

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' OPPOSITION TO
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Hearing Date: TBD
Time: TBD

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 oppose the Motion for Preliminary Injunction (“Motion”) (Docket No. 8) filed by Plaintiffs Sierra Club, Inc., Minnesota Center for Environmental Advocacy, Indigenous Environmental Network, and National Wildlife Federation (“Plaintiffs”). In this case, 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, 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 (“CWA”), 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. Plaintiffs’ Motion should be denied because the Court lacks jurisdiction over Plaintiffs’ NEPA claims against the State Department, Plaintiffs’ claims lack merit, and Plaintiffs have failed to demonstrate irreparable harm from the construction of the pipeline.

The Court should address its jurisdiction to review Plaintiffs’ claims first. 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). The claim that the State Department’s action is unconstitutional is contrary to over 100 years of precedent. And even if the Court addresses the NEPA claims, Plaintiffs are unlikely to

succeed on those claims because the State Department conducted a thorough NEPA analysis before issuing the Presidential Permit. Thus, the Plaintiffs' have no likelihood of success on the merits of their claims against the State Department.

Plaintiffs also have no likelihood of success on their claims against the Corps or the Forest Service because they have failed to allege or argue any particular NEPA violations by those agencies. Even if the State Department's NEPA analysis were insufficient in some respects, which Plaintiffs have not demonstrated, that would not necessarily mean that the Corps and the Forest Service violated NEPA. The Corps conducted additional analyses of water and wetlands impacts in issuing its permits. The Forest Service likewise conducted analyses specific to its decision, and the geographic scope of its analysis was narrower than that of the State Department.

With regard to irreparable injury, Plaintiffs allege that their use and enjoyment of wilderness areas in which the pipeline will be constructed will be diminished. The construction of the pipeline, however, will occur predominantly along an existing pipeline route where four pipelines already are constructed. Thus, any disturbance to Plaintiffs' interest is likely to be temporary. Further, Enbridge has been working with federal and state agencies to refine the pipeline route to avoid areas of environmental concern.

The balancing of the harms and the public interest also favor the government because the State Department's Presidential Permit was issued based upon a determination by the Deputy Secretary of State that the pipeline would serve the national interest of the United States. Plaintiffs cannot second guess the policy decisions of the Executive Branch as to what actions are in the "national interest."

FACTUAL 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). 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 issuance of the Presidential Permit to Enbridge was the culmination of a more than two-year process, which was initiated by the submission on May 15, 2007, of Enbridge's application for a Presidential Permit for the Alberta Clipper Pipeline project. ROD at 5. Upon receipt of the application, the State Department, conducted an environmental review of Enbridge's application, which included the preparation of an environmental impact statement under NEPA. Id. at 3, 12-24. During the NEPA process, the State Department conducted a series of public scoping meetings in North Dakota, Minnesota, and Wisconsin, accepted and reviewed public comments on its draft environmental impact statement ("DEIS"), consulted with the Corps, U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, other federal and state agencies, and American Indian tribes. Id. at 23. During the public comment period, the State Department received over 900 public comments on the DEIS. Id. The State Department notified the public of the completion of the final environmental impact statement ("EIS") on June 8, 2009, and received additional comments through July 3, 2009. Id.

The State Department's decision to issue a Presidential Permit, which was signed by the Deputy Secretary of State, to Enbridge was based on a determination under Executive Order 13337 that the issuance of the permit would serve the national interest. ROD at 25-26. The Deputy Secretary's decision was based on his determination 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

^{1/} "Def. Ex." refer to the exhibits to the Declaration of Luther L. Hajek filed herewith.

making up for the declining imports from other suppliers. Id. at 25. The Deputy Secretary also stated that, “the United States and Canada, through bilateral diplomacy and a Clean Energy Dialogue process that is now underway, are working across our respective energy sectors to cooperate on best practices and technology, including carbon sequestration and storage, so as to lower the overall environmental footprint of our energy sectors.” Id.

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 Corps Record of Decision (“Corps ROD”), Def. Ex. 3. The Corps issued a public notice regarding Enbridge’s permit application for the Alberta Clipper/Southern Lights Diluent pipelines on December 16, 2008, and a public notice regarding an application for the Superior Terminal Pump Station on June 5, 2009. Id. at 1. 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. Id. at 2. The Corps approved the issuance of the permits on August 11, 2009. Id. at 32-33.

On June 29, 2009, the U.S. Forest Service issued a record of decision to Enbridge authorizing the amendment of Enbridge’s existing Special Use Authorization and a Temporary Construction Special Use Permit. See Forest Service ROD, Plf. Ex. 9. The permits allow 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. See id. at 6-7, 13. Plaintiffs filed an administrative appeal challenging the permits, and the Forest Service rejected the appeal on September 28, 2009. See Forest Service Appeal Decision, Def. Ex. 4.

On September 3, 2009, Plaintiffs filed a Complaint challenging the issuance of the Presidential Permit and the issuance by the Corps of CWA and Rivers and Harbor Act permits. Complaint ¶¶ 76-113 & Prayer for Relief. On the same date, Plaintiffs filed a motion requesting a temporary restraining order. 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).

LEGAL BACKGROUND

I. ADMINISTRATIVE PROCEDURE ACT

Because NEPA does not create a private right of action, and Plaintiffs' claim against FWS is necessarily brought under Section 704 of the APA, the standard of review in this case is set forth in the judicial review provisions of the APA, 5 U.S.C. § 701 *et seq.* See Marsh, 490 U.S. at 377 n.23; 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), abrogated on other grounds by Califano v. Sanders, 430 U.S. 99 (1977); Moore v. Custis, 736 F.2d 1260, 1262 (8th Cir. 1984). The party bringing an APA case bears the burden of demonstrating that the agency's actions were arbitrary and capricious. Guaranty Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 794 F.2d 1339, 1342-43 (8th Cir. 1986). The APA directs the court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Thus, the court's review is limited to the administrative record before the agency decisionmaker. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138, 143 (1973).

When evaluating a challenge to agency action, the Eighth Circuit has directed that "great deference should be accorded an administrative agency's interpretation of its own regulations." Moore, 736 F.2d at 1262. An agency's interpretation of its own regulations controls unless it is plainly erroneous or inconsistent with the regulations. Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 527-28 (8th Cir. 1995). Deference is particularly appropriate when questions of scientific methodology are involved. Friends of Boundary Waters, 164 F.3d at 1130.

