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PRELIMINARY STATEMENT

This case centers on the actions of the President of the United States, acting through the Department of State (“State Department”), issuing a Presidential Permit pursuant to Executive Order 13337 allowing the construction of the Alberta Clipper (“AC”) Pipeline that will transport crude oil from the oil sands region of Alberta, Canada into the United States. Two other federal agency defendants, the U.S. Army Corps of Engineers (“Corps”) and U.S. Forest Service (“USFS”), also issued permits for the construction of that pipeline and another pipeline located in the same right-of-way, allowing them respectively to cross waters of the United States pursuant to Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act and to cross the Chippewa National Forest pursuant to USFS regulations.

Plaintiffs challenge the actions of all three federal permitting agencies because they do not believe that the United States should use oil from the Alberta oil sands. They apparently are of the view that the environmental costs associated with extracting that oil are too high. Since this Court cannot order a cessation to oil sands activity in Canada, Plaintiffs seek indirectly to impair such activity by challenging a pipeline that would transport Alberta oil sands crude into the United States.

The core problem with Plaintiffs’ approach is that they are seeking to use a lawsuit to accomplish a political end. Whether the United States should import oil from Alberta is a question of foreign policy and energy policy; it is not a question properly addressed through a NEPA challenge to a specific project. As shown below, the State Department’s

decision to allow the oil pipeline to be built, based solely on the President's constitutional authority to make foreign policy decisions, is not judicially reviewable.

Even if there were a jurisdictional predicate on which this Court could review the State Department's issuance of the Presidential Permit, Plaintiffs have failed to set forth a claim on which this Court can grant relief. Plaintiffs' First Claim is deficient as a matter of law because the Plaintiffs have failed to allege facts that would support their allegation that the pipelines at issue are "connected actions" that had to be reviewed in a single Environmental Impact Statement ("EIS").

Plaintiffs' Second Claim concerning the impacts of crude oil extraction from the Alberta oil sands fails because oil sands activities, which take place in Canada hundreds of miles from the United States, were not part of the project presented to the State Department for environmental review and thus there was no legal obligation to assess oil sands impacts. Likewise, Plaintiffs' other claims are unsupported.

Plaintiffs' Third Claim fails because the State Department's EIS contains significant information on potential leaks and prevention/mitigation measures for both pipelines and appropriately addresses the role of the federal pipeline safety agency.

Plaintiffs' Fourth Claim in effect asks this Court to substitute its judgment for the State Department's exercise, on behalf of the President, of his constitutional powers with respect to the project for which Enbridge sought a Presidential Permit. This claim too fails as a matter of law.

Plaintiffs' Fifth Claim, concerning the already-built LSr Pipeline, is a variant of its First Claim and fails for the same reasons, and for the additional reason that the LSr Pipeline is already built.

Plaintiffs' Sixth Claim is that the AC Pipeline cannot be constructed across an international border without Congressional authorization pursuant to the Foreign Commerce Clause of the U.S. Constitution. However, the Presidential Permit issued for the AC Pipeline was properly predicated on the President's constitutional authority over the foreign affairs of the United States.

STATEMENT OF FACTS

At issue in this litigation is Enbridge's construction of the AC Pipeline, which is designed to transport crude oil from a supply hub near Hardisty, Alberta to an existing terminal in Superior, Wisconsin. The AC Pipeline will traverse approximately 326.9 miles in the United States, and will be installed primarily within or adjacent to an existing Enbridge pipeline corridor. Construction of the AC Pipeline is well underway.

Enbridge is also currently constructing the SLD Pipeline along much of the same corridor as the AC Pipeline. The SLD Pipeline is a 20-inch diameter pipeline extending from Superior, Wisconsin to Clearbrook, Minnesota, where it will connect with an existing Enbridge pipeline. The SLD Pipeline will transport light petroleum liquids referred to as "diluent" from U.S. refineries to the Canadian oil sands producers. Diluents are used to dilute heavy crude oil and bitumen (a thick form of oil found in the Canadian oil sands) to a consistency thin enough to be transported by pipeline. Because

the SLD Pipeline does not cross an international border it was not required to obtain a Presidential Permit.

A third pipeline, the LSr Pipeline, was constructed by Enbridge to transport light and medium sour crude originating in the northern Williston Basin of Saskatchewan, Canada to the United States. The State Department issued a Presidential Permit for the LSr Pipeline on June 10, 2008, following the issuance of an Environmental Assessment (“EA”) and a Finding of No Significant Impact (“FONSI”). Construction on that pipeline has been completed, and it has been operational since April 2009.

A. The State Department’s Processing of the Alberta Clipper Pipeline Application

On May 15, 2007, Enbridge filed an application with the State Department for a Presidential Permit to construct, operate, and maintain the AC Pipeline. The AC Pipeline requires a Presidential Permit because it will cross the international border between the US and Canada.

