UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

SIERRA CLUB, et al., Plaintiffs v. HILLARY CLINTON, in her official capacity as Secretary of State, et al., Defendants ENBRIDGE ENERGY, LIMITED PARTNERSHIP Defendant-Intervenor	**CIV. NO. 09-2622 (DWF/RLE)** **ENBRIDGE ENERGY, LIMITED PARTNERSHIP'S REPLY TO PLAINTIFFS' OPPOSITION TO ENBRIDGE'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

Table of Contents

Page

ARGUMENT 1

I. The Issuance of the Presidential Permit is Not Reviewable under the APA 2

A. This Court Has No Jurisdiction to Entertain Plaintiffs' Claims under the Executive Order 2

1. The Fact That the State Department Issued the Permit for the President Does not Make the Presidential Decision Reviewable 3

2. The EIS is Not Final Agency Action 7

3. Issuance of the Presidential Permit was a Discretionary Action 9

II. The President's Issuance of a Permit was Constitutional 10

A. The President's Authority over Foreign Affairs and as Commander-in-Chief Supports the Issuance of the Permit 10

B. Congress Has Acquiesced in the President's Actions 13

III. Plaintiffs Have Failed to State a Claim under NEPA 16

A. Plaintiffs' Connected Actions Claim is Not Plausible 17

B. The Indirect and Cumulative Impacts Plaintiffs Identify Were Either Considered or Were Not Within the Scope of Required NEPA Review 18

C. Plaintiffs have Failed to State a Claim for Relief Regarding Oil Spill Impacts 20

D. Plaintiffs Have Failed to State a Claim Concerning the State Department's Purpose and Need Statement 22

E. Plaintiffs' Cannot Revive Moot Claims Regarding the LSr Pipeline to Impact the SLD Pipeline 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

American Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) 12, 14

American Int'l Group, Inc. v. Islamic Republic of Iran,
657 F.2d 430 (D.C. Cir. 1981) 14

Bell Atlantic v. Twombly,
127 S. Ct. 1955 (2007) 16, 21, 23

Blue Mountains Biodiversity Project v. Blackwood,
161 F.3d 1208 (9th Cir. 1998) 25

Cantrell v. City of Long Beach,
241 F.3d 674 (9th Cir. 2001) 25

Chicago & Southern Airlines v. Waterman S.S. Corp.,
333 U.S. 103 (1948) 11

Choate v. USACE,
07-cv-1170 (WRW), 2008 WL 4833113 (E.D. Ark., Nov. 5, 2008) 25

Citizens Against Burlington v. Busey,
938 F.2d 190 (D.C. Cir. 1991) 23

Citizens' Committee to Save Our Canyons v. USFS,
297 F.3d 1012 (10th Cir. 2002) 18

City of Bridgeton v. Slater,
212 F.3d 448 (8th Cir. 2000), *rehearing en banc denied*, 2000 U.S. App. LEXIS 13701 (June 13, 2000), *cert denied*, 531 US 1111 (2001) 24

Conley v. Gibson,
355 U.S. 41 (1957) 16

Dalton v. Specter,
511 U.S. 462 (1994) 3, 5

District No. 1, Pacific Coast Dist. v. Maritime Admin.,
215 F.3d 37 (D.C. Cir. 2000) 9

DOT v. Public Citizen,
541 U.S. 752 (2004) ... 20

Ecology Center, Inc. v. USFS,
451 F.3d 1183 (10th Cir. 2006) ... 22

Env. Law and Policy Center v. NRC,
470 F.3d 676 (7th Cir. 2006) ... 23

Franklin v. Massachusetts,
505 U.S. 788 (1992) ... 2, 5

Greene County Planning Bd. v. FPC,
528 F.2d 38 (2d Cir. 1975) ... 12

Gregory v. Dillard's, Inc.,
565 F.3d 464 (8th Cir. 2009) ... 16

Jensen v. Nat'l Marine Fisheries Serv.,
512 F.2d 1189 (9th Cir. 1975) ... 4, 5

Jersey Heights Neighborhood Ass'n v. Glendening,
174 F.3d 180 (4th Cir. 1999) ... 8

Kleppe v. Sierra Club,
427 U.S. 390 (1976) ... 19, 20

Marsh v. Oregon Natural Res. Council,
490 U.S. 360 (1989) ... 8

Mayo Found. v. STB,
472 F.3d 545 (8th Cir. 2006) ... 18

Medellin v. Texas,
128 S. Ct. 1346 (2008) ... 14

Natural Resources Defense Council, Inc., et al. v DOS,
No. 08-cv-1363 (RJL), 2009 WL 3153702 (D.D.C. Sept. 30, 2009) ("*NRDC*") . passim

Ohio Forestry Ass'n v. Sierra Club,
523 U.S. 726 (1998) ... 8

One Thousand Friends of Iowa v. Mineta,
364 F.3d 890 (8th Cir. 2003) ... 25, 26

Public Citizen v. USTR,
5 F.3d 549 (D.C. Cir. 1993) 4, 7

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 7

Ryan v. Department of Justice,
617 F.2d 781 (D.C. Cir. 1980) 6

Sierra Club v. U.S. Army Corps of Engineers,
446 F.3d 808 (8th Cir. 2006) 8

Southwest Williamson County Cmty. Ass'n v. Slater,
173 F.3d 1033 (6th Cir. 1999) 9