II. 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.” See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). NEPA’s mandate to the agencies is “essentially procedural . . . It is to insure a fully informed and well-considered decision” Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S.519, 558 (1978); Goos v. Interstate Commerce Comm’n, 911 F.2d 1283, 1293 (8th Cir. 1990). “NEPA does not mandate particular results, but instead prescribes only a process to ensure that federal agencies consider the environmental consequences of particular actions.” Goos, 911 F.2d at 1293; see Robertson, 490 U.S. at 350 (“It is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”). Thus, a court may not require agencies “to elevate environmental concerns over other, admittedly legitimate, considerations.” Stryker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227–28 (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 (footnote omitted).

NEPA requires federal agencies to consider the environmental impact of any major federal actions they undertake, and to prepare an environmental impact statement (“EIS”) 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)). If an activity does not automatically require an EIS, an environmental assessment (“EA”) may be conducted to determine whether an EIS is necessary. 40 C.F.R. §§1501.3–1501.4; Sierra Club, 46 F.3d at 837. An EIS is a “detailed statement” that does not “merely catalog environmental facts, but also explain[s] 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 agency is entitled to considerable deference in the Court’s consideration of whether it complied with NEPA. See id. The Court’s “role in reviewing the sufficiency of an agency’s consideration of environmental factors is a limited one.” Id. at 1127–28 (quoting Vermont Yankee, 435 U.S. at 555). 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. (citing Dubois v. U.S. Dep’t of Agric., 102 F.3d 1273, 1287 (1st Cir. 1996)). “When the resolution of the dispute involves primarily issues of fact and analysis of the relevant information ‘requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.’” Id. at 1128 (citing Marsh, 490 U.S. at 377). “Whether an agency’s action is arbitrary and capricious depends on whether ‘the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’” Id. at 1121 (citation omitted). The record reflects that the Corps fully complied with NEPA.

III. STANDARD FOR OBTAINING PRELIMINARY INJUNCTIVE RELIEF

A temporary restraining order or preliminary injunction is “an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In deciding a motion for a preliminary injunction, a district court balances four factors: (1) the likelihood of the movant’s success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest. Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir.1981); see also Emerson Elec. Co. v. Rogers, 418 F.3d 841, 844 (8th Cir. 2005). A party *must* demonstrate a “likelihood of success on the merits” in order to obtain a preliminary injunction. Munaf v. Green, 128 S.Ct. 2207, 2219 (2008).

Furthermore, a party seeking preliminary injunctive relief must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” Winter v. Natural Res. Defense Council, Inc., 129 S.Ct. 365, 375 (2008) (emphasis in original).

ARGUMENT

As explained below, Plaintiffs’ Motion for a Preliminary Injunction should be denied because they have no likelihood of success on the merits of their claims, they have not demonstrated irreparable injury to their interests in the environment, and the balance of the harms and the public interest weigh against injunctive relief.

I. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs are unlikely to succeed on the merits of their claims against the State Department, Corps, and Forest Service. As an initial matter, as explained in Defendants separately filed Motion to Dismiss, the Court lacks jurisdiction over Plaintiffs’ NEPA claims against the State Department. Jurisdiction is a threshold issue that should be resolved before the merits of a case. See Sisseton Wahpeton, 2009 WL 3153655, at *3. Furthermore, Plaintiffs’ claim that the issuance of the Presidential Permit was unconstitutional is without merit because Presidents have issued such permits based on their authority over foreign affairs for over a century. Accordingly, Plaintiffs have no likelihood of success on their claims against the State Department, and they should be dismissed with prejudice.

Even if the Court were to proceed to the merits of the NEPA claims against the State Department, Plaintiffs are unlikely to succeed on the merits of those claims. The State Department complied with NEPA through its preparation of a thorough EIS analyzing the potential environmental impacts of issuing the Presidential Permit to Enbridge. The EIS process lasted over two years and involved the input from federal and state agencies, American Indian tribes, and the public. This process satisfied the requirements of NEPA.

Although Plaintiffs’ First Amended Complaint also challenges the Corps’ issuance of CWA and Rivers and Harbors Act permits to Enbridge and the Forest Service’s issuance of a special use authorization to Enbridge, Plaintiffs’ Motion contains no argument that they

are likely to succeed on the merits of their claims against the Corps and Forest Service. See Motion at 6-15. Nevertheless, even if Plaintiffs had brought such arguments or attempt to belatedly bring such arguments, those arguments would fail because the Corps and the Forest Service fully complied with NEPA.²¹

Finally, Plaintiffs have not demonstrated that the construction of the Alberta Clipper Pipeline, primarily along an existing right-of-way where several pipelines already exist, will cause them irreparable harm. And the public interest favors denying injunctive relief because the Undersecretary of State has determined that the Alberta Clipper Pipeline project is in the “national interest.”

A. Plaintiffs Have No Likelihood of Success on Their NEPA Claims Against the State Department Because The Court Lacks Jurisdiction Over Those Claims

As explained in greater detail in Defendants’ Motion to Dismiss, which is 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 delegee. 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.

The State Department made this very same argument in two cases involving the State Department’s issuance last year of a Presidential Permit for the Keystone Pipeline, a different cross-border pipeline that will transport oil extracted from Canadian tar sands to the United States. Both courts independently found that the issuance of the Presidential Permit was a

²¹ Indeed, Plaintiffs’ initial Motion for a Preliminary Injunction was filed before Plaintiffs amended their Complaint to include allegations against the Forest Service. Yet, following the transfer of the case to this Court, Plaintiffs chose not to file a new motion for a preliminary injunction addressing the NEPA compliance by the Corps and Forest Service. The Court should not permit Plaintiffs to raise additional arguments in their reply regarding the actions of the Corps and the Forest Service.

Presidential action and therefore not reviewable under the APA. 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.”). There is no legal difference between the Presidential Permit issued for the Keystone Pipeline and the one at issue in this case. Therefore, the Court should find that it lacks jurisdiction over Plaintiffs’ NEPA claims against the State Department, find that Plaintiffs have no likelihood of success on those claims, and dismiss those claims with prejudice.

