

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)

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR A 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

INTRODUCTION

The U.S. Department of State's (State Department) issuance of the Presidential Permit for the Alberta Clipper and Southern Lights pipelines was the final permitting action that allowed construction to begin on 384 miles of new pipeline, stretching from Canada, across North Dakota and Minnesota, to a terminal in Superior Wisconsin. Although Defendants argue that this entire action is shielded from judicial review because the permit was issued pursuant to an executive order, Plaintiffs bring justiciable claims against the State Department pursuant to NEPA, the APA and the U.S. Constitution.

Plaintiffs also challenge the U.S. Army Corps of Engineers (Corps) permits that allow the filling of wetlands and placement of permanent structures under waterbodies of the United States, and U.S. Forest Service (Forest Service) permits that allow the pipelines to be constructed through the Chippewa National Forest. These permits are issued pursuant to statutory authority, and therefore Defendants' jurisdictional claims do not apply.

Because Plaintiffs' claims are justiciable under 28 U.S.C. § 1331 and the APA, and because Plaintiffs have shown 1) a likelihood of success on the merits of their constitutional and NEPA claims against the agencies; 2) that construction of the pipelines is causing irreparable harm to Plaintiffs and the environment; and 3) that the balance of harms and public interest weigh in favor of temporarily stopping construction, Plaintiffs request that this Court issue a preliminary injunction to preserve the status quo pending a decision on the merits of Plaintiffs' claims.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Court Has Jurisdiction Over Plaintiffs' Claims.

1. The Court has jurisdiction over Plaintiffs' claims that the Corps and the Forest Service violated NEPA.

The federal question statute, 28 U.S.C. § 1331, and the Administrative Procedure Act, 5

U.S.C. §§ 701-706, empower the Court to decide Plaintiffs' NEPA claims against the Corps and the Forest Service. Plaintiffs' claims that the Corps and the Forest Service have violated the NEPA present questions of federal law that this Court has jurisdiction to review under 28 U.S.C. § 1331. *Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001). The APA waives the government's sovereign immunity and provides a private cause of action for challenges to final agency action that violates NEPA. *Cent. S. Dakota Coop. Grazing Dist. v. USDA*, 266 F.3d 889, 894 (8th Cir. 2001).

The Corps has regulatory authority over the Alberta Clipper and Southern Lights projects pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Act, 33 U.S.C. § 401. The Forest Service has regulatory authority over the Alberta Clipper and Southern Lights pipelines pursuant to section 28 of the Mineral Leasing Act, 30 U.S.C. § 185, and the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.* Because both the Corps and the Forest Service acted directly pursuant to statutory mandates, the jurisdictional question Defendants raise concerning the availability of APA review for presidential actions is not relevant to Plaintiffs' claims against the Corps and the Forest Service.

Even if the Court were to hold that it does not have jurisdiction over Plaintiffs' NEPA claims against the State Department, the Court should evaluate Plaintiffs' motion for an injunction against the Corps and Forest Service independently and grant such an injunction because Plaintiffs have shown likelihood of success, harm, and that the balance of equities weighs in favor of the injunction.

2. The Court has jurisdiction over Plaintiffs' claim that the Presidential Permit is Unconstitutional and *Ultra Vires*.

Plaintiffs state a cause of action against the State Department for having issued the Presidential Permit without any constitutional authority to do so. Amend. Comp., Doc. No. 57,

¶¶ 6, 72-76. In their complaint, Plaintiffs assert that the Constitution does not give the President authority to issue such a permit for the pipelines and, to the extent that Congress has delegated authority over pipelines to the Executive Branch, it was to other agencies. *Id.* On those grounds, the State Department's action was *ultra vires*.

