

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Plaintiffs,

v.

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

Defendants.

and

ENBRIDGE ENERGY, LIMITED
PARTNERSHIP

Intervenor-Defendant.

Civ. No. 0:09-cv-02622-(DWF/RLE)

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

(National Environmental Policy Act, 42
U.S.C. §§ 4321 et seq.)

Hon. Donovan W. Frank
U.S. District Judge

Hearing Date: TBD
Time: TBD

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiffs request this Court to maintain the status quo in this case by issuing a preliminary injunction prohibiting the State Department from permitting the construction and operation of a pipeline known as the Alberta Clipper. The U.S. portion of the Alberta Clipper project involves the building of 384 miles of pipeline, from the connection to Canada in Neches, North Dakota, across Minnesota, to a terminal in Superior Wisconsin.

The Project, proposed by Enbridge Energy, Limited Partnership and its affiliates (collectively "Enbridge"), would transport heavy tar sands crude oil from Canada to terminals and refineries in the United States, which would spur refinery expansions and modifications that will lead to increased air and water pollution for residents of the Midwest and other states. Construction of the pipeline would involve 80 perennial and 123 intermittent water-body crossings and would impact 1,254.5 acres of upland forested lands, 655.4 acres of open lands, and 1,346.16 acres of wetlands. Refining and other industrial activities resulting from the pipelines would also increase emissions of air pollutants and greenhouse gases that contribute to global warming and related harmful effects on human health and the environment. Enbridge has already begun construction in some areas.

Plaintiffs are likely to prevail on their claim that the State Department 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, because it: a) improperly restricted the scope of the environmental impact statement ("EIS") to omit connected and cumulative actions; b) failed to assess all reasonably foreseeable environmental impacts of the Project, including direct, indirect, and cumulative effects; and c) failed to take a hard look at the Project's stated purpose and need or to consider a reasonable range of alternatives. Plaintiffs are also likely to prevail on their claim that the State Department's

permitting of the Project is unconstitutional or contrary to constitutional right, power, privilege or immunity because the President has no constitutional or statutory authority to regulate the Alberta Clipper project. For all these reasons, the State Department's issuance of the presidential permit for the Alberta Clipper project was not in accordance with law.

This Court should issue a TRO and preliminary injunction to preserve the status quo and prevent immediate and irreparable harm to the Plaintiffs and their members who live, work, and recreate in areas that would be affected by the clearing, cutting and destruction of rare wetlands and wildlife habitat during pipeline construction, by the increased air and/or water pollution from the pipeline, related facilities and refineries, and by the impacts of greenhouse gases resulting from the refining and use of tar sands crude oil.

II. STATEMENT OF FACTS

A. ENBRIDGE'S PIPELINE EXPANSION PROPOSAL

Enbridge proposes to expand significantly the existing pipeline system it owns and operates between Alberta, Canada and United States. This expansion includes the Alberta Clipper project and the related Southern Lights project. *See* Map of Alberta Clipper and Southern Lights Projects ("Map"), Exh. 1.

The Alberta Clipper pipeline is a 992-mile long, 36-inch diameter pipeline running from Hardisty, Alberta, Canada, crossing the border near Neche, North Dakota, and continuing through northern Minnesota to a terminal in Superior, Wisconsin. The Alberta Clipper pipeline will carry approximately 450,000 barrels per day ("bpd"), with an ultimate capacity of 880,000 bpd, of heavy crude oil, or "bitumen," from the Canadian tar sands fields to refineries throughout the midwestern United States. At Superior, the Alberta Clipper pipeline will connect to a mainline to Chicago, Illinois.

The Southern Lights project would transport "diluent" from Midwestern refineries to the Alberta tar sands. The Southern Lights project has two components: the Line 13 Reversal/New Diluent pipeline ("diluent pipeline") and the LSr Capacity Replacement

pipeline (“LSr pipeline”). Because bitumen crude from the Canadian tar sands is too viscous to be pumped through a pipeline, it must be diluted with lighter liquid hydrocarbons, known as “diluent,” in order to be transported by pipeline. Enbridge proposes to construct a new 678-mile, 20-inch pipeline from Manhattan, Illinois, to Clearbrook, Minnesota, where it would connect with Enbridge’s existing “Line 13.” Enbridge proposes to reverse the flow of Line 13, which currently transports light sour crude from Alberta, Canada to Clearbrook, to create a dedicated diluent delivery system from refineries in Illinois to the tar sands production centers in Alberta. The 188-mile segment of diluent pipeline from Clearbrook, Minnesota to Superior, Wisconsin would be constructed at the same time and in the same right-of-way as the Alberta Clipper.

The LSr Capacity Replacement pipeline is a new 313-mile 20-inch pipeline being constructed between Cromer, Manitoba, Canada, and Clearbrook, Minnesota to transport light sour crude. According to Enbridge, diversion of the capacity of Line 13 to the diluent pipeline necessitates the construction of the LSr pipeline to replace that capacity.

B. FEDERAL REVIEW AND PERMITTING

Because Enbridge’s proposed expansion would involve construction on the U.S.-Canada border and the import and export of crude oil and refined petroleum products, Enbridge applied to the State Department for presidential permits for the import of heavy crude and construction of the Alberta Clipper pipeline, for the import of light sour crude and construction of the LSr pipeline, and for the export of diluent in Line 13.

Enbridge also applied to: i) the U.S. Army Corps of Engineers for permits to dredge and fill wetlands and place structures in or under water-bodies pursuant to section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act; ii) the U.S. Forest Service for a special use permit to site and construct the pipeline through the Chippewa National Forest; iii) the U.S. Environmental Protection Agency for wastewater discharge permits pursuant to section 402 of the Clean Water Act; and iv) the Bureau of Indian Affairs for approval to cross certain Indian lands. Each agency decision on these permit requests is a major federal action triggering NEPA.

The State Department claimed to be the lead federal agency on the project for purposes of NEPA and assumed responsibility for conducting the environmental review for the expansion project. While the other agencies cooperated with the Department of State, no other federal agency conducted an independent NEPA review. Each agency relies on the State Department's EIS to satisfy their NEPA obligations. Instead of preparing one EIS for the entire expansion, as NEPA requires, the State Department segregated the component parts of Enbridge's proposal and conducted its environmental review in separate pieces.

On July 27, 2007, the State Department issued Notices of Intent to prepare separate Environmental Assessments ("EAs") for the LSr pipeline and the Alberta Clipper pipeline. Alberta Clipper Notice of Intent to Prepare an EA, 72 Fed. Reg. 41381 (July 27, 2007); LSr Project Notice of Intent to Prepare an EA, 72 Fed. Reg. 41383 (July 27, 2007). The State Department did not issue a Notice of Intent to prepare an EA for the diluent pipeline and to date no federal agency involved in permitting this project has conducted an environmental review for the diluent pipeline.

The State Department then determined it would proceed with an EA for the LSr pipeline, but prepare an EIS for the Alberta Clipper pipeline. Plaintiffs, in comment letters sent to the State Department in December 2007, pointed out that all three pipelines were part of one project and that NEPA required the State Department to evaluate all three in one environmental impact statement. *See* MCEA Scoping Comments, (Dec. 7, 2007), Exh. 2. Over Plaintiffs' objections, the State Department proceeded with separate environmental reviews for the Alberta Clipper and LSr pipelines and no review of the diluent pipeline.

The State Department's EA for the LSr pipeline did not evaluate environmental impacts from the Alberta Clipper pipeline or the diluent pipeline. In its final EA and Finding of No Significant Impact ("FONSI") for the LSr pipeline, the State Department represented that the diluent pipeline would be evaluated in the NEPA analysis for the Alberta Clipper project. Southern Lights LSr FONSI, 73 Fed. Reg. 32620 (June 9, 2008)

(“The Alberta Clipper pipeline ... and the construction by Enbridge of another pipeline that would bring diluent north to the oil sands project, will be addressed in a separate Environmental Impact Statement that is being prepared for the Alberta Clipper project by the DOS working with other agencies.”).

The State Department issued its final EIS (“FEIS”) for the Alberta Clipper project on June 8, 2009. However, the Department excluded both the LSr and diluent pipelines from its definition of the project under review, asserting that they were not connected actions for NEPA purposes.¹ FEIS, Exh. 3 at 1-17, 1-26.

On August 20, 2009, the State Department issued its Record of Decision (“ROD”) to issue a presidential permit for the Alberta Clipper pipeline, and issued the Alberta Clipper presidential permit. The permit allows the transport of tar sands crude oil from Canada into the United States across the U.S.-Canada border; authorizes the construction, connection, operation and maintenance of pipeline facilities at the border; and contains other terms and conditions as set forth in the permit. *See* ROD, Exh. 4.

III. ARGUMENT

Plaintiffs satisfy the four factors that a district court must consider when deciding whether to grant a preliminary injunction. “A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008)). *Winter* did not disturb the Ninth Circuit’s alternative formulation of the test for preliminary injunctive relief, the “sliding scale” approach, which requires that “serious questions [going to the merits] are raised and the

¹ The EIS claims in the introduction that the 188-mile segment of the diluent pipeline that extends between Clearbrook, Minnesota and Superior, Wisconsin, is included in its cumulative impacts analysis, FEIS, Exh. 3 at 1-26, but the environmental analysis in Chapter 4 of the final EIS does not address the significant environmental impacts of the diluent pipeline. The LSr pipeline, the Line 13 reversal project, and the remaining 490 miles of new construction of the Southern Lights diluent project between Superior and Manhattan Illinois are completely omitted.

balance of hardships tips sharply in [the plaintiff's] favor.” See *Greater Yellowstone Coal. v. Timchak*, 2009 WL 971474, at *1 (9th Cir. 2009) (observing viability of alternative formulation).

A. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

1. The State Department's Issuance of the Alberta Clipper Presidential Permit Violates the National Environmental Policy Act.

a. The failure to include the Southern Lights and LSr Pipelines in the EIS violates the requirement to assess connected and cumulative actions.

NEPA requires that decision-makers address in a single EIS all “connected,” “cumulative,” and “similar” actions. 40 C.F.R. § 1508.25(a); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002). Actions are connected if they: “(i) [a]utomatically trigger other actions which may require environmental impact statements; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously; [or] (iii) [a]re interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a). Cumulative actions are those with “cumulatively significant impacts and should therefore be discussed in the same impact statement.” *Id.* Actions are “similar” if they have “similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” *Id.* Analysis should be done in a single document when the record raises “substantial questions about whether there will be significant environmental impacts from the collection of anticipated projects.” *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 999 (9th Cir. 2004).

