

1 SARAH H. BURT (Cal. Bar No. 250378)
J. MARTIN WAGNER (Cal. Bar No. 190049)
2 Earthjustice
426 17th Street, 6th Floor
3 Oakland, CA 94612
Tel.: (510) 550-6700
4 Fax: (510) 550-6740
sburt@earthjustice.org
5 mwagner@earthjustice.org

6 KEVIN REUTHER (Minn. Bar No. 266255) (Application for Admission *Pro Hac Vice* Pending)
Minnesota Center for Environmental Advocacy
7 26 E. Exchange St., Suite 206
St. Paul, MN 55101
8 Tel.: (651) 223-5969
Fax: (651) 223-5967
9 kreuther@mncenter.org

10 ERIC E. HUBER (Col. Bar No. 40664) (Application for Admission *Pro Hac Vice* Pending)
DOUGLAS P. HAYES (Col. Bar No. 39216) (Application for Admission *Pro Hac Vice* Pending)
11 Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
12 Boulder, Colorado 80301
Tel. (303) 449-5595
13 Fax: (303) 449-6520
eric.huber@sierraclub.org
14 doug.hayes@sierraclub.org

15 *Counsel for Plaintiffs*

16
17 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
18 **SAN FRANCISCO DIVISION**

19 _____)
SIERRA CLUB, MINNESOTA CENTER FOR)
20 ENVIRONMENTAL ADVOCACY,) Civ. No. 3:09-cv-04086-SI
NATIONAL WILDLIFE FEDERATION, and)
21 INDIGENOUS ENVIRONMENTAL)
NETWORK,)
22 Plaintiffs,) PLAINTIFFS' RESPONSE IN
23 v.) OPPOSITION TO DEFENDANTS'
24) MOTION TO TRANSFER
25 UNITED STATES DEPARTMENT OF) Hearing Date: September 25, 2009
STATE, HILLARY CLINTON, in her official) Time: 9:00 am
26 capacity as Secretary of State, JAMES)
STEINBERG, in his official capacity as Deputy) Hon. Susan Illston
27 Secretary of State, and the UNITED STATES) U.S. District Judge
ARMY CORPS OF ENGINEERS,)
28 Defendants.)

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INTRODUCTION

1
2 Plaintiffs filed this action in the Northern District of California on September 3, 2009 to
3 challenge the United States Department of State's ("State Department") issuance of a Presidential
4 permit to Enbridge Energy LP and its affiliates (collectively, "Enbridge") to construct and operate a
5 pipeline known as the Alberta Clipper, the purpose of which is to import tar sands crude oil into the
6 United States from Canada.

7 As set forth in the Complaint, the State Department violated the National Environmental Policy
8 Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and NEPA's implementing regulations, 40 C.F.R. §§ 1500-
9 1508, because its Environmental Impact Statement (EIS): i) failed to analyze the impacts of connected,
10 cumulative, and/or similar actions; ii) failed to assess all reasonably foreseeable environmental impacts
11 of the project, including indirect and cumulative effects; and iii) failed to take a hard look at the Alberta
12 Clipper project's stated purpose and need or to adequately consider a reasonable range of alternatives
13 before granting the Presidential permit. Plaintiffs also challenge the authority of the State Department
14 to issue the Presidential permit for the Alberta Clipper project because the regulation of international tar
15 sands crude oil pipelines falls within Congress's exclusive and plenary authority over matters of foreign
16 commerce pursuant to Article I, Section 8, clause 3 of the United States Constitution.

17 With their Complaint, Plaintiffs filed a Motion for Temporary Restraining Order (TRO) and
18 Preliminary Injunction, Docket No. 8. In its Opposition to Plaintiffs' Motion for TRO, the State
19 Department requested transfer of the case "to the U.S. District Court for the District of Minnesota or
20 another more appropriate forum." Def. Opposition to Pl. Motion for TRO, Docket No. 15 at 1. In its
21 Order Denying Plaintiffs' Motion for Temporary Restraining Order and Setting Briefing Schedule on
22 Questions Concerning Venue, Docket No. 35, this Court declined to transfer venue *sua sponte* and
23 directed Defendants to file a Motion to Transfer Venue. Accordingly, on September 14, 2009, the State
24 Department filed a Motion and Memorandum In Support of Motion to Transfer Venue ("Motion"),
25 Docket No. 44, seeking to move this action from the forum chosen by Plaintiffs, to the U.S. District
26
27
28

1 Court for the District of Minnesota or, in the alternative, a U.S. district court in North Dakota,
2 Wisconsin, or the District of Columbia.¹

3 As discussed below, the Motion to Transfer should be denied because the Northern District of
4 California is an appropriate forum for this case. Defendants have not satisfied their burden of showing
5 that transfer to another district would be more convenient or in the interest of justice.

