can be granted.

V. Plaintiffs' First through Fourth Claims for Relief against the Corps and Forest Service Should Be Dismissed for Failure to State a Claim

Plaintiffs' claims against the Corps and the Forest Service should be dismissed because they fail to set forth with any particularity the actions of these agencies that resulted in violations of NEPA. The vast majority of Plaintiffs' allegations regarding the actions of the government relate solely to the conduct of the State Department. See First Amend. Comp. ¶¶ 1-9, 31-42, 77-115. With respect to the Corps and the Forest Service, Plaintiffs allege that the Corps and the Forest Service were cooperating agencies on the State Department's EIS. Id. ¶¶ 20-21. Beyond that, the actions of the Corps and the Forest Service are confined primarily to two paragraphs. Id. Without explanation, Plaintiffs then allege in conclusory fashion that the Corps and Forest Service have violated NEPA. Id. ¶¶ 80-81, 90, 95, 104. These allegations are no "more than labels and conclusions" are insufficient to raise "plausible" factual grounds to support their claim. Twombly, 127 S.Ct. at 1965-66; see also Benton, 524 F.3d at 870 ("[A] formulaic recitation of the elements of a cause of action will not do.").

Plaintiffs' allegations against the Corps are insufficient to state a claim. Plaintiffs allege that the Corps issued dredge and fill permits to Enbridge for the Alberta Clipper Pipeline. First Amend. Comp. ¶ 43. With regard to NEPA compliance, Plaintiffs allege: "In a telephone conversation with Ralph Augustin, on August 25, 2009, Plaintiffs confirmed the issuance of the permit, and confirmed that the Army Corps did not conduct independent NEPA review but relied on its participation in the State Department's preparation of the Alberta Clipper EIS." Id. Aside from impropriety of attempting to extract a concession from a staff level government employee, this allegation is insufficient to articulate a cognizable NEPA claim against the Corps. As the Plaintiffs concede, they did not even review the Corps' Record of Decision or permitting documents before filing suit. Id. Having not even reviewed the Corps' final NEPA

document (the Record of Decision), Plaintiffs cannot credibly allege that the Corps conducted no additional NEPA analysis or that the Corps' NEPA analysis was deficient.^{9/} Plaintiffs attempt to excuse this deficiency by alleging that the Corps did not provide its Record of Decision or permitting documents to them. Id. The Corps permitting document are voluminous, and the Corps cannot be expected to produce them immediately upon request. The Corps has since provided to Plaintiffs a CD-ROM containing the Record of Decision and permitting documents (with the exception of certain materials that were too large to fit on the CD-ROM).

Plaintiffs' allegations against the Forest Service are equally deficient. Plaintiffs allege that the Forest Service issued special use permits to Enbridge to allow construction in the Chippewa National Forest, that they filed an administrative appeal of those permits, and that the Forest Service denied their appeal. Id. ¶ 44. Other than mentioning that Forest Service was a cooperating agency on the State Department's EIS, the complaint contains no allegations regarding the Forest Service's NEPA process or its decision to issue the permits. See id. Therefore, Plaintiffs' allegations are insufficient to state a NEPA claim against the Forest Service.

Accordingly, Plaintiffs' First through Fourth Claims for Relief against the Corps and the Forest Service should be dismissed for failure to state a claim.

CONCLUSION

For the foregoing reasons, Plaintiffs First through Fifth Claims for Relief against the State Department should be dismissed with prejudice for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1); Plaintiffs' Sixth Claim for Relief should be dismissed with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6); and Plaintiffs' First

^{9/} As explained in Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction, the Corps did conduct additional NEPA analysis before issuing its permits.

through Fourth Claims for Relief against the Corps and the Forest Service should be dismissed without prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted this 16th day of October, 2009.

JOHN C. CRUDEN
Acting 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