The Sisseton-Wahpeton Oyate v. DOS, et al.,
No. 08-cv-3023 (CBK), 2009 WL 3153655 (D.S.D., Sept. 29, 2009) .... passim

Tulare County v. Bush,
185 F. Supp. 2d 18 (D.D.C. 2001), *aff'd* 306 F.3d 1138 (D.C. Cir. 2002), *cert denied*, 540 U.S. 813 (2003) 4, 5

United States v. Midwest Oil Co.,
236 U.S. 459, 469 (1915) 14

Utahns for Better Transportation v. DOT,
305 F.3d 1152 (10th Cir. 2002) 18

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) (Jackson, J., concurring) 11, 13, 14

STATUTES

5 U.S.C. § 701(a)(2) 9

REGULATIONS

40 C.F.R. § 1508.8 19

40 C.F.R. § 1508.25(a)(1) 17

E.O. 11423 2

E.O. 12094 6

E.O. 13337 1-3

ARGUMENT

Defendant-Intervenor Enbridge Energy, Limited Partnership ("Enbridge") hereby files this reply to Plaintiffs' Opposition to Enbridge's Motion to Dismiss Plaintiffs' First Amended Complaint ("Complaint").

Plaintiffs' Complaint should be dismissed because as a matter of law Plaintiffs will not be able to prove their claims. First, the Administrative Procedure Act ("APA") does not provide for judicial review of the exercise of Presidential authority under Executive Order ("E.O.") 13337, 69 Fed. Reg. 25299 (Apr. 30, 2004), which rests exclusively on the President's exercise of foreign affairs and Commander-in Chief powers. The fact that the President acted through the State Department does not convert the issuance of a Presidential Permit into something other than discretionary Presidential action.

Plaintiffs' constitutional challenge to the Presidential Permit issued in this case fails as a matter of law because the President acted well within his inherent constitutional authority over foreign affairs. That Congress may have concurrent, unexercised powers over the permitting of international oil pipelines under the foreign commerce clause does not deprive the President of his independent constitutional authority or mean that Congress must exercise its authority before a pipeline can be authorized. In this case, a long history of Congressional acquiescence over Presidential oil pipeline permits underscores the President's inherent authority. Under Plaintiffs' theory, none of the numerous international oil pipelines that the President has authorized both before and since adoption of E.O. 13337 could lawfully be operated, a result that strains reason.

Plaintiffs various NEPA claims should be dismissed for the reasons set forth below. As Enbridge will show, Plaintiffs have not stated a plausible or legally sustainable claim of violation of NEPA.

I. The Issuance of the Presidential Permit is Not Reviewable under the APA

A. This Court Has No Jurisdiction to Entertain Plaintiffs' Claims under the E.O.

In issuing the E.O.'s that provide for Presidential Permits of the sort issued to Enbridge in this proceeding, the President exercised his inherent Constitutional authority over foreign affairs. *See* E.O. 11423, 33 Fed. Reg. 11741 (Aug. 16, 1968) ("WHEREAS the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities connecting the United States with a foreign country"), *amended by* E.O. 13337 (providing for an expedited procedure for the issuance of Presidential Permits for certain energy-related projects).[1] Actions undertaken by the President, or his delegates, in the exercise of that foreign affairs power are not judicially reviewable "out of respect for the separation of powers and the unique constitutional position of the President." *Natural Resources Defense Council, Inc., et al. v DOS*, No. 08-cv-1363 (RJL), 2009 WL 3153702, at *4 (D.D.C. Sept. 30, 2009) ("*NRDC*") (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992)). Such actions are not "agency actions" and thus cannot be reviewed under the APA. The Supreme Court has so held on two occasions. *See Franklin*, 505 U.S. at 788 (Presidential action is not reviewable under

[1] E.O. 11423 authorized the President to approve a variety of cross-border infrastructure through a permitting process.

APA because it is not final agency action); *Dalton v. Specter*, 511 U.S. 462 (1994) (same). The non-reviewability of the President's action has been underscored by two recent cases rejecting challenges to a Presidential Permit issued under E.O. 13337 to another cross-border pipeline promoted by an Enbridge competitor, TransCanada's Keystone pipeline. *See NRDC*, 2009 WL 3153702; *The Sisseton-Wahpeton Oyate v. DOS, et al.*, No. 08-cv-3023 (CBK), 2009 WL 3153655 (D.S.D., Sept. 29, 2009) ("*Sisseton*"). Plaintiffs' various efforts to argue around this non-reviewability fail.

1. The Fact That the State Department Issued the Permit for the President Does not Make the Presidential Decision Reviewable

Plaintiffs argue that the President himself was not involved in the issuance of the Permit, and thus, the action at issue is not the action of the President. That reasoning ignores the fact that the governing E.O. contemplates that the President retains ultimate authority over issuance of a permit. Under the terms of the E.O. 13337, Section 1(i), the President retains the authority to grant or deny a permit when there is a dispute between the State Department and any other relevant federal agency. The question of reviewability cannot logically, and does not, turn on whether the President himself intervenes in a particular case. Rather, it turns on whether the State Department is carrying out the President's delegated constitutional authority in implementing the E.O.

