

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Sierra Club; Minnesota Center for
Environmental Advocacy; Indigenous
Environmental Network; and National
Wildlife Federation;

Civil No. 09-2622 (DWF/RLE)

Plaintiffs,

v.

**MEMORANDUM
OPINION AND ORDER**

Hillary Clinton, in her official capacity
as Secretary of State; James Steinberg,
in his official capacity as Deputy Secretary
of State; United States Department of State;
Lieutenant General Robert L. Van Antwerp,
in his official capacity as U.S. Army Chief
of Engineers and Commanding General
of U.S. Army Corps of Engineers; Colonel
Jon L. Christensen, in his official capacity
as District Engineer and Commander of the
U.S. Army Corps of Engineers; the United
States Army Corps of Engineers; Tom Tidwell,
in his official capacity as Chief of the United
States Forest Service; Rob Harper, in his
Official capacity as Forest Supervisor for the
Chippewa National Forest; and the United
States Forest Service;

Defendants,

and

Enbridge Energy, Limited Partnership,

Defendant-Intervenor.

Douglas P. Hayes, Esq. and Eric E. Huber, Sierra Club Environmental Law Program;
J. Martin Wagner, Esq. and Sarah H. Burt, Esq., Earthjustice; and Kevin Reuther, Esq.,
Minnesota Center for Environmental Advocacy, counsel for Plaintiffs.

Luther L. Hajek, Esq., U.S. Department of Justice, Chad A. Blumenfield, Assistant United States Attorney, United States Attorney's Office, counsel for Defendants.

Daniel J. Herber, Esq., and John F. Beukema, Esq., Faegre & Benson LLP; David H. Coburn, Esq., and Sara Beth Watson, Esq., Steptoe & Johnson LLP, counsel for Defendant-Intervenor.

BACKGROUND

Plaintiffs bring this action against Federal Defendants and Intervenor-Defendant Enbridge Energy (collectively, "Defendants"), claiming that Federal Defendants violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 706, by issuing permits allowing Enbridge to build and operate the Alberta Clipper Pipeline ("AC Pipeline") based on an inadequate Environmental Impact Statement (the "AC EIS"). Plaintiffs also allege that the State Department's issuance of the permit for the construction and operation of the AC Pipeline (the "AC Permit") is unconstitutional. Plaintiffs seek an order vacating the AC Permit and prohibiting the operation of the AC Pipeline.

On February 24, 2010, the Court issued a Memorandum Opinion and Order, granting in part and denying in part Federal Defendants' Motion to Dismiss and Enbridge's Motion to Dismiss (the "February 24 Order"). The Court denied the motions as to Plaintiffs' First through Fourth Claims for Relief and granted the motions as to Plaintiffs' Fifth and Sixth Claims for Relief, thereby dismissing the fifth and sixth claims with prejudice. Relevant to the present motion is Plaintiffs' Sixth Claim for Relief, in which Plaintiffs allege that the State Department's AC Permit violates the Foreign

Commerce Clause of the U.S. Constitution (the “Constitutional claim”). Plaintiffs now move for an entry of final judgment on Plaintiffs’ Constitutional claim under Rule 54(b) so that the issue of the State Department’s constitutional authority to issue the AC Permit can be immediately appealed. For the reasons set forth below, the Court denies the motion.

DISCUSSION

A judgment on fewer than all claims is not immediately appealable. *Huggins v. FedEx Ground Package Sys., Inc.*, 566 F.3d 771, 773 (8th Cir. 2009). Plaintiffs request that the Court enter a final judgment on their Constitutional claim pursuant to Rule 54(b). Rule 54(b) provides:

When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

Fed. R. Civ. P. 54(b). Motions to finalize judgment under Rule 54(b) are “generally disfavored” and appropriate only when a “special case” warrants certification. *Clark v. Baka*, 593 F.3d 712, 714-15 (8th Cir. 2010). A district court may certify a judgment under Rule 54(b) only if it determines that the judgment is final and that there is no just reason for delay. Fed. R. Civ. P. 54(b); *see also Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8 (1980). Plaintiffs maintain that the Court’s dismissal of their

Constitutional claim constitutes a final judgment and that the entry of final judgment is warranted because there is no just reason for delay and the equities favor entry of final judgment.

