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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SIERRA CLUB, INC., MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, NATIONAL WILDLIFE FEDERATION, and INDIGENOUS ENVIRONMENTAL NETWORK, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, HILLARY CLINTON, in her official capacity as Secretary of State, JAMES STEINBERG, in his official capacity as Deputy Secretary of State, and the UNITED STATES ARMY CORPS OF ENGINEERS, Defendants.	No. 3:09-cv-04086-SI **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER** Hearing Date: TBD Time: TBD Hon. Susan Illston U.S. District Judge

1
TABLE OF CONTENTS

2 INTRODUCTION 1
3 FACTUAL BACKGROUND 1
4 LEGAL BACKGROUND 3
5 I. ADMINISTRATIVE PROCEDURE ACT 3
6 II. NATIONAL ENVIRONMENTAL POLICY ACT 4
7 III. STANDARD FOR OBTAINING PRELIMINARY INJUNCTIVE RELIEF 4
8
ARGUMENT 5
9
I. THE COURT SHOULD DENY PLAINTIFFS' MOTION WITHOUT
10 PREJUDICE AND TRANSFER THE CASE TO A MORE APPROPRIATE VENUE 5
11
II. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS
12 ON THE MERITS 8
13 A. The Court Lacks Jurisdiction Over the Challenge to the Presidential Permit 9
14
1. The Presidential Permit Was Issued Pursuant to an
15 Executive Order Based Upon the President's Authority over Foreign Affairs and Therefore
16 Is Not Subject to Judicial Review Under the APA 9
17
2. Judicial Review Is Also Barred By Well-Recognized
18 Exceptions to APA Review 11
19 3. Plaintiffs Lack Standing to Challenge the Presidential Permit Because They Cannot Demonstrate
20 Redressability 12
21 4. Plaintiffs' Arguments That the Issuance of the Presidential Permit Was Unconstitutional Are
22 Without Merit 13
23 B. Plaintiffs Have No Likelihood Of Success On Their NEPA Claim 15
24
1. The EIS Adequately Analyzes the Potential Impacts
25 from the Southern Lights Diluent and LSr Pipelines 15
26 a. The Diluent Pipeline and LSr Pipeline Are Not Connected or Cumulative
27 Actions 16
28

b. The EIS Analyzes the Cumulative Effects of the Diluent and LSr Pipelines 17

2. The EIS Adequately Analyzes Indirect and Cumulative Effects 18

a. Indirect Impacts 18

b. Cumulative Impacts 20

3. The EIS Adequately Analyzes the Risk of Spills, Leaks, and Abandonment 20

4. The EIS's Purpose and Need Statement is Valid and the EIS Considers an Appropriate Range of Alternatives 21

III. PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE INJURY . . 23

IV. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PRELIMINARY INJUNCTIVE RELIEF 24

V. PLAINTIFFS' REQUESTED RELIEF IS INAPPROPRIATE 25

CONCLUSION 25

TABLE OF AUTHORITIES

CASES PAGE

Am. Bioscience v. Thompson, 243 F.3d 579 (D.C. Cir. 2001) 24

Am. Trucking Assoc. v. City of Los Angeles, 559 F.3d 1046 (9th Cir. 2009) 5

Amoco Produc. Co. v. Village of Gambell, 480 U.S. 531 (1987) 22

Arete Power, Inc. v. Beacon Power Corp., No. C 07-5167 WDB, 2008 WL 508477, *9 (N.D. Cal. Feb. 22, 2008) 7

Asarco, Inc. v. EPA, 616 F.2d 1153 (9th Cir. 1980) 24

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Bear Lake Watch, Inc. v. FERC, 324 F.3d 1071 (9th Cir. 2003) 3

Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 9385 (9th Cir. 2008) 17

Best Western Int'l v. Mahroom, 2007 WL 1302749, *4 (D. Ariz. May 3, 2007) 5

California v. Block, 690 F.2d 753 (9th Cir. 1982) 4

Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995) 9, 11

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City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142 (9th Cir. 1997) 10, 11

City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004) 22

Costlow v. Weeks, 790 F.2d 1486 (9th Cir. 1986) 5

Dalton v. Specter, 511 U.S. 462 (1994) 11

Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834 (9th Cir. 1986) 6, 7

Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004) 19

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2 Gulf Oil Corp v. Gilbert, 330 U.S. 501 (1947) 7

3 Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 939 F. Supp. 1, 3 n.5 (D.D.C. 1996) . 8

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5 In re Surface Mining Regulation Litig., 627 F.2d 1346 (D.C. Cir. 1980) 10

6 Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975) 10, 11

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9 Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000) 7

10 Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952) 6

11 Kings County Economic Comm. Devel. Assoc. v. Hardin, 333 F. Supp. 1302 (N.D. Cal. 1971) 7

12 Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989 (9th Cir. 2004) 16

13 Lac Anh Le v. Pricewaterhousecoopers LLP, 2008 WL 618938 (N.D. Cal. Mar. 4, 2008) 5

14 Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) 24

15 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12

16 Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965) 10

17 Mayo Found. v. Surface Transp. Bd., 472 F.3d 545 (8th Cir. 2006) 20

18 Mazurek v. Armstrong, 520 U.S. 968 (1997) 4

19 Michigan v. Thomas, 805 F.2d 176 (6th Cir. 1986) 11

20 Mid-States Coal. for Progress v. Transp. Bd., 345 F.3d 520 (8th Cir. 2003) 20

21 Multimin USA, Inc. v. Walco Int'l, 2006 WL 1046964, *8-*9 (E.D. Cal. April 11, 2006) . . 5,8

22 Munaf v. Green, 128 S.Ct. 2207 (2008) 5

23 Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981) 18,19

24

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28

CASES PAGE

Pacific Car & Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968) 7

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 6, 7

Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990) 3

Ranchers Cattleman Action Legal Fund v. U.S. Dep't of Agric., 415 F.3d 1078 (9th Cir. 2005) 3

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 4

Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220 (9th Cir. 2008) 13

Sierra Club v. Flowers, 276 F. Supp. 2d 62 (D.D.C. 2003) 7,8

Sisseton-Wahpeton Oyate v. U.S. Dep't. of State, No. 3:08-cv-03023-CBK
(D.S. Dakota) 9

