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8 **UNITED STATES DISTRICT COURT FOR THE**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11
12 SIERRA CLUB, MINNESOTA CENTER FOR
13 ENVIRONMENTAL ADVOCACY,
14 INDIGENOUS ENVIRONMENTAL
15 NETWORK, and NATIONAL WILDLIFE
16 FEDERATION,

17 Plaintiffs

18 v.

19 HILLARY CLINTON, in her official capacity
20 as Secretary of State, JAMES STEINBERG, in
21 his official capacity as Deputy Secretary of
22 State, UNITED STATES DEPARTMENT OF
STATE, and the UNITED STATES ARMY
CORPS OF ENGINEERS,

23 Defendants

24 **CIV. NO. 09-4086**

25 **ENBRIDGE ENERGY, LIMITED**
26 **PARTNERSHIP'S OPPOSITION TO**
27 **PLAINTIFFS' MOTION FOR A**
28 **TEMPORARY RESTRAINING ORDER**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND..... 3

ARGUMENT..... 5

 A. PLAINTIFFS HAVE FAILED TO PRESENT A CREDIBLE CASE ON THE MERITS 6

 1. DOS’s Issuance of the Alberta Clipper Presidential Permit Does Not Violate NEPA... 6

 a. The Alberta Clipper, LSR and Southern Lights are not “connected actions” and the
cumulative impacts of each were fully assessed..... 6

 b. DOS Properly Assessed Reasonably Foreseeable Indirect Impacts of the Alberta
Clipper in Accordance with NEPA..... 11

 (1) The FEIS considered all required indirect impacts..... 11

 (A) DOS was not required to consider the impacts of the Canadian oil sands ... 11

 (B) The impacts of refinery expansions are fully considered 12

 (C) DOS fully considered air quality and climate change impacts of petroleum
end use 13

 (2) DOS Considered Significant Cumulative Impacts 14

 (A) Upgrades and expansion are not foreseeable or planned 14

 (B) Cumulative impacts caused by other pipeline projects were considered in the
EIS 15

 (C) DOS fully considered greenhouse gas emissions 15

 c. DOS Adequately Considered the Risks, Impacts, and Mitigation Measures
Associated with Spills, Operational Leaks and Abandonment..... 16

 d. DOS took a hard look at the Project’s stated purpose and need and considered a
reasonable range of alternatives..... 17

 2. DOS’s Issuance of the Presidential Permit is Constitutional..... 19

 B. PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPERABLE HARM..... 19

 C. THE BALANCE OF HARMS FAVORS ENBRIDGE..... 22

1 D. THE PUBLIC INTEREST FAVORS DENYING PLAINTIFFS’ MOTION 24
2 CONCLUSION 25

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
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23
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25
26
27
28

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58 F.3d 469 (9th Cir. 1995) 11

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198 F.3d 862 (D.C. Cir. 1999) 17

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123 F.3d 1142 (9th Cir. 1997) 17

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66 F.3d 1489 (9th Cir. 1995) 5

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309 F.3d 1141 (9th Cir. 2002) 11

Friends of Southeast's Future v. Morrison,
153 F.3d (9th Cir. 1998) 17

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415 U.S. 423 (1974) 5

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836 F.2d 760 (2d Cir. 1988) 7

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1285 (D. Or. 2005) 7

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1 *O'Reilly v. U.S. Army Corps of Engineers*,
 2 477 F.3d 225 (5th Cir. 2007)7

3 *Robertson v. Methow Valley Citizens Council*,
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5 *State of N.C. v. City of Virginia Beach*,
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16 *Wetlands Action Network v. USACE*,
 17 222 F.3d 1105 (9th Cir. 2000)6

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 19 2008 WL 1946818 (D. Colo. Apr. 30, 2008), *aff'd*, 531 F.3d 1220 (10th Cir. 2008)6

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PRELIMINARY STATEMENT

1
2 Enbridge Energy, Limited Partnership's ("Enbridge"), as the holder of the Presidential
3 Permit and United States Army Corps of Engineers Permits ("USACE Permits") at issue in this
4 case, respectfully submits this Memorandum of Law in Opposition to the Motion of Plaintiffs
5 Earthjustice, Minnesota Center for Environmental Advocacy ("MCEA"), Sierra Club
6 Environmental Law Program ("Sierra Club"), Indigenous Environmental Network ("IEN"), and
7 National Wildlife Federation ("NWF") (collectively "Plaintiffs") for a Temporary Restraining
8 Order ("TRO") ("Motion") (Dkt. 8, Sep. 3, 2009). Plaintiffs seek a TRO to stop the on-going
9 construction of two federally and state-approved underground pipelines, the Alberta Clipper
10 Pipeline ("AC Pipeline") and Southern Lights Diluent Pipeline ("SLD Pipeline"), the
11 construction of which has been underway since August 20, 2009. Crawford Dec. ¶ 9. The
12 construction of these pipelines is no different than the construction of numerous other pipelines
13 that have been constructed and operated within the United States for decades. It is no different,
14 for example, than the on-going construction of Transcanada's Keystone Pipeline, another
15 federally and state approved U.S.-Canada pipeline recently issued a Presidential Permit for the
16 transportation of crude oil, which Plaintiffs did not seek to enjoin. Hamsher Dec. ¶ 29. Further,
17 the AC and SLD pipelines will be built largely along existing rights-of-way for other Enbridge
18 pipelines, some of which were constructed decades ago, and within a corridor that in many
19 places includes U.S. Highway 2, a BNSF railroad line and other energy facilities. Hamsher Dec.
20 at ¶ 9. Further, while there is some temporary disturbance of the land to lay the new pipe — just
21 as there has been repeatedly over the years in this same corridor — the disturbance can be
22 measured in days or weeks, after which vegetation and grasses will begin to grow once the pipe
23 is buried and filled over. Crawford Dec. ¶¶ 18, 26. The parade of exaggerated horrors that
24 Plaintiffs' witnesses present to this Court are in many cases no more than a consequence of the
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1 temporary disturbances that come with the construction of any linear project, a road, a railroad or
2 a pipeline. If these were sufficient to warrant a TRO, virtually all such construction would come
3 to a halt in this country.

4
5 Further, construction of these pipelines has been underway since August 20, nineteen
6 days ago. Plaintiffs had earlier opportunities to seek a TRO or injunction as it has been no secret
7 that construction began in August. At this stage, over 80 miles have right-of-way has been
8 cleared. The environmental harm of leaving disturbed areas alone for even a few days, and the
9 millions of dollars of monetary harm to Enbridge (which could total \$80 million) of putting a
10 halt to work that already involves 1700 workers with more added each day, dictates strongly
11 against an injunction of any length.

12
13 The AC and SLD pipelines have already been subjected to intensive environmental and
14 regulatory scrutiny by agencies in the three traversed states (North Dakota, Minnesota and
15 Wisconsin), the U.S. Department of State (which undertook a thorough EIS process for the
16 Alberta Clipper pipeline), the USACE (which undertook its own extensive review process for
17 both pipelines) and the U.S. Forest Service, Chippewa National Forest (“USFS”) (which
18 prepared yet another environmental review of both pipelines). Crawford Dec. ¶¶ 16, 28.¹ The
19 public interest in the construction and operation of these pipelines has been established during
20 the regulatory processes; the direct, indirect and cumulative impacts analyzed as required by
21 NEPA; and the environmental protection practices for their construction have been identified and
22 implemented so that, to the maximum extent possible, the adverse environmental impacts will be
23 avoided, minimized or mitigated.

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¹ The Draft and Final EISs can be found at www.albertaclipper.state.gov

FACTUAL BACKGROUND

1
2 Enbridge is a limited partnership organized in the state of Delaware. Enbridge’s
3 corporate structure, as relevant, is described in the attached declaration of Denise M. Hamsher.
4 Hamsher Dec. ¶ 2.

5
6 Enbridge is constructing the AC Pipeline, which will increase its pipeline distribution
7 system by up to 450,000 barrels per day (bpd) by transporting crude oil from a supply hub near
8 Hardisty, Alberta to an existing terminal in Superior, Wisconsin. Hamsher Dec. ¶ 6. In the
9 United States, the Pipeline will consist of approximately 326.9 miles of new 36-inch diameter
10 pipelines and associated facilities that will be installed primarily within or adjacent to the
11 existing Enbridge pipeline corridor that extends from the U.S./Canada border to the existing
12 terminal in Superior, Wisconsin. Crawford Dec. ¶ 6. At most points the Pipeline’s route will be
13 collocated with existing Enbridge pipelines and only expand existing pipeline rights-of-way over
14 private/public lands, thereby minimizing environmental impacts created during construction.
15 Hamsher Dec. ¶¶ 7, 16. There are only a few places, totaling less than 35 miles, where the right-
16 of-way for the AC Pipeline deviates from the existing right-of-way to address environmental or
17 constructability issues, or regulatory agency or landowner requests. Crawford Dec. ¶ 7.
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20 Because the AC Pipeline will cross the U.S./Canada border, Enbridge was required to
21 obtain a Presidential Permit from DOS. Crawford Dec. ¶ 8. In order to issue a Presidential
22 Permit, DOS must, in accordance with EO 13337, determine whether a proposed project is in the
23 “national interest.” DOS conducted an almost two-year environmental review process in
24 accordance with the National Environmental Policy Act (NEPA). Crawford Dec. ¶ 8. As the
25 lead federal agency for the environmental review, DOS prepared a Draft Environmental Impact
26 Statement (EIS) as well as a Final EIS. It did so in coordination with several federal agencies
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1 with an interest in the matter and two Indian tribes whose territory would be crossed by the
2 Pipelines. *See* FEIS at § 1.3.

3 DOS made a “national interest” determination, concluding that “the addition of crude oil
4 pipeline capacity between Canada and the United States will advance a number of strategic
5 interests of the United States. These include[] increasing the diversity of available supplies
6 among the United States’ worldwide crude oil sources in a time of considerable political tension
7 in other major oil producing countries and regions; shortening the transportation pathway for
8 crude oil supplies; and increasing crude oil supplies from a major non-Organization of Petroleum
9 Exporting Countries producer.” DOS August 3, 2009 Record of Decision/National Interest
10 Determination, *available at* Hamsher Dec. Exhibit 4. Enbridge began constructing its AC
11 Pipeline on August 20, 2009, upon issuance of a Presidential Permit. Crawford Dec. ¶ 9.

12 Enbridge also is constructing the SLD Pipeline. *Id.* The SLD Pipeline will be a 20-inch
13 diameter pipeline extending from Manhattan, Illinois to Clearbrook, Minnesota, where it will
14 connect with an existing Enbridge pipeline. Hamsher Dec. ¶ 21. The section of SLD at issue in
15 this action, Superior, Wisconsin to Clearbrook, Minnesota, will be constructed in the same
16 construction season with the AC Pipeline as it is collocated in the same corridor. *Id.* The SLD
17 pipeline will deliver light petroleum liquids referred to as “diluent,” from U.S. refineries to the
18 Canadian oil sand producers. *Id.* at ¶ 22.

19 Both the AC and SLD Pipelines cross certain wetlands and waters of the United States
20 and Enbridge was required to obtain a permit pursuant to Section 404 of the Clean Water Act
21 and Section 10 of the Rivers and Harbors Act from the USACE. Hamsher Dec. ¶ 18. USACE
22 issued the permit for Minnesota and Wisconsin on August 24, 2009; it previously issued a permit
23 for North Dakota. *Id.* Enbridge also applied for and received required authorizations from the
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1 States of North Dakota, Minnesota and Wisconsin to construct both Pipelines through those
2 states as well as permits from the Fond du Lac Band of Lake Superior Chippewa and the Leech
3 Lake Band of Ojibwe to cross their respective reservations.