6 Contrary to Defendants' assertions, Plaintiffs' case involves issues and impacts that are both
7 national in scope and have a direct impact on California. In fact, it is precisely the failure of the State
8 Department's NEPA analysis to address adequately the cumulative effects of the proposed pipeline and
9 its connected actions – including impacts in California and throughout the nation – that is the primary
10 focus of Plaintiffs' challenge. The Alberta Clipper Project and the connected Southern Light diluent
11 pipeline will greatly increase the extraction and importation of tar sands crude oil, resulting in increases
12 in greenhouse gas (GHG) emissions from tar sands extraction, upgrading, transport, refining, and end-
13 use. Increasing GHG emissions is a matter of national interest, especially when all credible science
14 points to the urgency of *reducing* emissions. The State Department's approval of this tar sands
15 infrastructure expansion without first analyzing the full impact of the pipeline proposal as required by
16 NEPA has national implications: it directly affects natural resources throughout the country, especially
17 in coastal states such as California, because it will contribute to global warming, and it undermines
18 national efforts to promote and invest in cleaner fuels and renewable energy.

19 In addition to being national in scope, this case has particularly strong connections to
20 California because many of California's coastal, mountain and agricultural regions stand to be
21 significantly harmed by the effects of global warming. The development, refining and burning of tar
22

23 ¹ On September 14 Enbridge Energy, LP filed a Statement in Support of Defendants' Motion to
24 Transfer Venue, Docket No. 45. Because an intervenor may not object to venue, the Court need not
25 consider Enbridge's submission on venue. *See* 7A Wright and Miller, *Federal Practice and*
26 *Procedure* § 1918 (2008) ("the intervenor cannot question venue"); 3B *Moore's Federal Practice* §
27 24.22 (2008); *Consumers Union of U.S. Inc. v. Consumer Product Safety Comm'n*, 590 F.2d 1209,
28 1222 (D.C. Cir. 1978) ("an intervenor is generally held to waive his privilege to challenge the venue
of a suit") (rev'd on other grounds *GTE Sylvania, Inc. v. Consumers Union of U. S., Inc.*, 445 U.S.
375 (1980); *Transworld Airlines, Inc. v. C.A.B.*, 339 F.2d 56, 64 (2d Cir. 1964) ("a person
intervening on either side of the controversy may not object to improper venue").

1 sands crude also affects California because it undermines the State’s legislative and regulatory efforts
2 to reduce the impacts of global warming by reducing carbon emissions in California. In addition,
3 Plaintiff Sierra Club’s headquarters are located here, and the Sierra Club has more than 150,000
4 members who live, work and recreate in California. These members stand to be adversely impacted by
5 the increased GHG emissions and global warming attendant to tar sands development. The 13 Sierra
6 Club chapters in California have been very active in global warming issues, and the Sierra Club has
7 opposed tar sands development through Sierra Club California and the national law program and media
8 departments in its San Francisco headquarters. These close ties to Plaintiffs’ chosen forum demonstrate
9 that Plaintiffs’ convenience and the interest of justice would be served by hearing this case in this
10 district. Plaintiffs therefore respectfully ask the Court to honor their choice of venue and deny the
11 Motion to Transfer.

12 ARGUMENT

13 “For the convenience of the parties and witnesses, in the interest of justice, a district court may
14 transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. §
15 1404(a). *See also Florens Container v. Cho Yang Shipping*, 245 F. Supp. 2d 1086, 1089 (N.D. Cal.
16 2002). However, plaintiffs are generally allowed to choose their forum and defendants should not be
17 able to use section 1404(a) in an effort to forum shop. *See, e.g., Ferens v. John Deere Co.*, 494 U.S.
18 516, 527-528 (1990) (there is a danger of forum shopping when defendant seeks a transfer). In the
19 Ninth Circuit, a plaintiff’s choice of forum is entitled to substantial deference. *Florens Container*, 245
20 F. Supp. 2d at 1092 (“Under Ninth Circuit law, a plaintiff’s choice of forum is accorded substantial
21 weight in proceedings under this section, and courts generally will not transfer an action unless the
22 ‘convenience’ and ‘justice’ factors strongly favor venue elsewhere.” (Citation omitted.)); *Gen. Ret. Sys.*
23 *of City of Detroit v. Wells Fargo Mortgage Backed Securities*, 2009 WL 2137094 at *5 (N.D. Cal. July
24 16, 2009).

25 As a general matter, “the district court is not required to determine the best venue, and transfer
26 under § 1404(a) should not be freely granted.” *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003)
27 (citations and quotations omitted), *vacated on other grounds, Bush v. Gherebi*, 542 U.S. 952 (2004).
28 “Unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely

1 be disturbed.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (plaintiff’s choice of forum should
 2 only be disturbed in “exceptional circumstances”); *see also Decker Coal Co. v. Commonwealth Edison*
 3 *Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (“The defendant must make a strong showing of inconvenience
 4 to warrant upsetting the plaintiff’s choice of forum.”).

5 In considering when to overcome the presumption in favor of a plaintiff’s choice of venue, a
 6 court must make its decision based upon an “individualized, case-by-case determination of convenience
 7 and fairness.” *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)); *Jones v. GNC*
 8 *Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000). In doing so, the court “considers the private
 9 and public factors which might weigh in favor of each of these alternate venues and measures these
 10 assets against those of the plaintiffs’ chosen forum, the Northern District of California.” *Ellis v. Costco*
 11 *Wholesale Corp.*, 372 F. Supp. 2d 530, 538 (N.D. Cal. 2005). “Private” factors include:

12 (1) the state that is most familiar with the governing law, (2) deference to a plaintiff’s
 13 choice of forum, (3) the respective parties’ contacts with the forum, (4) the contacts
 14 relating to plaintiff’s cause of action in the chosen forum, (5) the differences in
 15 litigation costs between the competing forums, (6) the availability of compulsory
 process to compel attendance of unwilling nonparty witnesses, (7) ease of access to
 sources of proof, and (8) the relevant public policy of the forum state.