B. Plaintiffs Have No Likelihood of Success on Their Claim That the Issuance of the Presidential Permit Was Unconstitutional

Plaintiffs argue that the State Department’s issuance of a Presidential Permit to Enbridge was unconstitutional because “the President has neither the Constitutional nor statutory authority to regulate international oil pipelines.” Motion at 16. Further, Plaintiffs argue that, because Congress could regulate international oil pipelines, the President has no authority to approve oil pipelines. Id. Indeed, neither the President nor the State Department has claimed any authority to regulate pipelines of any kind. Rather, the only reason that the State Department is involved in the permitting process at all is because the Alberta Clipper Pipeline crosses an international border. The border crossing implicates foreign affairs and national security concerns and, as explained below, throughout our country’s history, Presidents have exercised their inherent authority to approve or reject such border crossings. While Defendants do not dispute that Congress has and could enact legislation relating to international oil pipelines under its foreign commerce powers, no such laws are implicated in this case.

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 and his authority as Commander in Chief. 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. 247-66 (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).

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). 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, 69 Fed. Reg. 25299 (Apr. 30, 2004).

Plaintiffs argue that because Congress has acted in certain instances to regulate foreign commerce, congressional action is required here. Motion at 17-18. In fact, in the few instances that Congress has enacted laws relating to border crossings, Congress has affirmed the President's authority to approve border crossings. 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 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). Given these affirmations, the past history of the President's issuance of permits for border crossings, and the congressional

silence in other areas, at the very least, Congress has acquiesced to the President's authority to approve border crossings. See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

Accordingly, Plaintiffs' arguments regarding the constitutionality of the Presidential Permit are without merit. Moreover, even if Plaintiffs could reverse over 100 years of precedent, the result would be that no permit was required to cross the border, leaving Presidents apparently unable to protect U.S. foreign relations and national security interests in relation to permanent facilities at the U.S. border.

C. Even if the Court Has Jurisdiction Over Plaintiffs' NEPA Claims Against the State Department, Plaintiffs Have No Likelihood of Success On Those Claims

Plaintiffs argue that they are likely to succeed in arguing that the State Department's issuance of the Presidential Permit to Enbridge violates NEPA on four grounds: (1) the EIS failed to adequately analyze the potential environmental effects of the Southern Lights Diluent and LSr Pipelines, (2) the EIS failed to adequately analyze the indirect and cumulative effects of the Alberta Clipper Pipeline, (3) the EIS failed to adequately analyze the risk of spills, operational leaks, and abandonment of the pipeline, and (4) the EIS's purpose and need statement was invalid and the EIS failed to look at an adequate range of alternatives. Motion at 6-15. Even assuming that the Court has jurisdiction to review Plaintiffs' APA challenge to the Presidential Permit, none of these arguments has merit.

1. The EIS Adequately Analyzes the Potential Impacts from the Southern Lights Diluent and LSr Pipelines

Plaintiffs argue that, in considering the potential environmental effects of the Alberta Clipper Pipeline project, the State Department did not adequately consider the effects of two additional pipelines that have recently been constructed or will be constructed along the same pipeline route: the Southern Lights Diluent Pipeline (“Diluent Pipeline”) and the Southern Lights LSr Pipeline (“LSr Pipeline”). Motion at 6-10. Plaintiffs' assertion that the State

Department was required to consider these two other pipelines as connected or cumulative actions under the Council on Environmental Quality's ("CEQ") NEPA regulations is incorrect. More importantly, the State Department did consider the cumulative effects of these project in its analysis, and therefore Plaintiffs' assertions that the effects of those pipelines were not considered is without basis.

a. The Diluent Pipeline and LSr Pipeline Are Not Connected Actions

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. EIS at 1-26 - 1-29, Plf. Ex. 3.³⁷ The Diluent Pipeline involves the construction of an approximately 669-mile pipeline from Manhattan, Illinois to Clearbrook, Minnesota. *Id.* at 1-28. 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. *Id.*; see also Plf. Ex. 1 (map showing pipeline route). The Reversal Pipeline is an existing Enbridge Pipeline (Line 13) stretching across the international border from Clearbrook, Minnesota to Hardisty, Alberta. *Id.* at 1-29. 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.*

Relying on 40 C.F.R. § 1508.25(a), Plaintiffs argue that the State Department was required to expand the scope of the EIS to include the Diluent Pipeline and the LSr Pipeline as "connected actions." or "cumulative actions." See Motion at 6-10. The piecemeal evaluation of closely related projects is referred to as "segmentation" and is not permitted under NEPA. See *Sierra Club v. Froehlke*, 534 F.2d 1289, 1297 (8th Cir. 1976). This case, however, presents no segmentation issue because the actions which Plaintiffs refer to as connected or cumulative actions are not potential future actions by the State Department or other government agency and therefore do not fall under the requirement in section 1508.25

³⁷ The EIS is available at: <http://albertaclipper.state.gov/clientsite/clipper.nsf?Open> and can be accessed by clicking on the link for "Project Documents."

to consider proposed actions that are connected, cumulative, or similar in one NEPA document. See Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 999 (9th Cir. 2004) (“Under § 1508.25, two or more *agency actions* must be discussed in the same impact statement where they are ‘connected’ or ‘cumulative’ actions.”) (emphasis added). This is not to suggest that the impacts of these other pipelines need not be, or were not, considered in the EIS. Rather, such impacts are appropriately considered as cumulative effects of the State Department’s proposed action, a broader category which encompasses “past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) *or person* undertakes such other actions.” 40 C.F.R. 1508.7 (emphasis added); see also Missouri Coal. for the Env’t v. FERC, 544 F.3d 955, 958 (8th Cir. 2008) (“[T]he connected and cumulative actions analyses are separate and distinct from the cumulative impact analysis under the Council on Environmental Quality regulations implementing NEPA.”). In fact, the impacts of these other pipelines were considered as cumulative impacts in the EIS. See Section I.C.1.b., *infra*.

Applying these principles, it is clear that the State Department was correct in finding that it need not expand the scope of the EIS under 40 C.F.R. 1508.25 to include the Diluent and LSr Pipelines. As explained in the EIS, the Diluent Pipeline does not cross an international border and therefore did not require the issuance of a Presidential Permit by the State Department. EIS at 1-17, Plf. Ex. 3. Because the Diluent Pipeline requires no action from the State Department, there is no connected or cumulative agency action with respect to that pipeline. Similarly, the Reversal Pipeline is subject to an existing Presidential Permit and therefore no action by the State Department was required. EIS at 1-29, Plf. Ex. 3. Finally, there is no action left to be taken by the State Department with respect to the LSr Pipeline. The State Department analyzed the LSr pipeline in an Environmental Assessment completed in 2008, issued a Presidential Permit, and the pipeline has been constructed and is operational. EIS at 1-17, 1-29. Because NEPA applies to proposed future projects, there is no agency action left to be considered as a connected or cumulative action in the NEPA process for the Alberta Clipper Pipeline. See 42 U.S.C. 4332(C) (NEPA requires an analysis

of the environmental impacts of “*proposals* for legislation or and other major Federal actions significantly affecting the quality of the human environment.”) (emphasis added).⁴ Thus, none of the three Southern Lights pipeline should be considered connected or cumulative actions under NEPA.

Moreover, even assuming that the Diluent Pipeline, which required no State Department approval, and the LSr Pipeline, which has already been constructed, could be considered “actions” of the State Department for purposes of NEPA, which they are not, they are not connected actions because each has utility independent of the other. EIS at 1-26 - 1-29, Plf. Ex. 3. In analyzing whether actions are connected, “[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. Sierra Club, 541 F.2d 1292, 1306 (8th Cir. 1976). The Diluent Pipeline is already nearly 75 % (484 out of 669 total miles) completed and is not being constructed solely for the purpose of transporting oil through the Alberta Clipper Pipeline. EIS at 1-28. Rather, tar sands oil mixed with diluent may be transported through other Enbridge pipelines. 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.”). Similarly, the already completed and operational LSr Pipeline is being used to transport light sweet crude independently from the planned operation of the Alberta Clipper Pipeline. EIS at 1-29. Because each of these pipelines has independent utility, they cannot be considered connected or cumulative actions under NEPA. See Froehlke, 534 F.2d at 1298 (finding that two planned dam projects in the same watershed had independent utility); Watersheds Assoc. Rescue v. Alexander, 586 F. Supp 978, 993-95 (D. Neb. 1982)

⁴ Plaintiffs allege in their complaint that the Environmental Assessment prepared by the State Department for the Presidential Permit for the LSr Pipeline was inadequate. First Amend. Comp. ¶¶ 106-11. As explained in Defendants’ Motion to Dismiss, that claim is moot.

(finding that separate levees on the Missouri River had independent utility and were not required to be analyzed in a programmatic NEPA document).

b. The EIS Analyzes the Cumulative Effects of the Diluent and LSr Pipelines

As indicated above, NEPA requires the consideration of the potential cumulative effects of the proposed action when considered along with the effects of “past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7; see also *Missouri Coal.*, 544 F.3d at 958. Plaintiffs’ assertions that the EIS does not analyze the cumulative effects of the Diluent and LSr Pipelines is without basis. See Motion at 9-10. Indeed, the EIS makes clear that, although these projects are not analyzed as connected or cumulative actions, the cumulative effects of these projects are analyzed in the EIS. See EIS at 1-17 (“Enbridge and non-Enbridge pipelines are considered in the Cumulative Impacts analysis (Section 4.14) of this EIS”); EIS at 1-29 (“Impacts associated with construction of the LSr Project are described in the EA for that project (Enbridge 2008) and have been considered in the cumulative impacts presented in Section 4.14.”), Plf. Ex. 3.

In its discussion of Cumulative Impacts in Section 4.14 of the EIS, the State Department analyzed the potential incremental effects of the Alberta Clipper Pipeline when added to the effects of existing and planned pipeline projects, including the Diluent Pipeline. See EIS at 4-380, Def. Ex. 8. The State Department explained that:

There are currently six pipelines in the right-of-way between Neche, North Dakota and Clearbrook, Minnesota, and four existing pipelines in the Enbridge right-of-way between Clearbrook, Minnesota and Superior, Wisconsin. These existing pipelines transport crude oil or petroleum products. A fifth pipeline would be installed within the corridor south of Clearbrook (Diluent Project) at approximately the same time as the Alberta Clipper pipeline, and *the associated acreage impacts of the Diluent Project pipeline have been incorporated into the environmental review described in Section 4.0 of this EIS.*

Id. at 4-380 (emphasis added). Furthermore, the EIS analyzes 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. See EIS at 4-383 - 4-387.

Accordingly, Plaintiffs' fear that the construction of the Diluent Pipeline will have additional, unexamined impacts on soils, water, air and other resources are completely unfounded because such effects have been considered in the EIS. See Motion at 9.

2. The EIS Adequately Analyzes Indirect Effects

Plaintiffs argue that the EIS does not adequately analyze the indirect effects of producing, refining, and consuming oil transported through the Alberta Clipper Pipeline. Motion at 10-13. These arguments are without merit because the State Department was not required to analyze the potential impacts of developing tar sands in Canada and the State Department has considered the effects of refining and consuming oil transported through the pipeline.

a. The State Department Was Not Required to Analyze the Impacts of Developing Canadian Tar Sands

Plaintiffs argue that the State Department did not adequately consider the indirect effects in the United States caused by the development and extraction of oil from tar sands in Canada. Motion at 10. Specifically, Plaintiffs argue that the State Department was required to consider impacts caused by increased greenhouse gas emissions from the extraction process and the effects on migratory birds, which may become trapped in the tar sands. Id.; May Decl. ¶¶ 64-65, Plf. Ex. 5. Indirect effects that affect the environment in another country, including those that have a rebound effect in the United States, are known as transboundary impacts. See Consejo de Desarrollo Economico de Mexicali, AC v. United States, 438 F. Supp. 2d 1207, 1236 (D. Nev. 2006), vacated on other grounds, 482 F.3d 1157 (9th Cir. 2007). The State Department was not required to analyze the transboundary impacts alleged by Plaintiffs because there is not a sufficiently close causal nexus between the issuance of the Presidential Permit for the Alberta Clipper Pipeline and the development of the Canadian tar sands. The Supreme Court has established that, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." U.S. Dep't of Transp. v. Public Citizen, 541 U.S. 752, 767 (2004). Rather, "NEPA requires 'a reasonably close causal relationship' between the

environmental effect and the alleged cause.” Id. (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)). In addition, “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.” Id. at 770.