Courts have routinely held that agencies may not break a project or activity into components to avoid the full range of environmental analysis and that cumulative impacts analysis is necessary for all reasonably foreseeable results of the action under consideration. See, e.g., *Great Basin Mine Watch v. Hankins*, 456 F.3d 955 (9th Cir. 2006); *Native Ecosystems Council*, 304 F.3d 886. The purpose of this requirement is “to prevent an agency from dividing a project into multiple ‘actions,’ each of which

individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Great Basin*, 456 F.3d at 969.

- i. The Alberta Clipper and Southern Lights and LSr pipelines are connected actions.

The Alberta Clipper and diluent pipeline are “inextricably intertwined” and thus connected actions within the meaning of the CEQ regulations. *See Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985). The function of the diluent is to be mixed with tar sands crude to enable transportation of this crude by the Alberta Clipper pipeline. FEIS, Exh. 3 at 1-28. The Alberta Clipper pipeline’s additional 450,000 bpd capacity necessitates increased supplies of diluent along the identical route as the Alberta Clipper pipeline. *Id.* (noting that production from Alberta’s tar sands will require 316,000 bpd by 2015 to serve pipeline expansions). The interdependence of the Alberta Clipper and diluent pipelines is highlighted by Enbridge’s assertion that access to diluents from U.S. refining centers will “facilitate increased production of growing supplies of crude oil for delivery to the United States from Canada.”² Diluent is an integral part of the tar sands extraction process and a necessary part of the Alberta Clipper project. FEIS, Exh. 3 at 1-28 (“Crude oil produced in western Canada is generally too heavy and viscous to transport via pipeline. To allow transport of heavy crude oil from Canada to the United States via pipeline, lighter hydrocarbons (diluents) need to be blended into the crude oil before introducing it into the pipeline.”). Actions related to the diluent pipeline are thus connected actions for purposes of NEPA and 40 C.F.R. § 1508.25(c) requires the State Department to fully assess the Alberta Clipper and Southern Lights pipelines in a single EIS.

Enbridge itself treats the pipelines as one project. It applied for presidential permits for each pipeline together, referencing the other pipelines in each application. *See, e.g.*, Alberta Clipper Presidential Permit Application, Exh. 7 at 13. Enbridge plans

² Enbridge Website, <http://www.enbridge-expansion.com/expansion/main.aspx?id=1216&tmi=290&tmt=4>, (last visited Sept. 3, 2009), Exh. 6, at 1.

to construct the Alberta Clipper and diluent pipelines simultaneously and in the same corridor. FEIS, Exh. 3 at 2-14. Enbridge applied for a certificate of need and routing permit for both pipelines together from the Minnesota Public Utilities Commission (“MPUC”) and the MPUC accepted Enbridge’s single application and opened a single docket for consideration of the pipelines together. *See* MPUC Notice of Permit Application Acceptance, Exh. 8. Enbridge likewise applied for permits from the Army Corps of Engineers and special use permits from the U.S. Forest Service for the two pipelines jointly. Both the Army Corps and the Forest Service evaluated the permit applications for both pipelines together. *See* Forest Service ROD, Exh. 9.

Similarly, the LSr pipeline and the Southern Lights diluent pipeline are connected actions that should have been considered in a single EIS with the Alberta Clipper pipeline. Enbridge has acknowledged that the Southern Lights project “will require the construction of [the LSr pipeline] to replace the capacity of an exiting Enbridge pipeline that will be converted to diluent service.”³ If Line 13 were not being diverted to transport diluent to Canada there would be no reason to construct the LSr pipeline. Because the new LSr pipeline is an interdependent part of the larger expansion project and depends on the diluent pipeline for its justification, it meets the definition of a connected action under 40 C.F.R. § 1508.25(a)(1).

ii. The Alberta Clipper, Southern Lights and LSr pipelines are cumulative actions.

Where “several actions have a cumulative environmental effect, this consequence must be considered ... regardless of what agency or person undertakes such other actions.” *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1132-33 (9th Cir. 2007); *see also*, 40 C.F.R. § 1508.25(a) (actions with “cumulatively significant impacts” must be considered “in the same impact statement”).

³ Enbridge Website, <http://enbridgeexpansion.com/expansion/main.aspx?id=1216&tmi=290&tmt=4> (Nov. 14, 2007), Exh. 6, at 2. (Enbridge has since amended this page of its website. For the current version of the webpage see Exh. 6, at 1.)

The Alberta Clipper, the Southern Lights diluent pipeline and the LSR pipeline will have cumulatively significant impacts and thus must be considered comprehensively in a single EIS. The Alberta Clipper and Southern Lights diluent pipeline will be constructed side by side in the same right of way at approximately the same time. FEIS, Exh. 3 at 2-14. This will require widening the trench along which the pipelines will be laid, *Id.* at 2-17 to 18, disturbing more soil and wetlands, and increasing heavy equipment traffic and related harms, including increased soil compaction and contamination, sedimentation of water-bodies, noise, and air pollution from GHG, engine and fugitive dust emissions. *Id.* at 2-19, 4-20, 4-45 to 47, 4-69, 4-96; ROD, Exh. 4 at 6-7, 15. The threat of operational leaks and spills that would contaminate soil and water resources is also dramatically increased along the pipeline route. May Decl., Exh. 5 at ¶¶ 8, 23. Operation of the Southern Lights pipeline requires additional pump stations, which increases operational noise and GHG emissions. FEIS, Exh. 3 at 1-29. With the addition of the LSR pipeline in the same right of way between Neche and Clearbrook, these impacts are further compounded.