16 *Ellis*, 372 F. Supp. 2d at 538 (citing *Jones*, 211 F.3d at 498-99). “Public” factors include: (1) the
 17 relative congestion of the two courts’ dockets; (2) the local public interest in the outcome of the
 18 controversy; (3) the avoidance of conflict of laws issues; and (4) the unfairness of burdening citizens in
 19 an unrelated forum with jury duty. *Decker*, 805 F.2d at 843; *Ellis*, 372 F. Supp. 2d at 538-39. The
 20 party requesting a transfer has the burden to demonstrate that these factors necessitate transfer. *Silverlit*
 21 *Toys Manufactory, Ltd. v. Absolute Toy Marketing, Inc.*, 2007 WL 521239, *6 (N.D. Cal. Feb. 15,
 22 2007).

23 As discussed below, Defendants have failed to carry their burden of showing that the
 24 convenience of the parties and witnesses and the interests of justice overcome the presumption that the
 25 court should respect Plaintiffs’ choice of forum.²

26
 27 ² The State Department argues that Plaintiffs’ choice of forum is not entitled to deference because it
 28 “lacks sufficient ties to the controversy.” Motion at 13. However, as Plaintiffs demonstrate in
 Section I(B), pp. 8-11 *supra*, this case has particularly strong connections to California. Similarly,
 Enbridge incorrectly asserts that this “forum lacks a significant connection to the activities alleged in

1 **I. The Interests of Justice Favor Keeping this Case in this Forum.**

2 Defendants' contention that the interests of justice favor transfer rests on the "interest in having
3 localized controversies decided locally." Motion at 7. This contention fails for two reasons. First,
4 Defendants misapprehend and mischaracterize the nature of Plaintiffs' NEPA challenge. Plaintiffs are
5 primarily concerned with the nationwide implications of the federal government's decision in this case,
6 and have specifically challenged the failure of the EIS to fully examine the cumulative effects of the
7 project. Second, Defendants wrongly allege that "none of the actions challenged by Plaintiffs have any
8 tie to the Northern District of California." Motion at 9. In fact, California and its residents have a
9 direct stake in the outcome of this litigation.

10 **A. Plaintiffs' challenge raises issues of national significance with national implications.**

11 Plaintiffs do not, as Defendants assert, primarily challenge "activities ... taking place ... where
12 the pipeline and related facilities are being built." Motion at 8. Instead, Plaintiffs' claims focus on the
13 failure of a federal government agency to adequately analyze all of the environmental impacts – local
14 and national – that will flow from its decision, as required under federal law.

15 Defendants acknowledge that the purpose of the Alberta Clipper pipeline is to greatly increase
16 the importation of heavy tar sands crude oil into the United States. *See* FEIS, Pl. Motion for TRO,
17 Docket No. 8, Exh. 3 at 1-2. This in turn would spur refinery expansions and modifications in the
18 United States. *Id.* at 4-394 to 4-399. The FEIS notes that "at least three major refineries have recently
19 received permits to upgrade their facilities to refine relatively large volumes of heavy crude oil." *Id.* at
20 4-395. The Southern Lights diluent pipeline, which Plaintiffs allege is a connected and cumulative
21 action, is proposed to deliver diluent or light hydrocarbons north to Canadian tar sands production
22 facilities.³ *Id.* at 1-28. The availability of diluent for increased tar sands production results, in turn, in
23 increased crude production leading to GHG emissions and other environmental impacts.

24
25 the complaint" and that as a result Plaintiffs' choice of venue is "entitled to little or no weight."
26 Enbridge Statement at 7. In fact, the Complaint sets forth considerable detail on the impacts of tar
27 sands development and the contribution to greenhouse gases and climate change. *See, e.g.,*
28 Complaint at ¶¶ 3, 48-59. The Complaint sets forth Plaintiffs' interests in those impacts. *Id.* at ¶¶
14-17. Plaintiffs' interests relevant to California are further specified in the Magavern and Gallagher
declarations, attached hereto as Exhibits 1 and 2, and *infra* at pages 8 to 12. Thus, this forum does
have a significant connection to the matters raised in the Complaint.

