

Defendant-Intervenor, Enbridge Energy, Limited Partnership (“Enbridge”), submits this surreply to respond to arguments raised in Plaintiffs’ reply memorandum (“Reply”) [Dkt. 130] regarding the United States Army Corps of Engineers (“Corps”) and United States Forest Service (“USFS”) permit decisions on the Southern Lights Diluent (“SLD”) Pipeline.¹ Plaintiffs argue that these agencies’ SLD permit decisions should be invalidated because they are based on insufficient environmental reviews under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* As set forth below, Plaintiffs’ claims are meritless since both agencies undertook a thorough environmental review of the issues relevant to their respective permitting decisions.

I. The USFS and Corps Ensured the Impacts of Both Pipelines Were Adequately Assessed under NEPA

Plaintiffs assert that the Corps and USFS have not met their “independent obligations to comply with NEPA” with regard to the permits issued for the SLD pipeline. Reply, at 14. However, this is not a case where the cooperating agencies simply “rubber-stamped” the lead agency’s EIS. The USFS and Corps were fully engaged in the NEPA review of these projects, and ensured that the EIS included an assessment of both pipelines’ potential impacts.

¹On October 23, 2009, Plaintiffs moved to amend their Motion for Preliminary Injunction to include a specific request for injunctive relief against the U.S. Forest Service. Enbridge agreed not to oppose Plaintiffs’ Motion to Amend as long as Plaintiffs did not oppose Enbridge’s filing of a surreply on the Motion for Preliminary Injunction. Attorneys for Enbridge and the Government Defendants also conferred with the Judge’s law clerk by telephone regarding the filing of this surreply.

As noted in the Corps' ROD, "[t]he review of the proposed Project was an intensive, collaborative effort" among the agencies. Corps ROD, p. 1, *available at* Dkt. 83-3. The Corps not only relied upon the extensive information set forth in the EIS, but also compiled a significant amount of information to support its permit determinations on both pipelines. The Corps' ROD incorporates numerous supplemental submissions from Enbridge addressing the potential wetlands and waterbody impacts of both the AC and SLD pipelines. Corps ROD, at Appendix B.² The ROD also states that the Corps reviewed the Draft EIS and ensured the EIS contained the information needed to support the Corps' permit decision. Corps ROD at 11. For example, the Corps' ROD notes that the impacts to aquatic resources from construction of the SLD pipeline were adequately disclosed in the Final EIS. *Id.* The ROD also contains a full evaluation of both pipelines' impacts to wetlands and waterbodies, as well as a mitigation plan. *Id.* at 25-26, and App. A-C. Therefore, the Corps clearly did not "simply rely[] on another agency's conclusions" regarding the pipelines. Reply, at 14.

The USFS also worked closely with the State Department to ensure both pipelines' impacts on the Chippewa National Forest (CNF) were adequately addressed in the EIS. As set forth in the USFS ROD, the USFS requested that the impacts of the projects on the CNF be captured in an appendix, "rather than dispersed throughout" the EIS. USFS

² Enbridge understands that the Appendices to the Corps ROD will be included as exhibits to the Federal Defendants' surreply.

ROD, at p. 2.³ Thus, besides all of the information on the SLD pipeline provided in the main body of the EIS discussed below, the CNF Appendix to the Final EIS (App. U) [Dkt. 83-12] provides over 100 pages of focused analysis of the potential impacts of *both* pipelines on the CNF. Thus, Plaintiffs' argument that there is no EIS covering the USFS' permit decision for the SLD pipeline is simply meritless. Reply, at 15.

In sum, the EIS and RODs reflect that the USFS and Corps took a hard look at both pipelines and fully complied with NEPA's requirements.