The Court's February 24 Order dismissed the Constitutional claim with prejudice and thus ended the litigation of that claim on the merits. Therefore, the February 24 Order constitutes a final judgment on the Constitutional claim. The Court therefore turns to whether there is any just reason for delay. *See, e.g., Curtiss-Wright*, 446 U.S. at 8. This determination is "left to the sound judicial discretion of the district court." *Id; see also Hayden v. McDonald*, 719 F.2d 266, 268 (8th Cir. 1983). In making this determination, courts must "take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright*, 446 U.S. at 8. Among other things, courts consider "whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id; see also McAdams v. McCord*, 533 F.3d 924, 928 (8th Cir. 2008) (explaining the particular interest in preventing piecemeal appeals). "Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." *Curtiss-Wright*, 446 U.S. at 8. For the reasons discussed below, the Court concludes that the relevant judicial interests and equities favor the denial of Plaintiffs' motion for entry of final judgment.

Both the Plaintiffs' Constitutional claim and their surviving NEPA claims arise out of the State Department's issuance of the AC Permit. And although the claims

present separate legal theories, they are factually related and present overlapping arguments. For example, both the Constitutional claim and the NEPA claims involve the assertion that the AC Permit impermissibly regulates the entire length of the AC Pipeline. Defendants have responded to this allegation by asserting that the AC Permit only regulates the border crossing. Thus, appellate disposition of Plaintiffs' Constitutional claim and surviving NEPA claims will involve a consideration of the scope of the AC EIS and the State Department's role in the NEPA process. Therefore, if the Constitutional claim is appealed separately from the NEPA claims, the parties would likely be required to brief overlapping factual issues and the appellate court would have to re-familiarize itself to these facts on a subsequent appeal. Such an overlap weighs against certification. *See Hayden*, 719 F.2d at 270.

In addition, Plaintiffs request that the Court vacate the AC Permit as a remedy for both their Constitutional claim and their NEPA claims. The parties are proceeding with cross-motions for summary judgment on Plaintiffs' NEPA claims. A hearing on the parties' cross-motions is currently scheduled for August 2010. Should the Court find that the AC Permit violates NEPA and grant Plaintiffs' requested relief by vacating the AC Permit, appellate review of Plaintiffs' Constitutional claim might be unnecessary.¹

¹ The Court understands that Plaintiffs dispute that their Constitutional claim would be moot. In particular, Plaintiffs point out that if the Court vacates the AC Permit as a remedy for NEPA violations, the State Department could prepare a new EIS conforming to NEPA's requirements and re-issue AC Pipeline permits. While this may be true, the Court fails to see how there would be a live controversy in the event that the AC Permit
(Footnote Continued on Next Page)

Moreover, Plaintiffs will be able to appeal the Constitutional claim under several scenarios. First, should summary judgment be granted in favor of Plaintiffs on their NEPA claims and Defendants appeal that decision, then Plaintiffs could seek to file a cross-appeal on the Constitutional claim. Second, should Defendants succeed on summary judgment, Plaintiffs could appeal both the NEPA claims and the Constitutional claim.

The Court also concludes that the consideration of the equities involved favor denial of Plaintiffs' motion. In particular, the Court concludes that Plaintiffs have failed to demonstrate a danger of hardship or injustice that would be avoided by allowing an immediate appeal. Plaintiffs argue that they will suffer hardship absent an immediate appeal because the pipeline will soon become operational, making it more difficult to obtain relief on their Constitutional claim and to remedy adverse environmental impacts caused by the pipeline's operation. This argument is unavailing. The AC Pipeline was scheduled to be operational on or about April 1, 2010. Even if the Court were to grant Plaintiffs' motion, it is unlikely that an appeal of the Constitutional claim would be completed for over a year. The parties are currently scheduled to argue their cross-motions for summary judgment in less than four months. Therefore, the delay in waiting for a final resolution of all claims in this action will be roughly five or six

(Footnote Continued From Previous Page)

is, indeed, vacated. Should the State Department issue a new permit, then Plaintiffs could challenge that permit.

months. There has been no showing that this delay would cause hardship or injustice so as to justify the immediate appeal of a single claim in this action.

Plaintiffs also assert that an immediate appeal of the Constitutional claim is necessary because that claims involve uniquely important constitutional issues dealing with the separation of powers and to provide guidance to the State Department so that it can assess the issuance of a permit for another cross-border pipeline, the Keystone XL pipeline. These factors, however, do not justify the certification of the Constitutional claim for immediate appeal. On the facts of this case, the mere fact that the Constitutional claim raises a unique separation of powers issue does not warrant an immediate appeal. Further, there has been no showing that an appeal of the Constitutional claim would be completed prior to an issuance of a permit for the Keystone XL pipeline. Indeed, Plaintiffs represent that the Keystone XL permit is expected to be issued in 2010, which makes it highly unlikely that an appeal would be completed prior to its issuance.

CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons set forth above, **IT IS ORDERED** that:

1. Plaintiffs' Motion for Entry of Final Judgment on Plaintiffs' Sixth Claim for Relief (Doc. No. [191]) is **DENIED**.

Dated: April 22, 2010

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge