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INTRODUCTION

Plaintiffs' reasons for pursuing this case have little to do with the assortment of claims that they have directed against Enbridge's Alberta Clipper ("AC") Pipeline: they are looking for a way to stop the importation into the United States of heavy crude oil derived from the Canadian oil sands projects, which are located hundreds of miles north of the U.S.-Canada border in Alberta. To achieve their anti-oil sands goals, they have contrived arguments to challenge the adequacy of the environmental analyses of the AC Pipeline that were undertaken by the lead federal agency, the Department of State ("DOS") and the two other defendant agencies (the U.S. Army Corps of Engineers and the U.S. Forest Service) (collectively, the "Defendant Agencies") under the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.* ("NEPA"). Plaintiffs' summary judgment motion, however, offers no reason for this Court to retreat from its February 3, 2010 Preliminary Injunction decision finding that Plaintiffs were unlikely to succeed on their claims. *See* Preliminary Injunction Memorandum Opinion and Order, Doc. 183 (Feb. 3, 2010) ("PI Order").

Plaintiffs' central argument is that there is no need for the AC Pipeline. They frame this argument in NEPA terms by taking issue with the purpose and need statement set forth by DOS in its Environmental Impact Statement ("EIS"). However, they fail to demonstrate any NEPA error in the EIS's conclusion that the Pipeline will serve a legitimate purpose and need. DOS's core role here was to make a national interest determination under Executive Order 13337 relative to the Pipeline. DOS did exactly that when it issued a Presidential Permit on the basis of its finding that the AC Pipeline

would enhance the supply of crude oil required by refiners in the Midwest from a stable and secure North American source. *See* ACP0000018 (Presidential Permit); ACP0000023 (DOS Record of Decision and National Interest Determination (“DOS ROD”)). Given the irrefutable fact that the U.S. economy is still heavily dependent on oil, and that refineries served by the AC Pipeline are geared to handle the type of heavy crude oil that will be transported by the Pipeline, DOS’s finding that it would be better to obtain that oil from Canada than from less stable sources was rational and reasonable.

Plaintiffs seek to undermine DOS’s determination by relying almost exclusively on an annual government report forecasting a long-term nationwide decline in crude oil demand. Their argument is unavailing because the EIS adequately explained the need for the AC Pipeline in terms that were focused on the immediate needs of U.S. refiners for a stable and secure source of the heavy oil that the Pipeline would transport, as well as on the needs of Enbridge’s shippers. Moreover, the EIS’s discussion of need for the AC Pipeline was relevant for NEPA purposes only as a means of defining the range of alternatives that warranted consideration in the EIS. Here, Plaintiffs have failed to show that the EIS did not adequately address a full range of reasonable alternatives to the AC Pipeline.

In addition, the EIS properly assessed the risk of Pipeline spills and the cumulative impacts of the collocated Southern Lights Diluent (“SLD”) Pipeline and other pipelines, Plaintiffs arguments to the contrary notwithstanding. Further, the Defendant Agencies had no obligation under NEPA to assess the impacts of the AC Pipeline on the development of oil sands projects, the impacts of the Pipeline on the use of alternative

fuels or the impacts of Pipeline abandonment, all of which are too speculative to warrant review or otherwise beyond the scope of required NEPA review.

This Court should therefore deny Plaintiffs' summary judgment motion and grant Enbridge's cross-motion.

RE-STATEMENT OF FACTS

Enbridge will not burden this Court with another recitation of the facts which have been recited in prior memoranda filed with this Court.¹ Rather, Enbridge will here correct certain misstatements by Plaintiffs in their Statement of Facts.

First, Plaintiffs state that while the other agencies [referring to the U.S. Forest Service ("USFS") and U.S. Army Corps of Engineers ("Corps")] cooperated with DOS, "no other federal agency conducted an independent NEPA review." Pl. Mem. at 3. Plaintiffs then proceed to contradict their own assertion by correctly noting in a footnote that the USFS provided a separate environmental analysis of the AC and SLD Pipelines, both of which fell within its permitting jurisdiction. ACP2520-693 (FEIS App. U), cited at fn. 3 of Pl Mem. at 3. In fact, in support of its issuance of amended Special Use Permits, the USFS completed its own thorough Environmental Analysis ("EA") of the impacts of constructing and operating the AC and SLD Pipelines through the Chippewa National Forest, *see id.* The Corps gathered and reviewed extensive data from Enbridge about the impacts of both Pipelines on wetlands and waters that were to be crossed and

¹ *See* Memorandum of Law in Support of Enbridge' Motion to Dismiss, Doc. 90, 1-8 (Oct. 23, 2009); Enbridge's Opposition to Plaintiff's Motion for Preliminary Injunction, Doc. 78, 1-9 (Oct. 16, 2009).

prepared a lengthy and detailed Record of Decision (“ROD”) addressing those impacts and imposing environmental mitigation measures in support of the Section 404 Clean Water Act Section 404 and Rivers and Harbors Act Section 10 permits it issued for each Pipeline. *See, e.g.*, COE008808- 8926 (Enbridge submissions to Corps); COE007379-7617 (Corps ROD).

Second, Plaintiffs assert that the EIS “does not address significant environmental impacts of the SLD pipeline.” Pl. Mem. at 3, fn. 4. However, the EIS properly assessed cumulative and other impacts of the SLD Pipeline, which runs between Clearbrook, MN and Superior, WI in the same corridor as the AC Pipeline. As discussed further below, the two pipelines are independent of one another and thus were not connected actions for NEPA purposes.²

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). “In the context of summary judgment, an agency action is entitled to great deference.” *Hall v. U.S. Army Corps of Engineers*, 08-cv-278, 2008 WL 5058986, *7 (E.D. Ark. 2008) (citing *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of*

² The portion of the SLD Pipeline between Superior and Manhattan, IL is not relevant to this matter and thus its omission from EIS analysis, noted by Plaintiffs, was proper. Not only was it already constructed by the time that the EIS for the AC Pipeline was being prepared, but unlike the collocated SLD Pipeline that was analyzed here, the Superior-Manhattan portion did not share any right-of-way with the AC Pipeline. *See* ACP000146 (EIS, 1-28).

Eng'rs, 87 F.3d 1242, *1246 (11th Cir. 1996)). A reviewing court must therefore defer to the agency's decision "so long as it is not arbitrary, capricious, an abuse of discretion, or otherwise not supported by law." *State of Minnesota v. Apfel*, 151 F.3d 742, 745 (8th Cir. 1998).

In reviewing the agency's decision, the court must not substitute its judgment for that of the agency. *Citizen to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Where a dispute is primarily factual and "requires a high level of technical expertise," resolution of the dispute "is properly left to the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). Only where an agency's decision runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, should a court overturn the agency's decision. *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1121 (8th Cir. 1999). "Something more than mere error" must be found. *Falk v. U.S. ex rel. Dept. of Interior*, 452 F.3d 951, 953 (8th Cir. 2006).