4
5 A third pipeline, the LSr pipeline, was constructed by Enbridge to transport light and
6 medium sour crude originating in the northern Williston Basin of Saskatchewan to the United
7 States and avoid an existing bottleneck at Cromer, Manitoba. Hamsher Dec. ¶ 9. Because the
8 LSr crossed the international border it required a Presidential Permit, which DOS issued on June
9 10, 2008. Construction on that pipeline has been completed, and it is now operational. *Id.*

11 ARGUMENT

12 A TRO, such as Plaintiffs now seek, is an extreme injunctive remedy to be used only with
13 the utmost caution. *See Weinburger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982); *see also*
14 *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n. 2 (1977) (motions
15 for TROs are governed by the same standard applicable to preliminary injunctions). The moving
16 party has the burden of showing a TRO is necessary by clear and convincing evidence. *Granny*
17 *Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 441 (1974). A violation of NEPA
18 alone, and there was no violation here, certainly does not compel its issuance. *Forest Cons.*
19 *Council v. U.S. Forest Service*, 66 F.3d 1489, 1496 (9th Cir.1995).²

21 Plaintiffs have clearly failed to meet this burden.
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26 ² Enbridge understands that the United States contends that the issuance of a Presidential
27 Permit is a non-reviewable Executive Branch action. Enbridge concurs in that argument, but will
28 focus its arguments here on other issues. Further, Enbridge concurs in the position of the United
States in favor of a transfer of venue to the U.S. District Court in Minnesota or one of the other
states where the AC Pipeline is under construction, or to the District of Columbia.

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

3 **1. DOS’s Issuance of the Alberta Clipper Presidential Permit Does Not**
4 **Violate NEPA**

5 DOS’s environmental review “encompasses a thorough investigation” and a “candid
6 acknowledgement of the risks” posed by the construction and operation of the AC pipeline.
7 *National Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174 (4th Cir. 2005). By taking a “hard
8 look” at the impacts of that pipeline, DOS met its NEPA obligations. *Robertson v. Methow*
9 *Valley Citizens Council*, 490 U.S. 332, 350 (1989).

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

13 This case concerns not one three-legged pipeline project as Plaintiffs have contended, but
14 rather, three separate pipelines, each with “independent utility.” DOS fulfilled its NEPA
15 obligations by thoroughly considering in lengthy Draft and Final EISs the environmental impacts
16 of the project for which it issued a Presidential Permit on August 20, the AC Pipeline. DOS
17 likewise fulfilled its obligations under NEPA by issuing a separate Environmental Assessment
18 (“EA”) in June 2008 for the now-constructed LSr pipeline, which received a Presidential Permit
19 shortly thereafter. Hamsher Dec. ¶ 9. Plaintiffs did not challenge the sufficiency of that LSr EA
20 or Permit, and took no action to stop the now-completed construction of that pipeline. DOS was
21 not required to issue a Presidential Permit for the separate SLD pipeline, but it and the federal
22 and state agencies permitting that pipeline nonetheless considered its environmental impacts in
23 detail.
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1 Under NEPA, “connected actions” are to be considered in a single EIS. However, if a
2 project has “independent utility” it is not considered to be connected to another.³ *Wetlands*
3 *Action Network v. USACE*, 222 F.3d 1105 (9th Cir. 2000). Courts consider a project to have
4 “independent utility” where it would be built without the other project, *see id.* at 1118 (“we have
5 rejected claims that actions were connected when each of the two projects would have taken
6 place with or without the other”), and/or does not rely upon another project for its operation. *See*
7 *Wilderness Workshop v. BLM*, 2008 WL 1946818 (D. Colo. Apr. 30, 2008), *aff’d*, 531 F.3d 1220
8 (10th Cir. 2008). For example, in *Wilderness Workshop*, the plaintiffs argued that the proposed
9 gas pipeline and the proposed/future gas wells were connected actions because the pipeline’s
10 operation was dependent upon the development of new wells, evidenced by the pipeline’s
11 capacity that exceeded the supply of current wells. However, the court found that the pipeline
12 was not a “connected action” because it could “exist without future well development (although
13 that circumstance may be economically unwise) [and] [f]uture wells [could] exist without the
14 pipeline.” *See id.* at 2008 WL 1946818 at *5. The fact that the existence of the pipeline would
15 possibly encourage additional gas wells, and probably would serve those additional wells, did
16 “not mean necessarily that additional wells [were] connected actions.” *Id.*

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20 Even interrelated projects that are part of a larger expansion project may have
21 “independent utility.” For example, in *Utahans for Better Transportation v. DOT*, 305 F.3d
22 1152 (10th Cir. 2002), plaintiffs argued that the agency was required to consider the impacts of a
23 parkway, interstate project, and expansion of public transit in a single EIS because all three were
24 proposed as parts of a “Shared Solution” transportation plan. The FEIS for the parkway also
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28 ³ 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 CFR § 1508.25(a)(1).

1 admitted that “capacity needs would not be met without both the” parkway and interstate
2 improvements. *Id.* at 1183. The court, however, found that each project facilitated its own
3 increase in capacity, and “although interrelated as part of an overall transportation plan, []
4 individually contribute to alleviation of the traffic problems.” *Id.* at 1184.