Here, the State Department’s decision to issue a Presidential Permit did not bear a reasonably close causal relationship to the Canadian government’s decision to develop the tar sands. The development of Canadian tar sands is being conducted under the jurisdiction of the Canadian government, is subject to Canadian law, and underwent environmental review in Canada. EIS at 1-6 - 1-7, 1-18. The Canadian National Energy Board (“CNEB”) was responsible for reviewing the Canadian portion of the pipeline, and also oversees the development of the Canadian tar sands. EIS at 1-2, 1-6. The State Department’s issuance of a Presidential Permit allows Enbridge to construct pipeline facilities at the international border, which in turn enables Enbridge to construct a pipeline for the purpose of transporting oil from Canada into the United States. EIS at 1-1 - 1-2; ROD at 5-7; Permit at 1. But the State Department is not involved in the actions of the Canadian government in approving tar sands development in Canada. See EIS at 1-6, 1-18; ROD at 10. Nor does the State Department control the market forces spurring the development of the Canadian tar sands. Indeed, the need for the increased pipeline capacity that the Alberta Clipper Pipeline would provide arose due to the availability of oil from the Canadian tar sands and not the other way around. See id. at 1-6 - 1-7; ROD at 10-11. Accordingly, the State Department’s decision to issue a Presidential Permit was not even a “but for” cause of the effects of tar sands development, let alone the type of legally relevant cause that is required before NEPA obligations are triggered. See Consejo, 438 F. Supp. 2d at 1236-38 (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 too remote to require analysis under NEPA).

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 [EBC turbine] are ‘effects’ of the [power line] that must be analyzed under NEPA.” *Id.* at 1017. The same is not true of the Canadian tar sands, which are being developed independently from the Alberta Clipper Pipeline project and may be transported to the United States through existing pipelines or transported to other countries. *See* EIS at 1-6 - 1-7. Accordingly, the State Department was not required to consider the transboundary impacts of Canadian tar sands development.

b. The State Department Adequately Considered the Effects of Refining and Consuming the Oil in the United States

Plaintiffs argue that the State Department did not adequately analyze the effects of refining oil transported through the pipeline in the United States. Motion at 10. The State Department does not concede that it was required to analyze refining impacts because it has no authority over refineries and refineries may continue to refine oil, including heavy crude oil, regardless of whether the Alberta Clipper Pipeline is constructed. *See Public Citizen*, 541 U.S. at 770 (“[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”). Nevertheless, the State Department did conduct a thorough review of the potential refining impacts in the EIS, including a discussion of refineries that would receive oil from the Alberta Clipper Pipeline, potential upgrades to those refineries to process heavy crude oil from Canadian tar sands, and new refineries that are being constructed to process heavy crude. *See* EIS 4-390 - 4-400, Def. Ex. 8. Plaintiffs’ assertion that this analysis is insufficient under NEPA is without basis.

Conceding that the EIS does address the potential impacts of refineries and refinery emissions, Plaintiffs still argue that the analysis is insufficient because it relies on refineries complying with the requirements of the Clean Air Act (“CAA”) and CWA. See Motion at 11. Unlike the case relied upon by Plaintiffs, the State Department did not completely ignore a potential environmental impact of its proposed action. See Ill. Commerce Comm’n v. ICC, 848 F.2d 1246, 1258-59 (D.C. Cir. 1988). Rather, in its analysis of the effects on air and water quality, the State Department appropriately deferred to the relevant limits set by the U.S. Environmental Protection Agency in the CAA and CWA and the relevant analyses of state agencies. EIS at 4-394 - 4-400. For example, the EIS describes the analysis of the Michigan Department of Environmental Quality, which analyzed a planned expansion of the Marathon Detroit Oil Refinery and found that the project would increase carbon monoxide emissions and decrease emissions for certain other pollutants, such as particular matter, sulfur dioxide, nitrogen oxides, carbon monoxide, and volatile organic compounds. EIS at 4-395.

The State Department’s reliance on agencies with greater expertise in particular subject areas is appropriate under NEPA. See 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].”); Public 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); Maryland-National Capital Park & Planning Comm’n v. United States, 487 F.2d 1029, 1036-37 (D.C. Cir. 1973) (find that a construction project’s compliance with local zoning requirements supports a finding that the project’s effects will not be significant). Accordingly, it was appropriate for the State Department to rely on CAA and CWA standards in its analysis of air and water quality impacts in the EIS.

Plaintiffs also argue that the State Department did not adequately consider the effects

of consumers using liquid petroleum-based fuels produced from oil transported through the pipeline. As explained in the EIS, the crude oil transported through the Alberta Clipper pipeline will replace crude oil from other sources in the refining process, and will have no effect on consumer demand for refined petroleum products. EIS at 4-400, Def. Ex. 8. Plaintiffs have offered no explanation for how or why changing the source of crude oil supplied to refineries could itself lead to an increase in demand of the liquid petroleum-based fuels produced at the refineries. Moreover, as the State Department explained in the EIS, refined products developed from tar sands oil will be the same as those developed from conventional oils, and therefore climate change and air quality impacts from use of those refined products are likely to be the same regardless of the source of the oil. EIS at 4-400, Def. Ex.8.

In addition, Plaintiffs reliance on Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003) is misplaced. The Eighth Circuit's decision predates the Supreme Court's Public Citizen opinion and contains no analysis of whether the approval of the rail line was a "legally relevant cause" of the emissions from coal-fired power plants. 541 U.S. at 770. Instead, the court only analyzed whether the impacts to air quality were too speculative to be considered under NEPA, which is an entirely separate inquiry. See Mid-States, 345 F.3d at 549-50. Therefore, the validity of the causation analysis in Mid-States is questionable. Even if the Mid-States opinion survives Public Citizen, it does not require an analysis of the end use by individual consumers of oil transported through the pipeline. In fact, after remand, the Eighth Circuit upheld a regional analysis of the potential increase emissions from coal-fired power plants that would use the coal, which was much like the analysis of refineries conducted by the State Department here. See Mayo Found. v. Surface Transp. Bd., 472 F.3d 545, 555-56 (8th Cir. 2006) (rejecting arguments by the Sierra Club that the Board's analysis of greenhouse gas and air emissions was inadequate). Accordingly, even if Mid-States is valid, the State Department has complied with its mandates.