II. THE STATE DEPARTMENT'S PRESIDENTIAL PERMIT AND RECORD OF DECISION ARE NOT REVIEWABLE

Enbridge submits for the reasons stated in its Memorandum in Support of its Motion to Dismiss (*see* Doc. 90, 9-13) that the issuance of the Presidential Permit to Enbridge for the AC Pipeline was a discretionary act of the President and not reviewable in this Court. *See Dalton v. Specter*, 511 U.S. 462, 477 (1994) (Presidential actions not reviewable under the Administrative Procedure Act ("APA")); *Natural Resources Defense Council, Inc., et al. v U.S. Dept. of State*, Civ. No. 08-1363 (RJL), 2009 WL

3153702 (D.D.C. Sept. 30, 2009) (issuance of Presidential Permit for pipeline is a non-reviewable Presidential action); *The Sisseton-Wahpeton Oyate v. U.S. Dept. of State, et al.*, Civ. No. 08-3023 (CBK), 2009 WL 3153655 (D.S.D., Sept. 29, 2009) (“*Sisseton*”) (plaintiffs lacked standing to challenge Presidential Permit for pipeline since President could simply re-issue Permit).

Enbridge further submits that an EIS is not a final agency action reviewable under the APA. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA does not provide, itself, “substantive duties” that an agency acts upon); *Sisseton* at *8, (“NEPA does not create a private right of action.”). Here, the EIS was merely an informational document; DOS’s ROD (ACP000023-49) reflected DOS’s final decision to issue the Presidential Permit.

Nonetheless, this Court having previously ruled that DOS’s EIS is reviewable (without having explicitly decided the question of the reviewability of the Presidential Permit or DOS’s ROD), Enbridge will not further address this point in this memorandum.

III. THE DEFENDANT AGENCIES COMPLIED WITH NEPA

A. DOS’s Purpose and Need Discussion, and Related Alternatives Analysis, Met NEPA’s Requirements

Plaintiffs take issue with the statement of purpose and need for the project in the EIS, claiming that DOS misinterpreted certain data to overstate the level of demand for crude oil in the United States. Pl. Mem. at 6-13. Plaintiffs are wide of the mark for several reasons. First, in focusing on DOS’s analysis of nationwide demand, Plaintiffs overlook the more specific purposes identified in the EIS for the AC Pipeline. Second,

DOS reasonably concluded that there is sufficient demand for the oil that will be transported through the AC Pipeline. Third, DOS adequately considered a range of reasonable alternatives and rationally concluded that neither the no action alternative, nor other alternatives, would meet the purposes served by the AC Pipeline.

1. Plaintiffs Fail to Focus on the Three Purposes for the AC Pipeline Described in the EIS

In its February 3, 2010 decision denying Plaintiffs' PI Motion, this Court held that, "Plaintiffs are not likely to succeed in showing that the stated purpose for the AC and diluent projects – to meet a projected increase in demand for Canadian petroleum-based fuels – is arbitrary or capricious." PI Order, at 33-34. "In addition, Plaintiffs have not demonstrated that they are likely to succeed in showing that the stated purpose aimed at reducing U.S. dependence on oil obtained from outside North America by increasing access to more stable and secure oil supplies is arbitrary or capricious." *Id.* Plaintiffs offer nothing in their Memorandum to warrant this Court reversing course.

As quoted in this Court's February 3 Decision, the following passage from the EIS summarizes the three purposes for the AC pipeline:

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

Enbridge system expansion. PI Order, at 32 (citing ACP0000120 (EIS, 1-2)).

Plaintiffs do not seriously challenge any of these stated purposes for the AC Pipeline. As to the first stated purpose, Plaintiffs point to no facts in the record on which to question the fact that the AC Pipeline meets growing demands of U.S. refiners for heavy crude oil. The record is persuasive on this point; DOS observed in the EIS that approximately 75 percent of Canadian crude oil imported into the United States is delivered to refineries in the Midwest (PADD II), and that at least 15 refineries in this region already capable of refining heavy crude are connected to Enbridge's pipeline infrastructure. ACP0000664. 0000668 (EIS, 4-390, 4-394). Further, the EIS discusses the plans of certain major Midwest refineries served by the AC Pipeline to expand their capacity to handle oil sands-sourced heavy crude. Expansion of existing refinery capacity of PADD II refineries served by Enbridge and at new refineries that could be served by Enbridge is described at pages 4-390 through 4-399 of the EIS. ACP0000664-673. Three existing PADD II refineries discussed in detail in the EIS "are in the process of increasing their overall capacity for refining heavy crude oil by approximately 480,000 bpd . . .," which is an amount more than the 450,000 bpd capacity of the AC Pipeline. ACP0000669 (EIS, 4-395).

Plaintiffs do not address the second stated purpose at all, thereby conceding the critical point that the AC Pipeline will contribute to a reduction in U.S. dependence on less stable, non-North American crude oil supplies. The AC Pipeline would "serve the national interest by providing U.S. refiners access to secure, reliable and economic

sources of growing crude oil supplies.” ACP0029201 (Enbridge Presidential Permit Application). As further observed in the DOS ROD, the AC Pipeline “increases the diversity of available supplies among the United States’ worldwide crude oil sources in a time of considerable political tension in other major oil producing countries and regions.” ACP0000047. DOS also concluded that the Pipeline will allow the U.S. to increase non-OPEC crude oil supplies, allow the U.S. to take advantage of a shorter transportation pathway for imported oil and send a positive economic signal in a difficult economic period. *Id.*

With respect to the third stated purpose – serving the interests of Enbridge’s shippers – Plaintiffs point to nothing in the record that would suggest that this is not a valid purpose for the AC Pipeline. Enbridge’s Permit Application explains that the Pipeline project was “developed in consultation with western Canadian producers seeking increased capacity out of the [Western Canadian Sedimentary Basin] and into the traditional and extended PADD II, and eastern Canadian markets” and that the Pipeline will provide “the additional capacity needed to satisfy its shippers’ requirements.” ACP0029201-202.

Plaintiffs did not challenge Enbridge on this point below, but now ask this Court to take judicial notice of a post-EIS petition filed by a Canadian oil sands producer, Suncor, with the Federal Energy Regulatory Commission (“FERC”), the federal agency responsible for regulating the tariff rates for the AC Pipeline. Such extra-record materials prepared by an entity that did not even participate in the proceedings under review and

that post-date the EIS cannot be relied upon as a basis for finding the EIS to be flawed.³ *See Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004). Moreover, the Suncor Petition consists of no more than unproven assertions about pipeline need. Enbridge demonstrated in response that there were serious flaws with the Suncor analysis and that the AC Pipeline was justified. FERC subsequently denied the Suncor petition on March 31, 2010, a fact that Plaintiffs curiously chose not to bring to the Court's attention. *See Suncor Marketing Energy, Inc.*, 130 FERC P 61270, 2010 WL 1236356 (March 31, 2010).

Instead of focusing on the stated purposes for the AC Pipeline and the record evidence that supports DOS's discussion in the EIS, Plaintiffs take issue with DOS's conclusion that there is a demand in the U.S. for the oil that will be transported by the AC Pipeline. As shown next, the EIS's analysis of the need for the AC Pipeline in order to meet the demand for Canadian heavy crude was amply supported by the record.

2. The EIS's Analysis of Crude Oil Supply and Demand Was Credible

Plaintiffs devote seven pages of their Memorandum (pgs. 6-13) to their assertion that the EIS is flawed to the extent that it asserts that there is a need in the U.S. for the oil that will be transported through the AC Pipeline. Based on a forecast published in the 2009 Annual Energy Outlook ("AEO 2009") (Doc. 217-1) issued by the U.S. Energy

³ Enbridge has filed an opposition to Plaintiffs' request for judicial notice of the Suncor Petition because, as shown therein, there is no legitimate basis on which this Court should consider materials outside the administrative record in this APA review case.

Information Administration (“EIA”), they claim that because U.S. imported oil demand is predicted to decline over time and because Canadian imports are likewise predicted to decline, there is no need for the AC Pipeline. DOS’s failure to account for these declines, they claim, demonstrates that it failed to take a “hard look” at the asserted purpose for the pipeline.

Plaintiffs’ argument is bogus on two levels. First, Plaintiffs overlook that Enbridge conceived the AC Pipeline to meet the demands of its shippers and of the refineries it serves. Broadly framed EIA annual national crude oil demand forecasts – which vary from year to year – are not the primary drivers of the need for the AC Pipeline. Rather, Enbridge made the decision to invest about \$3.3 billion in the AC Pipeline for much more tangible reasons, namely, to meet the market demands of its customers and address a pipeline capacity shortfall in its system. Thus, even if one assumes that nationwide crude oil demand may decline over a period of years, that does not mean that additional pipeline capacity is not needed to meet the still considerable demand that does exist for the supply of heavy crude oil from Alberta. *See, e.g.* AEO2009, Table A21 (forecasting that the United States will consume 20.16 million barrels per day (“mbd”) of conventional and non-conventional crude in 2015, but will only produce 10.23 mbd).

The more specific demand for crude oil that the AC Pipeline will meet is being driven by the above-noted expansion in the capacity of Midwest refineries to refine the heavy crude produced in the Alberta oil sands and transported through the AC Pipeline and other trans-border pipelines. *See* ACP0000664-673 (EIS, 4-390 to 4-399). The

information in the record about the reliance of these refineries on Canadian crude oil sources, and the expansion of their capacity to refine heavy crude oil, offers a compelling justification for the AC Pipeline. *See* ACP00290201-206 (Enbridge Presidential Permit Application); ACP0000032-33 (DOS ROD, 10-11).

Moreover, Plaintiffs fail to adequately account for the fact that the AEO2009 forecast on which they rely predicts a dramatic growth in the production of unconventional crude oil (i.e., oil sands) production in Canada from under 2 million bpd currently to 4.3 million bpd in 2030. *See* AEO2009, Table A21. Plaintiffs acknowledge the forecasted growth in Canadian production of unconventional heavy crude, but claim that it “says nothing about U.S. demand or U.S. imports.” Pl. Mem. at 11. However, the record discloses, and Plaintiffs do not contest, that over 70% of Canadian oil sands crude is imported into the United States. ACP0000125 (EIS, 1-7). Thus, it was hardly a great leap of logic for DOS to conclude that the increase in Canadian production would translate into a growth in heavy crude imports from Canada, particularly given DOS’s acknowledgment that “many US refineries have been, or are in the process of being, retrofitted to accommodate heavy crude ...” ACP0000122 (EIS, 1-4). Indeed, this retrofitting is occurring at precisely the refineries served by Enbridge. While Plaintiffs correctly note that U.S. production of unconventional crude is also forecast to increase, that raw fact says nothing about where that U.S. production will take place or where that domestic unconventional crude will be transported for refining. Plaintiffs have failed to demonstrate any nexus between the impact of any increased U.S. production and the

needs of the PADD II refineries that the EIS explains depend on heavy crude transported from Canada.

In short, Defendants cannot fairly be accused of “willful ignorance of the facts,” Pl. Mem. 13; the EIS set forth a rational and supported assessment of the purpose and need for the AC Project.⁴ In these circumstances, DOS is “entitled to considerable deference in [its] definition of purpose and need.” *Stop the Pipeline v. White*, 233 F. Supp. 2d 957, 970 (S.D. Ohio 2002).

3. The EIS Properly Assessed and Dismissed Alternatives to the AC Pipeline Plaintiffs Argue that DOS Should Have Chosen

DOS’s statement of the purpose and need for the AC Pipeline in the EIS served only one purpose under NEPA, namely, to allow the agency to fashion an appropriate set of reasonable and feasible alternatives for comparative review. *See* 40 C.F.R § 1502.13 (“The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.”); *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (recognizing that “the goals of an action delimit the universe of the action’s reasonable alternatives”).

⁴ In *Izaak Walton League of America v. Kimbell*, 516 F.Supp.2d 982, 996 (D. Minn. 2007), cited at page 13 of Plaintiffs’ Memorandum, the agency did not prepare a detailed EIS, as here, but rather reached conclusions in an EA and in a Finding of No Significant Impact about sound levels without doing a noise study, an error the Court found reversible in the context of that case. In this case, DOS undertook a very detailed analysis of the need for the AC Pipeline and its findings are grounded in the record. Further, the need analysis is not itself an environmental impact analysis, but is relevant only to the extent it informs the alternatives analysis, which was thorough in the instant case.

Thus, as long as DOS identified and addressed a reasonable and feasible set of alternatives to Enbridge's AC Pipeline proposal, Plaintiffs cannot show – and have not shown – that there was any error resulting from the manner in which the EIS described the need for the Pipeline. *See Fuel Safe Washington v. FERC*, 389 F.3d 1313 (10th Cir. 2004) (finding scope of project to be adequately defined where reasonable, non-speculative, alternatives were considered). Moreover, where the action subject to NEPA review is triggered by an application from a private party, it is appropriate that the agency's evaluation of reasonable alternatives be “shaped by the application at issue.” *Citizens Against Burlington*, 938 F.2d at 199 (“Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be”); *see also Citizens' Comm. to Save our Canyons v. USFS*, 297 F.3d 1012, 1030 (10th Cir. 2002) (“it is appropriate for the agency to give substantial weight to the goals and objectives of th[e] private actor”). What would not be appropriate is for the agency to address alternatives that are beyond the scope of the proposal or infeasible. *See Env. Law and Policy Center v. NRC*, 470 F.3d 676, 683 (7th Cir. 2006) (“it was reasonable for the [agency] to conclude that NEPA did not require consideration of energy efficiency alternatives when [the applicant] was in no position to implement such measures”).