³ Because bitumen crude from the Canadian tar sands is too heavy and viscous to be pumped through

1 Because extraction and refining of tar sands crude is particularly energy intensive, life-cycle
2 greenhouse gas emissions⁴ from burning tar sands-derived fuels are significantly higher than from fuels
3 derived from conventional crude oil. *See* Complaint, Docket No. 1 at ¶ 3. The actual extraction of tar
4 sands in Canada in 2000 alone resulted in 23.3 million metric tons of GHG emissions. *May*
5 Declaration, Pl. Motion for TRO, Docket No. 8, Exh. 5 at ¶ 65. Refining 450,000 barrels per day of tar
6 sands crude oil would result in significant adverse impacts, including the emission of 23 million
7 additional metric tons of CO₂-equivalent compared to refining conventional fuel. *May Dec.* at ¶¶ 45-
8 47; *see also* FEIS at 4-402. The annual life-cycle GHG emissions from 800,000 barrels per day of tar
9 sands crude – the “ultimate” capacity of the Alberta Clipper, Presidential Permit Application, Plaintiffs
10 Motion for TRO, Docket No. 8, Exh. 7 at 9 – is 132 million metric tons of CO₂-equivalent.⁵ *See*
11 Plaintiffs’ Comments on FEIS, Motion for TRO, Docket No. 8, Exh. 11 at n.5. Consequently, the
12 Alberta Clipper pipeline will cause substantially increased emissions of GHGs that contribute to global
13 warming and related harmful effects on the environment nationwide. The State Department’s decision
14 to authorize Enbridge to deliver an enormous additional source of carbon-intensive tar sands crude to
15 the United States thus has impacts well beyond the three-state area traversed by the proposed pipe.

16 In its decision documents, the State Department itself portrays the Alberta Clipper Project as far
17 more than a “localized controversy.” The Record of Decision describes the project as an element of
18 national energy security that is in the interest of the nation as a whole. *See* ROD, Pl. Motion for TRO,
19 Docket No. 8, Exh. 4 at 2 (“[T]he Alberta Clipper project would serve the national interest, in a time of
20 considerable political tension in other major oil producing regions and countries, by providing
21 additional access to a proximate stable, secure supply of crude oil ... from a reliable ally and trading
22 partner of the United States.”); *see also id.* at 25.

23
24 a pipeline, it must be mixed with lighter liquid hydrocarbons, known as diluent, before it can be
25 transported by pipeline. *See* FEIS at 1-28. Diluent is thus necessary to facilitate the Canadian
26 petroleum industry’s plans to greatly increase tar sands production and export to the United States.
27 *Id.*

28 ⁴ “Life-cycle emissions” refers to the total GHG emissions associated with the use of a particular
fuel. For tar sands-derived fuels, life-cycle emissions include emissions resulting from extraction
(mining, drilling), upgrading, transport, refining, and burning of the fuel by the end user.

⁵ For comparison, the California Air Resources Board (CARB) estimated total California state-wide
annual emissions to be approximately 468 million tons of CO₂-equivalent in 2004. CARB,

1 Accordingly, the central contention of Plaintiffs' complaint is that the State Department made a
2 determination that this infrastructure expansion was in the "national interest" without fully looking at
3 all of those impacts. Plaintiffs have repeatedly described the failings of the State Department's NEPA
4 review in national, not local, terms. For example, Plaintiffs' comments on the FEIS pointed out the
5 State Department's failure to include cumulative and indirect impacts of the project, particularly the
6 reasonably foreseeable impacts, such as climate impacts, which occur outside the area where the
7 pipelines are located. Pl. Motion for TRO, Docket No. 8, Exh. 11 at 15. Plaintiffs' challenge to the
8 Department's analysis of the "purpose and need" for the pipeline likewise focuses on whether
9 nationwide demand necessitates the project, and highlights the negative effect the project would have
10 on the development of alternative fuels, which is a national objective. *Id.* Those same concerns –
11 expanded tar sands extraction, increased tar sands refining throughout the United States, increased
12 GHG emissions leading to global climate change, and the absence of a critical evaluation of need – are
13 central to Plaintiffs' complaint. Complaint, Docket No. 1 at ¶¶ 36-39, 48-59, 83-88, 97-100. Thus,
14 Defendants' portrayal of Plaintiffs' claims as a "localized controversy," Motion at 7, is simply
15 inaccurate. Because this case is of national interest, it is no more appropriate to hear this case in the
16 District of Minnesota, North Dakota, Wisconsin or the District of Columbia than it is appropriate for
17 the case to be heard in the Northern District of California.

18 Both the State Department and Enbridge rely primarily on *Center for Biological Diversity v.*
19 *Kemphorne*, 2007 WL 2023515 (N.D. Cal. July 12, 2007), for the proposition that cases of national
20 interest are not sufficient to support hearing a case in Plaintiffs' chosen venue. Motion at 10; Enbridge
21 Statement at 7. However the facts of that case are distinguishable from the present case. *Center for*
22 *Biological Diversity* involved objections to an incidental take of polar bears in Alaska with no impacts
23 in California. The Court found that the case "at its core" involved environmental impacts in Alaska.
24 *Id.* at *6. The same is true of the other cases cited by the State Department and Enbridge. *See Southern*
25 *Utah Wilderness Alliance v. Norton*, 315 F. Supp. 2d. 82 (D.D.C. 2004) (dispute entailed impacts to 21
26 discrete parcels of land in Utah and did not have impacts nationally or in the transferor district); *Adachi*
27 *v. Carlyle/Galaxy San Pedro L.P.*, 595 F. Supp. 2d 1147 (S.D. Cal. 2009) (dispute involved purchase of

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Greenhouse Gas Inventory – 2020 Forecast, Exh. 3 at 2.