5
6 As DOS found in the FEIS here, neither the AC Pipeline nor the SLD Pipeline depend
7 upon one another for their operation; they are separate and distinct projects. *See* FEIS at pg. 1-2;
8 *see also* Appendix A, at pgs. A-27, 27. Each is “[l]ogical when viewed in isolation.” *Hudson*
9 *River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763-64 (2d Cir.1988). The AC
10 Pipeline will transport heavy crude oil containing diluent that was not necessarily supplied by the
11 SLD pipeline. Likewise, diluent supplied by the SLD pipeline may stay in Canada, be mixed
12 with crude oil that is transported through the AC pipeline, or be mixed with crude oil that is
13 transported via other pipelines. Hamsher Dec. ¶ 22. Thus, each pipeline “can stand alone
14 without requiring construction of the other” for its operation. *O'Reilly v. U.S. Army Corps of*
15 *Engineers*, 477 F.3d 225 (5th Cir. 2007); *Utahns*, 305 F.3d at 1184. The fact that they are being
16 constructed at the same time and in the same corridor is a matter of convenience and efficiency,
17 but does not trigger a “connected action” analysis for NEPA purposes. *See League of Wilderness*
18 *Defenders-Blue Mountain Biodiversity Project*, 383 F. Supp. 2d 1285 (D. Or. 2005) (similarities
19 in time and place of projects to reduce wildfire risk not enough to require preparation of a single
20 impact statement).

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24 Moreover, Enbridge was not required to obtain a Presidential Permit from DOS for the
25 construction and/or operation of the SLD pipeline. Crawford Dec. ¶ 8. Because DOS does not
26 have any “licensing power or veto power over” it, DOS was not required to assess its
27 environmental impacts in depth, separate from its assessment of AC impacts. *State of N.C. v.*
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1 *City of Virginia Beach*, 951 F.2d 596 (4th Cir. 1991) (finding that a portion of a pipeline could be
2 constructed where FERC had no jurisdiction/permitting authority to prevent its construction).

3
4 Moreover, the environmental impacts of both pipelines have in fact already been fully
5 assessed. The SLD pipeline will, for its full 188 mile length, be collocated with the AC
6 Pipeline.⁴ Hamsher Dec. ¶ 16. Throughout the DEIS and FEIS, significant information about
7 the impact of the SLD pipeline is provided simultaneous with information about the AC pipeline.
8 DOS's FEIS in fact addresses the impacts of disturbances along the entire length of this ROW,
9 including impacts to wetlands, water body crossings, wildlife, water quality, land use, air quality,
10 etc. These impacts apply to both pipelines since both are being simultaneously constructed right
11 next to one another. *See* FEIS at § 4.14.2.1 ("impacts of the Diluent Project pipeline [were]
12 incorporated into the environmental review described throughout Section 4.0 of this EIS"). In
13 addition, because the SLD pipeline will use the same pump stations, the impacts associated with
14 the pump stations for it are also addressed in the FEIS throughout Section 4.
15

16
17 The federal agencies that issued permits for the SLD pipeline – the USACE and the
18 USFS – relied on this extensive EIS information as well as additional information that they
19 developed to support their determinations. Enbridge in fact supplied a tremendous volume of
20 detailed data to USACE over a period of months to support its issuance of the USACE Clean
21 Water Act permits for both pipelines, and worked with USFS to prepare a separate Draft and
22 Final EA to address impacts of *both* pipelines within the Chippewa National Forest and an
23 adjacent Indian reservation. Hamsher Dec. ¶¶ 18-19.
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27 ⁴ The Southern Lights Diluent pipeline is already constructed south of Superior, except
28 for a short segment that is under construction 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.

1 Finally, Plaintiffs incorrectly argue that the LSr and the SLD pipelines are connected
2 actions, the environmental impacts of which should have been considered in a single EIS.
3 Plaintiffs contend that the LSr pipeline is necessary to replace the capacity of an existing pipeline
4 (Line 13) that will be tied into the SLD pipeline at Clearbrook. *See* Motion at 8. What they fail
5 to demonstrate, and cannot demonstrate, is that the already-constructed LSr pipeline is dependent
6 in some way on the SLD pipeline; or has no independent utility. The fact that LSr is already up
7 and running – transporting crude oil from Saskatchewan into the United States without the need
8 for diluent at all – underscores that it has independent utility and is not dependent on the SLD
9 pipeline, which is only under construction now.⁵
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11

12 Both pipelines received thorough and appropriate cumulative impacts assessment by
13 DOS, which is precisely the correct level of environmental review for non-connected actions that
14 might have a cumulative impact. FEIS at § 4.14.2.1; 4.14.3.1, 4.14.3.7, 4.14.3.12, 4.14.4,
15 4.14.10.2. Impacts of the LSr, Alberta Clipper, and Southern Lights pipelines were additionally
16 assessed in the EA for the LSr pipeline. EA at pg. 3-86 (“[e]xpected cumulative impacts
17 resulting from Alberta Clipper impacts along the collocated [Southern Lights], and Alberta
18 Clipper pipelines [were] included in the LSr Project impact discussion and associated tables.”)
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25 ⁵ All pipelines within the Enbridge system form part of a network, just as every Interstate
26 highway is part of the entire network of Interstate highways. That does not mean, however, that
27 each proposed pipeline constitutes a “connected action” relative to every other constructed
28 pipeline, just as each new or expanded Interstate highway does not require an evaluation of every
other Interstate highway. *See Utahans*, 305 F.3d at 1152 (each individual highway project is not
necessarily a connected action to merely because it is part of a larger highway expansion
project).

1 being considered in the EIS, it is extremely unlikely that there will be any cumulative impacts of
2 the two Projects and no credible cumulative impact has been demonstrated. *See also* LSr EA at
3 pgs. 3-76 to 77 (concluding that LSr pipeline and the Canadian oil sands are not connected
4 actions because it “will accordingly have no impact on the size or scope of the Alberta oil sands
5 project” and “the Alberta oil sands have been and presumably will continue to be developed
6 regardless of the LSr pipeline and independent of any U.S. federal agency approval since the oil
7 sands region is located in Canada”).