The State Department’s authority to issue Presidential Permits is based on a delegation of Presidential authority under Executive Order (“E.O.”) 13337, 69 Fed. Reg. 25229 (April 30, 2004). Unlike some Executive Orders that are based on specific legislation, the President promulgated E.O. 13337 pursuant to his constitutional authority over national security and foreign affairs. U.S. Constitution, Art. II, Sections 1, 2. E.O. 13337 authorizes the State Department to exercise the President’s delegated authority to make national interest determinations for the construction, connection, operation or

maintenance of facilities for the exportation or importation of petroleum and other fuels at the border of the United States.

The President, however, retains ultimate authority over permitting decisions. Accordingly, the President is free to approve or deny cross border facilities without recourse to Executive Order, and is also free to amend or revoke E.O. 13337 at any time. While E.O. 13337 provides for input from other federal agencies and the public, the Order expressly does not create any right, benefit, or trust responsibility, substantive or procedural, by any party against the United States or its agencies.

The submission of Enbridge's application for a Presidential Permit resulted in an extensive federal environmental review process under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* The State Department served as lead federal agency for purposes of preparing an EIS. It also undertook consultations and assessments pursuant to Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470(f), and Section 7 of the Endangered Species Act, 16 U.S.C. § 1536. *See* State Department August 3, 2009 Record of Decision/National Interest Determination ("ROD/NID") at 3, *available at* Dkt. 80-2 (10/16/2009).

As lead agency, the State Department worked with various other federal cooperating and consulting agencies, including the Corps and the USFS, among several other agencies and Indian tribes. The State Department also sought and received technical assistance from the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA"), the federal agency that serves as the safety regulator for interstate liquid petroleum pipelines. The State Department

also consulted with numerous state agencies, and held 11 public scoping meetings in Minnesota and Wisconsin in August, 2007 and an additional meeting in May, 2008.

The environmental study led to the issuance of a detailed Draft EIS for public comment on December 5, 2008. Following the issuance of the Draft EIS, the State Department conducted several public meetings at locations along the route to take comment on the DEIS. The Department issued a Final EIS on June 5, 2009. The Final EIS included a response to the numerous comments filed, including a response to comments filed by Plaintiffs, and offered additional environmental analysis of the project.¹

The Final EIS contains extensive information not only about the AC Project, but also about the SLD Project, 188 miles of which will be collocated in the same contiguous right-of-way. Thus, in analyzing land use and impacts to important environmental resources, the EIS provides information relative to the purpose, need and environmental impacts of both pipelines since they share the same right-of-way and will be constructed concurrently. The EIS also provides extensive information about Enbridge's planned expansion of its existing tank terminal at Superior, WI.

In its ROD/NID, the State Department made a "national interest" determination, concluding that the addition of crude oil pipeline capacity between Canada and the United States will advance a number of strategic interests of the United States. These include increasing the diversity of available supplies among the United States' worldwide

¹ The Draft and Final EISs are *available at* <http://albertaclipper.state.gov/clientsite/clipper.nsf?Open>.

crude oil sources in a time of considerable political tension in other major oil producing countries and regions; shortening the transportation pathway for crude oil supplies; and increasing crude oil supplies from a major non-Organization of Petroleum Exporting Countries producer. *See* State Department August 3, 2009 ROD/NID at 25-26.

Accordingly, the State Department, acting pursuant to E.O. 13337, issued a Presidential Permit on August 3, 2009, allowing Enbridge to construct, operate, and maintain the AC Pipeline.

B. Other Agency Permits

On August 24, 2009, the Corps (acting through its regional office in St. Paul, MN) issued a Record of Decision approving permits for the AC and SLD Pipelines to cross wetlands and waters of the United States in Minnesota and Wisconsin pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, and Section 10 of the River and Harbors Act, 33 U.S.C. § 403. The Corps' ROD recites the considerable volume of environmental information in the Final EIS on which the Corps relied. Another Corps regional office located in Omaha, Nebraska had previously issued a permit for the North Dakota portion of the AC Pipeline.

Enbridge also applied to USFS for an amendment to its existing Special Use Authorization permit, and for a Temporary Construction Special Use Permit, allowing it to construct the two Pipelines through 34 miles in the Chippewa National Forest in Minnesota. USFS, jointly with the Leech Lake Band, an Indian tribe whose reservations overlaps with the Chippewa National Forest, undertook to prepare their own, particularized environmental review of the impacts of the Pipelines on the Forest, which

culminated in the USFS' EA published as Appendix U to the State Department Final EIS. USFS thereupon issued a Record of Decision approving the issuance of the permits on June 29, 2009.

On August 17, 2009, Plaintiffs administratively appealed the issuance of the USFS Permits pursuant to that agency's appellate procedures at 36 C.F.R. § 215. On September 28, 2009, the USFS Appeal Deciding Officer for the Service's Eastern Region in Milwaukee denied the appeal.

ARGUMENT

I. Standard of Review

A complaint may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The critical issue in determining whether dismissal is appropriate is whether the reviewing court has power to hear the case. *See Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). The reviewing court has broad power to decide this issue, *see id.*, and in making this determination, factual and legal issues may be considered, *see Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993), as well as matters outside the pleadings. *See Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 470 (8th Cir. 1993).