Stewart Org. v. Ricoh Corp., 487 U.S. 22 (1988) 6

Stryker's Bay Neighborhood Council v. Karlen, 444 U.S. 223 (1980) 4

Swanson v. Forest Service, 87 F.3d 339 (9th Cir. 1996) 4

Taylor v. Westly, 488 F.3d 1197 (9th Cir. 2007) 5

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United States v. Mitchell, 463 U.S. 206 (1983) 9

Van Dusen v. Barrack, 376 U.S. 612 (1964) 6

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Webster v. Doe, 486 U.S. 592 (1988) 12

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 4

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Winter v. Natural Resources Defense Council, Inc., 129 S.Ct. 365 (2008) 5, 23, 24

Youngstown Sheet and Tube Co. v. Sqwyer, 343 U.S. 579 (1952) 14, 15, 16

Zhang v. Slattery, 55 F.3d 732 (2d Cir. 1995) 9

STATUTES AND REGULATIONS PAGE

5 U.S.C. § 701(a)(2) 11
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5 U.S.C. §§ 702 9
28 U.S.C. § 1391(e) 6
28 U.S.C. § 1404(a) 6
29 U.S.C. § 1404(a) 5
33 U.S.C. § 535b 14
42 U.S.C. § 4321 1
42 U.S.C. 4332(C) 17
42 U.S.C. § 4332(2)(C) 4
47 U.S.C. § 35 14
40 C.F.R. §§ 1501.3 4
40 C.F.R. § 1508.7 . . . . 16, 17
40 C.F.R. 1508.25 16,17

FEDERAL REGISTER

33 Fed. Reg. 11741(Aug. 16, 1968) 14
66 Fed. Reg. 28357 (May 18, 2001) 14
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OTHER AUTHORITIES

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INTRODUCTION

Defendants United States Department of State, Secretary of State Hillary Clinton, Deputy Secretary of State James Steinberg ("State Department"), and the U.S. Army Corps of Engineers ("Corps") (collectively "Defendants") hereby oppose the Motion for Temporary Restraining Order ("Motion") (Docket No. 8) filed by Plaintiffs Sierra Club, Inc., Minnesota Center for Environmental Advocacy, National Wildlife Federation, and Indigenous Environmental Network ("Plaintiffs"). In their Motion, Plaintiffs argue that the State Department's issuance of a Presidential Permit to Enbridge Energy, Limited Partnership ("Enbridge"), allowing Enbridge to construct a pipeline at the Canadian border, violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. As a preliminary matter, because the pipeline at issue will be constructed through North Dakota, Minnesota, and Wisconsin and there are no ties to this forum, the Court should transfer the case to the U.S. District Court for the District of Minnesota or another appropriate forum without ruling on the Motion. Even if the Court addresses the merits of the Motion, it should deny it because Plaintiffs have not demonstrated a likelihood of success on the merits of their NEPA claim, any irreparable harm, or that the balance of the equities or the public interest favors injunctive relief.

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, Plf. Ex. 4 (Docket No. 8-8). 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. 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 Clean Water Act ("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.

1 The issuance of the Presidential Permit to Enbridge was the culmination of a more than two-
2 year process, which was initiated by the submission on May 15, 2007, of Enbridge's application for
3 a Presidential Permit for the Alberta Clipper Pipeline project. ROD at 5. Upon receipt of the
4 application, the State Department, conducted an environmental review of Enbridge's application,
5 which included the preparation of an environmental impact statement under NEPA. Id. at 3, 12-24.
6 During the NEPA process, the State Department conducted a series of public scoping meetings in
7 North Dakota, Minnesota, and Wisconsin, accepted and reviewed public comments on its draft
8 environmental impact statement ("DEIS"), consulted with the Corps, U.S. Fish and Wildlife Service,
9 U.S. Environmental Protection Agency, and other federal and state agencies. Id. at 23. During the
10 public comment period, the State Department received over 900 public comments on the DEIS. Id.
11 The State Department notified the public of the completion of the final environmental impact
12 statement ("EIS") on June 8, 2009, and received additional comments through July 3, 2009. Id.
13 The State Department's decision to issue a Presidential Permit, which was signed by the
14 Deputy Secretary of State, to Enbridge was based on a determination under Executive Order 13337
15 that the issuance of the permit would serve the national interest. ROD at 25-26. The Deputy
16 Secretary's decision was based on his findings that the construction of the Alberta Clipper Pipeline
17 would serve the national interest by increasing the diversity of oil supplies available to the United
18 States, shortening the transportation pathway for a portion of crude oil imports, increasing oil
19 supplies from a stable and reliable trading partner, and making up for the declining imports from
20 other suppliers. Id. at 25. The Deputy Secretary also stated that, "the United States and Canada,
21 through bilateral diplomacy and a Clean Energy Dialogue process that is now underway, are
22 working across our respective energy sectors to cooperate on best practices and technology,
23 including carbon sequestration and storage, so as to lower the overall environmental footprint of our
24 energy sectors." Id.
25 The Corps conducted a review of Enbridge's applications for permits under the CWA and
26 the Rivers and Harbors Act following the State Department's completion of the EIS. See Corps
27 Record of Decision ("Corps ROD"), Declaration of Luther L. Hajek Exhibit ("Def. Ex.") 1. The
28

1 Corps issued a public notice regarding Enbridge's permit application for the Alberta
2 Clipper/Southern Lights Diluent pipelines on December 16, 2008, and a public notice regarding an
3 application for the Superior Terminal Pump Station on June 5, 2009. The Corps' review of the
4 permit applications was based on the information and analysis in the EIS, additional information
5 submitted by Enbridge, and the Corps' analysis. Id. at 2. The Corps approved the issuance of the
6 permits on August 11, 2009. Id. at 32-33.

7 On June 29, 2009, the U.S. Forest Service separately issued a record of decision to Enbridge
8 authorizing the amendment of Enbridge's existing Special Use Authorization and a Temporary
9 Construction Special Use Permit. See Forest Service ROD, Plf. Ex. 9 (Docket No. 8-13). The
10 permits allow Enbridge to construct, operate, and maintain 34 additional miles of the Alberta Clipper
11 Pipeline and the Southern Lights Diluent Pipeline through the Chippewa National Forest in
12 Minnesota. See id. at 6-7, 13. On August 17, the Plaintiffs in this case filed an administrative
13 appeal of the U.S. Forest Service's decision to issue the permits. See Def. Ex. 2.

14 **LEGAL BACKGROUND**

15 **I. ADMINISTRATIVE PROCEDURE ACT**

16 Agency decisions are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C.
17 §§ 701-06. Under the APA's deferential standard of review, agency decisions may be set aside only
18 if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
19 Envt'l Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1008-09 (9th Cir. 2006) (quoting Native
20 Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1223, 1238 (9th Cir. 2005)); see also 5 U.S.C.
21 § 706(2)(A). "The relevant inquiry is whether the 'agency considered the relevant factors and
22 articulated a rational connection between the facts found and the choice made.'" Pyramid Lake
23 Paiute Tribe v. U.S. Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990) (citation omitted).
24 "Deference to the informed discretion of the responsible federal agencies is especially appropriate,
25 where, as here, the agency's decision involves a high level of technical expertise." Ranchers
26 Cattleman Action Legal Fund v. U.S. Dep't of Agric., 415 F.3d 1078,1093 (9th Cir. 2005); see also
27 Bear Lake Watch, Inc. v. FERC, 324 F.3d 1071, 1077 (9th Cir. 2003).
28

1 **II. NATIONAL ENVIRONMENTAL POLICY ACT**

2 NEPA serves the dual purpose of informing agency decision-makers of the significant
3 environmental effects of proposed major federal actions and insuring that relevant information is
4 made available to the public so that they "may also play a role in both the decisionmaking process
5 and the implementation of that decision." See Robertson v. Methow Valley Citizens Council, 490
6 U.S. 332, 349 (1989). To meet these dual purposes, NEPA requires that an agency prepare a
7 comprehensive environmental impact statement for "major Federal actions significantly affecting
8 the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.3. In reviewing
9 the sufficiency of an environmental impacts statement, a court should evaluate whether the agency
10 has presented a "reasonably thorough discussion of the significant aspects of the probable
11 environmental consequences." California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). "'The
12 reviewing court may not 'fly speck' an [environmental impact statement] and hold it insufficient on
13 the basis of inconsequential, technical deficiencies.'" Ass'n of Pub. Agency Customers, Inc. v.
14 Bonneville Power Admin., 126 F.3d 1158, 1184 (9th Cir. 1997) (internal citations omitted); see also
15 Swanson v. Forest Serv., 87 F.3d 339, 343 (9th Cir. 1996). In addition, a reviewing court may not
16 force an agency to elevate environmental concerns over other appropriate considerations. Stryker's
17 Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980). "Other statutes may impose
18 substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed
19 – rather than unwise – agency action." Methow Valley, 490 U.S. at 351.

20 **III. STANDARD FOR OBTAINING PRELIMINARY INJUNCTIVE RELIEF**

21 A temporary restraining order or preliminary injunction is "an extraordinary and drastic
22 remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden
23 of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original); see also
24 Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). The traditional equitable criteria for
25 granting preliminary injunctive relief are:

26 > (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships
27 > favoring the plaintiff, and (4) advancement of the public interest (in certain cases). The alternative test requires that a plaintiff demonstrate either a combination of

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1 probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.

2 Taylor v. Westly, 488 F.3d 1197, 1200 (9th Cir. 2007). A party *must* demonstrate a "likelihood of
3 success on the merits in order to obtain a preliminary injunction. Munaf v. Green, 128 S.Ct. 2207,
4 2219 (2008). Furthermore, a party seeking preliminary injunctive relief must "demonstrate that
5 irreparable injury is *likely* in the absence of an injunction." Winter v. Natural Res. Defense Council,
6 Inc., 129 S.Ct. 365, 375 (2008) (emphasis in original) (rejecting the Ninth Circuit's "possibility" of
7 irreparable harm standard); see also Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046,
8 1052 (9th Cir. 2009) ("To the extent that our cases have suggested a lesser standard, they are no
9 longer controlling, or even viable").

10 **ARGUMENT**

11 **I. THE COURT SHOULD DENY PLAINTIFFS' MOTION WITHOUT PREJUDICE**
12 **AND TRANSFER THE CASE TO A MORE APPROPRIATE VENUE**

13 The Court should transfer the case because, aside from the residence of one the Plaintiffs,
14 there is no basis for venue to lie in this forum. Under 28 U.S.C. § 1404(a), the Court has the
15 authority to transfer the case to a more appropriate forum either upon motions of the parties or *sua*
16 *sponte*. See Costlow v. Weeks, 790 F.2d 1486, 1488 (9th Cir. 1986) (court may transfer a case on
17 its own motion as long as the parties are given the opportunity to express their views on the issue);
18 see also Lac Anh Le v. Pricewaterhousecoopers LLP, 2008 WL 618938, *2 (N.D. Cal. Mar. 4,
19 2008). In the interest of judicial economy and in the interest of having cases decided in the locations
20 that will be most affected by any court decision, Defendants request that the Court immediately
21 transfer the case before proceeding to the merits of Plaintiffs' Motion. In similar situations, Courts
22 have deferred ruling on a motion for a temporary restraining order pending resolution of the venue
23 issue. See Best Western Int'l v. Mahroom, No. CV 07-827-PHX-JAT, 2007 WL 1302749, *4 (D.
24 Ariz. May 3, 2007) (denying motion for a temporary restraining order without prejudice and
25 ordering that the motion be re-filed in another court); Multimin USA, Inc. v. Walco Internation, Inc.,
26 No. CV F 06-226 AWI SMS, 2006 WL 1046964, *8-*9 (E.D. Cal. April 11, 2006) (declining to
27 enter a temporary restraining order and transferring the case to another court). As explained below,
28

1 the location most directly affected by the acts giving rise to Plaintiffs' lawsuit is Minnesota.
2 Therefore, the Court should deny Plaintiffs' Motion without prejudice and transfer the case to a
3 more appropriate forum.

4 Transfer is governed by 28 U.S.C. § 1404(a), which states that "[f]or the convenience of the
5 parties and witnesses, in the interest of justice, a district court may transfer any civil action to any
6 other district or division where it might have been brought." The decision whether to transfer under
7 § 1404(a) is committed to the sound discretion of the district court and should be exercised in light
8 of all the circumstances of a case. Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834,
9 843 (9th Cir. 1986); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981); Kerotest Mfg. Co. v.
10 C-O-Two Fire Equip. Co., 342 U.S. 180, 184-85 (1952). The only limitation on the Court's
11 discretion to grant a transfer motion is the statutory requirement that a case be transferred to another
12 "district or division where the [the case] might have been brought" in the first instance. See Van
13 Dusen v. Barrack, 376 U.S. 612, 613 (1964). In cases where the federal government is a defendant,
14 a case may be brought in a judicial district where: "(1) a defendant in the action resides, (2) a
15 substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of
16 property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is
17 involved in the action." 28 U.S.C. § 1391(e). If the statutory requirement is satisfied, courts balance
18 considerations of both convenience and the interest of justice in determining whether to transfer the
19 case to another district. See Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29 (1988).