Here, the State Department's mandate under the E.O. arises directly from the President's constitutional powers over foreign affairs and as Commander-in-Chief, rendering the question of the President's personal involvement irrelevant. *See NRDC*, 2009 WL 3153702, at *4 ("the President's exercise of significant discretionary authority

over agency decisions constitutes presidential action, which is shielded from judicial review under the APA out of concern for the separation of powers."); *Sisseton,* 2009 WL 3153655 at *6 ("President is the final actor in determining whether a permit should be issued").

What Plaintiffs fail to account for is the fact that the President retained complete discretion over the permitting process here, with the result that there was no "agency action" subject to APA review. If the issuance of a Presidential Permit by the State Department did not constitute presidential action, one would be faced with the "absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action." *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd* 306 F.3d 1138 (D.C. Cir. 2002), *cert denied*, 540 U.S. 813 (2003); *Jensen v. Nat'l Marine Fisheries Serv*., 512 F.2d 1189, 1191 (9th Cir. 1975) (Secretary's actions were those of the President's, and thus, not reviewable); *NRDC*, 2009 WL 3125556 at *6 (State Department's exercise of delegated constitutional authority was "tantamount to Presidential action and [could] not be reviewed" under the APA.); *see also Public Citizen v. USTR*, 5 F.3d 549, 552 (D.C. Cir. 1993) (finding right of the President to change a treaty prior to submission to Congress, as opposed to the exercise of that right, was the critical hallmark of Presidential action exempt from APA review). Here, Plaintiffs do not question the ability of the President to grant or deny a Presidential Permit, or even withdraw the E.O. altogether.

Further, accepting Plaintiffs' argument would lead to the untenable result that an APA challenge is available where there is agency consensus, as here, while no APA

challenge could be mounted if the President himself issued the permit pursuant to Section 1(i) of the E.O. as a result of a difference in views between the State Department and another federal agency. Plaintiffs offer no principled explanation for this anomalous result. *See NRDC*, 2009 WL 3153702, at *5 (challenging "issuance of a presidential permit, whether by the President himself or by the State Department as the President's delegee, is to challenge a presidential act, which is not reviewable"); *Sisseton,* 2009 WL 3153655, at *4 (because the State Department could not control the President's behavior, "it [was] purely speculative that a favorable ruling . . . would redress the injuries of which plaintiffs complain[ed]")

Ultimately, Plaintiffs are reduced to arguing in their Opposition that *NRDC* and *Sisseton* were wrong in holding that "an agency action pursuant to a delegation of the President's inherent constitutional authority over foreign affairs is tantamount to an action by the President himself." Opp. at 23 (citing *NRDC*, 2009 WL 3153702, at *3; *and Sisseton*, 2009 WL 3153655, at *6-8). But these recent cases are fully consistent with earlier cases logically holding that Presidential action need not be taken by the President himself to be unreviewable under the APA, as long it is taken under Presidential direction. *Tulare County*, 185 F. Supp. 2d at 28 (Forest Service acted at Presidential direction); *Jensen*, 512 F.2d at 1191 (Secretary of State acted as President in approving regulations). Further, even though *Franklin* and *Dalton* both involved situations in which the President was to be the final actor, nothing in those cases supports the proposition that the President must act personally, rather than through a delegation of his authority, to be exempt from review under the APA.

Plaintiffs argue that the State Department is an "agency" for APA purposes and therefore all of its actions are reviewable, even those undertaken as here pursuant to Presidential delegation under the Constitution. Opp. at 17-21. Were Plaintiffs correct, then any action undertaken by any agency at the direction of the President in the exercise of his constitutional powers would be subject to review under the APA, which is incorrect as shown above.

Plaintiffs heavily rely on cases involving the very different issue of whether the Freedom of Information Act ("FOIA") applies to certain units of government. *See Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980) (finding DOJ is an agency for FOIA purposes when compiling documents pursuant to an E.O.).[2] What Plaintiffs fail again to account for is the fact that the State Department here was acting under a Presidential delegation arising from the President's inherent foreign affairs powers. The fact that the State Department may be an agency for purposes of the FOIA does not transform the action it took here under a delegation of Presidential authority into reviewable agency action.

[2] E.O. 12094 at issue in *Ryan* was issued in part on the basis of a statute, the Omnibus Judgeship Act of 1978, in contrast to the E.O. here which was issued on the basis of the President's inherent constitutional powers.

2. The EIS is Not Final Agency Action

Plaintiffs seek to end run the fact that the Presidential Permit is not a reviewable agency action by arguing that the State Department's Final EIS is nevertheless reviewable final agency action under the APA. However, the EIS was not final agency action and is not reviewable.

The State Department's EIS may have informed the Department's final decision to issue its Record of Decision/National Interest Determination ("ROD")[3] and the Permit on behalf of the President, but the EIS did not set forth any substantive determinations, create any rights or obligations, or produce other legal consequences of the sort constituting final agency action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA "does not mandate particular results, but simply prescribes the necessary process."); *Public Citizen*, 5 F.3d at 552 (agency's failure to prepare an EIS does not "trigger APA review in the absence of identifiable substantive agency action putting the parties at risk").

In fact, Plaintiffs acknowledge that Enbridge could *not* have undertaken to construct the pipelines on the strength of the EIS alone. *See* Opp. at 22 ("consummation of the decisionmaking process and the point from which rights and obligations flowed was the State Department's issuance of a Presidential Permit to Enbridge, which enabled Enbridge to begin construction."). Plaintiffs accordingly cannot base their claim of reviewability on the EIS alone. It is the ROD and Permit which authorized pipeline

[3] The State Department's ROD is available at Dkt. 80-2.

construction subject to required mitigation. Because the authority for the ROD and Permit derived from the President's exercise of his inherent constitutional authority over foreign affairs, they are not reviewable.

Sierra Club v. U.S. Army Corps of Engineers, 446 F.3d 808 (8th Cir. 2006), on which Plaintiffs place primary reliance, lends no support to the argument that the EIS is reviewable. There, the Corps issued a Finding of No Significant Impact ("FONSI") following the Corps' preparation of an Environmental Assessment ("EA") on a levee project. The FONSI represented the "culmination of the agency's NEPA decision-making" since it reflected the Corps' determination that the project under review could proceed on the basis that it would have no significant environmental impacts. *Sierra Club*, 446 F.3d at 816. Here, by contrast, the EIS reflects only an analysis of the environmental setting and impacts of the proposed pipelines, together with recommended mitigation, and was only a prelude to the issuance of the State Department's ROD and the subsequent Presidential Permit.

Sierra Club relies on two Supreme Court cases for the reviewability of the FONSI, neither of which hold that a Final EIS is a reviewable agency action when followed by a final permit or other form of final agency action. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (finding review of Forestry Plan to not be ripe); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989) (arising from review of an agency decision taken following issuance of an EIS). *Sierra Club* also relies on two lower court cases in which the agency at issue had either issued a ROD or a FONSI. *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 188 (4th Cir. 1999) (involving

review of a ROD); *Southwest Williamson County Cmty. Ass'n v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999) (arising from review of a FONSI).

3. Issuance of the Presidential Permit was a Discretionary Action

Agency action committed to agency discretion is not reviewable under the APA. *See* 5 U.S.C. § 701(a)(2). Thus, even if the final agency action here was not that of the President, the issuance of the Permit would not be reviewable. Plaintiffs argue that the issuance of a Presidential Permit is not a matter "committed to agency discretion by law" and thus that it could be subject to APA review. But the very nature of the action is an exercise of authority over the foreign relations of the United States, *i.e.*, the President directed the State Department to base its decision on the "national interest," a standard that surely involves the weighing of diplomatic and security considerations that are at the heart of the discretionary exercise of executive foreign affairs powers. The ROD reflects this: the Deputy Secretary of State, on behalf of the President, decided to grant the Permit after determining that issuance of the Permit "would serve the national interest, in a time of considerable political tension in other major oil producing regions and countries, by providing additional access to a proximate, stable, secure supply of crude oil with minimum transportation requirements from a reliable ally and trading partner of the United States with which we have free trade agreements that further augments the security of this energy supply." ROD at 2-3.

Plaintiffs offer no answer to the question of what test a court might apply to such obviously discretionary Presidential action to measure the propriety of this national interest decision. *See District No. 1, Pacific Coast Dist. v. Maritime Admin.*, 215 F.3d

37, 41-42 (D.C. Cir. 2000) ("questions of foreign policy and national interest" are not "subjects fit for judicial involvement" because they are committed to agency discretion).

Plaintiffs claim that this Court should apply the standards of review applicable to an agency's NEPA determination. Opp. at 24. However, even if this Court were to find the EIS deficient under these standards, and void the Presidential Permit on that basis, they fail to explain why the President would be powerless to simply re-issue the Permit in the exercise of his foreign affairs powers, with or without any further NEPA compliance. *See NRDC,* 2009 WL 3153702, at *6 (President's authority to issue Presidential Permit was discretionary and not subject to NEPA requirements); *Sisseton,* 2009 WL 3153655 (NEPA violation could not be redressed by court because even if court were to revoke the Presidential permit, "the President would still be free to issue the permit again").

II. The President's Issuance of the Permit was Constitutional

A. The President's Authority over Foreign Affairs and as Commander-in-Chief Supports the Issuance of the Permit

Plaintiffs' constitutional claim is predicated on the following reasoning: an international oil pipeline is an instrumentality of foreign commerce; Congress has exclusive constitutional authority over foreign commerce; Congress has not exercised that authority to allow construction of the Alberta Clipper Pipeline or expressly delegated such authority to the Executive Branch; and therefore, the Presidential Permit is void because it is not authorized pursuant to the exercise of this foreign commerce power. Based on this reasoning, Plaintiffs conclude that the AC Pipeline may not be constructed absent Congressional authorization. Opp. at 32-35.

Plaintiffs' argument ignores the principle that controls this case: the President has independent constitutional authority in the realm of foreign affairs. He thus can "act in external affairs without Congressional authority." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). Therefore, while Congress may enact—and in many respects, has enacted—legislation regulating international oil pipelines under its power to regulate foreign commerce, the mere existence of dormant congressional authority does not prohibit the President from regulating those pipelines under his own foreign affairs powers. In fact, trans-border oil pipelines have been constructed on the strength of Executive Branch authorization for decades, and Congress has never even attempted to interfere with the President's actions.

On numerous occasions, Courts have acknowledged the President's independent authority to regulate border-crossing trade and instrumentalities, as part of his inherent foreign affairs and Commander-in-Chief powers. In *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court dismissed petitions challenging an order of the Civil Aeronautics Board that denied a certificate of convenience to operate an international air route into Chicago. The certificate was denied with the express approval of the President. In analyzing that order, the Court recognized that the President derived authority to prohibit routes of passage into the United States both by virtue of express congressional delegation of legislative authority *and* by virtue of his constitutional role as Executive. *Id.* at 109-110 (emphasis added). *Waterman* conclusively rebuts Plaintiffs' argument that the President lacks any constitutional

authority to act with respect to matters otherwise within Congress's foreign commerce power.

Similarly, in *Greene County Planning Bd. v. FPC*, 528 F.2d 38 (2d Cir. 1975), the Second Circuit dismissed for lack of jurisdiction a challenge to a Presidential Permit for a cross-border electric transmission line issued by the Federal Power Commission pursuant to an E.O. Plaintiff challenged the permit under jurisdiction provisions of the Federal Power Act, claiming that the E.O. under which it was issued was nothing more than an implementation of Congressional policy under the Act. The Court disagreed, concluding that the Permit was issued independently of the Federal Power Act because, notwithstanding the power of Congress over foreign commerce, the President retained independent authority to control border crossing instrumentalities under his power over "foreign relations if not as Commander in Chief." *Id.* at 46; *see also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 n.14 (2003) ("the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues"); *NRDC*, 2009 WL 3153702, at *5-6; *and Sisseton,* 2009 WL 3153655, at *7 (both holding that the State Department acted pursuant to the President's inherent authority over foreign affairs in the course of determining the reviewability issue).[4]

In this case, the importation of crude oil obviously implicates national security and foreign affairs concerns at the core of the President's foreign affairs and Commander-in-

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[4] In relying on situations such as international bridges and gas pipelines in which Congress has acted to set up a process for authorizing cross-border infrastructure (Opp. at 43-44), Plaintiffs fail to prove that in the absence of Congressional action, as here, the President is powerless to authorize new border infrastructure.

Chief powers. The State Department's ROD (at pages 25-26) makes this quite clear, finding *inter alia* that the AC Pipeline "increases the diversity of available supplies among the United States' worldwide crude oil sources in a time of considerable political tension in other major oil producing countries and regions;" "increases crude oil supplies from a major non-[OPEC] producer which is a stable and reliable ally and trading partner;" and is consistent with "bilateral diplomacy and a Clean Energy Dialogue process that is now underway . . . to lower the overall environmental footprint of our energy sectors." In short, the State Department's decision issued under delegated authority was quintessentially a diplomatic one, that took into account the needs and security of the United States and a host of international considerations.

B. Congress Has Acquiesced in the President's Actions

This Court need not decide the scope of the President's independent power over international oil pipelines in this case because Congress has, for many years, acquiesced in the exercise of Executive authority to license such pipelines. Especially in the realm of shared constitutional authority, the Supreme Court has repeatedly acknowledged that Presidential authority may be *found/enhanced* by Congressional silence in the face of such Presidential action. *See Youngstown,* 343 U.S. at 637 ("a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by

§ 1 of Art. II").[5] *See also Medellin v. Texas*, 128 S. Ct. 1346, 1371-72 (2008) (same); *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915) (a "long-continued practice, known to and acquiesced in by Congress," raises "a presumption" that Presidential action taken was pursuant to a "recognized administrative power in the Executive").[6]

Thus, in *Garamendi*, 539 U.S. at 396 415, the Court sustained the President's power to settle WWII-era claims in light of a history of congressional acquiescence: "[g]iven the fact that the practice goes back over 200 years and has received congressional acquiescence throughout its history, the conclusion '[t]hat the President's control of foreign relations includes the settlement of claims is indisputable.'" *See also American Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 443 (D.C. Cir. 1981) ("when Congress has not spoken, and the President has acted, courts have traditionally looked to a consistent practice of similar actions unmarred by congressional

[5] Plaintiffs actually misstate Justice Jackson's oft-cited standard for determining the scope of Presidential authority over foreign affairs. They argue that "[i]n the absence of Congressional authorization, the President's 'power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Opp. at 36. But Jackson stated that the President's powers are at their "lowest ebb" not when he acts in the face of Congressional silence, but where he acts in direct conflict with the will of Congress, expressed in or implied by statute. *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Plaintiffs cannot credibly contend that the issuance of a Presidential Permit somehow conflicts with any statute.

[6] Plaintiffs argue incorrectly that *Youngstown* undermines several Attorney General opinions and other authority cited by Defendants and Enbridge for the proposition that the President has authority to act with respect to cross-border infrastructure. (Opp. at 38, 40-41). However, *Youngstown* neither expressly nor impliedly calls those precedents and authorities into question. Further, *Youngstown* arose in a very different factual context, does not speak to the President's powers relative to cross-border infrastructure issues at all, and did not involve Congressional acquiescence to the degree present here.

objection to strike a workable accommodation between the principles of the separation of powers and the exigencies of governance").