Alternatively, an action may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure if the complaint fails to state a claim upon which relief can be granted. *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir.), *cert. denied*, 129 S. Ct. 222 (2008). To survive a 12(b)(6) motion, a complaint must allege facts

sufficient to state a claim as a matter of law. *See Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir.1998). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a [plaintiffs’] obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level . . .” *Bell Atlantic v. Twombly*, 127 S. Ct. 1555, 1564-65 (2007) (internal citations omitted).

II. Plaintiffs’ First through Fifth Claims for Relief against the State Department Should be Dismissed on Jurisdictional Grounds

Plaintiffs rely on the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, the federal question jurisdiction statute, 28 U.S.C. § 1331, and the Declaratory Judgments Act, 28 U.S.C. § 2201, 2202, as the basis for this Court’s jurisdiction. Amended Complaint at ¶¶ 10-11. However, the issuance of a Presidential Permit for an international crude oil pipeline pursuant to EO 13337 is not reviewable in this Court under any of these statutes since none of them provide a right of action or a waiver of sovereign immunity that would allow a challenge to such a Permit. Accordingly, the claims against the State Department in Plaintiffs’ First through Fifth Claims for Relief should be dismissed under Rule 12(b)(1) since Plaintiffs lack standing to pursue those claims.

By its plain terms, EO 13337 does not create a private cause of action:

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, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person. (EO 13337 at Section 6).

Apparently recognizing that the Executive Order does not supply a right of action, Plaintiffs rely on the APA to pursue their First through Fifth Claims for Relief against the State Department. Amended Complaint at ¶¶ 81, 90, 95, 104, and 111. While the APA creates a cause of action, and the requisite waiver of the Government's sovereign immunity, for a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, here there was no "agency action" by the State Department within the meaning of the APA. Rather, the "action" was that of the President acting through his delegation to the State Department. It is well settled that actions taken by the President are not agency actions subject to review under the APA. *See Dalton v. Specter*, 511 U.S. 462, 477 (1994) (actions of the President cannot be reviewed under the APA); *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) ("the actions of the President . . . are not reviewable under the APA"); *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 here is not reviewable."); *see also Tulare County v. Bush*, 185 F. Supp. 2d 18, 29 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) (dismissing a NEPA claim "because NEPA required agency action, and the action in question is an extension of the President's action").

Plaintiffs cannot find a basis for a cause of action or waiver of sovereign immunity in the federal question statute on which they rely, 28 U.S.C. §1331, because that statute creates no private right of action. *See e.g., Sabhari v. Reno*, 197 F.3d 938 (8th Cir. 1999) (Section “1331 does not, in and of itself, create substantive rights in suits brought against the United States.”). Neither can Plaintiffs properly base their cause of action on the Declaratory Judgments Act, 28 U.S.C. § 2201, 2202. It is “well-established [] that the Declaratory Judgments Act ‘is not an independent source of federal jurisdiction,’ rather, it merely grants an additional remedy “‘the availability of [which] presupposes the existence of a judicially remediable right.’” *C&E Servs., Inc. of Washington v. District of Columbia Water and Sewer Authority*, 310 F.3d 197, 201 (D.C. Cir. 2002) (citing *Schilling v. Rogers*, 363 U.S. 666, 677 (1960)).

Two courts recently dismissed challenges to a Presidential Permit for another U.S.-Canada crude oil pipeline, the Keystone Pipeline, on the basis that there was no “judicially remedial right” arising from the issuance of such a Permit under E.O. 13337. *See 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) (“NRDC”); *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”). In *Sisseton*, Judge Kornmann of the U.S. District Court for the District of South Dakota dismissed a challenge brought by several Indian tribes who claimed that the State Department’s environmental review of the Keystone pipeline was inadequate under NEPA. In granting Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction, the Court held that the plaintiffs lacked

standing since they are “unable to prove that a decision in their favor would result in the injury being redressed.” *Sisseton*, 2009 WL 3153655, *6. The Court predicated that holding on the fact that the President has inherent Constitutional authority to issue Presidential Permits based on his right to conduct foreign affairs. The Court reasoned that if it were to reverse the issuance of the Permit, “the President would still be free to issue the permit again under his inherent Constitutional authority to conduct foreign policy on behalf of the nation.” *Id.* at *7.

The *Sisseton* Court further held that even if the plaintiffs could overcome this lack of standing to obtain redress, they lacked a jurisdictional basis for their claims because, as relevant here, “NEPA does not create a private right of action.” *Id.* at *8 (citing *Central South Dakota Co-op. Grazing Dist. v. Secretary of U.S. Dept. of Agriculture*, 266 F.3d 889, 894 (8th Cir. 2001)). Neither, the Court held, does the APA, since the action at issue here was taken by the President (acting through powers that he delegated to the State Department) under the terms of EO 13337 and not by an agency subject to the APA. *Sisseton*, 2009 WL 3153655, *11. The *Sisseton* Court thus concluded that, “the actions taken pursuant to Executive Order 13337 are presidential in nature, and therefore, do not confer upon the plaintiffs a private right of action under the APA.” *Id.* at *12 (citing *Dalton v. Spector*, 511 U.S. 462 (1994) (holding that judicial review of Presidential decisions under the Defense Base Closure and Realignment Act is not available under the APA since the President is not an “agency”)). The Court therefore held that the APA and NEPA claims “must fail.” *Sisseton*, 2009 WL 3153655, *12.