1 real property located in transferee district and did not have impacts nationally or in the transferor
2 district).⁶ In the instant case, Plaintiffs are concerned with the impacts tar sands development will have
3 on the environment, economy and energy policy of California. For the reasons described below,
4 Californians have an interest in the outcome of this case that is much more direct than a generalized
5 concern for an endangered species that lives elsewhere.

6 **B. Importing, refining and burning tar sands crude oil will directly and significantly
7 impact California, Sierra Club, and Sierra Club's members in California.**

8 Contrary to Defendants' assertion that the issues Plaintiffs raise have "no ties" to the state,
9 Motion at 9, Californians have a direct and significant interest in the outcome of this case. Because this
10 case challenges the federal government's failure to adequately evaluate GHG emissions and climate
11 change impacts prior to authorizing construction of infrastructure to increase importation of tar sands
12 crude oil for refining and use in the United States, it has a direct and substantial impact on California.

13 The increase in GHG emissions and concomitant changes in climate directly and adversely
14 impact California's environment and the health of its citizens. According to the California Air
15 Resources Board (CARB), California "can expect to see worsening air quality, an increase in the
16 number of weather-related deaths, and a possible increase in infectious disease," as a result of increased
17 GHG emissions. *See* CARB, Background: The Greenhouse Effect and California, Exh. 4 at 1.
18 Climate change will increase the risk of fires and impact the availability of California's fresh water
19 supply. *Id.* Indeed, CARB reports that climate change has already begun to impact California's
20 freshwater, noting a 10% decline in the Sierra Nevada spring runoff over the last 100 years. *Id.*
21 Another change, already affecting California, is sea level rise, which "can lead to serious consequences
22 for the large populations living along California's coast." *Id.*

23
24
25 ⁶ The remaining cases cited by Enbridge all required evidence and testimony from witnesses located
26 in the transferee district and are thus inapposite to the present APA record review case. *See Eye
27 Laser Car Center, LLC v. MDTV Medical News Now, Inc.*, 2007 WL 2873782 (S.D. Cal., Sept. 28,
28 2007) (case requiring witness testimony where 16 of 18 potential witnesses resided in New Jersey,
the transferee state, and the other two resided in nearby Pennsylvania); *Hoefner v. Dept. of
Commerce*, 2000 WL 890862 (N.D. Cal., June 28, 2000) (class action lawsuit relying on witnesses
and evidence located in transferee district); *Jarvis v. Marietta Corp.*, 1999 WL 638231 (N.D. Cal.,
Aug 12, 1999) (sexual harassment and wrongful termination case requiring examination of human
resources documents, financial records and witness located in the transferee district).

1 The costs of climate change to California could be enormous. The Union of Concerned
2 Scientists recently calculated that unchecked climate change could cost California taxpayers,
3 businesses, and state and local governments hundreds of billions of dollars in damages. *See*, Union of
4 Concerned Scientists, *Climate Change in the United States* (2009), attached hereto as Exh. 5. In
5 California, annual heat-related health costs could reach an estimated \$14 billion by 2100, while rising
6 ground-level ozone levels would boost medical bills by another \$10 billion. *Id.* at 4. The cost of
7 protecting low-lying coastal property from sea level rise and the resulting storm surges, particularly
8 around San Francisco Bay, would range from \$6 billion to \$30 billion annually by 2100. *Id.* at 2-3.
9 California's economy will also be significantly impacted by climate change. By the end of the century
10 Sierra snowpack could diminish by 80 percent. *Id.* at 11. As a result, California's ski season could
11 disappear, and with it 15,000 jobs and \$500 million in annual industry revenues. *Id.* Annual losses to
12 state agriculture, forestry and fisheries could reach \$4.3 billion. *Id.* at 8. Additionally, annual large
13 wildfires would increase by as much as 53 percent by 2100. *Id.* at 11-12. Last year, the federal
14 government spent \$200 million on firefighting efforts in California, three-quarters of which went to
15 fight just three fires. *Id.*

16 California's interest in reducing GHG emissions and curbing climate change is well established
17 in the state's public policy. *See* California Global Warming Solutions Act of 2006, 2006 Cal. Stat. ch.
18 488, codified at Cal. Health & Safety Code §§ 38501 *et seq.*, § 38501(c) ("California has long been a
19 national and international leader on energy conservation and environmental stewardship efforts,
20 including the areas of air quality protections, energy efficiency requirements, renewable energy
21 standards, natural resource conservation, and greenhouse gas emission standards for passenger vehicles.
22 The program established by this division will continue this tradition of environmental leadership by
23 placing California at the forefront of national and international efforts to reduce emissions of
24 greenhouse gases.") In 2006 the California Legislature passed, and Governor Schwarzenegger signed,
25 the Global Warming Solutions Act of 2006 (AB 32), which established a state-wide GHG emissions
26 cap for 2020 and a goal of reducing emissions to 80 percent below 1990 levels by 2050. *Id.* at § 38550.
27 A central element of the law is mandatory GHG reporting and development of a greenhouse gas
28 emissions inventory. *Id.* at § 38530. California's state law equivalent to NEPA – the California

1 Environmental Quality Act (“CEQA”) – requires state and local agencies to analyze a project’s carbon
2 emissions before granting approval. *See, e.g., Sierra Club v. City of Tulare*, No. 08-228122 (Tulare
3 Super. Ct., Mar. 16, 2009); *Environmental Council of Sacramento v. California Dept. of*
4 *Transportation*, No. 07-00967 (Sacramento Super. Ct., July 15, 2008); *Center for Biological Diversity*
5 *v. City of Desert Hot Springs*, No. RIC464585 (Riverside Super. Ct., Aug. 6, 2008).