Because these are claims about the constitutionality of the permit, not its consistency with a federal statute, this Court has federal question jurisdiction over them pursuant to 28 U.S.C. § 1331 and the APA, 5 U.S.C. § 706(2)(B) (“The reviewing court shall ... hold unlawful and set aside agency action ... found to be ... contrary to constitutional right, power, privilege or immunity.”). *See, e.g., McLain v. Anderson Corp.*, 567 F.3d 956, 963 (8th Cir. 2009) (federal question jurisdiction extends to actions arising under the Constitution). Even if Defendants were correct that Executive Order 13,337 gave the agency some discretion in the granting of the Permit, such discretion does not foreclose judicial review of whether the agency has “violate[d] a constitutional, statutory or regulatory command.” *Angleton v. Pierce*, 574 F. Supp. 719, 729-30 (D.N.J. 1983), *aff'd* 734 F.2d 3, *cert. denied* 469 U.S. 880. This principle was recognized in *Natural Res. Def. Council, Inc. v. U.S. Dept. of State*, 2009 WL 3153702 (D.D.C. Sept. 30, 2009), where the court noted that had the plaintiffs brought a constitutional claim or contended the action was *ultra vires*, that claim would have been reviewable. *Id.* at *6 n.7.

3. The Court has jurisdiction over Plaintiffs' claims that the State Department violated NEPA.¹

Plaintiffs' claims that the Department of State has violated a federal statute present questions of federal law that this Court has jurisdiction to review under 28 U.S.C. § 1331. The APA waives the government's sovereign immunity and provides a private cause of action for

¹ This argument will be set forth in greater detail in Plaintiffs' Opposition to Defendants' Motion to Dismiss.

challenges to final agency action that violates NEPA. *Cent. S. Dakota Coop. Grazing Dist. v. USDA*, 266 F.3d 889, 894 (8th Cir. 2001).

(a) *The State Department's issuance of the Presidential Permit was final agency action for purposes of APA review, not "presidential action."*

Defendants' argument that the State Department's issuance of a Presidential Permit for the Alberta Clipper project is "presidential" rather than "final agency action," and therefore not subject to review, is contrary to the plain meaning of the APA. Agency action is presumptively reviewable if the agency takes the final step that subjects the parties to the "legal consequences" of the challenged action. If the President takes the final step, the courts acknowledge that the President's action is not reviewable under the APA. But there is no support for the assertion that acting pursuant to the President's request changes an agency's action into something unreviewable.

According to the APA the definition of an agency includes "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia." 5 U.S.C. § 551(1). "[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). There is no exemption for authorities of the Government of the United States acting pursuant to a presidential directive.

The State Department is an "agency" for APA purposes. *See Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (State Department failure to initiate consultation under Endangered Species Act is final agency action subject to judicial review under APA); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1352-53 (D.C. Cir. 1997); 5 U.S.C. § 701(b)(1).

It is Congress's clearly expressed intent that all final rules and licenses, or the equivalent thereof, issued by an "authority of the Government" be subject to judicial review. *Id.* § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (APA "embodies the basic presumption of judicial review to one suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"). There is no exemption for actions completed by an agency pursuant to an executive order. As the Supreme Court has made clear, "the cause of action for review of [final agency] action is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

The point at which an action is reviewable under the APA is when the action is "final" in the sense that it (1) "mark[s] the consummation of the ... decisionmaking process" and (2) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations and citations omitted). In this case, consummation of the decisionmaking process and the point from which rights and obligations flowed was the State Department's issuance of a Presidential Permit to Enbridge, which enabled Enbridge to begin construction. Executive Order 13,337 does not contemplate the President's involvement in the permitting process except when one of the federal officials the State Department is required to consult raises an objection and requests that the State Department refer the permit to the President for consideration and approval. *See* Exec. Order No. 13,337, 69 Fed. Reg. at 25,300 (§ 1(i)). Here, the State Department did not refer Enbridge's Presidential Permit application to the President. Rather, the Permit simply took effect, *without further review*, after the State Department

issued its “national interest” finding. Notice of Issuance of a Presidential Permit, 74 Fed. Reg. 43212 (Aug. 26, 2009). Because the State Department, not the President, took the final action on Enbridge’s Permit, Defendants’ speculation that the President *could* have taken the final action on some other Permit is irrelevant.² The final action is thus the State Department’s, and under the plain meaning of the APA, the State Department’s issuance of the Presidential Permit is reviewable.³

This plain language interpretation is consistent with Supreme Court precedent holding that agency action is presumptively reviewable under the APA if the agency, as opposed to the President, takes the final step that subjects the parties to the “legal consequences” of the challenged action. *See Dalton v. Specter*, 511 U.S. 462, 469 (1994) (Secretary’s action in submitting a census report to the President was “not final and therefore not subject to review”); *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (agency’s presentation of a report that had “no direct consequences,” and was “more like a tentative recommendation [to the President] than a final and binding determination” was therefore not reviewable); *Japan Whaling Assn.*, 478 U.S. at 231 n.4 (Secretary of Commerce’s certification to the President that another country was endangering fisheries was final agency action and therefore reviewable under the APA).