Plaintiffs argue that DOS should have adopted the “no action” alternative because, in their view, there is no need for the oil that the AC Pipeline will transport. Pl. Mem. at 14-16. As shown above, their argument that the AC Pipeline is not needed overlooks the demand for heavy crude oil by the Midwest refiners served by Enbridge, fails to account for the fact that Enbridge's shipper customers have demanded greater capacity,

misinterprets the forecasts of increasing production and consequent importation into the United States of oil sands crude and wholly ignores the interest of the United States in a stable supply of oil from a secure North American source. *See* ACP000023-49; ACP0000119-126; ACP0000664-673. DOS also had appropriate record support when it concluded at page 3-3 of the FEIS that, “[i]f the No Action Alternative is implemented, refiners would seek other means of obtaining the heavy Canadian crude oil, or attempt to obtain additional supplies from less stable and less reliable sources.” ACP0000211. DOS further concluded that the “other means” for obtaining this heavy crude could include constructing other pipelines or using surface transportation, any of which options “would cause environmental impacts that would be at least comparable” to the AC Pipeline impacts. *Id.*

Plaintiffs claim that the EIS should have considered a March 2009 proposal put forth by the Canadian Association of Petroleum Producers (“CAPP”) that contemplated the use of a pipeline proposed by an Enbridge competitor, TransCanada, known as the Keystone XL Pipeline, coupled with a portion of the AC Pipeline in Canada. Pl. Mem. at 16. However, “[a]n agency is not required to consider and evaluate every conceivable alternative.” *South Trenton Residents Against 29 v. FHA*, 176 F.3d 658, 666 (3d Cir. 1999). Nor do Plaintiffs have any basis to complain that DOS failed to assess the CAPP alternative that neither they nor any other party ever presented to DOS. *See Nevada v. Dept. of Energy*, 457 F.3d 78, 88-89 (D.C. Cir. 2006) (plaintiffs waived argument by not raising the issue in their comments). Further, that alternative would not meet the relevant needs because the XL Pipeline, if it is ever built, would be located far west of the AC

Pipeline, i.e., traversing a route between Montana and Texas that would not serve the refineries that the AC Pipeline will serve. *See* ACP0000213 (EIS, 3-5) (noting that a branch line two to three times longer than the US portion of the AC Pipeline would be needed to connect the XL Pipeline with the refineries served by the AC Pipeline.)⁵

Plaintiffs complain that the EIS failed to fully analyze renewable fuels or conservation as an alternative for meeting the needs for which the AC Pipeline is designed. Pl. Mem. at 17. But the EIS appropriately explains that these alternatives would not satisfy the needs of refineries dependent on handling heavy crude from Alberta or satisfy the national interest in a supply of crude oil from a stable and secure Canadian source. ACP0000211 (EIS, 3-3).⁶ Plaintiffs offer no evidence that there are other energy sources or conservation measures that would preclude the need for imported crude oil generally or specifically for the oil that would be imported through the AC Pipeline. *See Env. Law and Policy Center*, 470 F.3d at 683; *Fuel Safe Washington*, 389 F.3d at 1323 (finding that FERC was not required to reject natural gas pipeline proposal in “favor of a non-natural gas alternative which was purely hypothetical and speculative”). Plaintiffs may wish to encourage policy-makers to promote the use of renewable fuels and conservation, but NEPA did not require that DOS assess in any greater detail than it did

⁵ DOS has issued a Draft EIS on the XL pipeline, but it remains to be seen if the pipeline will be permitted.

⁶ The EIS states in relevant part that, “[a]lthough energy conservation and efficiency measures are important elements in addressing future energy demands for the Midwest market, current and projected participation in energy conservation and efficiency measures will reduce the energy demands by a small fraction of the projected energy demand within the foreseeable future.” ACP0000211 (EIS, 3-3).

the continued reliance of the economy on oil in the context of its review of reasonable Pipeline alternatives.

DOS considered in detail a range of reasonable alternatives to the AC Pipeline and its proposed routing, devoting a 66-page chapter of the EIS to a summary of its analysis. ACP0000209-274. Its analysis met the requirements of NEPA and warrants the issuance of summary judgment in favor of Enbridge and the Defendant Agencies on Plaintiffs' Fourth Claim of Relief (¶¶ 96-104).⁷

B. The Defendant Agencies Adequately Considered Operational Spills and Leaks of the SLD and AC Pipelines

Enbridge is entitled to summary judgment as a matter of law as to Plaintiffs' Third Claim of Relief (¶¶ 91-95) because the Defendant Agencies' environmental review took a "hard look" at operational spills and leaks of both the AC and SLD pipelines to the extent required by NEPA. *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (the "only role for the court is to insure that the agency has taken a 'hard look' at environmental consequences").

In their Memorandum (pgs. 19-22), Plaintiffs argue that impacts of spills associated with the operation of the SLD pipeline have not been considered. However, those impacts were directly addressed in several EIS appendices, i.e., USFS's Environmental Assessment, (ACP0002520 (EIS, Appendix U)), Enbridge's Spill

⁷ Even if the EIS were deficient in failing to assess some alternative – and it was not deficient – DOS would be free to have issued a Presidential Permit based on the discretion allowed it by E.O. 13337. For the reasons articulated previously by Enbridge, that decision is not reviewable.

Prevention, Containment, and Control Plan, (ACP0001574 (EIS, Appendix E)), as well as in Enbridge's Pipeline Integrity and Emergency Response Measures (ACP0001978 (EIS, Appendix Q)). For instance, USFS's EA specifically describes the "diluent" transported by the SLD Pipeline "to be a generic term that encompasses mixture range of hydrocarbons" that "is expected to have a similar composition and physical characteristics to gasoline;" "if released into the environment, diluent will behave in a similar manner to gasoline." ACP0002561 (App. U, 3-3). Likewise, the spill and emergency response plans included in the EIS (App. E and Q) and submitted to/approved by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") under the regulations of that safety agency, address spills and leaks from both the AC and SLD pipelines. EIS Appendix E further includes procedures for the containment, cleanup, and recovery to habitats such as rivers, wetlands, and other sensitive areas. *See* ACP0001574. The EIS reasonably concluded on the basis of Enbridge's plans and PHMSA oversight that all impacts of spills upon natural resources would be addressed or mitigated. *See* ACP0000551, ACP0000621- 651, ACP0000794.