Moreover, the section of the Southern Lights diluent pipeline explicitly excluded from the Alberta Clipper EIS – the portion extending from Superior, Wisconsin to Manhattan, Illinois – would require clearing trees and vegetation, removing topsoil, and filling wetlands along an additional 490 miles beyond the terminus of the Alberta Clipper. *Id.* at 1-28. This would result in additional loss of vegetation, habitat and wetlands, and cause additional harms to soil, water and air similar to those described above. When added to the impacts of the Alberta Clipper project, these additional impacts are cumulatively significant and must be included in the EIS.

Finally, refining the tar sands crude delivered by the Alberta Clipper pipeline will affect air and water quality, as well as the climate due to increased GHG emissions. May Decl., Exh. 5 at ¶¶ 42-47. These impacts are cumulatively significant when added to the impacts of processing increased quantities of crude oil into diluent (which is highly refined) for transport through the Southern Lights pipeline. These cumulative impacts

must also be considered in the EIS.

The State Department's piecemeal approach leaves a major component of the project unanalyzed and minimizes the project's true cumulative impact in violation of NEPA. *See Thomas*, 753 F.2d at 758; *Native Ecosystems Council* 304 F.3d at 895. The State Department violated NEPA's mandate to evaluate all connected, cumulative, and similar actions in one EIS. Because of this plain error, Plaintiffs are likely to prevail on the merits.

b. The failure to assess the reasonably foreseeable indirect and cumulative impacts of the Alberta Clipper project violates NEPA.

An EIS must include a "full and fair discussion" of the significance of all "direct," "indirect," and "cumulative" effects of the action. 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c). "Indirect effects" are reasonably foreseeable effects caused by the action, but later in time or farther removed in distance. *Id.* § 1508.8(b).

i. The EIS fails to consider significant indirect impacts.

First, the EIS fails to include any analysis of the impacts in the United States caused by increased exploitation and development of Canadian tar sands driven by the Alberta Clipper project. These impacts include those related to greenhouse gas emissions and impacts on migratory species. *See* May Decl., Exh. 5 at ¶¶ 62-65.

Second, the EIS does not adequately consider the impacts of the refineries in the United States that will cause additional air, water and climate pollution. Refining heavy sour (sulfurous) crude oil extracted from tar sands requires more energy inputs than refining conventional crude due to the energy needed to crack the heavy, long hydrocarbon molecules into final products and remove the high levels sulfur contaminants. *Id.*, ¶ 41, 44-45. This process yields significant increases in emissions of pollutants including heavy metals such as mercury, conventional air pollutants (in particular sulfur dioxide and carbon monoxide) and carbon dioxide. *Id.*, ¶¶ 42, 44, 59-60. Permits issued for these refinery expansions will result in significant increases in the discharge of water contaminants to local water-bodies, including the Great Lakes. *Id.*, ¶

42, 56-58. The increased emissions of air pollution and discharges of water contaminants have serious implications for public health in local communities near the refineries being upgraded.

The EIS dismisses the cumulative impacts of refining more heavy crude in the United States on air quality and water quality by asserting that such pollution will be regulated under the Clean Air Act and Clean Water Act. FEIS, Exh. 3 at 4-394, 4-400. However, that is no substitute for a full analysis of the environmental impacts of those increased emissions or discharges. An agency cannot ignore the environmental impacts of a project on the basis of an expectation that other federal agencies will address them. *See Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988).

Third, the EIS does not adequately address the air quality and climate change impacts of increased consumption of liquid petroleum-based fuels that would result from the Project. In *Mid-States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), the court held that the agency examining the environmental impacts of a railroad intended to deliver coal to Midwestern and Northeastern utilities must analyze the indirect impacts from increased use of coal resulting from the railroad construction. The court noted that the increased coal use was a likely and foreseeable result of the project and therefore the EIS must include the environmental effects of burning more coal. *Id.* at 549. Similarly, the Alberta Clipper pipeline will add 450,000 bpd into the energy markets for refining into liquid fuels, and the EIS should have examined the full suite of environmental effects of use of the product.

ii. The EIS fails to consider significant cumulative impacts.

A “cumulative impact” is defined as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency ... or person undertakes such other actions.” *Id.* § 1508.7. Cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* “A proper consideration of the cumulative impacts of a project requires some quantified or

detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” *Klamath-Siskiyou*, 387 F.3d at 993. A cumulative effects analysis has two critical features: “First, it must not only describe related projects but also enumerate the environmental effects of those projects. Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project.” *Oregon Natural Resources*, 492 F.3d at 1133 (quotations omitted).

The Alberta Clipper EIS does not meet these standards in at least three respects. First, the EIS describes the possibility of future upgrades to the Alberta Clipper pipeline to increase its capacity from 450,000 barrels per day to 800,000 barrels per day, and notes this increase in capacity would require new pumps or upgrades to existing pumps at seven stations in the United States. FEIS, Exh. 3 at 2-50. However, the EIS does not assess the impacts of installing and operating these more powerful pumps, the increased energy that would be required to operate at this increased capacity and the corresponding increases in GHG emissions, or the impacts of refining an additional 350,000 bpd of tar sands crude.