6 California’s climate policy has specifically focused on transportation fuels. In 2005, California
7 sought a waiver of the Clean Air Act to impose stricter emission limits on vehicles with the specific
8 intent of reducing GHG emissions. *See* Letter to Stephen Johnson, Administrator, USEPA from
9 Catherine Witherspoon, Executive Officer, California Environmental Protection Agency, Air Resources
10 Board, (Dec. 21, 2005), Exh. 6. In July, 2009, EPA found that the effects of climate change in
11 California are “compelling and extraordinary,” and on this basis granted California’s request for a
12 waiver. Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and
13 Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg.
14 32744, 32746 (July 8, 2009). California is also the first state in the nation to enact a low-carbon fuel
15 standard. Magavern Dec. at ¶ 7. The State Department’s conclusion that a project designed to increase
16 U.S. reliance of fossil fuels is “in the national interest” without fully disclosing and evaluating the
17 associated climate impacts and without considering alternative sources of energy, implicates
18 California’s public policy and is therefore of particular concern to Californians. Magavern Decl. at ¶ 8.

19 The California Attorney General recently submitted comments to the Bureau on Land
20 Management (BLM) concerning an EIS for a program to allow tar sands leasing on 431,224 acres of
21 public land in Utah. *See* Comments on the Oil Shale and Tar Sands Leasing Draft Programmatic
22 Environmental Impact Statement (CA AG Tar Sands Leasing Comments), (April 21, 2008), Exh. 7.
23 The Attorney General expressed concern that the BLM failed to consider, evaluate, and discuss the
24 impacts of the leasing program on greenhouse gas emissions and global climate change in violation of
25 NEPA and the Energy Policy Act of 2005, and noted that because California is particularly vulnerable
26 to climate change impacts, this matter is of particular interest to the State. *Id.* at 1.

27 Similarly, the Sierra Club and its California chapters are very concerned about the development
28 of tar sands and tar sands infrastructure because it will have a tremendous effect on Sierra Club

1 members in California. Magavern Declaration, at ¶ 5. The increased production, refining, and burning
2 of these high-carbon fuels threatens to undermine California's many efforts to reduce transportation
3 emissions and otherwise fight climate change. *Id.*

4 Many thousands of Sierra Club members live, work and/or recreate in coastal areas of
5 California such as Northern California's Point Reyes National Seashore, Central California's Monterey
6 Bay National Marine Sanctuary, and the San Francisco Bay. *Id.* at ¶ 6. These members stand to be
7 directly affected by increased emissions of GHGs and the resulting effects of global climate change.
8 *Id.* In addition, several thousands of Sierra Club members live, work and/or recreate in the Sierra
9 Nevada and other mountains ranges of California. These members face direct impacts from global
10 climate change, including disappearing glaciers and a diminishing mountain snow pack that will
11 severely weaken the state's commercial ski industry. *Id.* Climate change is also expected to increase
12 the number and intensity of storms and wildfires, cause severe draught, and reduce agricultural
13 productivity in California, which impacts Sierra Club members across California. *Id.*

14 Because of these anticipated effects, California has been at the forefront of national efforts to
15 combat global climate change for decades, and the Sierra Club has been heavily involved in these
16 efforts. *Id.* at ¶ 7. In 2002, the Sierra Club was one of the sponsors of California's clean-cars law, AB
17 1493, which was the first law to set standards to reduce GHG emissions from motor vehicles, and
18 Sierra Club intervened to defend that law against litigation by the auto companies. *Id.* The Sierra Club
19 also strongly supported the California Global Warming Solutions Act of 2006, which established the
20 nation's first enforceable statewide cap on GHGs. *Id.* The Sierra Club's advocacy efforts led Governor
21 Schwarzenegger to sign an executive order in January 2007 directing the California Air Resources
22 Board to adopt the world's first low-carbon fuel standard, which aims to achieve a 10% reduction in
23 motor vehicle GHG emissions by 2020. *Id.* The Sierra Club worked with CARB on the
24 implementation of that order in April of 2009. *Id.* California has also been a leader in the development
25 of renewable energy technology and the growth of the renewable energy sector. *Id.*

26 California's strong commitment to fight global warming and the Sierra Club's efforts in support
27 of that would be undermined by the Alberta Clipper pipeline project. *Id.* at ¶ 8. The tar sands
28 industry's contribution to global climate change will be felt in California no matter where the tar sands

1 crude oil is refined or where the end-product is burned. *Id.* See also CA AG Tar Sands Leasing
 2 Comments, Exh. 7 at 1 (“The impacts of climate change are not limited to remote parts of the world –
 3 they are being felt in California today.”). The Sierra Club believes that the Alberta Clipper pipeline
 4 project will lock the United States into a dirty-energy infrastructure for decades to come and thwart the
 5 further development of renewable energy sources. *Id.* Because the State of California, as well as Sierra
 6 Club, has led the fight against climate change, it has a strong interest in the Alberta Clipper project and
 7 in ensuring that the Department of State fully evaluates and develops mitigation measures for the
 8 climate change impacts of this proposed project. *Id.*