20 In the Ninth Circuit, the "convenience" factor typically requires that a court consider a
21 number of private interests, including: (1) the relative ease of access to sources of proof; (2) the cost
22 of obtaining witnesses; (3) the availability of compulsory process for attendance of unwilling non-
23 party witnesses; and (4) the possibility of a view of the premises, if a view would be appropriate to
24 the action. See Decker, 805 F.2d at 843. The "interest of justice" factor requires the consideration
25 of several *public* interests, including (1) the administrative difficulties flowing from court
26 congestion; (2) the local interest in having localized controversies decided at home; (3) the interest
27 in having a case heard in the state that is most familiar with the governing law; (4) the relevant
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1 public policy of the forum state; (5) the desire to avoid multiple litigation from a single transaction
2 and to promote consistency among court rulings that affect the development of the case; and (6) the
3 relative intensity in the two jurisdictions of any local interests that the litigation might implicate.
4 See id.; Jones v. GNC Franchising, Inc., 211 F.3d 495, 499 n.21 (9th Cir. 2000); Arete Power, Inc.
5 v. Beacon Power Corp., No. C 07-5167 WDB, 2008 WL 508477, *9 (N.D. Cal. Feb. 22, 2008).
6 In this case, the convenience and interest of justice factors all weigh in favor of a transfer to
7 Minnesota or another more appropriate forum. The border crossing facility authorized by the State
8 Department is in North Dakota and the pipeline will be constructed in North Dakota, Minnesota, and
9 Wisconsin. See Plf. Ex. 1; ROD at 5, Plf. Ex. 4. None of the proposed pipeline facilities will be
10 constructed anywhere near California. The decisions to issue the permits were made by the Corps
11 in Minnesota and by the State Department in the District of Columbia. In addition, the Forest
12 Service's issuance of a right of way through the Chippewa National Forest, which Plaintiffs have
13 challenged administratively and may challenge in court after the appeal is resolved, was made in
14 Minnesota and affects forest land in Minnesota. Moreover, all of Plaintiffs' standing declarants
15 reside in Minnesota or Wisconsin and allege injuries from the construction and operation of the
16 pipeline in those states. See Plf. Exs. 17-23. Thus, although one of the four Plaintiffs, the Sierra
17 Club, has its headquarters in San Francisco, the individuals with a personal interest in the case reside
18 elsewhere. See Kings County Economic Comm. Devel. Assoc. v. Hardin, 333 F. Supp. 1302, 1304
19 (N.D. Cal. 1971) ("[T]he general rule [is] that venue is confined to districts with some minimum
20 contact with the real parties in interest or the subject matter of the action."). Moreover, because the
21 actions giving rise to Plaintiffs' claims occurred outside of this district, Plaintiffs' choice of forum
22 is not entitled to deference. See Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 954 (9th Cir.
23 1968) ("If the operative facts have not occurred within the forum of original selection and that forum
24 has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only
25 to minimal consideration."); see also Florens Container v. Cho Yang Shipping, 245 F. Supp. 2d
26 1086, 1092 (N.D. Cal. 2002).
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28

1 The interest of justice is promoted when a localized controversy, such as this, is decided in
2 the region that it impacts. See Piper, 454 U.S. at 241 n.6; Decker, 805 F.2d at 843. "In cases which
3 touch the affairs of many persons, there is reason for holding the trial in their view and reach rather
4 than in remote parts of the country where they can learn of it by report only." Gulf Oil Corp. v.
5 Gilbert, 330 U.S. at 501, 509 (1947); see also Sierra Club v. Flowers, 276 F. Supp. 2d 62, 70
6 (D.D.C. 2003) (explaining that rationale articulated in Gulf Oil applies in cases involving federal
7 decisions that impact the local environment); Hawksbill Sea Turtle v. Fed. Emergency Mgmt.
8 Agency, 939 F. Supp. 1, 3 n.5 (D.D.C. 1996) ("The Court . . . notes the importance of allowing local
9 citizens to attend and observe the proceedings of this case. That would obviously be impossible (or
10 at least prohibitively expensive) if a trial were held in the District of Columbia."). This Court is a
11 much less convenient forum for those with the most compelling interest in viewing these
12 proceedings.
13 Under the circumstances, therefore, a transfer of venue would serve the interest of justice and
14 should be granted. See, e.g., Tropos Networks, Inc. v. IPCO, LLC, No. C 05-04281 JSW, 2006 WL
15 1883316, at *4 (N.D. Cal. July 7, 2006) (granting transfer where challenged conduct occurred
16 primarily in transferee district, and party opposing transfer failed to identify members in the
17 transferor district that were subjected to the allegedly illegal act); Jarvis v. Marietta Corp., No. C
18 98-4951 MJJ, 1999 WL 638231, at *7 (N.D. Cal. Aug. 12, 1999) (granting transfer where the actions
19 underlying the claim had occurred predominantly in New York and involved a New York
20 corporation and, accordingly, New York had "a greater local interest in the controversy at issue than
21 d[id] California"); Edwards v. Mallory, No. C-96-2049SI1996 WL 681973, *3 (N.D. Cal. Nov. 18,
22 1996) (Illston, J.) (transferring case where real property at issue and actions challenged occurred
23 outside the district).
24 Accordingly, Defendants request that Plaintiffs' Motion be denied without prejudice and that
25 the case be transferred to the U.S. District Court for the District of Minnesota or, in the alternative,
26 North Dakota, Wisconsin, or the District of Columbia. Plaintiffs would suffer no prejudice because
27 they could immediately seek to reinstate their motion in the district court in Minnesota. See
28

1 Multimin USA, 2006 WL 1046964, at *1 (finding that a plaintiff seeking a temporary restraining
2 order would not be prejudiced by a short delay to resolve the issue of venue). In addition, because
3 Plaintiffs Minnesota Center for Environmental Advocacy and Indigenous Environmental Network
4 are based in Minnesota, it will be just as convenient for Plaintiffs to have the case heard in
5 Minnesota. See Complaint ¶¶ 15.a., 16.a.