Second, the EIS does not analyze the cumulative impacts of increased importation, refining and use of tar sands crude oil in light of the combined increases in heavy crude supply from similar pipeline construction projects. Nor does the EIS examine the reasonably foreseeable expansion in tar sands production, transport, and refining that will be a consequence of providing a new source of diluent to the tar sands industry. The incremental impacts of the Alberta Clipper pipeline are significant when added to other existing and reasonably foreseeable pipeline expansion projects including the Southern Lights diluent pipeline; the Keystone and Keystone XL pipelines, which will also import tar sands crude from Alberta for refining in the United States; and other oil pipeline expansion projects such as the North Dakota Expansion Project, the Southern Access projects, and the MinnCan pipeline expansion. Although these expansion

projects are briefly described in the introduction of the FEIS, Exh. 3 at 1-30 to 31, there is no quantitative analysis of their cumulative impacts.

Third, the EIS does not adequately analyze the cumulative impact of greenhouse gas emissions. “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). While the EIS quantifies GHG emissions from construction and operation of the pipeline, and generally discusses the additional GHG emissions that can be expected from increased refining of tar sands crude, FEIS, Exh. 3 at 4-401 to 402, it does not evaluate the cumulative impacts of the Alberta Clipper’s GHG emissions in connection with similar emissions from the other tar sands pipelines under construction or seeking permits.

c. Failure to adequately evaluate the risks, impacts, and mitigation measures associated with spills, operational leaks and abandonment violates NEPA.

The EIS does not adequately address the impact that spills and operational leaks from the Alberta Clipper pipeline would have on the environment or on human health. Nor does it discuss the risks and impacts of a diluent leak or spill. The EIS fails to identify the chemicals that the diluent will contain, and offers the public and public officials no understanding of the unique environmental consequences of leaks and spills of diluent along the diluent pipeline.⁴

The EIS is also silent on end-of-life impacts, and does not evaluate mitigation measures, such as financial assurance, that should be required of Enbridge to ensure restoration upon abandonment, which the EIS projects will occur in approximately 50 years. FEIS, Exh. 3 at 2-51. The Southern Lights diluent pipeline and the other pipelines in Enbridge’s corridor have a similar lifespan. Yet the EIS does not discuss the process

⁴ Because diluent is composed of light hydrocarbons with different chemical and physical properties than heavy crude oil, it reacts differently when released into the environment. For example, it is more volatile and more highly flammable than crude oil. *See* May Decl., Exh 5, ¶¶ 33-25.

for or impacts of abandonment. *Id.* The EIS must assess these impacts. *See* 40 C.F.R. § 1508.20.

d. The failure to take a hard look at the project's stated purpose and need, or to consider a reasonable range of alternatives, violates NEPA.

An EIS must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. An agency cannot define a project's purpose and need so as to preclude consideration of reasonable alternatives. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812-14 (9th Cir. 1999). The alternatives analysis is the “heart” of an EIS. 40 C.F.R. § 1502.14. The EIS must “provide full and fair discussion of significant environmental impacts and ... inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” *Id.* § 1502.1. An agency must “rigorously explore and objectively evaluate all reasonable alternatives,” including the “alternative of no action,” and must “devote substantial treatment to each alternative ... so that reviewers may evaluate their comparative merits.” *Id.*

The State Department's alternatives analysis is insufficient for three reasons. First, the stated purpose and need for the Alberta Clipper and diluent projects is based on an unexamined and erroneous premise: that the project is needed to meet a projected increase in demand for Canadian petroleum-based fuels in either the Midwest or nationwide.

According to the EIS, “the demand for crude oil in the United States is expected to rise slightly until about 2030.” FEIS, Exh. 3 at 3-2. This conclusion is based on the inaccurate statement that “[t]he current EIA [U.S. Energy Information Agency] projection is that meeting domestic demand will require the ‘unconventional’ oil supply from Canada, which is predominately heavy crude from reserves in western Canada, and that the Canadian oil supply will grow from approximately 1.5 million bpd in 2008 to over 4.3 million bpd in 2030.” FEIS, Exh. 3 at 3-2. Because of this, the EIS concludes

that “[i]mplementation of the no action alternative would not alter the increasing need for Canadian crude oil in the United States.” *Id.* at 3-3. However, the EIA – the federal government’s expert on energy supply, demand and price – has projected that crude oil imports from Canada will *decline* between now and 2030. EIA Annual Energy Outlook 2009 (AEO), Table 127, (attached hereto as Appendix 2 to Plaintiffs Comments on FEIS (“Comments”), Exh. 11); *see also* Comments, Exh. 11 at 5-7. There is no evidence of any increasing need for Canadian crude oil in the United States. The State Department cannot reject the no action alternative based on statements that are contradicted by the very sources on which the EIS relies. *See Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997).

Without an adequate assessment of the purpose and need for the project, the entire EIS is deficient – the State Department cannot take a “hard look” at alternatives and balance costs and benefits of the project unless it has first established that there is a legitimate need for the project. The failure to adequately assess purpose and need has led to the State Department’s erroneous summary dismissal of the “no action” alternative without adequate justification.