Defendants cite no Supreme Court or circuit court authority for the proposition that a final action taken by an agency pursuant to an executive order is not a reviewable final agency action, but is instead a “Presidential action.” Defendants rely entirely on two recent district court

² The fact that the President could hypothetically rescind Executive Order 13,337 similarly cannot change this agency action into something else any more than the possibility that Congress could rescind a statute renders an agency action pursuant to such statute not final agency action.

³ At least one other court has exercised jurisdiction over challenges to the State Department’s issuance of a Presidential Permit. *See, e.g. Border Power Plant Working Group v. Dep’t of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (State Department issuance of a presidential permit for transborder electric lines violated NEPA).

decisions, *Natural Res. Def. Council, Inc. v. U.S. Dept. of State* (“NRDC”), 2009 WL 3153702 (D.D.C. Sept. 30, 2009) and *Sisseton-Wahpeton Oyate v. U.S. Dep’t of State*, 2009 WL 3153655 (D.S.D. Sept. 29, 2009), which address the State Department’s issuance of a Presidential Permit for a similar cross-border pipeline.⁴ Def. Opp., Doc. No. 82 at 9-10. These two cases incorrectly hold that “an agency action pursuant to a delegation of the President’s inherent constitutional authority over foreign affairs is tantamount to an action by the President himself.” *NRDC*, 2009 WL 3153702 at *7; *Sisseton-Wahpeton*, 2009 WL 3153655 at *12.

The district court in *NRDC* dismisses *Franklin* and *Dalton* as not directly on point because they address the finality of the action rather than the characterization of the action as agency or presidential action. However, those cases make clear that, had the agencies’ actions been final, the actions would have been reviewable under the APA. See *Dalton*, 511 U.S. at 469; *Franklin*, 505 U.S. at 798. It was only because the final actions in *Franklin* and *Dalton* were taken directly by the President that the Supreme Court held those actions to be presidential and therefore not subject to the APA. Where, as here, the final action is taken by the agency, the APA requires judicial review.

(b) The APA’s narrow exceptions to judicial review do not apply.

NRDC and *Sisseton-Wahpeton* have created an exemption to APA review unsupported by the APA’s plain meaning by concluding that the State Department’s issuance of the Presidential Permit is unreviewable because it is based on the President’s delegation of his “unfettered discretion over the permitting process.” *NRDC*, 2009 WL 3153702 at *11; *Sisseton-Wahpeton*, 2009 WL 3153655 at *7. However, whether an agency’s discretion over an action removes that action from review should be determined through the application of established interpretations of the APA provision exempting actions “committed to the agency’s discretion by law,” 5 U.S.C. §

⁴ Intervenor-Defendant cites a number of cases for the proposition that actions of the President are not reviewable under the APA. Enbridge Opp., Doc No. 78 at 11-12. That proposition is not remarkable, however, and those cases say nothing about whether agency action taken pursuant to an executive order is “presidential action.”

701(a)(2), rather than through a tortured interpretation of the definition of agency action.

As described above, the State Department's issuance of the Presidential Permit is a final agency action falling within the purview of the APA. It is not one of the rare final agency actions "committed to agency discretion by law" that the APA exempts from judicial review. *Abbott Labs.*, 387 U.S. at 140-41 (The APA's "generous review provisions must be given a hospitable interpretation."). Under the APA, the only actions exempt from review as discretionary are those with respect to which the relevant "statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Here, Plaintiffs are challenging the State Department's compliance with the terms of NEPA and its implementing regulations. Amend. Comp., ¶¶ 4, 77-111. NEPA requires all agencies of the federal government to prepare a "detailed statement" that discusses the environmental impacts of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The State Department's issuance of the Alberta Clipper permit is a "major federal action." Notice of Intent to Prepare EIS, 73 Fed. Reg. 16920 (March 31, 2008) ("the issuance of the Presidential Permit to [Enbridge] for the Alberta Clipper Project would constitute a major federal action that may have a significant impact upon the environment within the meaning of the National Environmental Policy Act"). The "standards" this Court must apply to determine compliance with this requirement are those set forth in NEPA, the CEQ regulations, and ample case law, all of which recognize that NEPA applies to State Department actions like the one Plaintiffs challenge here. Thus the State Department's compliance with NEPA is not committed to the agency's discretion by law.⁵