A similar result was reached by the US District Court for the District of Columbia in *NRDC*. There, rejecting *NRDC*'s claims that the State Department failed to adequately consider various issues in its environmental review of the Keystone Presidential Permit application, the Court determined that the President's issuance of the Permit was based on "the President's inherent constitutional authority over foreign affairs and is [therefore] tantamount to an action by the President himself." *NRDC*, 2009 WL 3153702, *7. The Court further reasoned that because the President "is not an 'agency' for purposes of the APA, presidential action is not subject to judicial review under that statute." *Id.* at 8. *NRDC*'s claims were thus dismissed under Rule 12(b)(6) for failure to state a claim.

Plaintiffs' allegations in the First through Fifth Claims for Relief regarding the State Department's obligations in connection with issuance of the AC Pipeline Presidential Permit fail as a matter of law for the same reasons as were articulated in *Sisseton* and *NRDC*. Here, as in those cases, the issuance of a Presidential Permit for the AC Pipeline is an unreviewable Presidential action, not an agency action subject to APA review. Accordingly, the First through Fifth Claims for Relief directed to the State Department should be dismissed.²

² These Claims for Relief should be dismissed for the additional reason that the Plaintiffs have failed to state a claim that can be redressed, as discussed at Section I of the Defendants' Motion to Dismiss. *See Sisseton*, 2009 WL 3153655, at *4 (plaintiffs lacked standing to challenge Presidential Permit).

III. Plaintiffs' First through Fifth Claims for Relief Should be Dismissed Because They Have Failed to Allege Facts Sufficient to Demonstrate a Violation of NEPA

While Plaintiffs' claims directed at the State Department fail for the jurisdictional reasons stated above, they also fail for the additional reasons set forth in the remainder of this Memorandum. So too do Plaintiffs' claims against the Corps and USFS.³

Plaintiffs contend that the State Department, the Corps, and the USFS violated NEPA in several respects. However, Plaintiffs make only unsupported, conclusory allegations that the EIS, and other environmental documents, failed to comply with NEPA requirements. This is not sufficient. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003) (giving "no effect to conclusory allegations of law" in adjudicating a motion to dismiss). The Plaintiffs' claims are not supported by adequate factual allegations and therefore do not state a claim for relief, as described further below. Accordingly, the First through Fifth Claims should be dismissed.

³ Enbridge concurs with the argument at Section V of the Government's Motion to Dismiss that the First through Fourth Claims directed at the Corps and Forest Service fail to state a claim because they have made only bald, conclusory allegations that NEPA was violated without alleging any specific facts to support those allegations. *Twombly*, 127 S.Ct. at 1965-66.

A. Plaintiffs' First Claim Should be Dismissed Because the AC, SLD, and LSr Pipelines are Not Connected Actions

Plaintiffs contend that the AC, SLD, and LSr Pipelines are “connected actions,” the impacts of which must be considered in a single EIS. *See* Amended Complaint, First Claim for Relief, ¶¶ 77-81. However, the impacts of the SLD and LSr Pipelines were not required to be considered in the EIS for the AC Pipeline because they do not meet the legal definition of “connected actions.”

NEPA implementing regulations issued by the Council on Environmental Quality (CEQ) define “connected actions” 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). Under NEPA, “connected actions” ordinarily should be considered in a single EIS. *See* 40 C.F.R. §§ 1508.25(a)(1), (2). Actions that have “independent utility,” however, are not “connected,” and are not required to be considered in a single EIS. *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973). A project has “independent utility” when it would not be “irrational, or [] unwise to undertake [it] without subsequent actions.” *Choate v. U.S. Army Corps of Engineers*, 07-cv-1170 (WRW), 2008 WL 4833113, *9 (E.D. Ark., Nov. 5, 2008). Thus, it has a “life of its own,” and is “[l]ogical when viewed in isolation.” *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004).

Courts have found that projects have “independent utility” where they satisfy their own purpose and are not reliant upon other portions/additional projects for their operation. For example, in *Utahns for Better Transportation v. DOT*, 305 F.3d 1152 (10th Cir. 2002), the court found that individual transportation projects that were part of a larger expansion plan each had independent utility because they individually satisfied a transportation purpose and did not rely upon one another for their function/operation. In that case, plaintiffs argued that the agency was required to consider the impacts of a parkway, interstate project, and expansion of public transit in a single EIS because all three were proposed as parts of a “Shared Solution” transportation plan. *Id.* at 1182. 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[d] to alleviation of the traffic problems.” *Id.* at 1184; *see also Sierra Club v. Froehlke*, 534 F.2d 1289, 1297 (8th Cir. 1976) (EIS prepared for a single dam project was sufficient because the dam operated independently from other flood control projects); *Watershed Associates Rescue v. Alexander*, 586 F. Supp. 978 (D. Neb. 1982) (Corps not required to consider entire Missouri River levee system in assessing one levee that has independent utility, even though entire system is interconnected).