II. The USFS and Corps Took the Requisite Hard Look at the Operational Impacts of the SLD Pipeline

Plaintiffs do not dispute that the EIS adequately considered the construction impacts of the SLD Pipeline. In fact, the Final EIS observes that "acreage impacts of the Diluent Project pipeline have been incorporated into the environmental review described throughout Section 4.0 of this EIS." EIS, at § 4.14.2.1, *available at* Dkt. 83-8. Instead, Plaintiffs claim that the Final EIS fails to consider the impacts of operation of the SLD pipeline. Reply, at 16. However, the primary environmental impacts of a pipeline project are not those associated with operation, but those arising from construction, including clearing the right of way, temporary construction roads, water crossings, etc. Thus, the focus of the EIS was properly on the cumulative and other impacts of construction of both pipelines. *See* Council on Environmental Quality Regulations implementing NEPA at 40 C.F.R. 1502.2(b) ("Impacts shall be discussed in proportion to

³ Enbridge understands that the USFS ROD will be included as an exhibit to the Federal Defendants' surreply.

their significance . . .”). Indeed, Plaintiffs point to only two potential “operational” impacts of the SLD pipeline – spills/leaks from the pipeline, and “downstream” impacts from the diluent transported by the pipeline. As discussed more fully below, both spills and downstream impacts of both pipelines were fully addressed in the EIS.

A. The Agencies Assessed the Impacts of Potential Spills and Leaks from Both Pipelines

Plaintiffs allege that the potential for spills from the SLD pipeline was inadequately considered. However, the agencies assessed the impacts of potential spills/leaks from both pipelines. *See* EIS, at § 4.13, *available at* Dkt. 83-7. An analysis was performed that “indicate[d] an overall frequency of between about 0.1 and 0.3 spills per year” would be foreseeable. EIS, at § 4.13.3.3. The EIS recognizes that spills could “affect natural resources, human uses and services, and aesthetics to varying degrees, depending on the cause, size, type, volume, rate, temperature of the oil, location, environmental conditions, and associated response actions.” EIS, at § 4.13.4. Since the SLD and AC Pipelines are collocated, any leaks and spills associated with the SLD Pipeline would occur along the same route as the AC Pipeline. In addition, the comprehensive federal pipeline safety and emergency response requirements administered by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and described in the EIS would apply to both pipelines. *See* EIS, at pg. 4-348; Corps ROD, Appendix D at D2 (“diluent pipeline is subject to . . . national regulatory program to ensure the safe transportation of hazardous liquids by pipeline”). Appendix U also specifically considered the impact of spills and leaks in connection with

both the AC and SLD Pipelines. *See* EIS, Appendix U, §§ 3.1.1.2 – 3.1.1.5, *available at* Dkt. 83-12. Thus, significant information is provided throughout the EIS, and in the documents prepared by USFS and the Corps, about the potential for spills from the SLD pipeline and the regulatory requirements that apply to reduce the risk and impact of spills.

The EIS also includes a thorough discussion of pipeline integrity and emergency response measures to be implemented by Enbridge for *both* pipelines, including design, construction, operation, maintenance, and inspection procedures. *See* EIS, Appendix Q, *available at* Dkt. 83-11. In addition, the EIS includes Enbridge’s comprehensive plan for spill prevention and containment for *both* the AC and SLD Pipelines. *See* EIS, Appendix E, *available at* Dkt. 83-9. Thus, the EIS demonstrates that the agencies took a hard look at the SLD pipeline’s design and operation, and ensured that adequate plans were in place for spill prevention and response.

Contrary to Plaintiffs’ arguments, the EIS also includes a description of diluent:

Diluent is a generic term that encompasses mixture range of hydrocarbons used for this purpose. Diluent is also referred to as condensate, natural gas oil, or pentane plus. The most prevalent types are condensate and naphtha. Diluent is expected to have a similar composition and physical characteristics to gasoline. ***Therefore, if released into the environment, diluent will behave in a similar manner to gasoline.***

EIS, Appendix U, p. 3-3 (emphasis added), *available at* Dkt. 83-12; *see also* EIS, Appendix A, at 286 (noting that oil and diluent “are both hydrocarbons.”). Further, the EIS addresses the potential impacts from spills of refined products such as gasoline. EIS at 4-359, *available at* Dkt. 83-7 (“For the proposed Project, the materials that could be released during construction or operation include the following: . . . Refined oil (diesel,

gasoline, hydraulic fluid, transmission oil, lubricating oil and grease, waste oil, mineral oil, solvents, and other petroleum-based products...”)); *see also*, references to “refined product” spills/impacts throughout EIS § 4.13, *avaialble at* Dkt. 83-7. Thus, the EIS recognizes that diluent spills would behave similar to gasoline, and addresses the potential impacts of spills of refined products such as gasoline.