The Defendant Agencies' citation to PHMSA's extensive pipeline safety regulatory oversight was appropriate. *See Stop the Pipeline v. White*, 233 F. Supp. 2d at 969-70. PHMSA not only was an assisting agency in the preparation of the EIS, but going forward Enbridge is subject to its continuing safety oversight and regulatory obligations, including submission and approval of an Emergency Response Plan under 49 CFR Part 194, as well as pipeline integrity management requirements.

Moreover, as this Court recognized in its PI Order, the EIS “addresse[s] the impacts of a diluent spill by concluding that a diluent spill would behave similarly to a gasoline spill.” PI Order, at 30. Specifically, EIS Section 4.13 details the “risk associated with oil spills” to different “[h]abitat, natural resources, and human use receptors,” including geology, soils, surface water, groundwater, wetlands, vegetation, birds, mammals, fisheries, threatened and endangered species, land use, socioeconomics, cultural resources, and air. *See* ACP0000621- 651, (EIS, 4-347 to 4-377). The EIS considers not only impacts caused by “crude oil” transported by the AC pipeline, but also consider impacts caused by “refined oil,” which includes “gasoline” and other hydrocarbons, such as diluent “that could be released during ... operation.” *See* ACP0000633 (EIS, 4-359); *see also* ACP0002561 (App. U, 3-3 to 3-4) (diluent behaves like gasoline); PI Order, at 30 (“conventional oil and diluent ‘are both hydrocarbons’”).

For example, in the subsection addressing soils, the EIS states that “[c]rude oil, lubricating oil, and similar heavy oils would be less likely to penetrate through the surface soil layers than *refined oil* (such as *gasoline* and *diesel*), which could infiltrate through the vegetation, debris, and litter cover.” ACP0000639-640 (EIS, 4-365 to 4-366). The EIS goes on to state that “[c]rude or refined oils typically do not penetrate beyond the surface layer in sediments” and that “[r]efined products also typically would not penetrate sediments because of their water content but may penetrate or be mixed further into the sediments under the same turbulent or cleanup actions as described for *crude oil*.” ACP0000640 (EIS, 4-366).

The other subsections of Section 4.13 pertaining to geology, surface water, groundwater, wetlands, vegetation, birds, mammals, fisheries, threatened and endangered species, land use, socioeconomics, cultural resources, and air also detail the impacts of various types of oil spills, including crude and refined oil, on natural and cultural resources. *See e.g.* ACP0000642 (EIS, 4-368, Wetlands) (“[v]ery small *refined product* or *crude oil spills* generally would cause negligible to minor impacts on wetlands;” [l]arger spills could result in substantial ecological impacts to wetlands”); ACP0000644-645 (EIS, 4-370 to 4-371, Fisheries) (“effects of *oil spills* on freshwater fish, macroinvertebrates, and other aquatic organisms have been documented and discussed for many spills” and “indicate that the effects of a spill depend on the concentration of *petroleum* present”) (emphasis supplied). Significant information is provided throughout § 4.13 about the potential for spills of *all types of hydrocarbons/petroleum*, including refined oil, which includes diluent.

Further, because the SLD Pipeline is collocated with the AC Pipeline, any spills/leaks from either pipeline will occur along the same route and impact the same types of natural resources. ACP0000621- 651. Therefore, while Plaintiffs argue that further environmental review is necessary, they have not identified any natural resources that would be impacted by diluent spills that have not already been fully considered in the EIS. Likewise, Plaintiffs fail to identify any mitigation that was not considered by the Defendant Agencies in relation to diluent.

Plaintiffs essentially ask the Defendant Agencies to duplicate the discussion of environmental impacts associated with operational spills already provided in the EIS.

But duplicating an agency's environmental analyses "would result in an unnecessary waste of resources and would not serve NEPA's purposes". *Weiss v. Kempthorne*, 683 F. Supp. 2d 549 (W.D. Mich. 2010). Summary judgment should be issued in favor of Enbridge on Plaintiffs claims concerning spills.

C. The SLD and AC Pipelines are Not "Connected Actions"

Enbridge is entitled to summary judgment as a matter of law as to Plaintiffs' First Claim of Relief (¶¶ 77-81) because the SLD and AC pipelines are not "connected actions," and even if they were, all relevant environmental impacts associated with the SLD Pipeline have already been fully considered.

Under NEPA, only "connected actions" are required to be considered in a single EIS. 40 C.F.R. § 1508.25(a). "Connected actions" are as those that: (1) automatically trigger other actions which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1). In assessing whether projects are "connected," a clear causal connection must be demonstrated. *See e.g., Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). Projects that have "independent utility," *i.e.*, those projects that would be built without the other or do not rely upon the other for their operation, are not sufficiently "connected," and thus, are not required to be considered jointly in a single EIS. *See Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) ("we have rejected claims that actions were connected when each of the two projects would have taken place with or without the other"); *see also Wilderness*

Workshop v. BLM, 2008 WL 1946818 (D. Colo. Apr. 30, 2008), *aff'd*, 531 F.3d 1220 (10th Cir. 2008).

In *Wilderness Workshop*, the plaintiffs argued that a proposed gas pipeline and the proposed/future gas wells were connected actions because the pipeline's operation was dependent upon the development of new wells, evidenced by the pipeline's capacity that exceeded the supply of current wells. However, the court found that the pipeline was not a "connected action" because it could "exist without future well development (although that circumstance may be economically unwise) [and] [f]uture wells [could] exist without the pipeline." *Id.* at 2008 WL 1946818, at *5. The fact that the existence of the pipeline would possibly encourage additional gas wells, and probably would serve those additional wells, did "not mean necessarily that additional wells [were] connected actions." *Id.*

Even interrelated projects that are part of a larger expansion project may have "independent utility." For instance, in *Utahns for Better Transportation v. DOT*, 305 F.3d 1152 (10th Cir. 2002), plaintiffs argued that the agency was required to consider the impacts of a parkway, an interstate highway project, and an expansion of public transit in a single EIS because all three were proposed as parts of a "Shared Solution" transportation plan. The EIS for the parkway also acknowledged that "capacity needs would not be met" without both the parkway and the interstate improvements. *Id.* at 1183. The court, however, found that each project facilitated its own increase in capacity, and "although interrelated as part of an overall transportation plan, [] individually contribute to alleviation of the traffic problems." *Id.* at 1184.

Here, neither the AC Pipeline nor the SLD Pipeline is reliant upon the other for its operation. As this Court found, while the AC Pipeline transports heavy crude oil that “has been blended with diluent, the diluent will not necessarily be supplied by the SLD Pipeline.” *See* PI Order, pg. 15 (Doc. 183); *see also* ACP0000120 (EIS, 1-2); ACP0000825 (App. A, A-27). Likewise, “the diluent transported by the Southern Lights Diluent pipeline will be used to facilitate the transportation of crude oil from Alberta through numerous pipelines other than the Alberta Clipper pipeline.” ACP0015770. Although the pipelines might benefit from one another similar to the gas well in *Wilderness Workshop*, “the SLD Pipeline is not being constructed solely for the purpose of transporting oil through the AC Pipeline.” PI Order, at 15-16 (Doc. 183); *see also* ACP0000135 (EIS, 1-17 (the SLD Pipeline has “independent utility” because it would “not be dependent on construction of the Alberta Clipper pipeline”). Further, each pipeline independently facilitates an increase in capacity that is necessary to meet current demand, like the independent highway projects in *Utahns*. The fact that they were constructed at the same time and in the same corridor was a matter of convenience and efficiency, but does not trigger a “connected action” analysis under NEPA. *See League of Wilderness Defenders-Blue Mountain Biodiversity Project v. Bosworth*, 383 F. Supp. 2d 1285 (D. Or. 2005) (similarities in time and place of projects to reduce wildfire risk not enough to require preparation of a single impact statement).

Despite the SLD Pipeline’s inherent “independent utility,” Plaintiffs argue that the SLD Pipeline would not be constructed/operated “but for” the increased need for diluent created by the AC Pipeline. Pl. Mem. at 28. However, they offer no factual support and

even acknowledge that “diluent is a fungible product” and may be “transported through the AC pipeline or added to the general supply to be used for heavy crude that will be transported to other regions in North America through other pipelines.” *Id.* at 27. Thus, by Plaintiffs’ own admission, the SLD Pipeline’s operation is not dependent upon supplying the AC Pipeline with diluent; the diluent supplied by the SLD pipeline may stay in Canada, be mixed with crude oil that is transported through the AC pipeline, or be mixed with crude oil that is transported via other pipelines or other sources.

ACP0000146 (EIS, 1-28).

The one case that the Plaintiffs cite in support of their connected action claim is very different. *Choate v. Army Corps of Eng’rs*, 2008 WL 483113, *9 (E.D. Ark. 2008). There, the court held that the construction of an access road that would not otherwise be built to serve a new shopping center was a connected action relative to the shopping center. By contrast, there is no similar “but for” link here between the pipelines.

Additionally, Plaintiffs fail to acknowledge that the relevant impacts of the SLD Pipeline, including the risk of leaks (as discussed above) and the cumulative impacts, were fully considered in the EIS. *See e.g.*, ACP0000654 (EIS, 4-380) (the “associated acreage impacts of the Diluent Project pipeline have been incorporated into the environmental review described throughout Section 4.0 of this EIS”). The AC and SLD pipelines were “constructed concurrently within the same construction footprint.” ACP0029172. Therefore, the EIS “addresses the impacts of the entire 140-foot ROW, which includes both projects.” ACP0015770. “For example, wetland and other land use impacts are addressed for both projects. Because the diluent pipeline will use the same

pump stations, the impacts associated with the pump stations for the diluent pipeline are also addressed.” *Id.*; *see also* COE007389 (“the impacts to aquatic resources resulting from construction of [the SLD] pipeline were disclosed in the EIS.”). The EIS also recognizes in its discussion of “the potential *cumulative impacts* associated with the concurrent construction of the two lines” that “the incremental effect of the construction of the Diluent Project would cause a negligible increase in the expected impacts presented [] for the Alberta Clipper Project.” ACP0000545 (EIS, 4-271); *see also e.g.*, ACP0000658, (EIS, 4-384) (“a minor cumulative impact on water resources would result from concurrent construction”); ACP0000663 (EIS, 4-389) (“emissions associated with this concurrent construction would be minor;” etc.).⁸

Plaintiffs do not appear to challenge the sufficiency of the EIS’s analysis of the air quality and other impacts of refining the crude oil that will be imported into the U.S. by the AC Pipeline, but now argue that any cumulative impacts of refining the diluent that will be transported through the SLD Pipeline should have been considered in the EIS. Pl. Mem. at 29. However, they failed to raise that issue below and thus cannot properly raise it on judicial review.

⁸ Plaintiffs also argue that the SLD and AC pipelines are “similar actions.” Pl. Mem. at 28. CEQ regulations do not require a reviewing agency to consider “similar actions” jointly in a single EIS. *See* 40 C.F.R. § 1508.25(a)(3) (when proposed actions are “similar,” the agency “*may wish*” to assess them in the same document) (emphasis added); *see also Earth Island Institute v. United States Forest Service*, 351 F.3d 1291 (9th Cir. 2003) (an agency is accorded deference under the CEQ regulations in deciding whether to analyze similar actions together). Here, the analysis of the SLD Pipeline satisfied NEPA’s demands even if one assumes that the two Pipelines are similar actions.

The USFS and Corps, in issuing their respective permits for the SLD Pipeline, appropriately relied on the EIS as well as extensive information supplied to them by Enbridge and its consultants, and their own assessments of the environmental impacts of that Pipeline. USFS prepared an EA which specifically addresses the impacts of both the AC and SLD Pipelines in the Chippewa National Forest. ACP0002520 (App. U).

The Corps likewise reviewed both pipelines relative to its concerns with wetland impacts and imposed mitigation measures that apply to both pipelines. *See* COE007379 (Corps ROD). For example, the Corps received detailed environmental information on both Pipelines from Enbridge (e.g., COE008831-008925) and evaluated the impacts on wetlands resulting from operation and maintenance of both the SLD and AC Pipelines. COE007390-7391. In terms applicable to both Pipelines, the Corps' ROD requires avoidance and mitigation “[t]o ensure minimization of wetland impacts to the maximum extent practicable.” COE007392.

In short, “no genuine dispute as to any material fact” remains as to whether the Defendant Agencies properly evaluated the SLD Pipeline. Summary judgment accordingly is warranted in favor of Enbridge and the Defendant Agencies.⁹

⁹ Plaintiffs cite to the Declaration of Julia May (Doc. No. 104), prepared in connection with their Preliminary Injunction Motion, to support their contention that cumulative impacts were not adequately considered. *E.g.*, Pl. Mem. at 28-29. To the extent that Plaintiffs rely on that extra-record Declaration, the Court should not consider their argument for the same reasons that it should not take judicial notice of the Suncor Petition.

D. Reasonably Foreseeable Indirect And Cumulative Impacts Were Fully Considered By The Defendant Agencies.

1. Impacts Associated With The Development Of Canadian Oil Sands Were Not Required To Be Considered By The Defendant Agencies

NEPA does not impose any obligation on DOS to address the impacts of oil sands developments hundreds of miles north of the border in Canada, including impacts on greenhouse gases and wildlife, because such impacts are not sufficiently related to the AC Pipeline to fall under the purview of NEPA.

CEQ guidance and Executive Order 12114 require agencies to consider transboundary impacts of proposed actions only “to the extent they are reasonably foreseeable consequences of the proposed action.” CEQ Memorandum (July 1, 1997) (Doc. 217-3). There must be a “reasonably close causal relationship” between the impacts at issue and the proposed action. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983).

As this Court found in its PI Order, at 18-19, there is no “reasonably close causal relationship” between the AC Pipeline and the development of the Canadian oil sands; the “oil sands in Canada would continue to be developed and the refinery emissions from that oil would still occur whether in Canada, the United States, or overseas even if the Alberta Clipper Project were not built.” PI Order, 18 (citing EIS, 4-402). “The clearest evidence of this is that Alberta oil sands production has been increasing for years even though the Alberta Clipper pipeline has not been constructed.” ACP0015774. For instance, “Canada has 174 billion barrels of [] reserves in oil sands located in the

Western Canadian Sedimentary Basin.” ACP0000122 (EIS, 1-4). Due to this vast reserve, “the number of major mining, upgrading, and thermal in-situ production projects grew [in 2006] to include over 46 existing and proposed projects, encompassing 135 individual project expansion phases in various stages of execution,” causing total production in oil sands crude to “rise to 3.9 million bpd.” ACP0000123 (EIS, 1-5).

The AC Pipeline will only have the capacity to transport 450,000 bpd of the oil sands’ vast 3.9 million bpd crude supply. ACP0000119 (EIS, 1-1). More importantly, the AC Pipeline is not the only means by which to transport oil sands crude; were the AC Pipeline not built, “the oil produced in Alberta ... would simply find another outlet.” ACP0019405. For instance, the oil will be transported through TransCanada’s Keystone Pipeline (also with a capacity of 450,000 bpd) or other pipelines. *See* ACP0000119, ACP0000123-124 (EIS, 1-1, 1-5 to 1-6). Thus, the Defendants Agencies’ decision not to assess impacts associated with the oil sands because they are “being developed independently from the AC Pipeline project” is supported by the administrative record and consistent with NEPA requirements. PI Order, 19.

The cases Plaintiffs cite in their Memorandum at 34-35 are distinguishable. In *Border Power*, the transmission line crossing the U.S./Mexican border was the “*only current means*” by which turbines in Mexico – located in Mexicali, Mexico at the Mexican/U.S. border – could transmit power. *Border Power Plan Working Group v. DOE*, 260 F. Supp. 2d 997, 1017 (S.D. Cal. 2003) (emphasis added). The turbines thus would not exist but for the transmission lines, justifying the court requiring an assessment of the turbine’s impacts to be considered in the transmission line EIS. *Id.* There is no

similar relationship between the oil sands projects and the AC Pipeline, as this Court has recognized.

In *Gov't of the Province of Manitoba v. Salazar*, 2010 WL 744713 (D.D.C. March 5, 2010), the Department of Interior (“DOI”) had conducted an environmental review associated with a project designed to withdraw water from a lake, treat that water, and transport that water by pipeline to an adjacent water system that was connected with Canada. Water treatment was necessary because “the untreated water from [the lake system] into [the system connected with Canada could] result in the introduction of biota,” which would have a “devastating” effect on “fish, plants and/or animals.” *Id.* at *2. Because the project was the “reasonably foreseeable” cause of any “biota transfer” that would impact waters in Canada, the court required DOI to consider any Canadian impacts posed by the project. *Id.* at *11. Unlike the project in *Gov't of Manitoba*, the AC Pipeline will have no direct causal relationship to a potentially significant environmental impact in Canada; the Pipeline was constructed because of the need for “increased pipeline capacity *aris[ing] due to the availability of oil from the Canadian*” oil sands. PI Order, at 19 (emphasis added).

Further, Plaintiffs fail to acknowledge that the requirement to consider “transboundary impacts” does not extend to “extraterritorial actions;” that is, actions “that take place in another country or otherwise outside the jurisdiction of the United States” because the reviewing agency has no ability to mitigate/prevent those impacts. CEQ Memorandum, at 1. Here, the “extraction of oil sands in Canada and construction and operation of the Canadian portion of the Alberta Clipper Project are under the jurisdiction

of the Canadian government” ACP0000136 (EIS, 1-18). Canada found those activities to be consistent with its environmental laws. *Id.* The Defendant Agencies, by contrast, have no ability to mitigate impacts caused by Canadian oil sands development and/or terminate that development. ACP0001033 (EIS, A-235). For these reasons, the EIS properly concluded that “the activities in Canada are beyond the NEPA authority of DOS.” ACP0000136 (EIS, 1-18).

2. The Agencies Were Not Required To Undertake A Further Analysis Of The Impact Of This Project On Alternative Sources Of Energy

Plaintiffs argue that the EIS fails to evaluate the effects of the project on “less-polluting alternative sources of energy, such as wind, solar, nuclear, or natural gas.” Pl. Mem. at 35-38. However, nothing in NEPA requires such an analysis.

The only precedent that Plaintiffs cite to support their argument that impacts on alternative energy sources must be considered is *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 536, 550 (8th Cir. 2003), but their reliance on that case is misplaced. The agency in *Mid States* had stated that an increase in coal consumption was “reasonably foreseeable” due to the project, but then failed to consider the impacts of the increase. *Mid States*, 345 F.3d at 550. The Court therefore remanded for the government to analyze the possible environmental impacts of the reasonably foreseeable increase in coal consumption that would result from the project. *Id.*; *see also Arkansas Wildlife Federation v. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005) (noting that agency in *Mid States* stated that particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so). Thus, *Mid States* relates to the need

to consider downstream environmental impacts where a project will cause a reasonably foreseeable increase in consumption of a particular fuel.