6 **II. PLAINTIFFS CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS**

7 As explained below, the Plaintiffs are unlikely to succeed on the merits of their claims, they
8 have not demonstrated irreparable harm, and the balance of the equities and the public interest favor
9 denying preliminary injunctive relief.

10 **A. The Court Lacks Jurisdiction Over the Challenge to the Presidential Permit**

11 The Court should deny Plaintiffs' request for preliminary injunctive relief because the Court
12 lacks jurisdiction over the challenge to the Presidential Permit issued by the State Department. The
13 State Department has raised similar arguments in recent litigation involving a different Presidential
14 Permit and those arguments are summarized below.[1] Following the resolution of Plaintiffs' Motion,
15 Defendants intends to file a motion to dismiss on jurisdictional grounds.

16 **1. The Presidential Permit Was Issued Pursuant to an Executive Order**
17 **Based Upon the President's Authority over Foreign Affairs and Therefore Is Not Subject to Judicial Review Under the APA**

18 Plaintiffs' claims are brought pursuant to the APA, which provides the requisite waiver of
19 sovereign immunity and right of action. See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d
20 1005, 1008-09 (9th Cir. 2006); Complaint ¶¶ 10-11; see also United States v. Mitchell, 463 U.S.
21 206, 212 (1983) ("[T]he United States may not be sued without its consent and . . . the existence of
22 consent is a prerequisite for jurisdiction."). The waiver of sovereign immunity and right of action
23 authorized in the APA are limited and subject to the requirements of the APA. See 5 U.S.C. §§ 702,
24 704. As shown below, the issuance of the Presidential Permit is not subject to judicial review under
25

26 [1] The State Department has moved to dismiss those challenges on jurisdictional grounds. See
27 Natural Resources Defense Council, Inc. v. U.S. Dep't of State, No. 1:08-cv-01363-RJL (D.D.C.) (Docket No. 26); Sisseton-Wahpeton Oyate v. U.S. Dep't of State, No. 3:08-cv-03023-
28 CBK (D. S. Dakota) (Docket No. 26). Those motions remain pending.

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, such as the one at issue here, 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).

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 to Enbridge, the Deputy Secretary acted pursuant to the President's inherent constitutional authority, not statutory authority. 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." 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 Under Secretary of State's issuance of the permit. Therefore, there is no basis for judicial 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). For the same reason, APA review is precluded under 5 U.S.C. § 701(a)(2), as discussed in Section II.A.2, infra.

Third, Executive Order 13337, by its own terms forecloses the possibility of private lawsuits to challenge the issuance of Presidential Permits. See Exec. Order 13337 § 6 ("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 any party against the United States . . . ."). 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.").

Accordingly, because all three criteria weigh against a finding of judicial reviewability, the Presidential Permit is not subject to judicial review.

2. Judicial Review Is Also Barred By Well-Recognized Exceptions to APA Review

Judicial review is also barred by the well-recognized exceptions to APA review for Presidential actions and actions that are reserved to agency discretion by law. First, 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). Here, the President delegated the task of issuing Presidential Permits to the Secretary of State, a cabinet level official, who in turn delegated it to the Deputy Secretary. See 74 Fed. Reg. 8835 (Feb. 26, 2009). That delegation, however, does not change the fact that the issuance of the Presidential Permit is a constitutional power of the President that does not rely on an act of Congress. 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.").

Second, even if this Court were to find that the State Department's action was agency action, not Presidential action, the APA would not provide for review because the Deputy Secretary's issuance of a Presidential Permit is an "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Executive Order 13337 imposes "no judicially manageable standards" by which the Court could conduct meaningful judicial review. Heckler v. Chaney, 470 U.S. 821, 830 (1985). Here, the only standard applicable to the issuance of the Presidential Permit was the requirement in Executive Order 13337 that the Secretary, after conferring with the heads of other federal agencies, determine whether doing so "would serve the national interest" or "would not serve the national interest." Exec. Order 13337 § 1(g)-(h). This determination leaves no meaningful basis for judicial review. See 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").

3. Plaintiffs Lack Standing to Challenge the Presidential Permit Because They Cannot Demonstrate Redressability

In order to have standing, Plaintiffs bear the burden of demonstrating that their alleged injury

will "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision" of the Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quotations omitted). Plaintiffs cannot establish redressability because the redress of their alleged injuries 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). Even if this Court were to vacate the Presidential Permit issued by the State Department and order the agency to conduct additional analyses under NEPA, it is entirely conjectural whether the Plaintiffs' injuries would be redressed because the President could simply authorize the border crossing under his inherent Constitutional authority rather than delegating that task to the State Department. Therefore, the Plaintiffs cannot demonstrate redressability and the case should be dismissed for lack of standing. See 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, the Court lacks jurisdiction over Plaintiffs' claims challenging the Presidential Permit, and therefore Plaintiffs are unlikely to succeed on the merits of those claims.

4. Plaintiffs' Arguments That the Issuance of the Presidential Permit Was Unconstitutional Are Without Merit

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 pipeline crosses an international border. The border crossing implicates foreign affairs and national security concerns and, as explained below, throughout our country's