Here, Plaintiffs have conclusorily alleged that the AC and SLD Pipelines are connected actions, but have failed to allege with sufficient specificity that the AC and SLD Pipelines each lack independent utility. Amended Complaint, ¶ 78. Thus, they have failed to state a claim in their First Claim for Relief.

Similar to the projects in the above cases, the AC and SLD Pipelines do not rely upon one another for their operation, and Plaintiffs do not allege otherwise. As concluded in the Final EIS, “the proposed Alberta Clipper [] does not include the Southern Lights” or other expansion projects since “the other pipeline projects referred to have independent utility because they are not/would not be dependent on the construction of the Alberta Clipper pipeline.” EIS at § 1.5.2.2; *see also* Appendix A, at pgs. A-27, 27. The AC Pipeline, independent from the SLD Pipeline, is intended to transport heavy crude oil from Canada to the United States, and will serve this function regardless of whether the SLD Pipeline is built. The SLD Pipeline likewise serves an independent function, namely, the transportation of diluent to be mixed with heavy crude oil that will move through a variety of pipelines. Since each pipeline has its own purpose, and is therefore “independent” relative to the other, it is irrelevant under NEPA whether or not they are part of a larger pipeline expansion project. *See Utahns*, 305 F.3d at 1183.

Further, Plaintiffs’ First Claim also should be dismissed to the extent that it alleges error in the State Department’s failure to assess the LSr Pipeline as a connected action relative to the AC or SLD Pipelines. Again, Plaintiffs have failed to allege any facts that would support their claim. Plaintiffs cannot dispute that the LSr Pipeline is already constructed and in operation, transporting crude oil from Saskatchewan into the United States. The very fact that the LSr Pipeline is already operational proves as a matter of law that it has utility “independent” from the other two pipelines and disposes of Plaintiffs’ “connected action” claim. *Citizens’ Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012 (10th Cir. 2002) (finding a project to not be connected

where it would be completed regardless of whether an interchange project was going to occur).⁴

Although Plaintiffs assert that the USFS and Corps violated NEPA relative to permitting the AC and SLD Pipelines, they make no factual allegations that state a claim for relief about the actions of those agencies relative to the AC Pipeline. They allege only cursorily that these agencies failed to conduct an independent environmental review of the SLD Pipeline, but then fail to offer any factual allegations to support that bald claim. Amended Complaint, ¶ 80. For example, they make no allegations as to the sufficiency of the environmental assessment that the USFS prepared for the AC and SLD Pipelines.

Since the Plaintiffs have failed to allege any specific facts “that affirmatively and plausibly suggest” that the AC, SLD, and/or LSr Pipelines are connected, or that the impacts of the SLD Pipeline were not considered to the extent required by NEPA, their First Count must be dismissed in its entirety. *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007); *see Ecology Center v. U.S. Forest Service*, 451 F.3d 1183, 1189 (10th Cir. 2006) (affirming dismissal of NEPA claim where Court determined that agency had taken a hard look at the issues by adhering to NEPA procedures).

⁴ Plaintiffs’ First Claim also alleges that the cumulative impacts of the pipelines relative to one another were not assessed, but supporting factual assertions are lacking. The Final EIS in fact addressed these impacts throughout Section 4.14 of the EIS. Similarly, the Environmental Assessment prepared by the State Department for the LSr Pipeline assessed the cumulative impacts of the AC and SLD Pipelines. *See* EA at pg. 3-86 (“[e]xpected cumulative impacts resulting from Alberta Clipper impacts along the collocated [Southern Lights], and Alberta Clipper pipelines [were] included in the LSr Project impact discussion and associated tables”).

B. Plaintiffs' Second Claim for Relief Should be Dismissed Because the Indirect and Cumulative Impacts they Identify Were Not Within the Scope of Required NEPA Review

Plaintiffs claim that the State Department's EIS fails to take into account the indirect and cumulative impacts of the AC and SLD Pipelines, particularly impacts from extraction activities in the Canadian oil sands area of Alberta. *See* Amended Complaint at ¶¶ 82-90. Contrary to Plaintiffs' claims at ¶¶84-85 and 88-89 of the Amended Complaint, the impacts of oil sands extraction activities in Canada are beyond the scope of NEPA review as a matter of law because: 1) those on-going extraction activities are not caused by the AC or SLD projects; and 2) the extraction activities are occurring in Canada several hundred miles from the United States border.

Specifically, the impacts of oil sands extraction are not "indirect effects" of the AC and SLD Pipelines, as Plaintiffs allege. "Indirect effects" are impacts *caused* by the action that are later in time or farther removed in distance. 40 C.F.R. § 1508.8. Any impacts of extraction activities at the oil sands area are not caused by the AC or SLD Pipelines since the oil sands area has been and will continue to be developed without the AC and SLD projects, and Plaintiffs do not (and could not plausibly) contend otherwise. *See* EIS at p. 4-402. *See Department of Transportation v. Public Citizen*, 341 U.S. 752, 767 (2004) (only those effects with "a reasonably close causal relationship" are required to be considered under NEPA) (internal citation omitted). Were the AC Pipeline not built, the oil produced in Alberta would simply find another outlet through any number of other pipelines or distribution sources to meet the global demand for that oil.

