

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

SIERRA CLUB, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, INDIGENOUS ENVIRONMENTAL NETWORK, and NATIONAL WILDLIFE FEDERATION,

Plaintiffs

v.

HILLARY CLINTON, in her official capacity as Secretary of State, JAMES STEINBERG, in his official capacity as Deputy Secretary of State, UNITED STATES DEPARTMENT OF STATE, Lieutenant General ROBERT L. VAN ANTWERP, in his official capacity as U.S. Army Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers; Colonel JON L. CHRISTENSEN, in his official capacity as District Engineer and Commander of the U.S. Army Corps of Engineers; the UNITED STATES ARMY CORPS OF ENGINEERS, TOM TIDWELL, in his official capacity as Chief of the United States Forest Service; ROB HARPER, in his official capacity as Forest Supervisor for the Chippewa National Forest; and the UNITED STATES FOREST SERVICE,

Defendants

ENBRIDGE ENERGY, LIMITED PARTNERSHIP

Defendant-Intervenor

CIV. NO. 09-2622 (DWF/RLE)

ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Defendant-Intervenor, Enbridge Energy, Limited Partnership (“Enbridge”), as the holder of the Presidential Permit, and the United States Army Corps of Engineers (“Corps”) and United States Forest Service (“USFS”) permits at issue in this case, respectfully submits this Memorandum of Law in Opposition to the Motion of Plaintiffs Minnesota Center for Environmental Advocacy (“MCEA”), Sierra Club Environmental Law Program (“Sierra Club”), Indigenous Environmental Network (“IEN”), and National Wildlife Federation (“NWF”) (collectively “Plaintiffs”) for a Preliminary Injunction (“Motion”) [Dkt. 8]. Plaintiffs allege that the Presidential Permit issued by the U.S. Department of State (“State Department”) to the Alberta Clipper (“AC”) Pipeline, as well as the permits issued to that Pipeline and the Southern Lights Diluent (“SLD”) Pipeline by the Corps and the USFS, should be invalidated because these agencies relied on insufficient environmental reviews undertaken pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* They further allege that the President of the United States, who delegated his authority by Executive Order to the State Department to issue Presidential Permits of the type issued to the AC Pipeline, lacks constitutional authority to issue such permits and that the AC Pipeline cannot be built unless Congress authorizes its construction.

Plaintiffs previously sought a Temporary Restraining Order to stop the construction of the AC and SLD Pipelines. The District Court for the Northern District of California denied the Plaintiffs’ request on September 9. [Dkt. 35, 9/9/2009]. Plaintiffs nonetheless now rely on the same Motion papers to seek a preliminary

injunction to stop the construction of both pipelines, which began almost two months ago, on August 20, 2009.

Plaintiffs' Motion did not support the issuance of a TRO to stop the on-going construction of the pipelines. Now that construction has proceeded for several more weeks, with about 2,800 workers fully engaged and contributing to the local economy, Plaintiffs have an even higher burden to justify the issuance of a Preliminary Injunction. The AC Pipeline will, as the State Department found, serve an important national interest by facilitating the transportation of crude oil into the United States from a stable, reliable and friendly source, Canada. The SLD Pipeline will also facilitate the transportation of oil from Canada to the United States by providing for the flow of diluent, a diluting compound, to Canada where it will be mixed with heavy crude oil to allow that oil to flow southbound (as well as within Canada) by pipeline. The pipelines are essential to satisfy the economic needs of the United States at a time when the economy of this nation remains dependent on oil, and their timely construction should be allowed to proceed.

Against this background, Plaintiffs cannot meet the heavy burden on them to justify a preliminary injunction, i.e., they cannot show likelihood of success on the merits, irreparable injury, a balance of harms in their favor or public interests that favor an injunction. In fact, Plaintiffs' claims against the State Department are unreviewable discretionary Presidential actions, as two very recent decisions have held. *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*”) (both dismissing very similar NEPA claims against the State Department on grounds that the issuance of a Presidential Permit is not judicially reviewable). Their claims against the other agencies are also likely to fail since each of the two other agencies undertook a thorough environmental review of the issues relevant to their permitting decisions and reasonably relied on the State Department’s exhaustive environmental review.

On the question of irreparable harm, Plaintiffs’ Motion exaggerates potential impacts that are in actuality no more than a consequence of the temporary disturbances that come with the construction of any linear project, such as a road, railroad or pipeline. Plaintiffs fail to acknowledge in their Motion that the AC and SLD Pipelines will be built underground, largely along existing rights-of-way for other Enbridge pipelines, some of which were constructed decades ago, and within a corridor that in many places includes a U.S. Highway, a BNSF railroad line and other energy facilities. Declaration of Denise Hamsher (“Hamsher Dec.”) ¶ 9.¹ While there is some temporary disturbance of the land to lay the new pipe — just as there has been repeatedly over the years in this same corridor — the disturbance can be measured in days or weeks, after which vegetation and grasses will begin to grow once the pipe is buried and filled over. Declaration of James Crawford (“Crawford Dec.”) ¶¶18, 25.

¹ The declarations of Denise Hamsher, Enbridge’s Director of Public, Regulatory and Government Affairs for U.S. Major Projects and James Crawford, Enbridge’s Director, Engineering & Construction, Alberta Clipper U.S. are offered in support of this Opposition and are attached hereto.

Moreover, construction of these pipelines has been underway for eight weeks, since August 20, 2009. At this stage, over 248 miles of right-of-way have been cleared and 220 of these miles have been graded. Crawford Dec. ¶ 10. The cleared right-of-way represents approximately 76 percent of the AC Pipeline's 326 mile length. The public interest in the construction and operation of these pipelines has been established during the regulatory processes; the direct, indirect and cumulative impacts have been analyzed as required by NEPA; and the environmental protection practices for their construction have been identified and implemented. To the maximum extent possible, any adverse environmental impacts will be avoided, minimized or mitigated. Any minor, temporary and/or mitigated environmental harms that may be suffered while the pipelines are completed do not outweigh the strong public interest favoring the pipelines' completion and/or the extensive financial harms that will be suffered by Enbridge. Injunctive relief is clearly inappropriate in the face of the temporary disruptions and speculative harms claimed by Plaintiffs.

FACTUAL BACKGROUND

Enbridge is a limited partnership organized in the state of Delaware. Enbridge's corporate structure, as relevant, is described in the declaration of Denise M. Hamsher. Hamsher Dec. ¶ 2.