1 history, Presidents have exercised the authority to grant or deny such border crossings. While
2 Defendants do not dispute that Congress has and could enact legislation relating to international oil
3 pipelines under its foreign commerce powers, no such laws are implicated in this case.
4 The authority to issue a permit for a border-crossing facility, such as the permit at issue in
5 this case, derives solely from the President's constitutional authority over foreign affairs and his
6 authority as Commander in Chief. For over a century, Presidents have exercised that inherent
7 authority without action by Congress. See A. Hackworth, Digest of International Law, Vol. IV,
8 § 350, pp. 247-66 (1942); John Bassett Moore, A Digest of International Law, Vol. II, § 227, pp.
9 452-66 (1906), Def. Exs. 3 & 4; see also, e.g., 38 U.S. Op. Atty. Gen. 163 (1935) (gas pipeline); 30
10 U.S. Op. Atty. Gen. 217 (1913) (electrical power); 24 U.S. Op. Atty. Gen. 100 (1902) (wireless
11 telegraphy); 22 U.S. Op. Atty. Gen. 514 (1899) (submarine cables); 22 U.S. Op. Atty. Gen. 408
12 (1899) (same); 22 U.S. Op. Atty. Gen. 13 (1898) (same).
13 In 1968, President Johnson delegated to the Secretary of State the authority to grant or deny
14 permits for certain types of border crossing facilities, including oil pipelines. See Exec. Order 11423
15 § 1(a), 33 Fed. Reg. 11741 (Aug. 16, 1968). In 2001, President Bush issued Executive Order 13212,
16 stating that it was the Administration's policy, "to the extent consistent with applicable law, to
17 expedite projects that will increase the production, transmission or conservation of energy." Exec.
18 Order 13212, 66 Fed. Reg. 28357 (May 18, 2001). And, in 2004, in furtherance of this policy,
19 President Bush issued Executive Order 13337, the executive order at issue in this case, which puts
20 the approval of border facilities for the importation or exportation of petroleum products or other
21 fuels on a different administrative track from the approval process for other border facilities. See
22 Exec. Order 13337.
23 Plaintiffs argue that because Congress has acted in certain instances to regulate foreign
24 commerce, congressional action is required here. Motion at 17-18. In fact, in the few instances that
25 Congress has enacted laws relating to border crossings, Congress has affirmed the President's
26 authority to approve border crossings. See Submarine Cable Landing Licensing Act of 1921, 47
27 U.S.C. § 35 (recognizing the President's authority to grant or revoke licenses for the landing of
28

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. Sqwyer, 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 150 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 border.

B. Plaintiffs Have No Likelihood Of Success On Their NEPA Claim

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.[2] Motion at 6-15. As explained below, none of these arguments has merit.

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

[2] Although Plaintiffs' Complaint also challenges the Corps' issuance of CWA and Rivers and Harbors Act permits to Enbridge, see, e.g., Complaint ¶ 80, Plaintiffs do not argue in their Motion that they are likely to succeed in arguing that the Corps' issuance of those permits violates NEPA. See Motion at 6-15.

1 Plaintiffs argue that, in considering the potential environmental effects of the Alberta Clipper
2 Pipeline project, that the State Department did not adequately consider the effects of two additional
3 pipelines that have recently been constructed or will be constructed along the same pipeline route:
4 the Southern Lights Diluent Pipeline ("Diluent Pipeline") and the Southern Lights LSr Pipeline
5 ("LSr Pipeline"). Motion at 6-10. Plaintiffs' assertion that the State Department was required to
6 consider these two other pipelines as connected or cumulative actions under the Council on
7 Environmental Quality's ("QEQ") NEPA regulations is incorrect. More importantly, the State
8 Department did consider the cumulative effects of these project in its analysis, and therefore
9 Plaintiffs' assertions that the effects of those pipelines were not considered is without basis.

10 **a. The Diluent Pipeline and LSr Pipeline Are Not Connected or Cumulative Actions**
11
12 As explained in the EIS, Enbridge's Southern Lights Project consists of three components:
13 (1) the Diluent Pipeline, (2) the Reversal Pipeline, and (3) the LSr Pipeline. EIS at 1-26 - 1-29, Plf.
14 Ex. 3.[3] The Diluent Pipeline involves the construction of an approximately 669-mile pipeline from
15 Manhattan, Illinois to Clearbrook, Minnesota. Id. at 1-28. Two stages of the pipeline have already
16 been constructed and only the third stage stretching from Superior, Wisconsin to Clearbrook,
17 Minnesota (approximately 183 miles) remains to be constructed. Id.; see also Plf. Ex. 1. The
18 Reversal Pipeline is an existing Enbridge Pipeline (Line 13) stretching across the international
19 border from Clearbrook, Minnesotat to Hardisty, Alberta. Id. at 1-29. And, the LSr Pipeline is a
20 pipeline stretching from Cromer, Manitoba to Clearbrook, Minnesota that has been permitted and
21 fully constructed and has been in operation since April 2009. Id.
22 Relying on 40 C.F.R. § 1508.25(a), Plaintiffs argue that the State Department was required
23 to expand the scope of the EIS to include the Diluent Pipeline and the LSr Pipeline as "connected
24 actions" or "cumulative actions." See Motion at 6-7. Plaintiffs' arguments confuse connected and
25 cumulative actions under 40 C.F.R. § 1508.25 with cumulative impacts under 40 C.F.R. § 1508.7.
26 The former relates to the scope of an EIS and is specifically directed towards other actions that an

27 [3] The entirety of the EIS is available at: http://albertaclipper.state.gov/clientsite/clipper.nsf?Open
28 and can be accessed by clicking on the link for "Project Documents."

1 *agency* is considering or may take in the future. See Klamath-Siskiyou Wildlands Ctr. v. BLM, 387
2 F.3d 989, 999 (9th Cir. 2004) ("Under § 1508.25, two or more *agency actions* must be discussed in
3 the same impact statement where they are 'connected' or 'cumulative' actions.") (emphasis added).
4 In contrast, the requirement that an agency consider the cumulative effects of its proposed action is
5 broader and requires consideration of the effects of "past, present, and reasonably foreseeable future
6 actions regardless of what agency (federal or non-federal) *or person* undertakes such other actions."
7 40 C.F.R. 1508.7 (emphasis added).

8 Applying these principles, it is clear that the State Department was correct in finding that it
9 need not expand the scope of the EIS under 40 C.F.R. 1508.25 to include the Diluent and LSr
10 Pipelines. As explained in the EIS, the Diluent Pipeline does not cross an international border and
11 therefore did not require the issuance of a Presidential Permit by the State Department. EIS at 1-17,
12 Plf. Ex. 3. Because the Diluent Pipeline requires no action from the State Department, there is no
13 connected or cumulative agency action with respect to that pipeline. Similarly, Reversal Pipeline
14 is subject to an existing Presidential Permit and therefore no action by the State Department was
15 required. EIS at 1-29, Plf. Ex. 3. With respect to the LSr Pipeline, the State Department analyzed
16 that pipeline in an earlier NEPA process, concluded that it had independent utility, issued a
17 Presidential Permit, and the pipeline has been constructed and is operational. EIS at 1-17, 1-29.
18 Because NEPA applies to proposed future projects, there is no agency action left to be considered
19 as a connected or cumulative action in the NEPA process for the Alberta Clipper Pipeline. See 42
20 U.S.C. 4332(C) (NEPA requires an analysis of the environmental impacts of "*proposals* for
21 legislation or and other major Federal actions significantly affecting the quality of the human
22 environment.") (emphasis added).