The second flaw in the State Department’s alternatives analysis is that, even if there were reliable forecasts of a future energy shortfall, the EIS assumes that construction of a new pipeline is the only feasible alternatives for filling this perceived need. Although other alternatives, such as energy efficiency, renewable energy, clean technologies, and demand-side management, are feasible alternatives to the Alberta Clipper, *see* Comments, Exh. 11 at 8, the FEIS rejects this in a one-paragraph addition asserting that “the projected energy demands for this market” could not be met by conservation or renewable sources. FEIS, Exh. 3 at 3-3. Such a conclusory statement does not meet NEPA’s requirement that agencies “rigorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). Moreover, NEPA regulations specifically require consideration of energy requirements and conservation in

environmental review documents. 40 C.F.R § 1502.16(e).

The third flaw in the alternatives analysis is the failure to adequately evaluate the alternative of increasing supply capacity without new line construction, taking into consideration the enormous expansion in transport capacity that has already been added to the pipeline systems that serve U.S. refineries. Upgrades and expansions already under construction will increase crude oil transport capacity from Canada into the Midwest by an additional 1 million barrels per day. Comments, Exh. 11 at 8-9. This additional capacity will more than satisfy any increase in U.S. demand for tar sands crude, and the failure to assess this possibility violates NEPA's "hard look" requirement.

2. The State Department's Issuance of the Presidential Permit is Unconstitutional.

a. The President has no constitutional or statutory authority to issue presidential permits for international tar sands crude pipelines.

The State Department claims its authority to issue the Alberta Clipper permit comes from Executive Order 13,337, 69 Fed. Reg. 25299 (May 5, 2004), Exh. 12, issued by President George W. Bush in 2004.⁵ ROD, Exh. 4 at 8. That order is based on "the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code." *Id.* However, the President has neither Constitutional nor statutory authority to regulate international oil pipelines.

International oil pipelines are matters of foreign commerce. *See, e.g., State v. Brown*, 850 F. Supp. 821, 827 (D. Alaska 1994) (crude oil transported through the Trans-Alaskan Pipeline System is "foreign commerce" despite not crossing any international borders.) As such, the power to regulate these pipelines falls under the exclusive and plenary constitutional authority of Congress to "regulate commerce with foreign nations."

⁵ Executive Order 13,337 amended the original grant of authority by President Johnson to the State Department in 1968, in Executive Order 11,423, 33 Fed. Reg. 11741 (Aug. 16, 1968), Exh. 13. The 1968 order invoked "the authority vested in me as President of the United States and Commander in Chief of the Armed Forces of the United States and in conformity with the provisions of Section 301 of Title 3, United States Code." *Id.*

U.S. Const. art. I, § 8, cl. 3; *see also Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974); *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824); *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006); *U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953) (invalidating an executive agreement with Canada regarding the importation of potato seeds because “the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is exclusively vested by the Constitution in Congress” and “[i]mports from a foreign county are foreign commerce subject to regulation, so far as this county is concerned, by Congress alone.”); *Target Sportswear Inc. v. U.S.*, 875 F.Supp. 835, 838 n.2 (Ct. Int’l Trade 1995) (“Fundamentally, under the U.S. Constitution the authority to regulate foreign commerce and trade with other nations lies exclusively with the Congress.”). Therefore, the President has no constitutional authority to regulate the tar sands pipelines.⁶

Nor does the President have statutory authority to regulate the pipelines. The only statute cited in Executive Order 13,337, 3 U.S.C. § 301, does *not* grant the President authority to issue permits for oil pipelines (or any other activity), but is instead simply Congress’s general authorization for the President to delegate functions vested in the President by other laws.

In the seminal case of *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court held that the Secretary of Commerce’s seizure of steel mills in the Korean War under an executive order exceeded the President’s constitutional power. Like the executive orders in the instant case, President Truman claimed authority for his action as the Nation’s Chief Executive and Commander in Chief. *Id.* at 582. The Court held that President Truman’s executive order was invalid because, as in the instant case, no express constitutional language authorized the President’s action, nor did any statute or other act of Congress expressly or implicitly authorize such action. *Id.* at 585–87.

⁶ The Constitution grants to the President the Commander-in-Chief powers, the power to make treaties and appoint ambassadors with the advice and consent of the Senate, and the power to receive ambassadors and other public ministers, and see that the laws are faithfully executed. U.S. Const. art. II. The Constitution grants the President no power to regulate “foreign commerce.”

b. Although Congress has delegated limited powers to specific agencies to regulate aspects of international pipelines, it has not delegated authority over international tar sands oil pipelines to the State Department.

Where Congress has granted limited authority to the Executive Branch over an aspect of foreign commerce, that grant establishes the limits of the President's power. In *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.C.P.A. 1975), the court held that a congressional delegation gave the President the authority to impose import duties on zippers, but stated that "no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency." *Id.* at 572. Without a delegation of power to the executive branch, Congress has not "abdicat[ed] its constitutional power to regulate foreign commerce. It remains the ultimate decision maker and the fundamental reservoir of power to regulate commerce." *Id.* at 582; *see also Target Sportswear Inc. v. U.S.*, 875 F. Supp. 835, 841 (Ct. Int'l Trade 1995) (President's regulation of foreign commerce cannot exceed authority delegated by Congress).