Enbridge is constructing the AC Pipeline, which will increase its pipeline distribution system by up to 450,000 barrels per day (bpd) by transporting crude oil from a supply hub near Hardisty, Alberta to an existing terminal in Superior, Wisconsin. Hamsher Dec. ¶ 6. In the United States, the Pipeline will consist of approximately 326.9

miles of new 36-inch diameter pipelines and associated facilities that will be installed primarily within or adjacent to the existing Enbridge pipeline corridor that extends from the U.S./Canada border to the existing terminal in Superior, Wisconsin. Crawford Dec. ¶¶ 6, 7, 16. At most points the Pipeline's route will be collocated with existing Enbridge pipelines, thereby minimizing environmental impacts created during construction. Hamsher Dec. ¶¶ 7, 16. There are only a few places, totaling less than 35 miles, where the right-of-way for the AC Pipeline deviates from the existing right-of-way to address environmental or constructability issues, or regulatory agency or landowner requests. Crawford Dec. ¶ 7.

Because the AC Pipeline will cross the U.S./Canada border, Enbridge was required to obtain a Presidential Permit from the State Department, which has been delegated authority by the President to issue such permits pursuant to Executive Order 13337, 69 Fed. Reg. 25299 (May 5, 2004). Crawford Dec. ¶ 8. In order to issue a Presidential Permit under this Executive Order, the State Department must determine whether a proposed project is in the "national interest." E.O. 13337, § 1(g). The State Department conducted an almost two-year environmental review process in accordance with NEPA. Crawford Dec. ¶ 8. As the lead federal agency for the environmental review, the State Department prepared a Draft Environmental Impact Statement ("EIS") that was issued on December 5, 2008 for public comments. Numerous entities commented on the Draft EIS, including MCEA on behalf of all of the plaintiffs in this action, except NWF. After consideration of the public comments received on that Draft

EIS, the State Department issued a Final EIS on June 8, 2009.² The State Department undertook its intensive environmental review with the assistance of an expert contractor and in coordination with several other federal agencies with an interest in the matter and two Indian tribes whose territory would be crossed by the Pipelines. *See* Final EIS at § 1.3.

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 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.” The State Department August 3, 2009 Record of Decision/National Interest Determination, *available at* Hamsher Dec., Exhibit 4. Enbridge began constructing its AC Pipeline on August 20, 2009, upon issuance of a Presidential Permit. Crawford Dec. ¶ 9.

Enbridge also is constructing the SLD Pipeline. *Id.* The SLD Pipeline will be a 20-inch diameter pipeline extending from Manhattan, Illinois to Clearbrook, Minnesota, where it will connect with an existing Enbridge pipeline. Hamsher Dec. ¶ 21. The section of SLD at issue in this action, Superior, Wisconsin to Clearbrook, Minnesota, will

² The Draft EIS and Final EIS can be found at www.albertaclipper.state.gov.

be constructed in the same construction season with the AC Pipeline as it is collocated in the same corridor. *Id.* The SLD pipeline will deliver light petroleum liquids referred to as “diluent,” from U.S. refineries to the Canadian oil sand producers for use in facilitating the flow of heavy Canadian crude through pipelines. *Id.* at ¶ 22.

Both the AC and SLD Pipelines cross certain wetlands and waters of the United States. Enbridge therefore was required to obtain a permit 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, from the Corps. Hamsher Dec. ¶ 18. Acting on the basis of the Draft and Final EISs issued by the State Department, as well as on extensive additional environmental data supplied to it by Enbridge and its contractors over the course of several months, on August 24, 2009 the Corps (acting through its regional office in St. Paul, MN) issued a Record of Decision approving the requisite Section 404 and Section 10 permits for construction of both pipelines in Minnesota and Wisconsin. Hamsher Dec. at ¶ 18. The Corps ROD recites the considerable volume of environmental information on which the Corps relied. A copy of the Corps’ ROD is available at, *Sierra Club, et al.*, Civ. No. 09-2622 (DWF/RLE), Dkt. 15-2 (9/8/2009). Another Corps regional office located in Omaha, Nebraska had previously issued a permit for the North Dakota portion of the AC Pipeline. *Id.*

The AC and SLD Pipelines also cross, for a distance of about 34 miles, the Chippewa National Forest in Minnesota, generally following the same corridor as existing Enbridge pipelines which traverse that Forest. Enbridge thus 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 in the Forest. USFS, jointly with the Leech Lake Band of Ojibwe (“LLBO”), 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. This environmental review is reflected in Draft and Final Environmental Assessments (“EAs”) prepared pursuant to the NEPA responsibilities of the USFS. *See* 36 C.F.R. § 220.7 (“[a]n environmental assessment (EA) shall be prepared for proposals . . . that are not categorically excluded”). The Draft and Final EAs were published, respectively, as Appendices to the Draft and Final State Department EISs. The EAs provided extensive information on the impacts of constructing the Pipelines in the Forest. Acting on the basis of the Final EA and the State Department’s Final EIS, USFS issued a Record of Decision approving the issuance of the permits to Enbridge on June 29, 2009. Notice of that decision was published in the *Bemidji Pioneer* on July 3, 2009.

Plaintiffs, none of which commented specifically on the USFS’s Draft EA, on August 17, 2009 administratively appealed the issuance of the USFS Permits pursuant to that agency’s appellate procedures at 36 C.F.R. Part 215. Their appeal raised many of the same challenges to the State Department Final EIS as they raise here. On September 28, 2009, the USFS Appeal Deciding Officer for the Service’s Eastern Region in Milwaukee issued a decision denying the appeal. The Plaintiffs subsequently, on October 1, amended their complaint in this case to add USFS as a defendant, among other amendments.

Enbridge also applied for and received required authorizations from the States of North Dakota, Minnesota and Wisconsin to construct both Pipelines through those states as well as permits from the Fond du Lac Band of Lake Superior Chippewa and the LLBO to cross their respective reservations. Following extensive hearings and on the basis of a significant written record addressing many of the issues raised in this lawsuit, the Minnesota Public Utilities Commission issued both routing permits and certificates of need for the AC and SLD Pipelines, finding that both Pipelines were in the public interest of the citizens of Minnesota. Hamsher Dec. at ¶ 12. Plaintiff MCEA is at present challenging the MPUC's decisions in Minnesota state courts, but has not sought a preliminary injunction. Hamsher Dec. at ¶ 12. Neither has MCEA nor any of the other plaintiffs sought injunctive relief with respect to permits issued by the state agencies in North Dakota and Wisconsin. Hamsher Dec. at ¶ 13.