There is a similar history of Congressional acquiescence here. Presidential Permits for cross-border oil pipelines, including several such permits issued to Enbridge or its predecessor Lakehead Pipe Line Company, have been issued continuously for decades. *See* Exhibit 1 to this Reply, consisting of a series of permits issued to Enbridge or its predecessor for cross-border pipelines. Notices of the applications for Permits for cross-border oil pipelines are published in the Federal Register and public comments are solicited on these notices. *See* Exhibit 2, which consists of a sampling of such notices dating back to the 1960's. The AC pipeline Permit is merely the latest example of such a Permit, and despite Plaintiffs' claim that oil sands permits are somehow different by virtue of their origin in the Alberta oil sands region (*see* Opp. at 44-46), such permits are in no sense different than any other Presidential Permit for a cross-border oil pipeline.

Thus, Congress has evinced no interest in exercising any form of exclusive authority over this long-standing permitting process. Indeed, Plaintiffs acknowledge Congress has enacted statutes that regulate the safety of these cross-border pipelines and the rates charged by their operators within the United States. *See* Opp. at 42. That Congress has enacted legislation premised on the prior issuance of construction permits by the President amply demonstrates the congressional gloss on Executive power. Similarly, the fact that Congress has chosen to enact laws authorizing the issuance of Presidential Permits for the construction and operation of cross-border natural gas pipelines, but has not acted with respect to oil pipelines in the face of Presidential action,

demonstrates congressional acquiescence. Therefore, quite contrary to Plaintiffs' contentions, the enactment of these regulatory statutes underscores, rather than undermines, Congress' acceptance of the President's power to authorize the construction of regulated oil pipelines. To reach any other conclusion would call into question the operation of numerous cross-border oil pipelines that have been in place for decades, a result that does not mesh with logic.[7]

III. Plaintiffs Have Failed to State a Claim under NEPA

Plaintiffs assert that they need only provide "a short and plain statement of the claim and the grounds on which it rests." Opp. at 25 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, *Conley* is no longer the standard, as it was overruled by *Bell Atlantic v. Twombly,* 127 S. Ct. 1955, 1964-65 (2007). *See Gregory v. Dillard's, Inc*., 565 F.3d 464 (8th Cir. 2009) ("*Twombly* confirmed this approach by overruling *Conley*"). Thus, the correct standard is *Twombly*, which obliges a pleader to amplify a claim with some plausible factual allegations. *Twombly,* 127 S. Ct. at 1964-65. Under this correct standard, Plaintiffs' conclusory NEPA claims should be dismissed.

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[7] Plaintiffs argue that the conditions imposed on Enbridge by the Permit exceed the State Department's authority under the E.O. Opp. at 46-48. However, these conditions set forth the terms of environmental mitigation as a consequence of the NEPA process. Were this Court to void those conditions, Enbridge could build and operate the AC Pipeline without adherence to these environmental mitigation conditions, a result that Plaintiffs presumably would not favor.

A. Plaintiffs' Connected Actions Claim is Not Plausible

Plaintiffs argue in support of their First Claim for Relief that the LSR and SLD pipelines were required to be considered in the EIS because they are "connected actions" under NEPA. Opp. at 25-26. However, the SLD and LSr Pipelines do not meet the legal definition of "connected actions." CEQ regulations implementing NEPA 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). Plaintiffs allege that the AC and SLD Pipelines are connected actions, but have failed to allege with sufficient specificity that the AC and SLD Pipelines are interdependent.

The AC and SLD Pipelines will not rely upon one another for their operation. 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. Plaintiffs' assertion that the AC pipeline would not be able to transport crude without the SLD pipeline (Opp. at 25-26) is speculative and unsupported. The undisputed fact that oil sands crude is already being transported out of Alberta demonstrates there are other sources of diluent besides SLD. Since each pipeline has its own purpose, and is therefore "independent" relative to the other, it is irrelevant

under NEPA whether or not they share the same corridor. *See Utahns for Better Transportation v. DOT*, 305 F.3d 1152, 1183 (10th Cir. 2002).

Further, Plaintiffs have failed to allege any facts that would support their claim that the LSr Pipeline is a connected action. Plaintiffs cannot dispute that the LSr Pipeline is already constructed and in operation, transporting crude oil from Saskatchewan into the United States. The 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. USFS*, 297 F.3d 1012 (10th Cir. 2002) (finding project not to be connected to an interchange where it would be completed regardless of whether the interchange project was built).

B. The Indirect and Cumulative Impacts Plaintiffs Identify Were Either Considered or Were Not Within the Scope of Required NEPA Review

Plaintiffs' Second Claim alleges that the EIS fails to take into account certain indirect and cumulative impacts, most of which have little connection to the actual project at issue.

Plaintiffs allege that the EIS did not address indirect "downstream" impacts, such as global warming impacts or impacts resulting from upgrades of refineries to accommodate the Alberta crude oil in the United States. Opp. at 27. In fact, however, an analysis of exactly the sort that this Circuit has found sufficient was completed. *See* EIS at 4-400 to 4-403; *Mayo Found. v. STB*, 472 F.3d 545 (8th Cir. 2006) (affirming adequacy under NEPA of agency's consideration of emissions from end-use of coal to be

transported by proposed railroad). Plaintiffs' claim therefore has no plausible predicate and should be dismissed.