In this case, Congress delegated limited powers to regulate certain aspects of international oil pipelines to specific Executive agencies, but there is no delegation to the State Department. For instance, in the Hepburn Act of 1906, Congress expanded the Interstate Commerce Act of 1877 to apply to international oil pipelines, and authorized the Interstate Commerce Commission (ICC) to set rates that pipeline operators can charge for the transport of oil by pipelines. Pub. L. No. 59-3337, § 1, 34 Stat. 584 (as amended). Congress transferred the ICC's jurisdiction to the Federal Energy Regulatory Commission (FERC) in the Department of Energy Organization Act, 42 U.S.C. § 7111 *et seq.* (1977), and amended FERC's authority in the Energy Policy Act of 1992, 49 U.S.C. § 112 *et seq.* In the Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. No. 96-129, and in an amendment in the Pipeline Safety Act of 1992, Pub. L. No. 102-508, Congress delegated limited authority to the Department of Transportation to regulate pipeline safety. In the 2006 Pipeline Inspection, Protection, Enforcement, and Safety Act, 49 U.S.C. § 60,134 *et seq.*, Congress addressed the authority of the Pipeline and Hazardous

Materials Safety Administration. In these statutes or others, Congress could have authorized the State Department to issue permits allowing transport of crude oil between the United States and Canada and for pipeline construction, connection and operation, but it did not.

Congress's retention of authority over international pipelines is also evident from its practice of authorizing specific pipeline systems. In 1973, Congress authorized construction of the Trans-Alaska Pipeline System ("TAPS"). 43 U.S.C. § 1651 *et seq.* (1973). The TAPS was a matter of "foreign commerce" for Congress despite the fact that it crossed no international borders. *State v. Brown*, 850 F. Supp. at 827-28. In the Public Utility Regulatory Policies Act, 43 U.S.C. § 2001 *et seq.*, Congress delegated to the President the authority to choose the preferred route of an east-west pipeline and to give it preferential treatment in the permitting process. These statutes demonstrate that Congress reserved ultimate authority over oil pipelines and required the passage of specific legislation, with specific grants of authority to the Executive Branch, before specific pipelines could be built. There is, however, no such grant of authority for the Alberta Clipper pipeline.

In addition, Congress's reservation of authority over pipelines crossing the Canadian border is evident in its grants of authority for other border crossings. For example, Congress delegated to the Executive authority over transboundary natural gas pipelines in the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1938); transboundary bridges in the International Bridge Act, 33 U.S.C. § 535(b) (1972); and international telegraph cables in the Kellogg Act, 47 U.S.C. § 34 *et seq.* (1921). By contrast, there is no congressional act authorizing border crossings for tar sands crude oil pipelines.

In sum, the State Department's issuance of the Alberta Clipper permit was not based on any constitutional authority or any explicit or implicit congressional grant of power. Without such authority, the State Department's issuance of the Alberta Clipper presidential permit was unconstitutional.

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY INJUNCTION.

The construction of the Alberta Clipper pipeline involves the installation of 327 miles of new 36-inch-diameter pipeline in the United States, with attendant clearing of trees and vegetation, removing topsoil, and filling wetlands ranging from 140 to 440 feet wide. FEIS, Exh. 3 at 2-19, 4-20, 4-69, 4-96; ROD, Exh. 4 at 6. This will harm 6,402 acres of land (including 1,255 acres of forest, 655 acres of open lands, and 1,346 acres of wetlands), and will damage at least 80 perennial and 123 intermittent waterbodies. FEIS, Exh. 3 at 4-45 to 47; ROD, Exh. 4 at 7, 15. The FEIS documents significant harm to soils and sediments, surface water and groundwater, wetlands, vegetation, wildlife, fisheries, threatened, endangered and sensitive species, land use, recreation and special interest areas, visual areas, air quality and noise, risks from spills, and cumulative impacts. Excerpts of these FEIS sections are collected in Exh. 14. On September 1 a portion of Highway 2 in Bemiji, Minnesota collapsed during boring for the Alberta Clipper pipeline. *See Bemidji Pioneer*, Exh. 15.

Many of the impacts to vegetation would be long-term or permanent. FEIS, Exh. 3 at 4-96. More than 820 acres of wetlands will be permanently destroyed. ROD, Exh. 4 at 7. The permitted route alignment cuts through a calcareous fen, one of North America's most rare wetland habitats. *See Plaintiffs' Letter to DOS*, Exh. 16. Construction would adversely modify wildlife habitats, including through habitat fragmentation and widening of existing rights-of-way. FEIS, Exh. 3 at 4-120 to 122. It could harm fisheries resources through loss or alteration of habitat, reduced spawning success, direct and indirect mortality, adverse health effects, and loss of individuals and habitats due to hydrostatic testing and exposure to toxic materials. *Id.* at 4-146. Pipeline construction would also result in concrete and irreparable harm to water-bodies and aquatic ecosystems, including increased sedimentation, degradation and alteration of aquatic habitat, increased runoff and erosion, changes in channel morphology and stability, temporary reductions in flow, and temporary to short-term surface water

degradation during or after construction. *See* FEIS, Exh. 3 at 4-20, 4-46 to 49, 4-67 to 69.