Further, the State Department was not required to consider oil sands extraction impacts as “cumulative impacts” of the AC or SLD Pipelines. Plaintiffs have not alleged any specific facts regarding cumulative impacts that would occur between the pipelines to be constructed in the US and the oil sands extraction activities occurring hundreds of miles away in Canada. Given the distance between the areas of extraction and the pipelines considered in the EIS, the State Department properly determined that the oil sands area is beyond the reasonable geographic scope of the EIS. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (“identification of the geographic area within which [impacts] may occur[] is a task assigned to the special competency of the appropriate agencies”).

Plaintiffs allege that the EIS did not address “downstream” indirect impacts resulting from refinery upgrades in the U.S. and use of the imported oil. Amended Complaint, ¶ 85. As a matter of law, there was no obligation on the agencies to undertake such an analysis. *See Department of Transportation v. Public Citizen*, 341 U.S. at 767 (NEPA requires an agency only to consider those effects with “a reasonably close causal relationship” to the original agency action, a requirement equivalent to the “familiar doctrine of proximate cause from tort law”) (internal citation omitted). An analysis was nonetheless undertaken and thus the allegation in ¶ 85 of the Amended Complaint that the Final EIS “does not account for” these impacts is unsupported. *See* FEIS at 4-400-403. *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).

Plaintiffs allege that the Final EIS fails to account for impacts associated with future expansion of the AC Pipeline. Amended Complaint, ¶ 85. However, they fail to allege that there are expansion plans or provide any basis for their bald opinion that expansion is “reasonably foreseeable.” *Id.* The impacts of any theoretical expansion were therefore not required to be considered in the EIS and no claim has been stated. *See Kleppe*, 427 U.S. 390 (NEPA does not require an agency to consider the environmental effects of speculative or hypothetical projects).⁵

Plaintiffs also allege that there is no analysis in the USFS EA on the impacts of climate change on the Chippewa National Forest. Amended Complaint, ¶ 85. However, the issue of the impacts of climate change on the Chippewa National Forest was not raised in any comments filed by Plaintiffs on the Draft EIS or on the EA prepared by the USFS. Plaintiffs’ claim should be dismissed on that basis. *See Department of Transportation v. Public Citizen*, 341 U.S. at 764-765 (parties forfeited right to raise issue in Court when it was not raised with the agency in comments on an Environmental Assessment).⁶

⁵ The EIS clearly states that expansion of the AC Pipeline beyond 450,000 barrels per day is not currently planned, and may never occur. EIS at pg. 2-50.

⁶ Moreover, it is beyond the scope of these project-specific NEPA documents to attempt to characterize the impacts that global climate change will have on a specific area, such as a particular National Forest. *See* CEQ Draft Memorandum, “Guidance Regarding Consideration of Global Climate Change in Environmental Documents Prepared Pursuant to NEPA” 1997, p. 5 (“Analysis of the impacts of [GHG] emissions or sinks at the project level [] would not provide meaningful information in most instances....”).

Plaintiffs claim that the EIS “does not consider” the cumulative impacts of two cross-border pipelines being built (Keystone) and planned (Keystone XL) by an Enbridge competitor. Amended Complaint, ¶ 88. However, the EIS included a discussion of both Keystone pipelines and thus the claim is unsupported. *See* EIS at 4-388 – 4-390 and Appendix A at A-18. As noted in the response to comments portion of the Final EIS, the XL project was proposed subsequent to the preparation of the AC EIS and is designed to serve a different market altogether. EIS, Appendix A at A-18. Plaintiffs therefore have failed to state a claim that the EIS did not consider these points.

C. Plaintiffs’ Third Claim for Relief Should be Dismissed for Failure to Allege Facts that Would Support a Violation of NEPA

Plaintiffs claim that the reviewing agencies failed to adequately consider the risks of spills and operational leaks associated with the pipelines. *See* Complaint, Third Claim for Relief, ¶¶ 91-95. However, the EIS fully assesses the impacts if a spill/leak were to occur, and discusses the safety and response plans that Enbridge is required to maintain by the federal pipeline safety agency, PHMSA. *See* EIS at § 4.13. “As part of the NEPA environmental review, a frequency-volume analysis was performed using PHMSA data” that “indicate[d] an overall frequency of between about 0.1 and 0.3 spills per year” would be foreseeable/likely. EIS, at § 4.13.3.3. The EIS recognizes that “[c]rude oil released into the environment” from these spills could “affect natural resources, human uses and services, and aesthetics to varying degrees, depending on the cause, size, type, volume, rate, temperature of the oil, location, environmental conditions, and associated response actions.” EIS, at § 4.13.4. However, “to minimize the potential for releases from the

proposed pipeline and associated facilities,” Enbridge’s design and construct[ion] [of] the [pipelines would be] in accordance with applicable” standards and regulations of the federal pipeline safety agency, PHMSA, and Enbridge “would be required to develop a comprehensive [Emergency Response Plan] for the Project for review and approval by [PHMSA]” and “have a written pipeline [Integrity Management Plan] in accordance with Part 195.452.” *See* EIS, § 5.14 and pg. 4-348.