A third pipeline, the LSr pipeline, was recently constructed by Enbridge to transport light and medium sour crude originating in the northern Williston Basin of Saskatchewan to the United States and avoid an existing bottleneck in the Enbridge pipeline system. Hamsher Dec. ¶ 9. Because the LSr pipeline crossed the international border it required a Presidential Permit, which the State Department issued on June 10, 2008. The State Department acted following its issuance of a Draft and Final Environmental Assessment addressing the impacts of constructing that pipeline and the issuance of a Finding of No Significant Impact ("FONSI"). Hamsher Dec. ¶ 9. Construction on that pipeline has been completed, and it is now operational. *Id.*

ARGUMENT

A preliminary injunction is an extraordinary remedy. *See Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). In order to be granted, the plaintiff must demonstrate: (1) the likelihood that it will succeed on the merits; (2) the threat of irreparable harm; (3) the balance of harms weighs in its favor; and (4) injunctive relief would be in the public interest. *See Sierra Club v. U.S. Army Corps of Engineers*, 771 F.2d 409 (8th Cir. 1985). No one factor by itself is determinative. *See West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). Further, because the granting of an injunction “is not favored,” *see Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984), the balance of harms must weigh *decidedly* in favor of the moving party. *General Mills, Inc., v. Kellogg Co.*, 824 F.2d 622, 624 (8th Cir. 1987).

Plaintiffs have clearly failed to meet this burden.

A. PLAINTIFFS HAVE FAILED TO PRESENT A CREDIBLE CASE ON THE MERITS

1. Plaintiffs’ Claims Against the State Department Fail Because Issuance of the AC Pipeline Presidential Permit is Unreviewable by this Court

In their Motion, Plaintiffs argue that they are likely to succeed on the merits because, “The State Department’s Issuance of the Alberta Clipper Presidential Permit Violates the National Environmental Policy Act.” Motion at 6. Plaintiffs assume, and therefore do not address, the reviewability of the State Department’s issuance of the Presidential Permit. They rely on the Administrative Procedure Act, 5 U.S.C. § 551 *et*

seq., and the federal question jurisdiction statute, 28 U.S.C. § 1331, as the basis for this Court's jurisdiction over their claims. *See* Amended Complaint at ¶ 10. They also rely on the Declaratory Judgments Act, 28 U.S.C. § 2201, 2202. *Id.* at ¶ 11.

In fact, the issuance of a Presidential Permit for an international crude oil pipeline pursuant to EO 13337 is not judicially reviewable in the federal courts on the grounds asserted by Plaintiffs. Plaintiffs cannot succeed on the merits of their challenge to the Presidential Permit because this Court has no jurisdiction to hear a challenge to a Presidential Permit and, alternatively, Plaintiffs cannot state a claim in support of such a challenge on environmental grounds. The statutes on which they rely do not supply the basis for the private cause of action that does not otherwise exist.

By its plain terms, EO 13337 does not create a private cause of action. It expressly states at Section 6 that:

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.

Plaintiffs' reliance on the APA to create a private right of action where the Executive Order does not create one is unavailing. The APA creates a cause of action 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, however, there was no "agency action" within the meaning of the APA; the action was that of the President acting through his delegation to the Department of State under an Executive Order. 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 also cannot find a basis for a cause of action in the federal question statute on which they rely, 28 U.S.C. §1331. 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.”).

Plaintiffs also cannot 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)).

On the basis that there was no “judicially remedial right”, two courts recently dismissed cases almost identical to this one arising from challenges to a Presidential

Permit issued to an Enbridge competitor, Transcanada Keystone, for another U.S.-Canada crude oil pipeline. 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 underlying the Presidential Permit issued for the Keystone pipeline was inadequate under NEPA. In granting Rule 12(b)(1) motions to dismiss filed by the State Department and Keystone for lack of subject matter jurisdiction, the Court held that the plaintiffs lacked standing since they were "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 before it “must fail.” *Sisseton*, 2009 WL 3153655, *12.

A similar result was reached by the District of Columbia District Court 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. The Court observed that “[n]ot even the EIS requirement of NEPA applies to the President.” *Id.* at 14. NRDC’s claims were thus dismissed under Rule 12(b)(6) for failure to state a claim.

There is no factual or legal distinction between *Sisseton*, *NRDC* and this case. Plaintiffs’ allegations as they relate to the State Department’s obligations under NEPA 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 Presidential Permit was an unreviewable presidential action and the EIS issued by the State Department is likewise unreviewable.³

2. There Was No Violation of NEPA

The environmental review undertaken here was fully consistent with NEPA. Plaintiffs may not be pleased with the result of the environmental review process, but there can be no doubt the review was exhaustive and allowed the permitting agencies to take the “hard look” at environmental impacts required by NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

The environmental record in this case consists of the Draft and Final EISs issued by the State Department, as well as environmental data reviewed by the Corps with respect to wetlands impacts, and the Draft and Final EAs issued by USFS with respect to Forest impacts. It is clear that the State Department’s Final EIS, USFS’s Final EA, and all other supporting environmental documentation/data supplied to the agencies allowed them to take a “hard look” at impacts posed by the construction and operation of both pipelines so as to allow the permitting agencies to issue their respective permits in compliance with their NEPA obligations. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (an agency must only take a “hard look at the environmental consequences before taking a major action). For this reason, Plaintiffs are not likely to succeed on the merits of their NEPA claims.

³ Plaintiffs may argue that they can escape the non-reviewability of the Presidential Permit by arguing that the President acted unconstitutionally. However, as discussed below, their constitutional argument is without merit and they are therefore not likely to succeed on that claim either.

a. The Alberta Clipper, Southern Lights Diluent and LSr Pipelines are not “connected actions” and the cumulative impacts of each were fully assessed

This case concerns not one three-legged pipeline project as Plaintiffs have contended, but rather, three separate pipelines, each with “independent utility.” As such, the environmental impacts of the AC, SLD, and LSr pipelines were not required to be considered in a single EIS, as Plaintiffs contend.

Under NEPA, “connected actions” should ordinarily be considered in a single EIS. However, if a project has “independent utility” it is not considered to be connected to another.⁴ *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973). Courts consider a project to have “independent utility” where it would be built without the other project, *see e.g., 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”), and/or does not rely upon another project for its operation. *See Wilderness Workshop v. BLM*, 2008 WL 1946818 (D. Colo. Apr. 30, 2008), *aff’d*, 531 F.3d 1220 (10th Cir. 2008). For example, 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

⁴ CEQ regulations 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).

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 example, 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, interstate highway project, and expansion of public transit in a single EIS because all three were proposed as parts of a “Shared Solution” transportation plan. The Final EIS for the parkway also admitted that “capacity needs would not be met” without both the parkway and 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.