Plaintiffs argue that the Final EIS fails to account for impacts associated with future expansion of the AC Pipeline (Opp. at 27), but fail to provide any basis for their bald opinion that expansion is "reasonably foreseeable." 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. at 390 (NEPA does not require the environmental effects of speculative projects to be considered).[8]

Plaintiffs continue to allege there was no assessment of cumulative impacts of refining impacts in light of Keystone and Keystone XL projects, despite the fact that this assertion is simply wrong. The EIS includes a discussion of the impacts of the Keystone pipeline. *See* EIS at 4-388 to 4-390. Moreover, as noted in the response to comments portion of the Final EIS, the XL project was proposed subsequent to the preparation of the EIS and is designed to serve a different market altogether. EIS, Appendix A, at A-18. Thus, the EIS correctly observes that XL project would not involve "cumulative impacts" in the same geographic region with the AC or SLD pipelines.

Plaintiffs point to impacts from extraction activities in the Canadian oil sands area of Alberta. However, the impacts of oil sands extraction are not "indirect effects" of the AC and SLD Pipelines, as a matter of law. "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

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

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 contend otherwise. *See* EIS at pgs. 4-402 ("it is expected that the oil sands in Canada would continue to be developed and the refinery emissions from that oil would still occur . . . even if the Alberta Clipper Project were not built"); *see also DOT v. Public Citizen*, 541 U.S. 752, 767 (2004) (only those effects with "a reasonably close causal relationship" must be considered under NEPA). Were the AC Pipeline not built, the oil produced in Alberta would simply be sent to another outlet to meet the global demand for that oil.

Further, Plaintiffs have not alleged any specific facts regarding cumulative impacts that would occur as a consequence of both constructing the AC and SLD Pipelines in the US and pursuing oil sands extraction activities hundreds of miles distant in Canada. Given the distance between the pipelines and the areas of extraction, the State Department properly determined that the oil sands area is beyond the reasonable geographic scope of the EIS's impact assessments. *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").

C. Plaintiffs have Failed to State a Claim for Relief Regarding Oil Spill Impacts

In their Third Claim, Plaintiffs claim the State Department failed to adequately consider the risks of spills and operational leaks associated with the pipelines in its EIS. Opp. at 28-29. However, Plaintiffs' Complaint contains only an insufficient "statement

of facts that merely creates a suspicion" that impacts of spills were not considered. *Twombly,* 127 S. Ct. at 1974 (internal citation omitted).

The Third Claim is focused on the State Department's assessment of leaks and spills risks; it directs no specific allegations at all to the environmental assessment undertaken by the Corps or the Forest Service. Complaint, ¶¶ 92-94. Rather, it conclusorily asserts that the permits issued by the latter agencies were issued without compliance with NEPA. Complaint, ¶ 95. But the Corps and the Forest Service did not rely solely on the State Department's EIS in their capacity as cooperating agencies; they also undertook their own, supplemental analysis of the risks of leaks and spills. The Corps issued an extensive ROD which addressed both the AC and SLD pipelines, and addressed the risk of spills and leaks. The Corps observed that the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), which assisted the State Department in preparing the EIS, intensively regulates pipeline safety and that Enbridge had prepared plans for responding to spills and leaks and for maintaining pipeline integrity for both pipelines, which plans were to be submitted to, and overseen by, PHMSA.[9] The Forest Service prepared, and incorporated into the EIS, its own EA, which also assessed PHMSA's role and addressed the risk of leaks for both pipelines.[10] In addition, the Forest Service's EA offered a discussion of diluent, explaining its makeup. *See* EA at pg. 3-3.

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[9] *See* Corps ROD at 25-26, *available at* Dkt. 83-3.

[10] The Forest Service's EA was included as Appendix U to the EIS and is available at Dkt. 83-12.

However, the Complaint offers no allegations at all about any claimed deficiencies of the Corps or Forest Service analyses. By simply alleging with no factual predicate that these agencies failed to fulfill NEPA requirements, Plaintiffs fail to state a claim against the Corps or Forest Service.

They likewise have failed to state a viable claim against the State Department. Plaintiffs allege that the State Department erred by not including an analysis of the risks of spills and leaks from the SLD pipeline. However, the State Department was not permitting that domestic pipeline, and thus, had no legal obligation under NEPA to address any operational risks associated with the diluent pipeline. Plaintiffs' claims against the State Department therefore fail as a matter of law. Moreover, because the potential for spills and leaks from both pipelines was in fact considered in the EIS,[11] the Third Claim should be dismissed on that ground as well. *See Ecology Center*, *Inc. v. USFS*, 451 F.3d 1183, 1189 (10th Cir. 2006) (dismissing complaint where agency took "hard look").

D. Plaintiffs Have Failed to State a Claim Concerning the State Department's Purpose and Need Statement

In their Fourth Claim, Plaintiffs assert that the EIS is flawed because it failed to adequately consider the no action alternative and incorrectly defined the purpose and need for the project. While Plaintiffs claim that this Court must accept their allegations

[11] *See* Enbridge's Surreply to PI Motion, Dkt. 146, pgs. 4-6 (Nov. 10, 2009), which discusses the EIS's extensive consideration of spills and leaks.

as true, Plaintiffs must do more than recite a formulaic description of the elements of the cause of action to survive a motion to dismiss. *Twombly*, 127 S. Ct. at 1964-65.