To the extent that Plaintiffs allege that the EIS improperly relies upon a future review process by PHMSA (Amended Complaint, ¶92), their allegations are incorrect as a matter of law because the EIS properly accounts for future PHMSA regulatory oversight of the AC Pipeline regarding leaks and spills. For example, in *Stop the Pipeline v. White*, 233 F. Supp. 2d 957 (S.D. Ohio 2002), the plaintiffs asserted that “the Corps inappropriately deferred to [PHMSA] on all safety issues” and that “spills and leaks were not actually assessed.” *Id.* at 967. However, the court disagreed, finding that the agency’s deferral to the PHMSA report which concluded “the pipeline itself incorporate[d] numerous safety precautions, monitoring programs, and is designed to meet or exceed all requirements of 49 C.F.R. Part 195” satisfied NEPA. *Id.* at 969-970. Similar to *Stop the Pipeline*, it was therefore proper for the EIS to conclude that “[d]ue to the stringent safety and integrity measures that Enbridge incorporated into the design” of its pipelines “as well as governing PHMSA pipeline safety regulations[,]” all risks of spills and leaks will be nonexistent, minimal or mitigated. *See* EIS, §§ 4.13.6, 5.14, and pgs. 4-277, 4-348.

The risk of SLD Pipeline spills and leaks were fully considered to the extent relevant. Since the SLD and AC Pipelines are collocated, any leaks and spills associated with the SLD Pipeline would inevitably occur along the same route as those associated with the AC Pipeline. Also, the same PHMSA safety standards would apply. *See* EIS, at pg. 4-348. The EA prepared for the USFS also specifically considered the impact of spills and leaks in connection with the SLD Pipeline. *See* EIS, Appendix U, §§ 3.1.1.2 – 3.1.1.5.

Plaintiffs' Amended Complaint contains only "a statement of facts that merely creates a suspicion" that impacts of spills were not considered. *Twombly*, 127 S. Ct. at 1974 (internal citation omitted). Because they were considered, the Third Claim for Relief should be dismissed. *See Ecology Center*, 451 F.3d at 1189 (complaint dismissed where agency took the required "hard look" at issues).

D. The Fourth Claim for Relief Should be Dismissed on the Ground that the State Department had no Obligation to Consider Alternatives that Did Not Meet the Purpose and Need for the AC Pipeline

Plaintiffs allege that the EIS does not support the need for the AC Pipeline, and that its assessment of alternatives is insufficient. Amended Complaint, Fourth Claim for Relief, ¶¶ 96-104. However, Plaintiffs' claims fail as a matter of law.

Plaintiffs rely on a U.S. Energy Information Administration (EIA) forecast purportedly showing a declining demand for crude oil. Amended Complaint at ¶¶ 98-99. However, the demand for heavy crude oil in the primary refinery market to be served by the AC Pipeline — the Midwest refinery market — is fully documented in the EIS. EIS, at pgs. 1-2 to 1-7, 4-390. Midwest refineries are increasingly dependent on Canadian oil

and several of them are investing millions of dollars to expand their capacity to refine heavy crude. *Id.* at 4-390. The Enbridge system provides the transportation service to meet this need, and Plaintiffs do not allege otherwise. The “no action” alternative that they favor would not satisfy the need for the AC Pipeline and thus was properly rejected by the State Department. *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001) (alternatives that "do not accomplish the purpose of an action are not reasonable" and need not be studied by the agency).

Consistent with their broader purpose here to terminate the importation of oil sands crude, Plaintiffs claim that conservation and renewable energy should have been considered by the State Department as alternatives for the AC Pipeline. Amended Complaint at ¶ 101. However, the issue before the State Department was whether to issue the permit requested for the Enbridge pipeline, not to formulate the nation’s public policy for future energy use. 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 is “shaped by the application at issue.” *Citizens Against Burlington v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (“Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.”); *Env. Law and Policy Center v. NRC*, 470 F.3d 676 (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”).

Here, the State Department fulfilled its NEPA obligations when it undertook an extensive review of the pipeline project that Enbridge proposed. It then proceeded to exercise the constitutional authority delegated to it by the President to issue a Presidential Permit based on its finding that the Enbridge-proposed project was in the “national interest.” The State Department had no legal obligation under NEPA to address the environmental consequences of entirely different projects or energy solutions that Plaintiffs might have preferred, but are not legitimate alternatives to the proposal. Plaintiffs therefore have failed to state a claim on which this Court can grant relief. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA does not “mandate particular results” but provides a process to ensure that federal agencies take a “hard look” at the environmental impacts of proposed acts).