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

24
25 As indicated above, NEPA requires the consideration of the potential cumulative effects of
26 the proposed action when considered along with the effects of past, present, and reasonably
27 foreseeable future actions. 40 C.F.R. § 1508.7; see also Bering Strait Citizens for Responsible Res.
28 Dev. v. U.S. Army Corps of Eng'rs, 524 F.3d 938, 955 (9th Cir. 2008). 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.").

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. 5. 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' fears 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 and Cumulative Effects

Plaintiffs argue that the EIS does not adequately analyze the indirect and cumulative effects of producing, refining, and consuming oil transported through the Alberta Clipper Pipeline. Motion at 10-13. These arguments are without merit.

a. Indirect Impacts

First, Plaintiffs argue that the State Department did not adequately consider the "impacts in

1 the United States" caused by the development and production of oil from tar sands in Canada.
2 Motion at 10. Contrary to Plaintiffs' assertions, the State Department has adequately considered the
3 effects in the United States of tar sands development, including the impacts of greenhouse gas
4 emissions, as it was required to do under NEPA. See generally EIS; EIS at 4-379 - 4-403, Def.
5 Ex. 5. Plaintiffs' bald assertions that the EIS is inadequate are unavailing.
6 Second, Plaintiffs argue that the State Department did not adequately analyze the effects of
7 refining oil transported through the pipeline in the United States. Motion at 10. The State
8 Department does not concede that it was required to analyze refining impacts because it has no
9 authority over refineries and refineries may continue to refine oil, including heavy crude oil,
10 regardless of whether the Alberta Clipper Pipeline is constructed. See Dep't of Transp. v. Public
11 Citizen, 541 U.S. 752, 770 (2004) ("[W]here an agency has no ability to prevent a certain effect due
12 to its limited statutory authority over the relevant actions, the agency cannot be considered a legally
13 relevant 'cause' of the effect."). Nevertheless, the State Department did conduct a thorough review
14 of the potential refining impacts in the EIS, including a discussion of the refineries that would
15 receive oil from the Alberta Clipper Pipeline, potential upgrades to the refineries to process heavy
16 crude oil from Canadian tar sands, and new refineries that are being constructed to process heavy
17 crude. See EIS 4-390 - 4-400, Def. Ex. 5. Plaintiffs' assertion that this analysis is insufficient under
18 NEPA is without basis.
19 Third, Plaintiffs argue that the State Department did not adequately consider the effects of
20 consumers using liquid petroleum-based fuels produced from oil transported through the pipeline.
21 As explained in the EIS, the crude oil transported through the Alberta Clipper pipeline will replace
22 crude oil from other sources in the refining process, and will have no effect on consumer demand
23 for refined petroleum products. EIS at 4-400, Def. Ex. 5. Plaintiffs have offered no explanation for
24 how or why changing the source of crude oil supplied to refineries could itself lead to an increase
25 in demand of the liquid petroleum-based fuels produced at the refineries. Moreover, as the State
26 Department explained in the EIS, refined products developed from tar sands oil will be the same as
27 those developed from conventional oils, and therefore climate change and air quality impacts from
28

use of those refined products are likely to be the same regardless of the source of the oil. EIS at 4-400, Def. Ex.5.[4]

b. Cumulative Impacts

Plaintiffs' arguments regarding alleged deficiencies in the State Department's analysis of cumulative effects are baseless. 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. As discussed above, the argument that the EIS does not consider the cumulative impacts of other pipelines, including the Diluent and LSr Pipelines is incorrect. See Section II.B.I.B., supra; EIS at 4-380 - 4-388, Def. Ex. 5.

Similarly, Plaintiffs' argument that the EIS does not adequately consider greenhouse gas emissions simply ignores the anlaysis 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. 5. 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 form 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

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[4] Plaintiffs cite Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520 (8th Cir. 2003). After remand, the Eighth Circuit upheld a regional analysis of emissions from coal-fired power plants, 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 emissions was inadequate).

1 Contrary to Plaintiffs' assertions, see Motion at 13, the EIS contains a sufficent analysis of
2 the potential impacts of leaks and spills and the mitigation measures in place should such an event
3 occur. See EIS at 2-47, Plf. Ex. 3. Enbridge's emergency response plan has been approved by the
4 Pipeline and Hazardous Materials Safety Administration and complies with the applicable
5 requirements of the Occupational Safety and Health Administration. Id.; see also EIS, Appendices
6 E, J, and Q, available at http://albertaclipper.state.gov/clientsite/clipper.nsf?Open.

7 Plaintiffs provide no support for their assertion that the EIS is inadequate for failing to
8 analyze the abandonment of the pipeline, which will likely not occur for 50 years. See Motion at
9 13. As explained in the EIS, plans will be submitted and reviewed by the appropriate agencies prior
10 to the abandonment of the pipeline and related facilities. EIS at 2-51. NEPA only requires that
11 mitigation measures be developed "to a reasonable degree" when a proposal is considered.
12 Wetlands Action Network v. U.S. Army Corp of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000).
13 Accordingly, it was reasonable for the State Department to complete its NEPA analysis without a
14 completed abandonment plan.

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

17 Agencies are afforded considerable discretion in defining the purpose and need of the
18 proposed action. Westlands Water Dist. v. U.S. Dep't of the Interior, 376 F.3d 853, 866 (9th Cir.
19 2004). The State Department's stated purpose and need is as follows: "The overall purpose of the
20 Alberta Clipper Project is to transport additional crude oil into the United States and eastern Canada
21 from existing Enbridge facilities in western Canada to meet the demands of refineries and markets
22 in those areas." EIS at 1-2, Plf. Ex. 3. A purpose and need statement which is formulated to "meet
23 market demand" is valid under NEPA. See Friends of Southeast's Future v. Morrison, 153 F.3d
24 1059, 1067 (9th Cir. 1998). Accordingly, Plaintiffs' assertion that the purpose and need statement
25 was too narrow is without merit. Motion at 13-14.

26 Plaintiffs also argue that the purpose and need statement is based on an incorrect assumption
27 that demand for oil from Canada is increasing. Id. Plaintiffs' cherry-picking of data from the 2009
28 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 cannot dispute what is stated in the EIS, which is 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. Accordingly, the State Department appropriately excluded this alternative from further consideration. See City of Sausalito v. O'Neill, 386 F.3d 1186, 1207 (9th Cir. 2004) (An EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones.") (quoting City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997)).