3. The EIS Adequately Analyzes Cumulative Impacts

Plaintiffs' arguments regarding alleged deficiencies in the State Department's analysis

of cumulative effects are baseless.

First, Plaintiffs argue that the State Department did not adequately consider the impacts from increasing the capacity of the Alberta Clipper Pipeline from 450,000 barrels per day (“bpd”). Motion at 12. As clearly stated in the EIS, however, no such expansion is currently planned, and if it were proposed in the future, it would be subject to further environmental reviews. EIS at 2-50, Plf. Ex. 3. The State Department was not required to analyze such an unplanned expansion that may occur at some point in the future. See Gulf Restoration Network v. U.S. Dep’t of Transp., 452 F.3d 362, 369-71 (5th Cir. 2006) (finding that the Department of Transportation’s analysis of only two of five ports to store liquified natural gas was adequate under NEPA because applications for the three other ports had not progressed to the draft EIS stage); Nat’l Wildlife Fed’n v. FERC, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (“*Kleppe* thus clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.”) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.20 (1976)).

Second, Plaintiffs argue that the EIS does not sufficiently analyze the cumulative impacts of importing, refining, and using heavy crude oil, the potential expansion of tar sands production, and the incremental effects of the Alberta Clipper Pipeline when combined with other existing and planned pipelines. See Motion at 12. As discussed above, the EIS does not sufficiently analyze the impacts of importing, refining, and using heavy crude oil transported through the pipeline. See Section I.C.2.b, *supra*. And, as already established, the State Department was not required to analyze the effects of developing the tar sands in Canada. See Section I.C.2.a., *supra*. Finally, Plaintiffs also are incorrect that the EIS does not consider the cumulative impacts of other pipelines, including the Diluent and LSr Pipelines is incorrect. See Section II.C.1.b., *supra*; EIS at 4-380 - 4-388, Def. Ex. 8.

Third, Plaintiffs argue that the EIS does not adequately consider greenhouse gas emissions. Motion at 12-13. This argument simply ignores the analysis contained in the EIS.

Motion at 12-13. In fact, the EIS contains detailed, quantified data regarding the potential greenhouse gas emissions associated with construction and operation of the pipeline. EIS at 4-388 - 4-403, Def. Ex. 8. Indeed, based on estimates by the Natural Resources Defense Council and other sources regarding the greenhouse gas emissions from refining heavy crude oil from tar sands, the State Department estimated that the total carbon emissions from the Alberta Clipper Project could range from 1.5 to 7.8 million metric tons per year. (“tpy”) *Id.* at 4-402. The State Department explained that this total represents approximately 0.001 percent of the United States’ annual carbon dioxide (or equivalent) emissions of 7,054 million metric tpy. *Id.* Accordingly, the State Department has sufficiently analyzed the cumulative impacts of the greenhouse gas emissions of the project.

3. The EIS Adequately Analyzes the Risk of Spills, Leaks, and Abandonment

Plaintiffs assert that the EIS does not contain an adequate analysis of the risk of pipeline spills. Motion at 13. To the contrary, the EIS contains a thorough analysis of the potential impacts of leaks and spills and the mitigation measures in place should such an event occur. See EIS at 4-347 - 4-375, Def. Ex. 7. Enbridge’s Emergency Response Plan has been approved by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and complies with the applicable requirements of the Occupational Safety and Health Administration. EIS at 2-47, Plf. Ex. 3. The Emergency Response Plan is set forth in EIS Appendix E and contains detailed requirements regarding spill prevention, storage and handling of fuels and hazardous liquids, spill management, spill notification responsibilities, spill containment and cleanup, and storage and disposal of contaminated materials. EIS App. E at 1-10; see also EIS App. J (Petroleum-Contaminated Soil Management Plan) & App. Q (Pipeline Integrity and Emergency Response Measures). Def. Exs. 9, 10, 11. In addition, mainline valves are installed along the pipeline to limit the volume of a spill should a spill occur. EIS at 2-5, Plf. Ex. 3. Also, pipeline sensors will be used to detect leaks. EIS at 2-46, Plf. Ex. 3; EIS at 4-374, Def. Ex. 7. Enbridge’s Emergency Response Plan applies to both

oil and diluent and was approved by the PHMSA. EIS at 2-47; EIS App. E.⁵⁷ Accordingly, Plaintiffs' assertion that the State Department has not adequately considered the risks of spills and mitigation to avoid and minimize the damage of any spills is without basis.

Plaintiffs also assert that the EIS is inadequate for failing to analyze the abandonment of the pipeline, which will likely not occur for 50 years. See Motion at 13. This assertion is without basis. As explained in the EIS, plans will be submitted and reviewed by the appropriate agencies prior to the abandonment of the pipeline and related facilities. EIS at 2-51. Abandonment procedures, such as cleaning and emptying the pipelines, will be established per applicable regulations. 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.

4. The EIS's Purpose and Need Statement is Valid and the EIS Considers an Appropriate Range of Alternatives

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). The State Department's stated purpose and need is 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." EIS at 1-2, Plf. Ex. 3. A purpose and need statement which is formulated to "meet market demand" is valid under NEPA. See Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1067 (9th Cir. 1998). Accordingly, Plaintiffs' assertion that the purpose and need statement was too narrow is

⁵⁷ Plaintiffs' argument that the State Department was required to conduct analysis of the risks of a diluent spill in addition to the PHMSA's analysis is without basis because the Diluent Pipeline required no approval from the State Department and therefore was not within the scope of the EIS. See EIS at 1-17, 1-26 - 1-29.

without merit. Motion at 13-14.

Plaintiffs also argue that the purpose and need statement is based on an incorrect assumption that demand for oil from Canada is increasing. Id. Plaintiffs' cherry-picking of data from the 2009 U.S. Energy Information Administration ("EIA") report does not demonstrate a decrease in demand for Canadian heavy crude. See Motion at 14. While Plaintiffs cite data in the report regarding projected imports of "crude oil" from Canada, they ignore the fact that the EIA projects that demand for "unconventional" oil from Canada, which consists primarily of oil produced from tar sands, is projected to increase from 1.5 million bpd in 2008 to 4.3 million bpd by 2030. See EIS at 1-4.