9 Further, an “agency has discretion to determine the geographic scope of its NEPA
10 analyses.” *Forest Guardians v. APHIS*, 309 F.3d 1141, 1143 (9th Cir. 2002) (citing *Kleppe v.*
11 *Sierra Club*, 427 U.S. 390, 414 (1976)). Thus, DOS properly defined the geographic scope of
12 the AC EIS given that certain impacts were too remote or not sufficiently tied to federal
13 permitting. *See California Trout v. Schaefer*, 58 F.3d 469 (9th Cir. 1995) (upholding agency's
14 decision to limit the scope of its NEPA review to impact associated with the fill of wetlands
15 rather than considering the impact on downstream fisheries from an entire canal project).

18 (B) The impacts of refinery expansions were fully
19 considered

20 Plaintiffs also argue that DOS failed to consider the indirect impacts of refinery
21 expansions that will cause air and water pollution. *See* Motion at 10. The claim is simply wrong
22 since DOS fully discussed impacts posed by current and future refinery expansions at pages 4-
23 390 to 4-403 of the FEIS, including potential GHG and water emissions.

25 The FEIS thoroughly examines three major refineries’ plans regarding upgrades to
26 provide estimates of the incremental increases in emissions associated with refining heavy crude
27 oil. *See* FEIS at pgs. 4-390 to 4-399. In regard to air quality, the FEIS discusses the expected
28

1 emissions at these refineries, and uses this information to develop an estimate of the potential
2 emissions associated with refining the oil transported via the AC Pipeline. *See* FEIS at pgs. 4-
3 400 to 4-403. The FEIS also examines how upgrades/expansions to these major refineries could
4 impact water quality. *See id.* at pg. 4-400. Based on these examples, the FEIS concludes that
5 refineries can expand without significant impacts to and/or water quality. *See id.* at § 4.14.3.12.
6

7 Despite Plaintiffs' contention otherwise (*see* Motion at 11), the FEIS does not improperly
8 dismiss air quality and water quality by asserting that emissions will be regulated under the
9 Clean Water Act and Clean Air Act. DOS has in fact concluded that in order for these refineries
10 to operate, they are required to obtain, and operate under, permits issued by regulatory agencies
11 pursuant to the Clean Water Act and Clean Air Act. For instance, to operate, a facility must
12 obtain an air permit which "define[s] maximum emissions levels for criteria pollutants" that
13 cannot otherwise be exceeded. FEIS at pg. 4-394. If refineries do increase emissions, they are
14 "required to update their permits (which would establish new emission limits) and implement
15 BACT to control and limit emissions." *Id.* Therefore, contrary to the Plaintiffs' contentions,
16 DOS fully considered the regulatory agencies' statutory obligations to address/regulate any
17 emissions by these refineries and determined that, as a consequence, impacts would be
18 nonexistent and/or minimal.
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22 (C) DOS fully considered air quality and climate change
23 impacts of petroleum end use

24 Plaintiffs attempt to argue that the Alberta Clipper will cause increased consumption of
25 oil, the air quality and climate change impacts of which must be considered. *See* Motion at 11.
26 However, the FEIS considered the impacts of end-product petroleum usage to the extent required
27 by NEPA. As discussed in the FEIS at page 4-400, the volume of crude oil that would be
28 transported via the Alberta Clipper Project would total only about 3 percent of the crude oil

1 processed in the United States. DOS concluded that this amount of crude oil is not expected to
2 influence the ultimate types of petroleum products refined, or to significantly impact end-use
3 product price or demand. *See id.* Because only a slight increase in emissions, if any, will be
4 caused by the end-use of the oil transported into the United States via the AC Pipeline, DOS was
5 under no NEPA obligation to undertake a further analysis. *See Mayo Foundation v. STB*, 472
6 F.3d 545 (8th Cir. 2006) (rejecting argument that SEIS' consideration of GHG emissions from
7 end-use of coal was insufficient where project would result in only a small increase in coal
8 consumption).

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10
11 Further, Plaintiffs' argument that the AC Pipeline will cause an increased demand in
12 consumption is unfounded. The AC Pipeline is being constructed to meet domestic oil demand,
13 not to increase that existing/expected demand. *See Hamsher Dec.* ¶¶ 4, 26 ("domestic supply and
14 demand will require the 'unconventional' oil supply from Canada"). Plaintiffs cite *Midstates*
15 (*see* Motion at 11) in which the Court had ordered the government to analyze the possible
16 environmental impacts of an increase in coal consumption that would result from a rail extension
17 project. *See Mid States Coalition for Progress v. STB*, 345 F.3d 520, 536, 550 (8th Cir. 2003).
18 The EIS at issue in that case failed to provide any analysis of downstream impacts of burning the
19 coal. In stark contrast, the EIS that DOS prepared here provides an analysis of the impact on air
20 quality of refining the transporting oil. *See* FEIS at pg. 4-400.
21
22

23 (2) DOS Considered Significant Cumulative Impacts

24 (A) Upgrades and expansion are not foreseeable or planned

25
26 Plaintiffs incorrectly assert that the FEIS failed to consider upgrades and expansions to
27 the AC Pipeline. That pipeline, as proposed by Enbridge, will have a capacity of 450,000 bpd
28 once fully constructed. The FEIS clearly states that expansion beyond 450,000 bpd is not

1 currently planned, and may never occur. FEIS at pg. 2-50. DOS therefore was not required to
2 consider the impacts of such potential expansion. *See Kleppe*, 427 U.S. 390 (NEPA does not
3 require an agency to consider the environmental effects that speculative or hypothetical projects
4 might have on the proposed project). Moreover, it is inconsistent for Plaintiffs to argue, as
5 explained below at page 18-19, that the pipeline is not needed to meet crude oil demand, but on
6 the other, to argue that the Pipeline will be expanded to nearly double its proposed capacity.
7

8
9 (B) Cumulative impacts caused by other pipeline projects
10 was considered in the EIS