Neither the AC Pipeline nor the SLD Pipeline depends upon the other for its operation; they are each separate and distinct projects. *See* Final EIS at pg. 1-2; *see also* Appendix A, at pgs. A-27, 27. Each is “[l]ogical when viewed in isolation.” *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004). The AC Pipeline will transport heavy crude oil containing diluent that was not necessarily supplied by the SLD pipeline. 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. Final EIS §1.7.1.1; Hamsher Dec. ¶ 22. Therefore, each of these pipelines “can stand alone without requiring construction of the other” for its operation. *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225 (5th Cir. 2007); *Utahns*, 305 F.3d at 1184. The fact that they are being constructed at the same time and in the same corridor is a matter of convenience and efficiency, but does not trigger a “connected action” analysis for NEPA purposes as Plaintiffs mistakenly contend. *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).

Even so, the environmental impacts of both pipelines have in fact already been fully assessed. The SLD pipeline will, for its full 188 mile length in Minnesota and Wisconsin, be collocated with the AC Pipeline.⁵ Hamsher Dec. ¶ 16. Throughout the Draft EIS and Final EIS, significant information about the impact of the SLD pipeline is provided simultaneous with information about the AC pipeline. The Final EIS in fact addresses the impacts of disturbances along the entire length of this right-of-way, including impacts to wetlands, water body crossings, wildlife, water quality, land use, air quality, etc. These impacts apply to both pipelines since both are being simultaneously constructed right next to one another. *See* Final EIS at § 4.14.2.1 (“impacts of the Diluent

⁵ The Southern Lights Diluent pipeline is already constructed south of Superior, except for a short segment that is under construction in Illinois at this time. Crawford Dec. ¶ 7. As noted, the line now under construction will terminate at Clearbrook, where it meets up with another, existing pipeline that will transport diluent to Canada.

Project pipeline [were] incorporated into the environmental review described throughout Section 4.0 of this EIS”). In addition, because the SLD pipeline will use the same pump stations, the impacts associated with the pump stations are also addressed throughout the Final EIS.

The federal agencies that issued permits for the SLD pipeline – the Corps and the USFS – appropriately relied upon the extensive Final EIS information as well as additional information they developed to support their determinations. For example, Enbridge supplied detailed data on specific waterbody crossings to the Corps over a period of months to support its issuance of the Corps Clean Water Act permits for the AC and SLD pipelines. In issuing the Section 404 permit for the SLD and AC pipelines, the Corps considered “[a]ll wetland areas [would be] temporarily impacted along the proposed route” of the pipelines and ultimately required those impacts to “be restored to preconstruction conditions.” Crawford Dec., Exhibit 3.

Likewise, the USFS acknowledges in its Final EA that the SLD pipeline “would be co-constructed with the Alberta Clipper Project” and “would include the construction and operation of” “approximately 42.72 miles of new 20-inch-diameter underground pipeline generally on or adjacent to existing utility rights-of-way” within the Leech Lake Reservation and another 42.72 miles through the Chippewa National Forest. Final EIS, Appendix U, at 1-3. The impacts of the AC and SLD pipelines upon vegetation, recreational resources, land use, etc., are thoroughly discussed in the USFS EA.

Plaintiffs incorrectly argue that the LSr and the SLD pipelines are also connected actions, the environmental impacts of which should have been considered in a single EIS

and/or the EA for the LSr pipeline. Amended Complaint, Claims I, V. Plaintiffs contend that the LSr pipeline is necessary to replace the capacity of an existing pipeline (Line 13) that will be tied into the SLD pipeline at Clearbrook. *See* Motion at 8. What they fail to demonstrate, and cannot demonstrate, is that the LSr pipeline is dependent in some way on the SLD pipeline; or lacks “independent utility.” The LSr pipeline is already operational, transporting crude oil from Saskatchewan into the United States without the need for diluent from the SLD pipeline. The LSr pipeline was therefore built regardless of whether or not the SLD pipeline would ever receive permitting approval and/or be constructed. *See 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).⁶ Its impacts were therefore not required to be considered in the same environmental documents that addressed the AC and SLD pipelines. Moreover, Plaintiffs’ claims regarding the LSr pipeline are moot; it is already built and operational and they took no steps to seek an injunction against its construction.

The cumulative impacts of each of these pipelines also were appropriately considered in the NEPA documents. *See* 40 C.F.R. § 1508.25(c) (an environmental impact statement must contain a discussion of “impacts, which may be . . . cumulative”);

⁶ All pipelines within the Enbridge system form part of a network, just as every Interstate highway is part of the entire network of highways. That does not mean, however, that each proposed pipeline constitutes a “connected action” relative to every other constructed pipeline, just as each new or expanded Interstate highway does not require an evaluation of every other Interstate highway. *See Utahns*, 305 F.3d at 1152 (each individual highway project is not necessarily a connected action merely because it is part of a larger highway expansion project).

see also 40 C.F.R. § 1508.7 (“cumulative impact” is the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions”). The Final EIS clearly states that “information on the cumulative impacts of the appropriate Enbridge Expansion Projects is presented in Section 4.14 (Cumulative Impacts).” Final EIS, pg. 1-26. “Enbridge Expansion Projects” include both the SLD and LSr pipelines. The cumulative impacts of these projects are fully discussed throughout Section 4.14 of the Final EIS at § 4.14.2.1; 4.14.3.1, 4.14.3.7, 4.14.3.12, 4.14.4, 4.14.10.2. These sections include cumulative impacts of these projects on geological resources, water resources, fisheries, land uses, air quality, greenhouse gases, climate change, etc. Likewise, the cumulative impacts of the AC and SLD pipelines were additionally assessed in the EA for the LSr pipeline. *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. The Final EIS Properly Assesses Reasonably Foreseeable Indirect Impacts of the Alberta Clipper in Accordance with NEPA

As explained below, the Final EIS includes a “full and fair discussion” of the significance of all “direct,” “indirect” and “cumulative” impacts of the proposed Alberta Clipper Pipeline that were required to be consider under 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c).

(1) The Final EIS considered all required indirect impacts

(A) The impacts of the Canadian oil sands were not required to be considered in the Final EIS

Plaintiffs argue that the Final EIS fails to take into account the impacts, including on greenhouse gas (GHG) emissions and migratory species, of the extraction activities in the Canadian oil sands area of Alberta. *See* Motion at 10. However, these impacts, if any, were not required to be considered by the State Department or the other permitting agencies.

The area of extraction in the Canadian oil sands is in Alberta, several hundred miles from the US border. The environmental impacts of such development are subject to the laws of another sovereign nation. Moreover, “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.” Final EIS at pg. 4-402. Indeed, the Alberta oil sands production has been increasing for years even though the AC pipeline has not been constructed. Final EIS at § 1.2.2.3. Production of oil from the oil sands is driven by global market demand for oil, and is not dependant on the construction of any particular pipeline. Were the Alberta Clipper 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. Final EIS at A-11. *See also* LSr EA at pgs. 3-76 to 77 (concluding that the LSr pipeline and the Canadian oil sands are not connected actions because the pipeline “will accordingly have no impact on the size or scope of the Alberta oil sands project”

and “the Alberta oil sands have been and presumably will continue to be developed regardless of the LSr pipeline and independent of any U.S. federal agency approval since the oil sands region is located in Canada”).

Further, the State Department had discretion to determine the geographic scope of its NEPA analyses. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (“ . . . determination of the extent and effect of [environmental] factors, and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”) Thus, the State Department properly defined the geographic scope of the AC EIS given that certain impacts were too remote or not sufficiently tied to federal permitting. *See e.g., California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995) (upholding agency's decision to limit the scope of its NEPA review to impact associated with the fill of wetlands rather than considering the impact on downstream fisheries from an entire canal project).

(B) The impacts of refinery expansions were fully considered

Plaintiffs also argue that the Final EIS fails to consider the indirect impacts of refinery expansions that will cause air and water pollution. *See* Motion at 10. The claim is simply wrong as the impacts posed by current and future refinery expansions are fully discussed at pages 4-390 to 4-403 of the Final EIS, including potential GHG and water emissions.

The Final EIS thoroughly examines three major refineries’ plans regarding upgrades to provide estimates of the incremental increases in emissions associated with

refining heavy crude oil. *See* Final EIS at pgs. 4-390 to 4-399. In regard to air quality, the Final EIS discusses the expected emissions at these refineries, and uses this information to develop an estimate of the potential emissions associated with refining the oil transported via the AC Pipeline. *See* Final EIS at pgs. 4-400 to 4-403. The Final EIS also examines how upgrades/expansions to these major refineries could impact water quality. *See id.* at pg. 4-400. Based on these examples, the Final EIS concludes that refineries can expand without significant impacts to and/or water quality. *See id.* at § 4.14.3.12.

(C) The Final EIS fully considers air quality and climate change impacts of petroleum end use

Despite Plaintiffs' contention otherwise (*see* Motion at 11), the Final EIS does not improperly dismiss air quality and water quality impacts of refining or using the imported crude oil. For example, the Final EIS concludes that in order for the refineries that receive the oil to operate, they are required to obtain, and operate under, permits issued by regulatory agencies pursuant to the Clean Water Act and Clean Air Act. Specifically, a facility must obtain and operate within an air permit which "define[s] maximum emissions levels for criteria pollutants" that cannot otherwise be exceeded. Final EIS at pg. 4-394. If refineries do increase emissions, they are "required to update their permits (which would establish new emission limits) and implement BACT to control and limit emissions." *Id.* It was not unreasonable for the State Department to acknowledge this permitting obligation on refineries.

Moreover, consistent with NEPA the State Department undertook its own analysis of air and water impacts associated with refining. Plaintiffs attempt to argue that the AC pipeline will cause increased consumption of oil, the air quality and climate change impacts of which must be considered. *See* Motion at 11. As discussed in the Final EIS at page 4-400, 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. The Final EIS 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 product price or demand. *See id.* Because only a slight increase in emissions, if any, will be caused by the end-use of the oil transported into the United States via the AC Pipeline, no further analysis was required under NEPA. *See Mayo Foundation v. STB*, 472 F.3d 545 (8th Cir. 2006) (rejecting argument that SEIS' consideration of GHG emissions from end-use of coal was insufficient where project would result in only a small increase in coal consumption).

Further, Plaintiffs' argument that the AC Pipeline will cause an increased demand in consumption is unfounded. The AC Pipeline is being constructed to meet existing and expected domestic oil demand, not to increase that demand. *See* Hamsher Dec. ¶¶ 4, 26 ("domestic supply and demand will require the 'unconventional' oil supply from Canada"). Plaintiffs cite *Mid States* (*see* Motion at 11) in which the court ordered the government to analyze the possible environmental impacts of an increase in coal consumption that would result from a rail extension project. *See Mid States Coalition for Progress v. STB*, 345 F.3d 520, 536, 550 (8th Cir. 2003). The EIS at issue in that case

failed to provide any analysis of downstream impacts of burning the coal, despite the agency's statement in its scoping notice that it would do so. In stark contrast, the Final EIS provides an analysis of the impact on air quality of refining the crude oil transported through the AC pipeline. *See* Final EIS at pg. 4-400.

(2) The Final EIS Considers Significant Cumulative Impacts

(A) Upgrades and expansion are not foreseeable or planned

Plaintiffs incorrectly assert that the Final EIS failed to consider upgrades and expansions to the AC Pipeline. That pipeline, as proposed by Enbridge, will have a capacity of 450,000 bpd once fully constructed. Hamsher Dec. ¶ 26. The Final EIS clearly states that expansion beyond 450,000 bpd is not currently planned, and may never occur. Final EIS at pg. 2-50. The impacts of such potential expansion were therefore not required to be considered in the Final EIS. *See Kleppe*, 427 U.S. 390 (NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on the proposed project). Moreover, it is inconsistent for Plaintiffs to argue, as explained below, that the pipeline is not needed to meet crude oil demand, but on the other, to argue that the Pipeline will be expanded to nearly double its proposed capacity.

(B) Cumulative impacts caused by other pipeline projects were considered in the EIS

Plaintiffs argue that the Final EIS fails to consider cumulative impacts of refining and importation caused by similar pipeline construction projects. *See* Motion at 12. However, Plaintiffs are entirely incorrect and greatly overstate what is required under NEPA. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (the statement must only contain a “useful analysis of the cumulative impacts of past, present, and future projects,” which merely requires “discussion of how [future] projects together with the proposed . . . project will affect [the environment]”). Despite Plaintiffs’ contention otherwise, the Final EIS fully considers the impacts of large-scale pipeline projects, including existing Enbridge pipelines, the Keystone oil pipeline, Great Lakes pipeline system, and the MinnCan oil pipeline. *See* Final EIS at pgs. 4-380 to 4-390. The Final EIS describes each project, *see id.* at 4-380 to 4-381, and devotes discussion of the cumulative impacts of these “large-scale projects” throughout Section 4.14.3. For example, the State Department fully considered the impacts to air quality, among others, of these large scale projects, *see* Final EIS at § 4.14.3.12, and found that “cumulative impacts to air quality may occur, but potential impacts would be minor and short term.” Final EIS at pg. 4-389. Thus, Plaintiffs are simply wrong in asserting that these pipelines are only discussed “briefly in the introduction of the Final EIS.” Motion at 12.

(C) The Final EIS fully considers greenhouse gas emissions

Plaintiffs claim that the EIS fails to properly consider the cumulative impact of greenhouse gas (GHG) emissions. *See* Motion at 12-13. However, the potential sources of GHGs are examined in the Final EIS, including mitigation measures to reduce such emissions. *See* Final EIS at pgs. 4-388 to 4-403. The Final EIS examines the potential GHG emissions of not only the AC Pipeline's construction and operation, but also those of heavy crude refining, refinery upgrades, and new refineries, along with other large-scale pipeline projects, as discussed above. *Id.* at § 4.14.3.12. The Final EIS estimates the total CO₂ emissions involved with the AC Pipeline, *see id.* at pgs. 4-400 to 4-403, and discusses several mitigation measures that will help mitigate or offset GHG emissions. The Final EIS concludes that the AC Pipeline's incremental contribution to greenhouse gas emissions, along with cumulative impacts of other pipelines, is likely to be very small. *See* Final EIS at pgs. 4-388 to 390, 4-400 to 403.

c. The Final EIS Adequately Considered the Risks, Impacts, and Mitigation Measures Associated with Spills, Operational Leaks and Abandonment

Plaintiffs argue that the Final EIS fails to adequately address the impact of potential oil spills and leaks on the environment. *See* Motion at 13. However, the Final EIS contains an extensive discussion of the risk of leaks and spills. *See* Final EIS at §§ 4.3.2, 4.7.3, 4.7.4, 4.13, 4.12.2.3, 5.14. This discussion addresses governing safety standards; sets forth a the history of Enbridge's experience with oil spills; provides an assessment of risks; discusses oil spill behavior and types of impacts; assesses resource-specific impacts; and describes potential mitigation. *See id.* Because of the expertise of

another federal agency in pipeline safety matters (the Pipeline and Hazardous Materials Safety Administration or PHMSA) [the] State Department called upon it to “provide[] technical assistance with the environmental review process.” *See* Final EIS at § 1.3.3. Through that process, PHMSA advised the permitting agencies in regard to its “responsibilit[ies] for monitoring the operation of liquid hydrocarbon pipeline systems” and its “authority for [approving] . . . oil spill response plans.” *Id.* at § 1.3.3.1. The Final EIS concludes that “to minimize the potential for releases from the proposed pipeline and associated facilities,” Enbridge’s design and construct[ion] [of] the proposed Project [would be] in accordance with applicable” PHMSA standards and regulations. *See* Final EIS § 5.14. Enbridge’s future operation would also mitigate harm arising from spills because it would be required to develop an Emergency Response Plan and Integrity Management Plan, both of which are discussed at Appendix Q of the Final EIS. The Final EIS also includes Enbridge’s plans for spill prevention and containment for both the AC and SLD Pipelines. *See* Appendix E of the Final EIS.

Moreover, contrary to Plaintiffs’ contention (*see* Motion at 13), a greater discussion of abandonment, including mitigation measures such as financial assurance for restoration in the event of abandonment, was not required to be provided in the Final EIS. Abandonment of the Project is not currently planned; the lifetime of the pipeline is over 50 years.

d. The Final EIS properly defines the Project's stated purpose and need and considers a reasonable range of alternatives

Plaintiffs entirely misconstrue NEPA's requirements to consider project alternatives. Plaintiffs have failed to realize that the project at issue is an oil pipeline owned and to be operated by Enbridge. The project scope is clearly defined and limited to: a pipeline owned by Enbridge "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." Final EIS at § 1.2.1.

Despite the stated purpose, Plaintiffs would have this Court believe that renewable energy and increased capacity of other pipelines were required to be considered as reasonable alternatives. *See* Motion at 15. However, these alternatives are clearly "inconsistent with the project's purpose[]." *Mayo Foundation*, 472 F.3d at 545 (finding STB was not required to consider alternative route for a rail line because it was inconsistent with the project's stated purpose). While an agency is "obliged to consider all reasonable alternatives, an alternative that does not effectuate the project's purposes, is by definition, unreasonable, and [the agency] need not evaluate it." *Ringsred v. Dole*, 828 F.2d 1300, 1304 (8th Cir. 1987). The alternatives raised by Plaintiffs are clearly unreasonable as they do not provide *Enbridge* with a *pipeline* to transport crude oil to the United States from Canada. In fact, defining the AC Pipeline project more broadly, to include renewable energy or the expansion of existing pipelines, would be improper under NEPA. *See e.g., City of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999) (rejecting district court's broad articulation of the purpose and need of a highway project

as “addressing future transportation needs in the region”). Therefore, despite Plaintiffs’ contention otherwise, the Final EIS includes all *reasonable* alternatives: a no action alternative, system alternatives, major route alternatives, route variations, aboveground facility alternatives, and Superior Terminal expansion alternatives. *See* Final EIS at §§ 3.1-6.

In addition, Plaintiffs illogically claim that the AC Pipeline is unnecessary (Motion at 14); Enbridge would not spend \$3.3 billion on a pipeline that was not necessary to meet market demands. The demand for the crude oil sources in the primary refinery market to be served by the AC Pipeline — the Midwest refinery market — is fully documented in the Final EIS. *See* Final EIS at §§ 1.2.2, 4.14. As domestic production in certain parts of the United States has declined, Midwest refineries are increasingly dependent on Canadian oil. For that reason, several of them are expending millions of dollars to expand their capacity to refine heavy crude from the Canada. *See e.g.*, http://www.fhr.com/newsroom/news_detail.aspx?id=74. Refiners take into account the availability of transportation (e.g., pipeline) systems and the availability of a significant source of oil. The Enbridge system provides the transportation service suited for these refineries and the EIA forecast shows significant growth in “other North American” production of unconventional oil (which grows from 1.38 millions bpd in 2007 to 4.31 millions bpd in 2030). *See* EIA Reference Case 2009, Table A21 at <http://www.eia.doe.gov/oiaf/servicerpt/stimulus/pdf /stimulus.pdf>. Thus, as fully documented in the Final EIS, there is, and will continue to be, a need for the oil transported by the AC Pipeline.

In essence, Plaintiffs confuse the NEPA process with the very different process of formulating the nation's public policy for future energy use. The NEPA process was never intended as a means by which federal agencies, in their assessment of the impacts of specific energy-related projects, were to fashion national policy on conservation, renewable energy, or the use (or non-use) of fossil fuels. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983) (“[t]he political process, and not NEPA, provides the appropriate forum in which to [address] air policy disagreements”); *see also Foundation on Economic Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987) (“NEPA was not intended to resolve fundamental policy disputes.”).

3. The State Department's Issuance of the Presidential Permit is Constitutional

Plaintiffs mistakenly assert that the President lacks authority to issue Presidential Permits, contending that such authority rests exclusively with Congress pursuant to its constitutional right to regulate foreign commerce. *See* Motion at 16-19. It has been recognized for over a century that the President has authority to regulate cross-border facilities. *See* 38 U.S. Op. Atty. Gen. 163 (1935) (gas pipeline); 30 U.S. Op. Atty. Gen. 217 (1913) (electrical power); 24 U.S. Op. Atty. Gen. 100 (1902) (wireless telegraphy); 22 U.S. Op. Atty. Gen. 514 (1899) (submarine cables); 22 U.S. Op. Atty. Gen. 408 (1899) (same); 22 U.S. Op. Atty. Gen. 13 (1898) (same). While Congress has authorized Presidential Permits with respect to certain other cross-border facilities, e.g., bridges, the fact that it has not done so as to international oil pipelines is evidence of congressional acquiescence of the exercise of plenary authority by the President. *See also* 22 U.S. Op.

Atty. Gen. 514 (1899) (“in the absence of Congressional action [the laying of international cables is] to be regulated and controlled by the executive department of the Government”). Further, if the State Department did not have authority to issue a Presidential Permit, the Plaintiffs’ claims are superfluous since Plaintiffs cite to no persuasive authority for the proposition that in the absence of Congressional authorization the pipeline could not be built. The fact that Congress has chosen to regulate oil pipeline rates and safety does not give rise to an implied prohibition on oil pipeline construction absent Congressional action. *Haig v. Agee*, 453 U.S. 280, 291 (1981) (“congressional silence is not to be equated with congressional disapproval”).

B. PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPERABLE HARM

Plaintiffs’ allegations of environmental harm resulting from the construction of the pipeline have been greatly exaggerated and fail to take into account the various conditions and mitigation measures for the Project required by the federal and state regulatory agencies. In a seminal 2008 case, the U.S. Supreme Court clarified the level of irreparable harm that must be shown by the plaintiff; a mere “possibility” of irreparable injury will not suffice, rather, a plaintiff must show irreparable harm “is *likely* in the absence of an injunction.” *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008). Plaintiffs have failed to meet their burden. Mr. Crawford’s declaration (*see* ¶¶ 25-34) explains that the claims of irreparable harms that are offered by the declarations in support of the Plaintiffs’ motion describe no more than either the type of temporary disruption that accompanies any pipeline construction or very

generalized and unfocused concerns about climate change, air pollution, etc. — all matters assessed in the EIS.

While the very act of construction requires disturbance of the ground, various agencies including the Minnesota Pollution Control Agency, the Minnesota Department of Natural Resources, the Wisconsin Department of Natural Resources, the North Dakota Department of Health, the Fond du Lac Reservation, the Corps and the U.S. EPA, have analyzed the facts and imposed measures to protect the environment. Some of the measures that have been required by regulatory agencies pursuant to their permitting authority include: (1) prohibiting discharge of water from dewatering work areas to wetlands or waterbodies in Wisconsin if it is cloudy or exceeds 40 mg/L of total suspended solids (TSS); (2) requiring a botanist as a Rare Plant Monitor (RPM) to verify avoidance of all rare plant occurrences in Wisconsin illustrated in the environmental plan sheets and re-verify the boundary of all state-listed T & E plant species identified on public lands in the 2008 survey; (3) installing silt fence, hay bales, sediment logs, maintain vegetative buffers, etc. as necessary along the construction right-of-way in North Dakota. Crawford Dec. at Exhibit 2.

Similarly, the Corps has analyzed specific plans for both the Alberta Clipper pipeline and Southern Lights Diluent pipeline and imposed conditions on construction to protect wetlands and other water bodies, including specific crossing methods. The Corps requires that all wetland areas temporarily impacted by the pipeline construction be restored to preconstruction condition or to specific conditions as described in the permit. Crawford Dec. ¶¶ 17-18.

Plaintiffs allege irreparable impacts to a calcareous fen, a rare wetland habitat. However, the robust review process discussed above means that there is little likelihood that the fen would suffer irreparable impacts. Before construction began on the LSr pipeline, which is not part of this project but has a partial collocation with the Alberta Clipper pipeline, Enbridge located a potential calcareous fen in northwestern Minnesota along the route. Enbridge filed a request for a route width deviation at that location in order to avoid this fen. The Minnesota Department of Natural Resources supported Enbridge's request for a route width deviation, stating that "[t]he reroute would avoid impacts to a potential calcareous fen." Crawford Dec. ¶ 34. Enbridge then requested a similar deviation at the same location for the Alberta Clipper pipeline. *Id.* However, there was an intervening determination by the State of Minnesota that the features qualified as a fen and cover a greater area. Enbridge has now suspended construction in the area from Mileposts 892.5 to 894.8 until the Minnesota DNR approves a calcareous fen management plan for the pipeline or determines that such a plan is not required. *Id.*

Plaintiffs also fail to acknowledge the relatively short duration of disturbance involved with the pipeline construction process. As described in the declaration of Mr. Crawford, the construction of the Alberta Clipper and Southern Lights Diluent pipelines was designed so that the actual time that earth disturbing activities occur in any specific area is limited. Crawford Dec. ¶¶ 18-26. Limiting the amount of time that an area of the right-of-way is disturbed and exposed limits the impacts of construction. Given the rainfall and potential for other severe weather events that are frequent in Wisconsin,

Minnesota and North Dakota during the fall, limiting the disturbances reduces environmental impacts. *Id.* at ¶ 18.

Plaintiffs argue that a preliminary injunction is needed to maintain the status quo. But stopping the on-going work now would not maintain the current status quo; it has the potential for creating greater erosion and other environmental impacts by stopping work on ground that has been disturbed rather than allowing Enbridge to proceed with its work, including the appropriate restoration measures. Thus, not only have Plaintiffs failed to show the likelihood of irreparable harm, they have proposed a course of action which could create environmental harm.