9 In sum, the contention that this case has no ties to California has no merit. Sierra Club, the lead
 10 Plaintiff, is headquartered in California and has over 150,000 members state-wide, many of whom are
 11 concerned about the outcome of this case. Moreover, the State itself has a demonstrated policy interest
 12 in the issues raised by Plaintiffs and its resources will be directly affected by the issues of national
 13 importance that this case raises. In any case, Defendants’ inaccurate assertion that this dispute involves
 14 “just local” concerns does not rise to the level of the “exceptional circumstance” needed to overcome
 15 the presumption in favor of the Plaintiffs’ choice of forum. See *Gulf Oil Corp.*, 330 U.S. at 504. Given
 16 that this case addresses an issue of national significance that will have direct consequences for
 17 Californians and the deference afforded Plaintiffs’ choice of venue, see, e.g., *Florens Container*, 245 F.
 18 Supp. 2d at 1092; *Ellis*, 372 F. Supp. 2d at 538, this Court should deny Defendants’ request to transfer
 19 the case.⁷

20 **II. Venue In This Court is Proper and the Convenience of the Parties and Witnesses**
 21 **Favors Keeping this Case in this Forum.**

22 As alleged in the Complaint, venue lies in this Court because Plaintiff Sierra Club is
 23 incorporated in California and resides and maintains its headquarters in the County of San Francisco,
 24 and this action seeks relief against an agency of the United States and federal officials acting in their
 25 official capacities. See 28 U.S.C. § 1391(e); Complaint, ¶¶ 12-14. Although Defendants assert that this
 26 case could have been brought in other districts, they do not dispute that venue in this Court is proper.

27 ⁷ The cases relied on by the State Department at p. 13 of its motion are inapposite because the venue
 28 in those cases “involved no meaningful ties to the controversy.” As demonstrated above, this case
 has particularly strong connections to California and to Plaintiff Sierra Club’s members and

1 Defendants' argument that the "convenience of the parties" supports transfer primarily because
2 the State Department's permit was issued in Washington, D.C. and the Corps of Engineers permit was
3 issued in Minnesota is without merit. *See* Motion at 10-12. Federal agencies and officials such as
4 Defendants are regularly sued and defend actions in district courts all over the country, and Defendants
5 have failed to satisfy their burden of showing that another district would be more convenient for the
6 parties based on any of the relevant factors. *See Van Dusen v. Barrack*, 376 U.S. 612, 646 (1964)
7 ("Section 1404(a) provides for transfer to a more convenient forum, not to a forum likely to prove
8 equally convenient or inconvenient.").

9 As Defendants concede, *see* Motion at 7, this case will be reviewed under the Administrative
10 Procedure Act, 5 U.S.C. § 706, on the basis of an administrative record that Defendants will make
11 available to the parties and the Court. Because the administrative record is already available
12 electronically, it is no more or less convenient for this Court to examine the record than it would be for
13 any other district court. *See Ctr. For Biological Diversity v. Kempthorne*, 2007 WL 2023515, *5 (N.D.
14 Cal. July 12, 2007). Many of the factors often considered by the courts, such as the convenience of
15 witnesses, ease of access to evidence, availability of compulsory process and the burden on potential
16 jurors are, therefore, not relevant to the consideration of convenience in this case and provide no basis
17 for transfer of venue. *See Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 2006 WL 194507,
18 *3 (N.D. Cal. Jan. 24, 2006) ("[I]n environmental cases involving challenges to an administrative
19 record, many of the factors [weighing in favor of transfer] are not applicable, in part because there is no
20 evidentiary hearing or presentation of witnesses.").

21 Nor have Defendants established any particular hardship in litigating this suit in Plaintiffs'
22 chosen venue. Defendants admit that the need for discovery or witnesses is very unlikely. Motion at
23 11. Their vague speculation that, if such a need were to arise, "it would be much more convenient for
24 all of the parties if the case were litigated in Minnesota or the District of Columbia," Motion at 11, does
25 not meet Defendants' burden of specifically identifying any evidence or witnesses that would be
26 inconvenient to produce in Plaintiffs' chosen forum. *See Flint v. UGS Corp.*, No. C 07-4640, 2007 WL
27 4365481, at *3 (N.D. Cal. Dec. 12, 2007). Similarly, although Defendants speculate that it is "not

28 _____
activities in the state.

1 unusual for a judge to conduct a site visit of the area affected by the litigation,” *id.*, such a site visit is
2 less appropriate and therefore unlikely in APA cases, where the “focal point” for judicial review
3 “should be the administrative record already in existence, not some new record made initially in the
4 reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142, (1973).