Plaintiffs' members have attested to the significant and irreparable harm they will suffer if the project is allowed to proceed. *See* Exhs. 17-23. For example, Sierra Club members Lois Norrgard and Joshua Davis describe how the pipeline's crossing of the Chippewa National Forest in Minnesota would interfere with their use and enjoyment of the forest. Declaration of Lois Norrgard ("Norrgard Decl."), Exh. 17 at ¶¶ 4-5, 7, 10-11; Declaration of Joshua Davis ("Davis Decl."), Exh. 18 at ¶ 10. Mr. Davis describes impacts to public lands he uses downwind of the refinery that would process the tar sands crude. Davis Decl., Exh. 17 at ¶7. Mary Johnson, who lives near the refinery, describes her concerns over increased air pollution. *See* Declaration of Mary Smith-Johnson ("Johnson Decl."), Exh. 19 at ¶¶ 6, 8. Minnesota Center for Environmental Advocacy member Ami Aalgaard has already lost enjoyment of mature oak and other trees in her yard and neighboring property. *See* Declaration of Ami Aalgaard ("Aalgaard Decl."), Exh. 20, App.1. She describes the adverse effects of strong diesel smells and noise both inside and outside her home, as well as her fear of living next to a pipeline transporting highly volatile liquid fuels. *Id.* at ¶ 7. Shelley Steva, an MCEA member, teacher and avid birder, describes the irreparable impacts the pipeline will have on specific areas that she frequents for bird watching. *See* Declaration of Shelley Steva, ("Steva Decl."), Exh. 21 at ¶¶ 4-11. She also describes projects she has planned with her high school science class that she is prevented from pursuing because of the pipelines. *Id.* at ¶¶ 13-17. MCEA member Steve Caron has been a sport hunter for 45 years and frequents forests and grasslands traversed by the pipelines. His ability to hunt during the fall hunting season will be prevented or severely diminished by construction of the pipelines. Declaration of Steve Caron ("Caron Decl."), Exh. 22 at ¶¶ 4-7.

Plaintiffs have also submitted the declaration of two expert witnesses, Julia May and Phyllis Fox, who describe the environmental impacts of the Canadian processing of tar sands crude oil on the climate and migratory birds in the United States, the increased

air emissions and greenhouse gases from refining tar sands crude, and other harms associated with the operation of the pipeline and the Superior Terminal. *See* May Decl. Exh. 5; Declaration of Phyllis Fox (“Fox Decl.”) Exh. 24. In particular, May concludes that the Alberta Clipper and Southern Lights pipeline projects will result in: damage to soils, vegetation, wetlands and wildlife habitat due to pipeline construction; increased greenhouse gas emissions due to extraction and refining of tar sands crude oil; increased emissions of hazardous air pollutants due to refining, flaring, and fugitive emissions sources such as tanks, valves, flanges; and increased water pollution including mercury, selenium, vanadium, and others contaminants. May Decl. Exh. 5 at ¶¶ 8, 42.

These impacts are precisely the kind of irreparable injury that justifies an injunction. As both the Supreme Court and the 9th Circuit Court of Appeals have repeatedly said, “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (quotation omitted); *see also Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1137 (9th Cir. 2009).

C. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF PLAINTIFFS.

While Plaintiffs will suffer irreparable harm in the absence of an injunction, the issuance of a preliminary injunction will not harm the State Department. The Department alleges a general interest in securing increased access to Canadian tar sands oil due to projected increases in demand for energy and the desire to reduce reliance on oil from countries considered unstable or unfriendly to U.S. interests. However, as the Ninth Circuit recognized in *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002), “restrictions on human intervention are not usually irreparable in the sense required for injunctive relief.” The Ninth Circuit explained: “Unlike the resource destruction that attends development, and that is bound to have permanent repercussions, restrictions on forest development and human intervention can be removed if later proved to be more harmful than helpful.” *Id.* Similarly, a preliminary injunction against the

Department of State's issuance of a presidential permit for the Alberta Clipper Project is not irreparable and will not significantly harm the State Department's long-term interests in securing increased access to Canadian tar sands oil.

Moreover, any economic harm that Enbridge might incur due to a temporary delay in construction of the pipeline is far outweighed by the irreparable environmental harms that pipeline construction and operation would cause. As the Ninth Circuit has often held, potential monetary damage either to an agency or to a private litigant weighs only lightly, if at all, on the scales of equity in environmental cases. *See, e.g., National Parks & Cons. Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (loss of anticipated revenues to tour boat operator "does not outweigh the potential irreparable damage to the environment"); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d at 569 (Although "a preliminary injunction could present a financial hardship to the Forest Service, the appellees-intervenors, and the communities in and around the [national forest], this possible financial hardship is outweighed by the fact that '[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce.'" (quoting *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989))).

D. THE PUBLIC INTEREST FAVORS ISSUANCE OF A PRELIMINARY INJUNCTION.

"The preservation of our environment ... is clearly in the public interest." *Earth Island Inst. v. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). Moreover, the public has an interest in preventing Defendants from acting in a manner inconsistent with the applicable law. As the court stated in *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991), "[t]his invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." "Such compliance is especially appropriate in light of the strong public policy expressed in the nation's environmental laws." *Citizen's Alert Regarding Env't v. U.S. Dep't of Justice*, 1995 WL 748246, *11 (D.D.C. 1995) (citation omitted).

Plaintiffs expect that the State Department will argue that a preliminary injunction would cause not only economic harm to Enbridge but would also prevent the creation of jobs and harm the economy more generally. However, as described above, the Ninth Circuit has “held time and again that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns.” *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2007). In short, any alleged economic harms are not sufficient to outweigh the likelihood of environmental harm in this case.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to issue a preliminary injunction against the issuance of a presidential permit for the construction and operation of the Alberta Clipper Project to preserve the status quo pending a resolution of the merits of this case.

Respectfully submitted,

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