Finally, it is notable that Plaintiffs have not sought preliminary injunctions from the Minnesota Courts where Plaintiff MCEA has launched challenges to the MPUC's decisions allowing the Pipelines to be constructed. Plaintiffs offer no explanation of why MCEA did not seek preliminary relief in state court, while arguing to this Court that such relief is essential to prevent irreparable harm.

C. THE BALANCE OF HARMS FAVORS ENBRIDGE

While the Plaintiffs point to various temporary and/or mitigated environmental harms, they fail to acknowledge the environmental harms which would be suffered were this Court to grant injunctive relief. Apart from very substantial and irrecoverable monetary costs described below, there is the potentially significant risk of environmental harm to waterways if construction, already well underway, were enjoined. About 248 miles of the pipeline right-of-way has already been cleared and approximately 220 of these cleared miles have already been graded. Crawford Dec. ¶ 18. Thus, the pipeline

construction is already well underway with about 2,800 workers already employed in the effort with another approximately 200 to 300 to be hired. *Id.* at ¶ 12.

Notably, if existing excavations were left exposed to the elements, including the risk of significant rain/snow storms, extensive erosion would be caused, thereby injuring wetlands and rivers with an influx of sediment and other debris. Crawford Dec. ¶¶ 16, 18. The permitting conditions imposed by several agencies, requiring that Enbridge take various steps to reduce the risk of such erosion and limit stormwater pollution (see Crawford Dec. ¶¶ 16-17) would thereby be entirely undermined were construction to come to a halt for some period of time.

In addition, Enbridge is in the midst of numerous road bores which require large excavations next to public roads under which the pipeline will pass. Were an injunction issued, these large excavations would remain exposed and unsupervised, and the inspections of roadways to determine the impacts of the excavations on roadway stability would not be undertaken. Crawford Dec. ¶19. The significant adverse implications to the environment, and to public safety, of simply stopping construction in its tracks are thus clear and weigh heavily against injunctive relief.

Further, as demonstrated in the Crawford Declaration, an injunction would result in *severe* harm to Enbridge. Crawford Dec. ¶¶ 10, 13, 18-24. Enbridge would be required to continue to pay its contractors at the rate of \$3.9 million/day, in return for which it would obtain no work on the pipelines. *Id.* at ¶ 20. In addition, there would be significant de-commissioning and re-commissioning costs, lost productivity and other costs. *See id.* at ¶¶ 21-24.

Courts have found much more minor economic and financial harm to weigh in favor of denying injunction relief. *See e.g., Valley Community Preservation Comm'n v. Mineta*, 373 F.3d 1078 (10th Cir. 2004) (a suspension of construction would cost \$144,000 per day, or \$4,320,000 per month, amounts that were significant financial harms weighing against granting the preliminary injunction); *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250 (1st Cir. 1996) (extensive financial commitments, including: \$8 million in general obligation bonds to fund the operation, \$40 million in guaranteed bonds to help finance the location of two major tenants, construction contracts aggregating \$50 million, federal grants of more than \$6 million received to support the airport operations, outweighed issuance of injunction).

Further, if Enbridge terminated the construction contracts it would face several million dollars in termination fees. Were the injunction then lifted, Enbridge would be faced with the daunting task of re-hiring thousands of workers and once again locating all of the equipment and contractors it would need to renew construction efforts. Doing so would take a considerable amount of time and result in significant additional costs. Crawford Dec. ¶ 24.

Balanced against these costs and risks, Plaintiffs offer only generalized concerns and concerns about temporary impacts. A preliminary injunction at this point would result in the significant harms and costs noted above. The balancing is easy in this case.

D. THE PUBLIC INTEREST FAVORS DENYING PLAINTIFFS' MOTION

The public interest weighs heavily in favor of Enbridge. First, courts have determined that “the development of domestic energy resources is of paramount public interest.” *NRDC v. Kempthorne*, 525 F. Supp. 2d 115 (D.D.C. 2007) (refusing to grant injunction where plaintiffs failed to show irreparable injury or likelihood of success on the merits and because the public interest would not be furthered). Moreover, the State Department has already found that the AC Pipeline is in the national interest (*see* Hamsher Dec. ¶¶ 17, 25). Because the State Department’s national interest determination is equivalent to a decision made by the President himself, *see NRDC*, there is certainly a public interest in avoiding judicial intrusion into this decision. *See Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999) (enjoining shipment of plutonium from New Mexico to the Canadian border would conflict with deference owed to executive decision related to foreign policy). Thus, these public interests would not be served if Plaintiffs’ motion were granted.

Furthermore, denying injunctive relief will have direct and immediate benefits in terms of increased employment and the avoidance of harm to businesses and small communities along the pipeline right-of-way. These businesses and communities have made preparations for the influx of pipeline workers and are dependant on continued pipeline construction for business and tax revenues. Hamsher Dec. ¶¶ 30-34, Exhibit 6. In fact, labor unions have voiced their opposition to a stoppage of construction, pointing out the high unemployment rates in the area and the importance of these projects to

supplying badly-needed jobs, up to 3,000 of them, for their members. *See* Hamsher Dec. ¶ 33, and Exhibit 6. Avoiding harms to these businesses, communities, and individuals is without question in the public interest. *See e.g., Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250 (1st Cir. 1996) (more than 1,100 persons became employed as a result of the development project; they may be jobless if an injunction were issued); *Peshlakai v. Duncan*, 476 F. Supp. 1247 (D.D.C. 1979) (creation of employment opportunities). Because the pipeline construction currently employs approximately 2,800 workers for this project and will lead to continued economic benefits as construction progresses, injunctive relief would certainly not be in the public interest. *See Valley Community Preservation Comm'n v. Mineta*, 373 F.3d 1078 (10th Cir. 2004) (increased economic development if project was constructed).

The issue in this case is not a simple preservation of the environment versus monetary losses equation as Plaintiffs argue. They have failed to show any significant adverse environmental impact from constructing a pipeline largely in an existing disturbed corridor and point primarily to short-term construction impacts in an effort to make their case for immediate harm. Such short-term impacts do not warrant an injunction, and in fact such a preliminary injunction risks greater and longer-term environmental problems in the form of increased erosion and construction-related risks, as described above and in the Crawford Declaration. The public's interest in minimizing the risk of adverse environmental impacts will be advanced by allowing construction to proceed.

This factor weighs *decidedly* in favor of denying injunctive relief.

CONCLUSION

For the foregoing reasons, Enbridge respectfully urges that Plaintiffs' Motion for a Preliminary Injunction be denied.

RESPECTFULLY SUBMITTED

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