

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

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 submit this surreply in opposition to 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”) and Plaintiffs’ Reply in Support of its Motion (“Reply”) (Docket No. 130).<sup>1/</sup> In this surreply, Defendants address only the arguments in Plaintiffs’ Reply directed against the Corps and the Forest Service. See Reply at 13-21. The Corps and the Forest Service were cooperating agencies with respect to the Environmental Impact Statement (“EIS”) prepared by the State Department for the Alberta Clipper Project. They fulfilled their obligations as cooperating agencies and appropriately relied on the EIS in their decision making processes. Plaintiffs are incorrect, however, that these agencies’ evaluation of the potential environmental impacts of their actions ended with the preparation of the EIS. The Corps and the Forest Service each took an independent look at the potential environmental effects of their own actions. These agencies’ actions differed in at least one important respect from the State Department’s action: their actions encompassed not just the Alberta Clipper Pipeline but also the Southern Lights Diluent Pipeline (“Diluent Pipeline”). The Corps and the Forest Service analyzed the potential effects of the Diluent Pipeline and discussed those potential effects in separate analyses that they each prepared. Therefore, Plaintiffs’ assertions that the potential environmental effects of the Diluent Pipeline were not considered are without basis.

## ARGUMENT

Plaintiffs argue that the Corps and the Forest Service failed to comply with NEPA because they failed to fulfill their independent obligation to comply with NEPA and failed

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<sup>1/</sup> This surreply is submitted per the agreement of the parties and the instructions of Judge Frank’s law clerk during a teleconference on November 6, 2009.

to adequately analyze the effects of the Diluent Pipeline. As explained below, these arguments are without merit.

**I. The Corps and the Forest Service Satisfied Their Independent Obligations to Comply with NEPA for both the Alberta Clipper Pipeline and Southern Lights Diluent Pipeline**

The Corps and the Forest Service did not merely rely on the EIS prepared by the State Department to satisfy their NEPA compliance. Rather, the Corps and the Forest Service participated as cooperating agencies during the EIS process, independently reviewed the analysis in the EIS, and conducted additional analyses that they determined were necessary before completing their own NEPA processes and issuing their decision documents. Contrary to Plaintiffs' assertions, this process fully complies with NEPA.

As Plaintiffs recognize, both the Corps and the Forest Service were cooperating agencies during the EIS process. See Reply at 14; see also EIS at 1-9 - 1-10. As cooperating agencies, they were not required to prepare independent NEPA documents. See 40 C.F.R. § 1506.3(c) (“A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.”); see also *CEQ Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34263, 34265 (Jul. 28, 1983) (“[T]he cooperating agency may adopt a final EIS and simply issue its record of decision.”). A cooperating agency is required by NEPA, however, to make an independent determination as to whether the EIS satisfies the agency's NEPA obligations. See *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002) (“Cooperating agencies are permitted to adopt an EIS signed by the lead agency, provided they undertake an ‘independent review of the statement’ and determine that their ‘comments and suggestions have been satisfied.’”) (quoting 40 C.F.R. § 1506.3(c)); see also *CEQ Guidance*, 48 Fed. Reg. at 34265 (“[T]he cooperating agency must independently review the EIS and determine that its own NEPA procedures have been satisfied.”).

In this case, the Corps and the Forest Service recognized that the EIS prepared by the State Department did not fully address their own NEPA obligations because the State

Department's action did not involve the Diluent Pipeline. The State Department did not consider the Diluent Pipeline to be within the scope of its review because no Presidential Permit was required for the Diluent Pipeline. See EIS at 1-17, Plf. Ex. 3.<sup>2</sup> The State Department did, however, analyze the impacts of constructing the Diluent Pipeline in its analysis of cumulative impacts. See EIS at 4-380 (“[T]he acreage impacts of the Diluent Project pipeline have been incorporated into the environmental review described in Section 4.0 of this EIS.”), Def. Ex. 8; see also Def. Opp. to Plf. Mot. for Prelim. Inj. (“Def. Opp.”) at 16 (Docket No. 82). In accordance with NEPA, the Corps and the Forest Service independently reviewed the EIS and, having determined that the EIS did not fully address the potential environmental effects of their actions, conducted additional analyses of the Diluent Pipeline in order to comply with their NEPA obligations and the requirements of other substantive laws.

Following the issuance of the State Department's EIS, the Corps issued a public notice regarding Enbridge's applications to the Corps for permits relating the Alberta Clipper and Southern Lights Diluent Pipelines. See Corps ROD App. D at 16, Def. Ex. 18.<sup>3</sup> The Corps solicited comments on the applications and indicated that the responses to comments would be used in the preparation of a NEPA document. Id. at 25. Following review of the permit applications and the comments on the applications, the Corps prepared a Record of Decision, in which it clearly stated the scope of its review, which included both the Alberta Clipper Pipeline and the Diluent Pipeline. See Corps ROD at 1 (“The Alberta Clipper pipeline and the Southern Lights Diluent pipeline are the subject of a Department of the Army, Clean Water Act and Rivers and Harbors Act permit application to discharge dredged and fill

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<sup>2</sup> “Plf. Ex.” refers to the Exhibits submitted with Plaintiffs' Motion for a Preliminary Injunction.

<sup>3</sup> “Def. Ex.” refers to the Exhibits to the Declaration of Luther L. Hajek (Docket No. 83) and to the Exhibits to the Declaration of Luther L. Hajek submitted herewith (Exhibits 15-24). At Plaintiffs request, the Forest Service's permits are attached to the Declaration of Luther L. Hajek as Exhibits 22-24.

material into waters of the U.S. and to cross navigable waters, respectively, for construction of the pipelines in Minnesota and Wisconsin.”), Def. Ex. 3. The Corps indicated that in reaching its decision to issue the permits, it considered the information in the EIS and also analyzed supplemental information submitted by Enbridge as part of the Section 404 permitting process. Id. at 2; see also Corps ROD App. A (Corps’ Section 404(b)(1) Analysis), Def. Ex. 15; Corps ROD App. B (Pipeline Segment Supplemental Submittals), Def. Ex. 16, Corps ROD App. C (Summaries of Compensatory Mitigation Sites), Def. Ex. 17, Corps ROD App. F (Special Permit Conditions), Def. Ex. 19. The Corps described the Diluent Pipeline. See Corps ROD at 3 (“The Southern Lights Diluent project, combined with the Southern Lights Reversal project, is proposed to return diluent from the United States to Canada to blend with the heavy crude oil.”). The Corps analyzed the effects of both pipelines pursuant to its regulations. See id. at 12-30.

Similarly, the Forest Service prepared an Environmental Analysis, in which it clearly analyzed the environmental impacts of both the Alberta Clipper Pipeline and the Diluent Pipeline. See EIS App. U at 1-1 (describing the project under review as “two new pipelines, referred to as the Alberta Clipper Project and the Southern Lights Diluent Project”); id. at 1-3 (“The purpose of the Southern Lights Diluent Project from Superior, Wisconsin to Clearbrook, Minnesota is to deliver light petroleum liquids, referred to as ‘dilutents’ from U.S. refineries to the Alberta oil sand producers to dilute the heavy crude oil produced in that region, thereby facilitating pipeline transportation.”), Def. Ex. 12; see also Forest Service ROD at 1, Plf. Ex. 9. In its Environmental Analysis, the Forest Service analyzed the potential environmental effects of both pipelines. See App. U at 3-1 - 3-96.

Thus, contrary to Plaintiffs’ assertions, the Corps and the Forest Service analyzed the potential environmental impacts of the Diluent Pipeline prior to making their permitting decisions. Therefore, Plaintiffs’ argument that the Corps and the Forest Service failed to fulfill their independent obligation under NEPA to evaluate the Diluent Pipeline is without basis.

**II. The Corps and the Forest Service Have Adequately Evaluated the Potential Environmental Effects of the Southern Lights Diluent Pipeline**

The additional analyses of the Diluent Pipeline conducted by the Corps and the Forest Service were sufficient under NEPA. These agencies sufficiently analyzed the risk of leaks and spills and properly deferred to the expertise of agencies within the U.S. Department of Transportation (“DOT”) that regulate the operations of pipelines transporting oil and hazardous materials. The Corps and the Forest Service also adequately analyzed the indirect effects of the Diluent Pipeline.

**A. The Corps and the Forest Service Adequately Analyzed the Potential Environmental Effects of Leaks and Spills from the Diluent Pipeline**

Contrary to Plaintiffs’ arguments, the potential effects of leaks and spills of diluent are adequately addressed in the agencies’ NEPA documents. Plaintiffs make much of the fact that the precise chemical formula for the diluent was not disclosed in the EIS or the agencies’ other documents. See Reply at 16-17. While the precise chemical formula may not have been disclosed, certainly the nature of the diluent was disclosed in the agencies’ NEPA documents. The diluent is described in the EIS as “lighter hydrocarbons” and in the Corps Record of Decision as “light . . . hydrocarbon derivatives.” Corps ROD at 5, Def. Ex. 3; EIS at 1-28, Plf. Ex. 3. The Forest Service’s Environmental Analysis, which is an appendix to the EIS and therefore part of the EIS, provides more detail:

In order to transport this crude oil over long distances, the standard practice is to dilute the material using a low molecular weight hydrocarbon mixture generally described as diluent. Diluent is a generic term that encompasses mixture range of hydrocarbons used for this purpose. Diluent is also referred to as condensate, natural gas oil or pentane plus. The most prevalent types are condensate and naphtha. Diluent is expected to have a similar composition and physical characteristics to gasoline. Therefore, if released into the environment, diluent will behave in a similar manner to gasoline.