Plaintiffs also argue that the range of alternatives considered was inadequate because the State Department rejected from consideration an alternative that would rely solely on energy conservation and renewable sources of energy. Motion at 15. As explained in the EIS, energy conservation alone will not suffice to meet the United States' energy demands, and currently renewable sources of energy supply only a small fraction of the nation's projected energy demands. EIS at 3-3, Plf. Ex. 3. Accordingly, the State Department appropriately excluded this alternative from further consideration. See City of Bridgeton v. FAA, 212 F.3d 448, 455 (8th Cir. 2000) ("[An EIS] must '[r]igorously explore and objectively evaluate' all reasonable alternatives, but it need only 'briefly discuss' the reasons why other alternatives were eliminated from more detailed study.") (quoting 40 C.F.R. § 1502.14).

Finally, Plaintiffs argue that the range of alternatives considered was inadequate because the EIS did not analyze the possibility of utilizing existing pipeline capacity. Motion at 15. This argument is without merit because, in fact, the EIS does analyze the possibility of utilizing existing pipelines and explains that it is not feasible because existing capacity is insufficient to meet future demands. EIS at 3-4, Plf. Ex. 3. Furthermore, increasing the size of existing pipelines would require the excavation of the existing crude pipeline in the right of way, and replacing it with larger diameter of pipe than the Alberta Clipper pipeline (42-48 inches versus 36 inches). Such excavation in the middle of the existing right of way and

installation of such large diameter pipes raises concerns regarding equipment, safety, and the environment that prevent that from being a viable, environmentally preferred alternative. Id. at 3-4 - 3-5. Accordingly, the State Department was justified in excluding this alternative from further consideration.

D. Plaintiffs Have No Likelihood of Success on Their NEPA Claims Against the Corps

Although Plaintiffs request that the Court enjoin the Corps' permits, see Motion at 1, their brief does not contain any arguments directed at the actions of the Corps. See Motion at 6-15 (arguing that the State Department violated NEPA). The Corps' analysis of the potential environmental impacts of its permitting decisions complied with NEPA for all of the reasons that the State Department's EIS complied with NEPA. In addition, the Corps conducted additional analysis of water and wetlands impacts before issuing its record of decision regarding the CWA and Rivers and Harbors Act permits. See Corps ROD at 1-2, 12-30, Def. Ex. 3. Plaintiffs have presented no argument as to why the Corps' own analyses are deficient in any respect. Indeed, the involvement of the Corps, as a cooperating agency in the EIS process, provided significant value in ensuring that potential impacts were addressed. For example, the Corps ensured that, "although the DOS did not consider the Southern Lights Diluent pipeline to be a connected action to the Alberta Clipper Project, the impacts to aquatic resources resulting from construction of that pipeline were disclosed in the EIS." Id. at 11. Indeed, the Corps specifically considered the Diluent Pipeline in its permitting process. Id. at 1-5. Therefore, Plaintiffs' arguments that the State Departments did not adequately analyze the Diluent Pipeline do not even apply to the Corps. Accordingly, the Corps has complied with NEPA due its additional analyses of water and wetlands impacts and for all of the reasons set forth in Section I.C., *supra*.

E. Plaintiffs Have No Likelihood of Success on Their NEPA Claim Against the Forest Service

No relief should be granted against the Forest Service because Plaintiffs have not sought any relief against the agency in their Motion. Nevertheless, even if the Court were to entertain a belated attempt by Plaintiffs to supplement the relief sought, it would fail

because the Forest Service has fully complied with NEPA. The scope of the Forest Service's review was narrower than the State Department's review, and the Forest Service conducted additional analysis demonstrating compliance with NEPA.

The Forest Service was a cooperating agency in the State Department's EIS, and it conducted its own additional analysis of the potential impacts of issuing the special use permits allowing construction in the Chippewa National Forest. See EIS App. U, Def. Ex. 12. The geographic scope of the Forest Service's NEPA analysis was expressly limited to areas within the Chippewa National Forest and the Leech Lake Reservation. Id. at 1-6; see also Forest Service Appeal Decision at 3-4, Def. Ex. 4. An agency's reasonable decision to limit the scope of its analysis to a certain geographic area is entitled to deference. Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976). This is especially true given that the Forest Service's decision relates to only a portion of the pipeline. See EIS App. U at 2-16 (34.11 miles through the Chippewa National Forest and 43.79 miles in total), Def. Ex. 12. Due to the limited geographic scope of the Forest Service's NEPA analysis, Plaintiffs' arguments that the EIS does not adequately consider indirect and cumulative effects, such as greenhouse gas emissions and refinery impacts, and fails to consider alternatives relying on renewable sources of energy are inapplicable to the Forest Service. See Forest Service Appeal Decision at 2, 7.

With respect to the other issues, the Forest Service conducted a thorough review of the potential impacts of the Diluent Pipeline and the potential impacts of leaks and spills from that pipeline. See id. at 2-5. The Forest Service's analysis clearly encompassed both the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline. See EIS App. U at 1-1 - 1-4. And the Forest Service clearly addressed the potential impacts of leaks and spills from the Diluent Pipeline and the Alberta Clipper Pipeline. EIS App. U at 3-2 - 3-9. Accordingly, in addition to the arguments in Section 1.C., *supra*, the Forest Service's own analysis demonstrates compliance with NEPA.

In conclusion, Plaintiffs have failed to demonstrate a likelihood of success on their claim that the State Department's issuance of a Presidential Permit violated the U.S.

Constitution or their claims that the State Department, the Corps, or the Forest Service failed to comply with NEPA. Accordingly, the Court should deny Plaintiffs' Motion.

II. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE INJURY

Plaintiffs are entitled to no presumption of irreparable harm based upon alleged harm to the environment. See Amoco Produc. Co. v. Vill. of Gambell, 480 U.S. 531, 544-45 (1987) (reversing a preliminary injunction premised on Ninth Circuit's presumption of irreparable damage when an agency fails to evaluate thoroughly the environmental impact of a proposed action); Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992) ("Merely establishing a procedural violation of NEPA does not compel the issuance of a preliminary injunction"). Rather, Plaintiffs Plaintiffs bear the burden of demonstrating that they will be irreparably harmed if an injunction does not issue. See Winter, 129 S.Ct. at 374. Plaintiffs have not demonstrated any such irreparable injury warranting preliminary injunctive relief.