11 Plaintiffs argue that DOS failed to consider cumulative impacts of refining and
12 importation caused by similar pipeline construction projects. *See* Motion at 12. However,
13 Plaintiffs are entirely incorrect and greatly overstate what is required under NEPA. Despite
14 Plaintiffs' contention otherwise, DOS *did* fully consider the impacts of large-scale pipeline
15 projects, including existing Enbridge pipelines, the Keystone oil pipeline, Great Lakes pipeline
16 system, and the MinnCan oil pipeline. *See* FEIS at pgs. 4-380 to 4-390. DOS describes each
17 project, *see id.* at 4-380 to 4-381, and devotes discussion of the cumulative impacts of these
18 "large-scale project" throughout Section 4.14.3. For example, DOS fully considered the impacts
19 to air quality, among others, of these large scale projects, *see* FEIS at § 4.14.3.12, and found that
20 "cumulative impacts to air quality may occur, but potential impacts would be minor and short
21 term." FEIS at pg. 4-389. Thus, Plaintiffs are simply wrong in asserting that these pipelines are
22 only discussed "briefly in the introduction of the FEIS." Motion at 12.
23
24

25
26 (C) DOS fully considered greenhouse gas emissions

27 Plaintiffs claim that the EIS fails to properly consider the cumulative impact of
28 greenhouse gas (GHG) emissions. *See* Motion at 12-13. However, the potential sources of

1 GHGs are examined in the FEIS, including mitigation measures to reduce such emissions. *See*
2 FEIS at pgs. 4-388 to 4-403. The FEIS examines the potential GHG emissions of not only the
3 AC Pipeline’s construction and operation, but also that of heavy crude refining, refinery
4 upgrades, and new refineries, along with other large-scale pipeline projects, as discussed above.
5
6 *Id.* at § 4.14.3.12. The FEIS estimates the total CO₂ emissions involved with the AC Pipeline,
7 *see id.* at pgs. 4-400 to 4-403, and discusses several mitigation measures that will help mitigate
8 or offset GHG emissions. The FEIS concludes that the AC Pipeline’s incremental contribution
9 to greenhouse gas emissions, along with cumulative impacts of other pipelines, is likely to be
10 very small. *See* FEIS at pgs. 4-388 to 390, 4-400 to 403.

11
12 **c. DOS Adequately Considered the Risks, Impacts, and Mitigation**
13 **Measures Associated with Spills, Operational Leaks and**
14 **Abandonment**

15 Plaintiffs have argued that DOS did not comply with NEPA because it failed to
16 adequately address the impact of potential oil spills and leaks on the environment. *See* Motion at
17 13. However, the FEIS contains an extensive discussion of the risk of leaks and spills. *See* FEIS
18 at §§ 4.3.2, 4.7.3, 4.7.4, 4.13, 4.12.2.3, 5.14. This discussion addresses governing safety
19 standards; sets forth a the history of Enbridge’s experience with oil spills; provides an
20 assessment of risks; discusses oil spill behavior and types of impacts; assesses resource-specific
21 impacts; and describes potential mitigation. *See id.* Because of the expertise of another federal
22 agency in pipeline safety matters (the Pipeline and Hazardous Materials Safety Administration or
23 PHMSA) DOS called upon it to “provide[] technical assistance with the environmental review
24 process.” *See* FEIS at § 1.3.3. Through that process, PHMSA advised DOS in regards to its
25 “responsibilit[ies] for monitoring the operation of liquid hydrocarbon pipeline systems” and its
26 “authority for [approving] . . . oil spill response plans.” *Id.* at § 1.3.3.1. The FEIS concludes that
27
28 “to minimize the potential for releases from the proposed pipeline and associated facilities,”

1 Enbridge's design and construct[ion] [of] the proposed Project [would be] in accordance with
2 applicable" PHMSA standards and regulations. *See* FEIS § 5.14. Enbridge's future operation
3 would also mitigate harm arising from spills because it would be required to develop an
4 Emergency Response Plan and Integrity Management Plan, both of which are discussed at
5 Appendix Q of the FEIS. *See also* FEIS at Appendix E (discussing the Spill Prevention,
6 Containment and Control Plan for both the AC and SLD Pipelines).
7

8
9 Moreover, contrary to Plaintiffs' contention (*see* Motion at 13), DOS was not required to
10 provide a greater discussion of abandonment, including mitigation measures such as financial
11 assurance for restoration in the event of abandonment. Abandonment of the Project is not
12 currently planned; the lifetime of the pipeline is over 50 years.

13
14 **d. DOS took a hard look at the Project's stated purpose and need and
considered a reasonable range of alternatives**

15 Plaintiffs entirely misconstrue NEPA's requirements to consider project alternatives.
16 While an agency cannot define a project's purpose and need so as to preclude consideration of
17 reasonable alternatives, *see Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812-14
18 (9th Cir. 1999), Plaintiffs have failed to realize that the project at issue is an oil pipeline owned
19 and to be operated by Enbridge. The project is not a renewable energy project or a pipeline
20 owned by Enbridge's competitors. Rather, the project scope is clearly defined and limited to: a
21 pipeline owned by Enbridge "to transport additional crude oil into the United States and eastern
22 Canada from existing Enbridge facilities in western Canada to meet the demands of refineries
23 and markets in those areas." FEIS at § 1.2.1.
24

25
26 Plaintiffs would have this Court believe that DOS was required to consider renewable
27 energy and increased capacity of other pipelines as reasonable alternatives. *See* Motion at 15.
28 However, these alternatives are clearly "inconsistent with the proposed action's overarching

1 purpose.” *Friends of Southeast's Future v. Morrison*, 153 F.3d at 1066 (9th Cir. 1998). “The
2 stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives,” *City of*
3 *Carmel-By-The-Sea v. DOT*, 123 F.3d 1142, 1155 (9th Cir. 1997), and in this instance, DOS fully
4 considered a wide range of alternatives to meet the need for an oil pipeline from Canada to the
5 United States. DOS considered the following alternatives: a no action alternative, system
6 alternatives, major route alternatives, route variations, aboveground facility alternatives, and
7 Superior Terminal expansion alternatives. *See* FEIS at §§ 3.1-6.