EIS App. U at 3-3, Def. Ex. 12. While the description of the diluent may not be as specific as Plaintiffs would like, the agencies have satisfied their NEPA obligations to adequately consider and disclose the nature of the diluent. Arkansas Wildlife Fed’n v. U.S. Army Corps of Eng’rs, 431 F.3d 1096, 1100 (8th Cir. 2005) (A court’s role in reviewing a NEPA claim is to “ensure that the agency has adequately considered and disclosed the environmental

impacts of its actions.”) (quoting Mid-States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 534 (8th Cir. 2003)).

In addition, Plaintiffs are incorrect that the agencies have ignored the risks of leaks and spills from the Diluent Pipeline in their analyses. As explained by the Corps in its analysis of pipeline safety:

The Department of Transportation (DOT) is mandated to regulate pipeline safety under 49 USC Chapter 601. DOT’s Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Pipeline Safety (OPS) administers the national regulatory program to ensure the safe transportation of hazardous liquids by pipeline, including crude oil. OPS develops safety regulations and other approaches to risk management for pipeline systems that mandate safety in the design, construction, testing, operation, and maintenance, and for emergency responses.

Corps ROD at 25-26, Def. Ex. 3. Indeed, DOT was an assisting agency and provided technical expertise in assessing pipeline safety issues and determining appropriate mitigation measures during the NEPA process for the Alberta Clipper Pipeline. See EIS at 1-12, Plf. Ex. 3. Enbridge is required to obtain approval from DOT before its pipelines can become operational and DOT will have continuing regulatory responsibility over the pipelines. EIS at 1-21.

In light of the requirement to obtain DOT approval, the Corps explained that “Enbridge designed the proposed pipelines and Superior Terminal Pump Station in accordance with applicable design, engineering, and safety standards and incorporate[d] them into its existing Environmental Response Plan (ERP).” Id. at 26. The Corps further explained that Enbridge’s existing ERP has been approved by the PHMSA and that the PHMSA will have to approve a revised plan before the Alberta Clipper Pipeline and Diluent Pipelines can become operational. Id.; see also EIS at 2-47 (noting that Enbridge’s existing ERP complies with PHMSA requirement and that additional approval will be required prior to operation of the Alberta Clipper Pipeline), Plf. Ex. 3; EIS at 4-348 (same), Def. Ex. 7. Enbridge’s ERP applies to both the Alberta Clipper Pipeline and the Southern Lights Diluent Pipeline. See EIS App. E (Spill Prevention, Containment, and Control Plan), Def. Ex. 9; EIS App. J (Petroleum-Contaminated Soil Management Plan), Def. Ex. 10; EIS App. Q (Pipeline

Integrity and Emergency Response Measures), Def. Ex. 11. Accordingly, the Corps found that “the Project does not pose a significant threat to public safety if constructed and operated within the oversight of the national regulatory program to ensure the safe transportation of hazardous liquids by pipeline.” Corps ROD at 26, Def. Ex. 3; see also Corps ROD App. D at 2 (“The Enbridge diluent pipeline is subject to the U.S. Department of Transportation Standards under 49 USC Chapter 601 and the Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of hazardous liquids by pipeline.”), Def. Ex. 18.

Similarly, in its analysis of potential leaks and spills from the Alberta Clipper Pipeline and Diluent Pipeline, the Forest Service notes that OPS regulates pipeline safety. EIS App. U at 3-3; id. at 3-6 (“Safety controls required by the Office of Pipeline Safety include quality control and testing during construction, inspection of structural integrity of the pipelines during operation, and steps to prevent damage to the pipeline by third parties.”), Def. Ex. 12; see also Forest Service ROD at 8, Plf. Ex. 9. In addition, “[t]o further enhance its leak detection program for the proposed Projects, Enbridge proposes to treat the 43.79 miles each of 36- and 20-inch diameter pipeline [the Diluent Pipeline] within the LLR and CNF boundaries as high consequence areas (HCAs).” EIS App. U at 3-8. The designation as an HCA requires additional inspections, evaluation, and mitigation to prevent harm to environmentally sensitive areas. Id. Finally, the Forest Service notes that Enbridge has prepared an emergency response plan “that has been reviewed and approved by the Office of Pipeline Safety.” Id.