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. 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.

In conclusion, Plaintiffs have failed to demonstrate a likelihood of success on their arguments that the Presidential Permit was not constitutional or that the State Department failed to

comply with NEPA. Accordingly, the Court should deny Plaintiffs' request for preliminary injunctive relief.

III. 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. Plaintiff have not demonstrated any such irreparable injury warranting preliminary injunctive relief.

Notably, Plaintiffs' arguments regarding their likelihood of success on the merits – *e.g.*, the arguments that the EIS failed to adequately consider impacts on air quality and climate change – have little to do with their alleged irreparable harm. Rather, their claimed irreparable harm is based on the proposed construction of the pipeline, primarily in Minnesota, and the potential harms to soils, surface water, wetlands, and other resources. See Motion at 19. Once again this underscores the impropriety of Plaintiffs seeking preliminary injunctive relief in this Court, and Defendants request that the Court immediately order Plaintiffs to submit their arguments regarding venue and, after considering those arguments, order that the case be transferred to Minnesota.

Furthermore, the alleged irreparable injuries to wetlands are addressed by the Corps in the permits that it issued to Enbridge. See Corps ROD, Def. Ex. 1. 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." Id. at 3; see also EIS at 4-380 - 4-381, Def. Ex. 5; Plf. Ex. 1 (showing the pipeline routes). The Corps concluded that the "cumulative impacts from the current and reasonably foreseeable actions would be relatively minor" and approved the permits. Corps ROD at 29, 33. Plaintiffs offer no argument as to why the

1 permits issued by the Corps were unlawful under NEPA or the CWA. And, even if they had, the
2 Corps' determinations in its area of expertise are entitled to substantial deference. See Lands
3 Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (stating that a court should defer to an
4 agency's determination in areas involving a "high level of technical expertise"); Nat'l Wildlife
5 Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1177-78 (9th Cir. 2004).

6 The extra-record declarations submitted by Plaintiffs purportedly analyzing the potential
7 effects of the construction of the pipeline are entitled to no weight and may not be relied upon by
8 the Court in evaluating the "correctness or wisdom" of an agency's decision. Asarco, Inc. v. EPA,
9 616 F.2d 1153, 1160 (9th Cir. 1980); Am. Bioscience v. Thompson, 243 F.3d 579, 582-83 (D.C. Cir.
10 2001). Furthermore, the declarations should not be considered because they were prepared
11 exclusively for litigation and were not submitted to the agency during the administrative process.
12 See Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978). Furthermore, the
13 alleged injuries of Plaintiffs' standing declarants, such as interference with the use and enjoyment
14 of the Chippewa National Forest, air pollution from refineries, prevention of school science projects,
15 and diminution of hunting opportunities, do not constitute irreparable injury. See Motion at 20.

16 **IV. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PRELIMINARY INJUNCTIVE RELIEF**

17

18 A balancing of the equities and the public interest weigh in favor of denying Plaintiffs'
19 request for preliminary injunctive relief. The public interest prong is a significant factor which the
20 Court must weigh in determining whether injunctive relief is appropriate. See Winter, 129 S.Ct. at
21 376-77 ("In exercising their sound discretion, courts of equity should pay particular regard for the
22 public consequences in employing the extraordinary remedy of injunction.") (quoting Weinberger,
23 456 U.S. at 312). The Presidential Permit at issue in this case was issued based on a finding by the
24 State Department that it "would serve the national interest." See ROD at 27, Plf. Ex. 4; see also
25 Exec. Order 13337 ¶ 1(g). The Deputy Secretary concluded that the "national interest" would be
26 served by the issuance of the permit to Enbridge because the pipeline would increase the nations oil
27 supplies from a stable and reliable trading partner and would do so using the best available
28 environmental control technologies and policies. ROD at 25-26. Plaintiffs cannot rebut the policy

1 decisions of the Executive Branch as to what actions are in the "national interest."

2 **V. PLAINTIFFS' REQUESTED RELIEF IS INAPPROPRIATE**

3 Finally, even if this Court were to issue a temporary restraining order, the relief requested
4 by Plaintiffs is improper because it asks the Court to take actions that could not have been taken by
5 the State Department. Plaintiffs request that the Court enjoin "any activity in furtherance of the
6 construction or operation of the Alberta Clipper and Southern Lights project." See Proposed
7 Temporary Restraining Order (Docket No. 8-2). The only authority that the State Department has
8 with respect to the Alberta Clipper Pipeline is the issuance of a Presidential Permit for border
9 crossing facilities. The State Department has no authority over other aspects of the pipeline,
10 including the permits issued by the Corps and the special use amendment and authorization issued
11 by the Forest Service, which Plaintiffs have appealed administratively. Accordingly, Enbridge
12 should not be enjoined from *any* activity related to the pipeline, even activity that is not before the
13 Court, where the State Department could not have prevented such activity in the first instance. See
14 North Carolina v. City of Virginia Beach, 951 F.2d 596, 604 (4th Cir. 1991) ("NEPA review in this
15 case should have a preclusive effect only on that portion" of the project under the regulatory control
16 of the agency).

17 Should a hearing be held in the next few days, lead counsel for Defendants, Luther L. Hajek,
18 requests permission to appear by telephone.

19 **CONCLUSION**

20 For the foregoing reasons, Defendants request that the Court deny Plaintiffs' Motion for a
21 Temporary Restraining Order and transfer the case to the U.S. District Court for the District of
22 Minnesota or another more appropriate forum.

23 Respectfully submitted this 8th day of September, 2009.

24 JOHN C. CRUDEN
Acting Assistant Attorney General
25 Environment & Natural Resources Division

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/s/ Luther L. Hajek
27 LUTHER L. HAJEK, D.C. Bar No. 467742
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1 **CERTIFICATE OF SERVICE**

2 I, Luther L. Hajek, hereby certify that on September 8, 2009, I electronically filed the
3 foregoing DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY
4 RESTRAINING ORDER and DECLARATION OF LUTHER L. HAJEK and EXHIBITS thereto
5 with the Clerk of Court using the CM/ECF system, which will automatically send email notification
6 to all attorneys of record whose e-mail addresses are listed below:

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12

13 */s/ Luther L. Hajek*
Luther L. Hajek

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