Plaintiffs cite to the CEQ regulations to support their claims that the State Department had to consider alternatives, preferred by Plaintiffs, that are inconsistent with the goals of the project and outside of the control of the agency, such as changes to the country's energy policy to require less consumption of carbon based fuels. Opp. at 29. However, CEQ's own interpretation of the regulations does not support the Plaintiffs' views. In discussing the selection of alternatives where an agency is asked to issue a license or permit, CEQ has stated that there is "no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, at 34,267 (1983); *see also 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."). Moreover, the State Department was not required to consider energy efficiency alternatives that Enbridge could not implement. *See Env. Law and Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006) (agency was not required to consider energy efficiency alternatives when applicant could not implement them).[12]

[12] The State Department's delegated role is to determine whether a Presidential Permit is in the national interest. It is not the role of the Department to determine the energy strategy for the United States or to speculate on what future executive/legislative actions might occur that could impact energy demands.

Contrary to the Plaintiffs' assertions that the agency must broadly define the purpose and need of a project, the Eighth Circuit has stated that in reviewing an agency's selections for the EIS the court should "properly look at whether the agency defined the terms so unreasonably narrow as to make the EIS a 'foreordained formality.'" *City of Bridgeton v. Slater*, 212 F.3d 448, 458 (8th Cir. 2000), *rehearing en banc denied*, 2000 U.S. App. LEXIS 13701 (June 13, 2000), *cert denied*, 531 US 1111 (2001). The EIS was not merely a formality and it demonstrates that the State Department properly considered Enbridge's goals in defining the purpose and need of its privately conceived and funded pipeline project. EIS 1-2 to 1-7.

Plaintiffs' claim is merely a re-packaged statement of Plaintiffs' energy policy agenda. Plaintiffs oppose importation of oil sands crude from Canada and favor conservation and renewable energy alternatives, but the State Department's failure to adopt their policy in an EIS on Enbridge's project does not arise to a legal cause of action. Having failed to set forth a plausible claim that the State Department erred under NEPA when it rejected an alternative that plainly would not meet the purpose or satisfy the need underlying Enbridge's project, Plaintiffs' claim should be dismissed.

E. Plaintiffs' Cannot Revive Moot Claims Regarding the LSr Pipeline to Impact the SLD Pipeline

Plaintiffs attempt to circumvent the fact that any claim against the completed and operational LSr pipeline is moot by arguing in support of their Fifth Claim that relief for perceived deficiencies in the NEPA process for the LSr pipeline can be addressed by action directed to a different project, the SLD pipeline. The Eighth Circuit has held that a

NEPA claim is moot if no effective relief is available. *See One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 893 (8th Cir. 2003) (NEPA claim does not present a controversy when the proposed action is complete and no effective relief is available). It is undisputed that the LSr pipeline has been completed and in operation since April 2009. EIS at 1-29. Because the LSr pipeline has independent utility relative to the SLD pipeline, a perceived deficiency in the environmental review of the LSr pipeline cannot be corrected by changes to the SLD pipeline.

The cases cited by Plaintiffs are distinguishable because in each case effective relief was arguably available that was directly tied to the specific project about which plaintiffs alleged a NEPA violation. In *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208 (9th Cir. 1998), plaintiffs objected to the Forest Services' sale of trees for harvesting. The Ninth Circuit found that the NEPA claim was not moot because some trees remained standing. *Id*. at 1215. Similarly, in *Cantrell v. City of Long Beach*, 241 F.3d 674 (9th Cir. 2001), although the buildings and birding areas had been destroyed, the plaintiffs argued that there were ways to provide relief by creating nesting and foraging areas on the land at issue or nearby. By contrast, Plaintiffs here are asking for relief related to the completed LSr pipeline by asking this Court to take action again the separate, independent SLD pipeline.

As explained in Section III(A) above, the LSr is a separate project. The purpose of the LSr is to bring light and medium sour crude oil from the Williston Basin in Saskatchewan, Canada to the United States. EA, at xi. The pipeline is operational and clearly did not need the AC or SLD for its operation. *See Choate v. USACE*, 07-cv-1170

(WRW), 2008 WL 4833113, *9 (E.D. Ark., Nov. 5, 2008) (a project has independent utility when it would not be irrational or unwise to undertake the project without subsequent action).

Plaintiffs' arguments here are very similar to those rejected by the Eighth Circuit in *One Thousand Friends,* 364 F.3d. at 890. The plaintiffs in that case argued that the Federal Highway Administration had improperly segmented a completed highway interchange and one under construction and that a supplemental EA for the completed interchange could impact the one under construction. The Eighth Circuit rejected this argument finding that the interchanges were not improperly segmented as each had independent utility and that the changes to the other interchange could not be used to circumvent the fact that the issue was moot as to the completed interchange. *Id*. at 894. Similarly, here the LSr has independent utility and is complete and in operation. Plaintiffs cannot use fancy footwork to revive a moot claim.

Finally, as the court noted in *One Thousand Friends*, plaintiffs could have avoided the dismissal based on a moot claim by seeking a stay pending appeal. *Id*. Similarly, the Plaintiffs here could have filed a challenge to the LSr EA last year, but chose not to do so. As a matter of law, Plaintiffs cannot now resurrect their LSr claim.

CONCLUSION

Plaintiffs' Complaint should be dismissed because as described above Plaintiffs will not, as a matter of law, be able to prove their various claims.

Respectfully submitted,

Dated: December 2, 2009

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

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

Attorneys for Defendant-Intervenor Enbridge Energy, Limited Partnership