9 Defining the AC Pipeline project more broadly would be improper under NEPA. *See City*
10 *of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999) (rejecting district court’s broad
11 articulation of the purpose and need of a highway project as “addressing future transportation
12 needs in the region). In addition, Plaintiffs’ claim that oil demand will decline, and thus, that the
13 AC Pipeline is unnecessary (Motion at 14) is illogical; Enbridge would not spend \$3.3 billion on
14 a pipeline that was not necessary to meet market demands. The demand for the crude oil sources
15 in the primary refinery market to be served by the AC Pipeline — the Midwest refinery market
16 — is fully documented in the FEIS. *See* FEIS at §§ 1.2.2, 4.14. As domestic production in Padd
17 II and Padd III has declined, Midwest refineries are increasingly dependent on Canadian oil. For
18 that reason, several of them are expending millions of dollars to expand their capacity to refine
19 heavy crude from the WCSB. *See e.g.*, http://www.fhr.com/newsroom/news_detail.aspx?id=74.
20 Refiners take into account the availability of transportation (e.g., pipeline) systems and the
21 availability of a significant source of oil. The Enbridge system provides the transportation
22 service suited for these refineries and the EIA forecast shows significant growth in “other North
23 American” production of unconventional oil (which grows from 1.38 millions bpd in 2007 to
24 4.31 millions bpd in 2030). *See* EIA Reference Case 2009, Table A21 at
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1 <http://www.eia.doe.gov/oiaf/servicerpt/stimulus/pdf /stimulus.pdf>. Thus, as fully documented
2 and considered by DOS, there is, and will continue to be, a need for that transportation of
3 domestic oil.

4
5 In essence, Plaintiffs confuse the NEPA process with the very different process of
6 formulating the nation's public policy for future energy use. The NEPA process was never
7 intended as a means by which federal agencies, in their assessment of the impacts of specific
8 energy-related projects, were to fashion national policy on conservation, renewable energy, or
9 the use (or non-use) of fossil fuels.

10 2. DOS's Issuance of the Presidential Permit is Constitutional

11 Plaintiffs mistakenly assert that the President lacks authority to issue Presidential Permits.
12 *See* Motion at 16-19. As recognized for over a century, the President's authority to issue
13 Presidential Permits is based upon his plenary authority over foreign relations, congressional
14 acquiescence of the exercise of plenary authority, and voluntary acquiescence by applicants
15 seeking Presidential Permits. *See* 22 Op. Attys. Gen. 25-27 (1898).

16
17 Further, if DOS did not have authority to issue a Presidential Permit, the Plaintiffs'
18 NEPA claims are superfluous. Construction of Enbridge's Alberta Clipper would not be
19 considered a "major federal action" for which an EIS must be prepared. Since Congress has not
20 passed a law restricting Enbridge from constructing its pipeline, Enbridge can construct its
21 pipeline without seeking Congressional approval.

22 B. PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPERABLE HARM

23
24 Plaintiffs' allegations of environmental harm resulting from the construction of the
25 pipeline have been greatly exaggerated and fail to take into account the various conditions and
26 mitigation measures for the Project required by the federal and state regulatory agencies. In a
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1 seminal 2008 case, the U.S. Supreme Court clarified the level of irreparable harm that must be
2 shown by the plaintiff; a mere “possibility” of irreparable injury will not suffice, rather, a
3 plaintiff must show irreparable harm “is *likely* in the absence of an injunction.” *Winter v.*
4 *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008). Plaintiffs have failed to meet
5 their burden. Mr. Crawford’s declaration (*see* ¶¶ 28-35) explains that the claims of irreparable
6 harms that are offered by the declarations in support of the Plaintiffs’ motion describe no more
7 than either the type of temporary disruption that accompanies any pipeline construction or very
8 generalized and unfocused concerns about climate change, air pollution, etc. — all matters
9 assessed in the EIS.
10

11
12 While the very act of construction requires disturbance of the ground, various agencies
13 including the Minnesota Pollution Control Agency, the Minnesota Department of Natural
14 Resources, the Wisconsin Department of Natural Resources, the North Dakota Department of
15 Health, the Fond du Lac Reservation, the USACE and the U.S. EPA, have analyzed the facts and
16 imposed measures to protect the environment. Some of the measures that have been required by
17 regulatory agencies pursuant to their permitting authority include: (1) prohibiting discharge of
18 water from dewatering work areas to wetlands or waterbodies in Wisconsin if it is cloudy or
19 exceeds 40 mg/L of total suspended solids (TSS); (2) requiring a botanist as a Rare Plant
20 Monitor (RPM) to verify avoidance of all rare plant occurrences in Wisconsin illustrated in the
21 environmental plan sheets and re-verify the boundary of all state-listed T & E plant species
22 identified on public lands in the 2008 survey; (3) installing silt fence, hay bales, sediment logs,
24 maintain vegetative buffers, etc. as necessary along the construction ROW in North Dakota; (4)
25 establishing erosion and sediment control practices on all down-gradient perimeters before any
26 up-gradient land disturbing activities begin in Minnesota; and, (5) using best management
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1 practices in Minnesota for water quality, erosion prevention, and sediment control to reduce total
2 suspended solids in all discharge to surface waters including control of flow velocity, and
3 discharge into a well-vegetated upland area, a sump constructed from silt fence and straw bales,
4 or geotextile filter bags and numerous other measures. Crawford Dec. at Exhibit 2. Each state
5 has imposed measures to control sediments and prevent damage to wetlands and other water
6 bodies. *Id.*