In this case, it is not reasonably foreseeable (and thus within the scope of NEPA) that the oil being transported by the AC Pipeline would increase the amount of oil consumed in the United States, much less have a meaningful impact on the development or use of renewable sources of energy. As this Court found in denying Plaintiffs' motion for preliminary injunction, "Plaintiffs have not explained how the transportation of crude oil through the AC Pipeline would increase consumer demand." PI Order, at 22. The volume of crude oil that would be transported via the Alberta Clipper Project would total only about 3 percent of the crude oil processed in the United States. ACP0000674 (EIS, 4-400). The FEIS concludes that this amount of crude oil is not expected to influence the ultimate types of petroleum products refined, or to significantly impact end-use price or demand. *See* ACP0000674-677 (EIS, 4-400 to 4-403); *see e.g.*, ACP0001028 (EIS, A-230) ("There is no substantive evidence that shows that more efficient and safer transportation of the tar sands oil via pipeline will itself significantly reduce the price of petroleum products, and increase the use of such products."). Therefore, unlike *Mid States*, it is not reasonably foreseeable that the AC pipeline will lead to an increase in the consumption of crude oil. And it is even less likely that this project will impact the development or use of renewable energy in the United States.¹⁰

¹⁰ *Mid States* involved a rail project that would supply coal for power generation, whereas here crude oil will be transported for refining into a variety of end-use products. While some of oil transported by the AC pipeline could be used for power generation, the primary use of refined oil in the US is vehicle fuels. *See* AEO2009, Doc. 217-1, at Table

Given the finding in the EIS that construction of the AC Pipeline will not affect crude oil demand, there was no obligation on the agencies to undertake a further analysis of the impact of this project on alternative sources of energy. *See Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545 (8th Cir. 2006) (rejecting argument that Supplemental EIS' consideration of emissions from end-use of coal was insufficient where project would result in only a small increase in coal consumption); *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (NEPA requires an agency only to consider those effects with "a reasonably close causal relationship" to the original agency action) (internal citation omitted). The development and use of alternative energy sources is more a matter of national energy policy and market forces and is not a suitable issue to address through an EIS for a single crude oil pipeline.

Plaintiffs also assert that they raised the issue of impacts to alternative energy sources in their comments on the DEIS and that the agencies failed to respond adequately. Pl. Mem. 36-37. What Plaintiffs actually stated in their comments was that "the likely and foreseeable environmental effects of burning more liquid fossil fuels must be included in the EIS" and that these impacts should be compared to "alternative fuels and improving energy efficiency." ACP0031124 (MCEA Comments, 29). As stated above, the EIS found that it is not reasonably foreseeable that the oil being transported by

A11 (motor gasoline is largest percentage of liquid fuels consumption). Thus, renewable energy sources such as wind, solar and nuclear are even less relevant here than in *Mid States*. As noted in the FEIS, renewable energy sources "represent a small fraction of the projected energy demands for [the Midwest] market for the foreseeable future, *especially related to providing refined petroleum products for the transportation sector.*" ACP0000211 (EIS, 3-3) (emphasis added).

the AC pipeline would increase the amount of oil consumed in the US, and therefore there was no need to assess the impacts of such an increase. *See* ACP0001029 (EIS, A-231); *see also* ACP0000674-677 (EIS, 4-400 to 4-403). Moreover, renewable energy alternatives were addressed in Sections 1.2.2.1 and 3.1 of the FEIS, and found not to be viable alternatives. *See* ACP0000122 (EIS, 1-4); ACP0000210-211 (EIS, 3-2 to 3-3).

The agencies found that renewable energy sources “represent a small fraction of the projected energy demands for [the Midwest] market for the foreseeable future, especially related to providing refined petroleum products for the transportation sector.”

ACP0000211 (EIS, 3-3). The argument that the EIS is deficient for failing to include more discussion of renewable energy sources is baseless.

E. The Defendant Agencies Considered Abandonment to the Extent Required by NEPA

In their Amended Complaint, Plaintiffs do not allege that the Defendant Agencies violated NEPA by failing to consider the environmental impacts associated with pipeline abandonment. *See* Amended Complaint, Doc. 57 (Oct. 1, 2009). Plaintiffs, however, now seek summary judgment on this issue. *See* Pl. Mem. at 38-39. Their request should be denied; abandonment was adequately considered in the EIS. *See* ACP0000202- 203 (EIS, 2-50 to 2-51); *see also, e.g.,* ACP0000855. As stated in the EIS, “[t]he proposed Project is expected to operate for 50 years or more.” ACP0000203 (EIS, 2-51).

Therefore, “Enbridge has not submitted plans for abandonment of the facilities at the end of the Project’s operational life.” *Id.* “Abandonment plans would be submitted to the

appropriate agencies for review and approval prior to abandonment of the pipelines” and “would be responsive to regulations that are in place at the time.” *Id.*

For example, “[c]urrent regulations require that oil pipelines be emptied and cleaned prior to abandonment.” ACP0000855 (EIS A-57). “[A]gencies with jurisdiction may also require that a pipeline be filled with sand or that it be removed and the corridor be restored to conditions acceptable to the applicable resource agencies.” *Id.* PHMSA specifically requires that pipeline operators file a report upon abandonment and include a “certification that the facility has been abandoned in accordance with all applicable laws.” 49 C.F.R. § 195.59. Enbridge is subject to this PHMSA requirement.

Plaintiffs argue that the above discussion of abandonment is insufficient because of the “dangers of leaving steel pipe contaminated with crude oil and diluent chemicals buried in the ground.” Pl. Mem. at 39. However, Plaintiffs fail to acknowledge that current regulations require Enbridge to engage in procedures and mitigation to avoid continuing contamination from an abandoned pipeline, i.e., cleaning the pipeline so no oil or chemicals remain. *See* ACP0000855. For any chemicals that may remain or leak/spill from the pipeline, the environmental consequences of such have already been fully considered in the EIS. *See e.g.*, ACP0000621- 651 (EIS, 4-347 to 4-377).

Further, an agency is not required to consider environmental consequences “that are so lacking in specificity to be remote or speculative.” *City of Bridgeton v. FAA*, 212 F.3d 448 (8th Cir. 2000). As noted by this Court in its PI Order, the Pipeline will be operated for over 50 years or more. *See* PI Order, 31. At that point, the regulations governing pipeline abandonment may be very different than they are today. Due to this

uncertainty in future regulation, the EIS considered abandonment to the fullest extent known and properly concluded that “planned abandonment procedures would be responsive to regulations ... in place at that time.” ACP0000203 (EIS, 2-51). Any further consideration would be highly speculative and not provide a meaningful discussion of environmental impacts intended by NEPA. *See City of Bridgeton*, 212 F.3d at 459.

CONCLUSION

For the foregoing reasons, Enbridge requests that its Motion for Summary Judgment be granted and that Plaintiffs’ Motion for Summary Judgment be denied.

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Respectfully submitted,

s/ John F. Beukema
JOHN F. BEUKEMA (Minn. Bar. No. 8023)
Faegre & Benson LLP
220 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Tel: (612) 766-8832
Fax: (612) 766-1600
JBeukema@faegre.com

DAVID H. COBURN (Admitted pro hac vice)
Step toe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-8063
(202) 429-3902
dcoburn@steptoe.com

Attorneys for Defendant-Intervenor, Enbridge Energy,
Limited Partnership