Although Plaintiffs argue that more information on the potential impacts of spills of diluent should have been included in the EIS, the discussion of spills clearly meets the deferential standard applicable to assessing an agency’s compliance with NEPA. *See Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545, 550 (8th Cir. 2006) (“[o]ur role in the NEPA process is ‘simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that the decision is not arbitrary or capricious.’”⁴). The EIS addresses how often spills are likely to occur, what the likely impacts of such spills would be, what measures would be used to avoid spills, and what measures would be used to mitigate spills should they occur. The EIS also recognizes that Enbridge maintains an Emergency Response Plan for spills that meets PHMSA extensive pipeline safety requirements and appends the Enbridge emergency response measures that would be applied to both the AC and SLD pipelines. Thus, the EIS satisfied NEPA’s requirements.

B. The EIS Adequately Addresses Downstream Impacts

⁴ Quoting from the Eighth Circuit’s decision in *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2004).

Plaintiffs argue that the EIS is silent regarding the downstream impacts of the SLD pipeline. Plaintiffs assert that the additional diluent to be delivered by the SLD pipeline “will induce additional growth in tar sands mining and facilitate additional transport of heavy tar sands crude to refineries throughout the United States.” Reply, at p. 19.⁵ The issue of the diluent transported by the SLD leading to increased oil sands crude being extracted and transported into the US was not raised in any comments on the EIS. Therefore, the issue of the “downstream impacts” of the diluent to be transported by the SLD is not properly before this Court. *See Department of Transportation v. Public Citizen*, 341 U.S. at 764-765 (parties forfeited right to raise issue in Court when it was not raised with the agency in comments).

Even if this issue were properly before this Court, the argument is meritless. The agencies fully considered the impacts of refining oil sands crude in the United States, including refinery expansions and GHG emissions. The impacts posed by current and future refinery expansions are discussed at pages 4-390 to 4-403 of the EIS, *available at* Dkt. 83-8. The EIS thoroughly examines several major refineries’ plans regarding

⁵ The diluent to be transported to Canada by the SLD pipeline will not be used solely for diluting crude to be delivered to the US, so contrary to Plaintiffs’ assertion, it is not “reasonably foreseeable” (Reply at 19) that the diluent transported by SLD will lead to greater oil sands crude being refined in the US. *See* EIS at pg. 1-28. Moreover, the development and extraction of the oil sands is not dependant on the SLD diluent. The Alberta oil sands production has been increasing for years (*see* EIS at § 1.2.2.3) even though the SLD pipeline has not been constructed. 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 or any particular source of diluent. *See* LSr EA at pp. 3-76 to 77 (concluding that “the Alberta oil sands have been and presumably will continue to be developed regardless of the LSr pipeline...).

upgrades to provide estimates of the incremental increases in emissions associated with refining heavy crude oil. *See* EIS, at pgs. 4-390 to 4-399. The diluent to be transported by SLD will not increase these impacts, as the full expansion plans at these refineries were already considered.⁶

The EIS also examines cumulative GHG impacts of heavy crude refining, refinery upgrades, and new refineries. *See* EIS, at pgs. 4-388 to 4-403. The 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* EIS, at pgs. 4-388 to 390, 4-400 to 403. As the Eighth Circuit stated in *Mid States*, "NEPA regulations require agencies to expend the bulk of their efforts on the most pressing environmental issues." 345 F.3d at 541. In this case, the agencies determined that the combined projects' contribution to climate change was very small. "Further expenditure of agency resources was therefore not required." *Id.* at 541.

⁶ Plaintiffs' reliance on *Mid States* is misplaced. The agency in *Mid States* had stated that an increase in coal consumption was reasonably foreseeable due to the project, but then failed to consider its impacts. *Mid States*, 345 F.3d at 550; *see also Arkansas Wildlife Federation v. Army Corps of Engineers*, 431 F.3d 1096, 1102 (8th Cir. 2005). Here, the agencies never found that it was "reasonably foreseeable" that the diluent being transported by the SLD pipeline would increase the extraction and exportation of oil sands crude. Moreover, as discussed above, the agencies here fully assessed the impacts of the refining and use of oil sands crude in the United States.

CONCLUSION

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

Respectfully submitted this 10th day of November 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*