E. Plaintiffs’ Fifth Claim is Moot

Plaintiffs’ Fifth Claim challenges the sufficiency of the EA issued by the State Department for the LSr Pipeline, which was awarded a Presidential Permit by the State Department on June 10, 2008. Amended Complaint, ¶¶ 105-111. This Claim is unreviewable as a matter of law for the reasons stated in Section II, above.

In addition, the claim is untimely and moot. Plaintiffs could have, but did not, challenge the LSr Presidential Permit in 2008, when it was issued. While Plaintiffs sat on their rights, the pipeline was built and it has been operational since April 2009. EIS at 1-29. As the U.S. Court of Appeals for the Eighth Circuit has held, “A NEPA claim does not present a [live] controversy when the proposed action has been completed and no

effective relief is available.” *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 893 (8th Cir. 2004).

IV. Plaintiffs’ Sixth Claim Should Be Dismissed as a Matter of Law Because the Authority to Issue the Presidential Permit Rests with the Executive Branch

As a matter of law, the authority to issue Presidential Permits for international oil pipelines lies with the President, who has delegated his authority to the State Department through E.O. 13337. The State Department acted in accordance with this delegation of authority in issuing the Presidential Permit for the AC Pipeline. Therefore, contrary to Plaintiffs’ claim, *see* Amended Complaint, Sixth Claim for Relief, ¶¶ 112-115, the State Department complied with the Constitution.

The President, under his “plenary power, [may] prevent any physical connection (not authorized by Congress) between any foreign country and the United States.” 30 Op. Att’y Gen. 217, 221 (1913). The President’s approval for such physical connection is necessary for “the proper conduct of the foreign relations of the United States.” Executive Order 10485, 18 Fed. Reg. 5397 (Sept. 3, 1953); *see also* Executive Order 11423, 33 Fed. Reg. 11741 (Aug. 16, 1968). Thus, “no one, alien or native, has any right to establish a physical connection between the [border] of this country and that of any foreign nation” without the consent of the President. *United States v. La Compagnie Francaise des Cables Telegraphiques*, 77 Fed. 495 (C.C. N.Y. 1896). “Such consent may be implied as well as expressed [in the Constitution], and whether it shall be granted or refused . . . [clearly] fall[s] within the province of the executive to decide.” *Id.*; *see also* *Sisseton*, 2009 WL 3153655, *7 (“the President has the sole authority to allow oil

pipeline border crossings under his inherent constitutional authority to conduct foreign affairs”); *NRDC*, 2009 WL 3153702, *5 (in issuing a Presidential Permit for an international oil pipeline, the President is “acting pursuant to [his] inherent foreign affairs power”).

While the Plaintiffs assert that the AC Pipeline cannot be built unless Congress authorizes it, the law is otherwise. “In the absence of Congressional action [the issuance of Presidential Permits for oil pipelines is] to be regulated and controlled by the executive department of the Government.” 22 U.S. Op. Atty. Gen. 514 (1899). Therefore, whether or not Plaintiffs are correct that oil pipelines are a matter of interstate commerce, Congress’ failure to regulate, *see Sisseton*, 2009 WL 3153655, *7 (“Congress has failed to create a federal regulatory scheme for the construction of oil pipelines . . .”), coupled with its acquiescence in the long-standing exercise of plenary authority by the President, evidences the President’s right to issue Presidential Permits for international oil pipelines.⁷

The President has used Executive Orders to delegate the “authority vested in [him] by the Constitution and the laws of the United States of America” to the State

⁷ E.O. 13337 is one in a series of directives for managing the President’s constitutional authority over energy facilities that cross international borders. In 1968, President Johnson issued E.O.11423, which delegated to the State Department the authority to issue “Presidential permits for the construction, connection, operation, and maintenance at the borders of the United States” for a wide variety of “border crossing facilities”, including oil pipelines. 33 Fed. Reg. 11,741 (Aug. 20, 1968); *see also* Executive Order 10485, Sept. 3, 1953 (18 Fed. Reg. 5397) (electrical power lines and natural gas facilities), as amended by Executive Order 12038, Feb. 3, 1978 (43 Fed. Reg. 4957); Executive Order 10530, May 10, 1954 (19 Fed. Reg. 2709) (submarine cables).

Department on numerous occasions, apart from the E.O. 13337. *See e.g.*, Executive Order 10485, Sept. 3, 1953 (18 Fed. Reg. 5397); Executive Order 11423, August 16, 1968 (33 Fed. Reg. 11741). The State Department acted in accordance with the most recent of these, E.O. 13337, in issuing the Presidential Permit to Enbridge. Therefore, Plaintiffs' "conclusory allegations" that the issuance of a Permit here was unconstitutional should be dismissed. *See Mattes*, 323 F.3d at 698.

CONCLUSION

Plaintiffs seek through their Amended Complaint to challenge Enbridge's Pipelines, when in fact their goal is to challenge the Alberta oil sands projects, a matter beyond the scope of this case. For the threshold jurisdictional reasons, and all of the other reasons stated above, Plaintiffs' First Amended Complaint should be dismissed.

RESPECTFULLY SUBMITTED

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