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

14 Plaintiffs allege irreparable impacts to a calcareous fen, a rare wetland habitat. However,
15 the robust review process discussed above means that there is little likelihood that the fen would
16 be impacted. Before construction began on the LSr pipeline, which is not part of this project but
17 has a partial collocation with the Alberta Clipper pipeline, Enbridge located a calcareous fen in
18 northwestern Minnesota along the route. Enbridge filed a request for a route width deviation at
19 that location in order to avoid this fen. The Minnesota DNR supported Enbridge's request for a
20 route width deviation, stating that "[t]he reroute would avoid impacts to a potential calcareous
21 fen." Crawford Dec. ¶ 35. Enbridge then requested a similar deviation at the same location for
22 the Alberta Clipper pipeline. *Id.* Enbridge is now working with the Minnesota DNR to develop
23 an acceptable location and construction plan for that area. *Id.*

26 Plaintiffs also fail to acknowledge the relatively short-time of disturbance involved with
27 the pipeline construction process. As described in the declaration of Mr. Crawford, the
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1 construction of the Alberta Clipper and Southern Lights Diluent pipelines was designed so that
2 the actual time that earth disturbing activities occur in any specific area is limited. Crawford
3 Dec. ¶¶ 18-26. Moreover, the USACE permits specifically state that no more than 14,400 feet of
4 trench may be open at any one time and that the trailing end of each spread shall be restored as
5 the leading edge is opened. *Id.* ¶ 18. Limiting the amount of time that an area of the ROW is
6 distributed and exposed limits the impacts of construction. Given the rainfall that is frequent in
7 Wisconsin, Minnesota and North Dakota during the fall, limiting the disturbances reduces
8 environmental impacts. *Id.* at ¶ 19.

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

18 C. THE BALANCE OF HARMS FAVORS ENBRIDGE

19 Apart from very substantial and irrecoverable monetary costs described below, there is
20 also the potentially significant environmental cost of a heightened risk of erosion and other
21 adverse impacts to waterways resulting from the cessation of work in areas where work has
22 already begun. Crawford Dec. ¶¶ 16, 18-19. By itself, this heightened risk of adding additional
23 sediment to wetlands and rivers tips the balance heavily against a TRO.

25 A TRO also would result in substantial harm to Enbridge, as shown in the Crawford
26 Declaration. About 81 miles of the pipeline right-of-way has already been cleared and another
27 approximately 35 miles graded. *Id.* at ¶ 19. Thus, the pipeline construction is already well
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1 underway with about 1700 persons already employed in the effort and another approximately
2 1300 in the process of being hired. *Id.* at ¶ 12.

3 Ceasing construction even for ten days would come with a significant monetary cost
4 estimated to be in range of \$60 million to \$80 million. *Id.* at ¶ 25. As explained in Mr.
5 Crawford's declaration, Enbridge would be required to continue to pay its contractors at the rate
6 of \$2.8 million/day, in return for which it would obtain no work on the pipelines. *Id.* at ¶ 21. In
7 addition, there would be significant de-commissioning and re-commissioning costs, lost
8 productivity and other costs. *See id.* at ¶¶ 21-23. As he explains, were construction stopped
9 now, during the end of summer season, it could conservatively take five to ten late fall days to
10 accomplish what could be accomplished in the coming ten days given the much shorter workday
11 of late fall versus late summer and more problematic weather. *Id.* at ¶ 13. In addition, certain
12 streams have restrictions on the dates when work can be completed in order to protect spawning
13 trout. Enbridge must be out of the beds and banks from September 15 to April 15. Enbridge has
14 completed this work for all but one stream crossing; however, if Enbridge were required to halt
15 work for even a short period of time, it would miss this window for the remaining stream. *Id.* at
16 ¶ 19. There is also a risk that Enbridge will not readily be able to re-engage skilled workers who
17 will seek other, less risky opportunities were a TRO issued.

18 Further, labor unions have voiced their opposition to a TRO, pointing out the high
19 unemployment rates in the area and the importance of these projects to supplying badly-needed
20 jobs, up to 3,000 of them, for their members. *See Hamsher Dec.* ¶ 34, and Exhibit 6.

21 Balanced against these costs and risks, Plaintiffs offer only generalized concerns and
22 concerns about temporary impacts. Moreover, Plaintiffs could have acted sooner. The fact that
23 construction was gearing up to begin in August, and that it began on August 20, was no surprise
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1 to anyone in the area. Yet, Plaintiffs waited to file their TRO and PI motion with this Court until
2 September 3. A TRO at this point would result in the significant harms and costs noted above.

3 The balancing is easy in this case.
4

5
6 **D. THE PUBLIC INTEREST FAVORS DENYING PLAINTIFFS' MOTION**

7 The public interest weighs heavily in favor of Enbridge. DOS has already found that the
8 AC Pipeline is in the national interest. Hamsher Dec. ¶¶ 17, 25. The goals that the pipeline will
9 serve will be delayed were a TRO issued. Further, the public's interest in minimizing the risk of
10 adverse environmental impacts will also be reduced by allowing construction to proceed, rather
11 than halting construction. Crawford Dec. ¶¶ 18-20. And denying a TRO will have direct and
12 immediate benefits in terms of increased employment and the avoidance of harm to businesses
13 and small communities that have made preparations for the influx of pipeline workers and that
14 are dependant on continued pipeline construction for business and tax revenues. Hamsher Dec.
15 ¶¶ 30-34, Exhibit 6.
16

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18 The issue in this case is not a simple preservation of the environment versus monetary
19 losses equation, as Plaintiffs argue. They have failed to show any significant adverse
20 environmental impact from constructing a pipeline largely in an existing pipeline corridor and
21 point primarily to short-term construction impacts in an effort to make their case for immediate
22 harm. Such short-term impacts do not warrant a TRO, and in fact such a TRO risks greater and
23 longer-term environmental problems.
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CONCLUSION

For the foregoing reasons, Enbridge respectfully urges that Plaintiffs' Motion be denied.

RESPECTFULLY SUBMITTED

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