5 Further, transfer of this case to another jurisdiction would inconvenience the Plaintiffs. *See*
6 *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001) (convenience of parties relevant
7 factor in considering motion to transfer); *Gen. Ret. Sys. of City of Detroit*, 2009 WL 2137094 at *5
8 (considering convenience to Plaintiffs). Defendants assert that the Northern District of California is
9 “not the most convenient forum in which to litigate this case for any of the parties,” Motion at 13, and
10 argue that Minnesota would be no less convenient forum for Plaintiffs. *Id.* at 11. However, this
11 ignores that Plaintiffs chose to file in this district because they believe it to be the most convenient and
12 appropriate forum due to the San Francisco location of the Sierra Club’s headquarters, its litigation
13 work, its media work and its global warming and tar sands campaigns. *See* Gallagher Declaration, at ¶¶
14 7-9. Having the case in this forum enables the relevant Sierra Club staff to attend the hearings. The
15 Sierra Club has 150,000 members in California, including thousands of members in the Bay area.
16 Many of these members are interested in these proceedings since tar sands development has
17 repercussions in California and nation-wide. Keeping this case in this Court would enable them to
18 attend the proceedings.

19 Having this case in this forum is economically most practical for Plaintiffs. Plaintiffs’ lead
20 counsel, Earthjustice, is located in Oakland. The convenience of plaintiffs’ counsel, while not
21 dispositive, is a relevant factor for consideration in the convenience of the parties. *See Ontel Products*
22 *Inc., v. Project Strategies Corp.*, 899 F. Supp. 1144, 1155 (S.D.N.Y. 1995). It would cost these non-
23 profit Plaintiffs considerably more to send them to Minnesota to litigate the case.

24 Moreover, transferring the case would undoubtedly inconvenience Plaintiffs by delaying the
25 proceedings and requiring them to start again in the new court. Plaintiffs’ suit is intended to ensure
26 compliance with NEPA’s purpose that full environmental review occur *before* a project results in
27 environmental harm. *See* 40 C.F.R. § 1506.1 (to ensure that “the objectives and procedures of NEPA
28 are achieved,” no action should be allowed before the Record of Decision is issued that would “have an

1 adverse environmental impact” or “limit the choice of reasonable alternatives”). In addition, they have
2 sought temporary and preliminary injunctive relief because such harm is *already* occurring. As
3 Plaintiffs asserted in their Motion for a TRO and Preliminary Injunction, Docket No. 8, Enbridge began
4 construction on the pipeline on August 21, 2009 in numerous locations, including Bemidji, Minnesota.
5 *See* Motion for TRO at 19; Decl. of Ami Aarlgard in Support of Motion for TRO, Docket No. 8, Exh.
6 20. Enbridge acknowledged that by September 8, 2009, it had already cleared trees and vegetation
7 from 80 miles of the pipeline right of way. Enbridge Opposition to Plaintiffs’ Motion for TRO, Docket
8 No. 19 at 2. The need for quick resolution of this case would be undermined by transfer and
9 reassignment, which would require re-filing the Complaint and Motion for Preliminary Injunction in a
10 new jurisdiction and would set back by a number of weeks a hearing and decision on Plaintiffs’ Motion
11 for Preliminary Injunction. At the rate at which Enbridge is proceeding with construction, irreparable
12 damage to forests, wetlands and waterways along the pipeline route could double before Plaintiffs
13 would be heard in the transferee court. Thus some of the harms that this action seeks to prevent would
14 have occurred during transfer.

15 In sum, Defendants have failed to make the “strong showing of inconvenience” necessary to
16 warrant upsetting Plaintiffs’ choice of forum. *Decker*, 805 F.2d at 843. Indeed, they have failed to
17 demonstrate that litigating this case in another district would be any more convenient than doing so in
18 this Court. Weighed against the significant prejudice to Plaintiffs that would result from transferring
19 venue, Defendants have not met their burden of showing that the convenience of the parties and
20 witnesses and the interest of justice “strongly favor” venue elsewhere and thus require transfer to
21 another district. *Florens Container*, 245 F. Supp. 2d at 1092; *see also Gherebi v. Bush*, 352 F.3d at
22 1303; *Silverlit Toys*, 2007 WL 521239, at *6.

23 CONCLUSION

24 For the reasons set forth above, Plaintiffs’ respectfully request that the Court deny
25 Defendants’ Motion to Transfer Venue and proceed to set an expedited briefing schedule on
26 Plaintiffs’ Motion for Preliminary Injunction.
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28

Respectfully submitted,

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/s/ Sarah H. Burt
SARAH H. BURT
J. MARTIN WAGNER
Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612
Tel.: (510) 550-6700
Fax: (510) 550-6740
mwagner@earthjustice.org
sburt@earthjustice.org

KEVIN REUTHER (*Pro Hac Vice* Applicant)
Minnesota Center for Environmental Advocacy
26 E. Exchange St., Suite 206
St. Paul, MN 55101
Tel.: (651) 223-5969
Fax: (651) 223-5967
kreuther@mncenter.org

ERIC E. HUBER (*Pro Hac Vice* Applicant)
DOUGLAS P. HAYES (*Pro Hac Vice* Applicant)
Sierra Club Environmental Law Program
1650 38th Street, Suite 102W
Boulder, Colorado 80301
Tel.: (303) 449-5595
Fax: (303) 449-6520
eric.huber@sierraclub.org
doug.hayes@sierraclub.org

*Counsel for Plaintiffs Sierra Club, Minnesota
Center for Environmental Advocacy, National Wildlife
Federation and Indigenous Environmental Network*