The pipeline will for the most part not be laid along a new route; rather it will be constructed primarily along an existing right of way where pipelines already exist. The Corps noted that "[a]pproximately 88 % of the proposed Alberta Clipper pipeline route in the United States (about 287 miles) would be within or adjacent to an existing Enbridge Pipeline corridor." Corps ROD at 3, Def. Ex. 3; see also EIS at 4-380 - 4-381, Def. Ex. 8; Plf. Ex. 1 (showing the pipeline routes). Similarly, the Forest Service explained in its appeal decision: "[T]his is not a new special use permit. The Forest Service is simply reviewing an application for the amendment of an existing special use permit. The existing right-of-way already crosses the management area. The applicant has applied to amend an existing permit, asking to expand an existing utility corridor." Forest Service Appeal Decision at 11 (internal page 9), Def. Ex. 4. Therefore, harm to the environment will be minimized by taking advantage of a pre-existing pipeline route.

Indeed, the Corps projected that the project would result in permanent (as opposed to temporary) loss of only 11.86 acres of wetland due to the construction of the Superior Terminal Pump Station. Corps ROD at 14. The remaining impacts to wetlands would be

temporary. See id. The conditions of the Corps' permits require Enbridge to restore temporarily disturbed wetlands to their pre-construction condition. Id. at 15. The Corps concluded that the "cumulative impacts from the current and reasonably foreseeable actions would be relatively minor" and approved the permits. Id. at 29, 33. Plaintiffs offer no arguments as to why the permits issued by the Corps, which contain numerous, detailed provisions to prevent and minimize harm to wetlands, are unlawful under NEPA or the CWA. And, even if they had, the Corps' determinations in its area of expertise are entitled to substantial deference. See Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (stating that a court should defer to an agency's determination in areas involving a "high level of technical expertise"); Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1177-78 (9th Cir. 2004).

Plaintiffs also allege that the construction of the pipeline will damage a calcareous fen, a rare wetland. Motion at 19. In fact, the Corps is currently working with the Minnesota Department of Natural Resources ("MDNR") to develop a management plan to avoid or minimize harm to the calcareous fen. See Letters dated September 23 and 25, 2009, Def. Exs. 13 & 14. Should an acceptable plan be developed, the Corps permit will be modified to require that construction, operation, and maintenance of the pipeline be undertaken in compliance with that plan. See September 25 Letter at 1. Construction in the vicinity of the calcareous fen has been temporarily suspended by the Corps until the Corps and the MDNR develop a management plan to evaluate least damaging practical alternatives for constructing this portion of the pipeline. Id.

The injuries alleged by Plaintiffs' standing declarants are insufficient to establish irreparable harm. See Motion at 20. For example, Lois Norrgaard alleges that her property will be injured due to potential leaks from the pipeline. Norrgaard Decl. ¶¶ 6-7 (Docket No. 8-28). Given the extensive precautions against leaks, this allegation is speculative and therefore insufficient to establish irreparable injury. See Couteau Props. Co. v. Dep't of Interior, 53 F.3d 1466, 1484 (8th Cir. 1995). Moreover, such injury could not occur until the pipeline is operational and therefore an injunction against construction of the pipeline is not

warranted. Joshua Davis alleges that he will be injured due to potential emissions from the Murphy Oil Refinery from processing heavy crude. Davis Decl. ¶ 7 (Docket No. 8-29). Even assuming that the construction of the Alberta Clipper Pipeline will cause the Murphy Oil Refinery to process greater amounts of heavy crude than it does currently and that emissions of harmful pollutants will be greater, such harms would not occur until the pipeline is completed. Plaintiffs' other standing declarants similarly allege speculative harms or harms that would not occur until the pipeline is completed. Smith-Johnson Decl. ¶¶ 7-8 (alleging injury from changes in water and air quality due to the Murphy Oil Refinery) (Docket No. 8-30); Aalgaard Decl. ¶¶ 7-8 (alleging injury due to noise, diesel fumes, and potential of leak from the diluent pipeline) (Docket No. 8-31); Steva Decl. ¶¶ 4-7 (alleging injury to bird watching activities due to construction of the pipeline) (Docket No. 8-32); Caron Decl. ¶¶ 4-7 (alleging that noise of construction will interfere with hunting) (Docket No. 8-33). Therefore, Plaintiffs' declarants fail to establish irreparable injury.

Finally, the extra-record declarations submitted by Plaintiffs purportedly analyzing the potential effects of the construction of the pipeline are entitled to no weight and may not be relied upon by the Court in evaluating the "correctness or wisdom" of an agency's decision. Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980); Am. Bioscience v. Thompson, 243 F.3d 579, 582-83 (D.C. Cir. 2001). In addition, the declarations should not be considered because they were prepared exclusively for litigation and were not submitted to the agency during the administrative process. See Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978). Further, the declarations are largely irrelevant to whether preliminary injunctive relief is warranted because they deal primarily with alleged impacts from the operation of the pipeline, such as increased greenhouse gas emissions and refinery emissions. See May Decl. ¶¶ 22-65 (Docket No. 8-9).

III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PRELIMINARY INJUNCTIVE RELIEF

A balancing of the equities and the public interest weigh in favor of denying Plaintiffs' request for preliminary injunctive relief. The public interest prong is a significant

factor which the Court must weigh in determining whether injunctive relief is appropriate. See Winter, 129 S.Ct. at 376-77 (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”) (quoting Weinberger, 456 U.S. at 312). The Presidential Permit at issue in this case was issued based on a finding by the State Department that it “would serve the national interest.” See ROD at 27, Def. Ex. 1; see also Exec. Order 13337 ¶ 1(g). The Deputy Secretary concluded that the “national interest” would be served by the issuance of the permit to Enbridge because the pipeline would increase the nations oil supplies from a stable and reliable trading partner and would do so using the best available environmental control technologies and policies. ROD at 25-26. Plaintiffs cannot rebut the policy decisions of the Executive Branch as to what actions are in the “national interest.”

CONCLUSION

For the foregoing reasons, Defendants request that the Court deny Plaintiffs’ Motion for a Preliminary Injunction.

Respectfully submitted this 16th day of October, 2009.

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