The Corps’ and Forest Service’s reliance on Enbridge’s compliance with OPS regulations and approvals was appropriate. Pipeline construction and operation is highly regulated by OPS and the agencies were entitled to rely on OPS’s expertise in that area. See Stop the Pipeline v. White, 233 F. Supp.2d 957, 969-70 (S.D. Ohio 2002) (finding that the Corps appropriately deferred to OPS in its NEPA analysis for an oil pipeline); see also Edwardsen v. U.S. Dep’t of the Interior, 268 F.3d 781, 789 (9th Cir. 2001) (“It was not unreasonable for the [Minerals Management Service] to rely upon compliance with the

[National Ambient Air Quality Standards].”); 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). Therefore, the Corps and the Forest Service satisfied their NEPA obligations. See Arkansas Wildlife Fed’n, 431 F.3d at 1104 (“[T]he NEPA process involves an almost endless series of judgment calls . . . [t]he line drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.”) (quoting Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987)).

**B. The Corps and the Forest Service Adequately Analyzed the Indirect Effects of the Diluent Pipeline**

Plaintiffs argue that the Corps and the Forest Service violated NEPA because they did not adequately consider the indirect effects of transporting diluent to Canada. See Reply at 19-21. They argue that transporting 180,000 barrels per day of diluent will result in “increased extraction and export of heavy crude from the Canadian tar sands” and therefore increase refining and burning of oil from tar sands in the United States. Id. at 20. The agencies were not required to consider the potential for increased extraction of tar sands oil based on the transport of the diluent to Canada because the development of the Canadian tar sands is subject to the authority of the Canadian government and therefore beyond their control. See Def. Opp. at 17-19. Plaintiffs’ attempt to distinguish Public Citizen is unavailing because the agencies clearly have no control over the pace and extent of the extraction of oil from Canadian tar sands. See Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 770 (2004) (“[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.”). Thus, an analysis of the potential for increased extraction of tar sands was not required.

The Mid-States case also does not support the proposition that the Corps and the Forest Service must analyze the potential effects of the Diluent Pipeline on Canada’s

extraction of oil from tar sands. In that case, the Eighth Circuit found that the Surface Transportation Board was required to analyze the general “nature” of the impacts on regional air quality from emissions from coal fired power plants that would burn coal transported on a new rail line. Mid-States, 345 F.3d at 549-50. After the Board conducted a regional analysis of the emissions from the power plants, the Eighth Circuit upheld the Board’s analysis over the objections of the Sierra Club. See Mayo Found. v. Surface Transp. Bd., 472 F.3d 545, 555-56 (8th Cir. 2006). As we have already demonstrated, the State Department’s EIS is consistent with the analysis required by Mid-States and Mayo Found. See Def. Opp. at 21. The Mid-States case did not involve the extraction of a resource from a foreign country and therefore does not support Plaintiffs’ arguments that analysis of the potential for increased extraction was required.

Further, Plaintiffs’ assertion that the transport of the diluent to Canada will *increase* the amount of oil exported to the United States and refined in this country is pure speculation and has no factual basis. As Plaintiffs recognize and as explained in numerous places in the agencies’ documents, the purpose of the diluent is to dilute heavy crude so that it can be transported back to the United States. See, e.g., EIS at 1-28, Plf. Ex. 3. While the supply of diluent may be a limiting factor on the amount of heavy crude that can be transported, the real limit is determined by pipeline capacity, which will be the same regardless of how much diluent is supplied. Thus, regardless of the amount of diluent transported through the Diluent Pipeline, the maximum amount of heavy crude that could be transported through the Alberta Clipper Pipeline would be 450,000 barrels per day, which was analyzed in the EIS. See EIS at 1-1. Moreover, the assumption that the transport of diluent to Canada will result in increased exportation of oil to the United States is speculative because the diluent may be used in Canada to transport crude oil that is refined in Canada or exported to other countries.

Finally, to the extent that the State Department made any promise in past NEPA documents to evaluate the Diluent Pipeline in the NEPA process for the Alberta Clipper Pipeline, see Plf. Reply at 20-21, the State Department followed through on that promise by

analyzing the potential effects of constructing the Diluent Pipeline. See EIS at 4-380, Def. Ex. 8.

### CONCLUSION

For the foregoing reasons and the reasons stated in Defendants' Opposition to Plaintiffs' Motion, Defendants request that the Court deny Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted this 10th day of November, 2009.

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