(c) *NRDC and Sisseton-Wahpeton are distinguishable and were wrongly decided.*

⁵ Defendants argue that the State Department has discretion over the permitting process pursuant to the Executive Order. However, Plaintiffs are not seeking to enforce or challenge the State Department's compliance with the Executive Order. Rather, Plaintiffs challenge the State Department's compliance with NEPA, which provides sufficient standards for judicial review.

Defendants overlook key differences between the claims brought in the *NRDC* and *Sisseton-Wahpeton* cases and the claims at issue here when they assert that “there is no legal difference between the Presidential Permit issued for the Keystone Pipeline and the one at issue in this case.” Def. Opp. at 10.

First, the plaintiffs in these cases did not raise, and neither *NRDC* nor *Sisseton-Wahpeton* considers, that the State Department’s action was unconstitutional because regulation of international tar sands crude oil pipelines falls within the exclusive and plenary authority of Congress over matters of foreign commerce pursuant to Article I, Section 8, clause 3 of the United States Constitution, or that Congress has not delegated that authority to the Executive Branch or acquiesced to the President’s action in this case. Accordingly, the posture of this lawsuit is significantly different from the D.C. and South Dakota cases, and they do not control here.

Second, *NRDC* and *Sisseton-Wahpeton* are premised, albeit in dicta, on the assumption that the President has unreviewable authority to issue the Presidential Permit under his “inherent foreign affairs” power. *NRDC*, 2009 WL 3153702 at *15; *Sisseton-Wahpeton*, 2009 WL 3153655 at *7. For the reasons set forth in Section ID below, this assumption is erroneous.

Third, because neither case involved claims against other permitting agencies, they provide no basis for dismissing Plaintiffs’ claims against the Corps and the Forest Service.

B. Plaintiffs Are Likely to Prevail on their Claims that the State Department’s Issuance of the Alberta Clipper Permit Violates NEPA.

For the reasons set for in their opening brief, Plaintiffs are likely to prevail on their claims that the State Department’s EIS violates NEPA and the implementing regulations because it: a) improperly restricted the scope of the 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.

1. The EIS failed to consider important direct, indirect and cumulative effects.

The State Department's EIS does not adequately examine important direct, indirect and cumulative effects of the Alberta Clipper. Although Defendants assert that the EIS addresses the impacts of the Southern Lights Diluent pipeline, Def. Opp. at 16-17, the EIS fails to identify the chemicals that 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. Moreover, Defendants' argument that the EIS considers the cumulative impacts of the diluent pipeline refers only to the cumulative impacts of construction and is silent regarding the cumulative impacts of operation of the pipeline, including the cumulative impacts of refining tar sands crude and producing additional diluent to be delivered to the tar sands production areas so that the tar sands crude can be transported by the Alberta Clipper pipeline.

Similarly, Defendants' argument that the EIS considered the cumulative effects of refining and consuming tar sands oil in the United States addresses only "refineries that would receive oil from the Alberta Clipper Pipeline, potential upgrades to those refineries to process heavy crude oil from Canadian tar sands, and new refineries that are being constructed to process heavy crude." Def. Opp. at 19. Not only is the analysis that Defendants point to in the EIS too cursory to satisfy the requirements of NEPA, *see Sierra Club v. Bosworth*, 352 F.Supp.2d 909, 926 (D.Minn. 2005), it fails altogether to address the cumulative effects of refining and consumption in light of the other similar projects in the region, including the Keystone and proposed Keystone XL pipelines, which collectively will result in over 2 million additional barrels of tar sands crude oil being imported, refined and burned in the United States every day.

Amend. Comp., ¶ 88.

Finally, Defendants argue that they need not consider the impacts of abandoning the pipeline because abandonment “will likely not occur for 50 years” and plans for abandonment “will be reviewed by the appropriate agencies prior to the abandonment of the pipeline and related facilities.” Def. Opp. at 24. However, because such pipelines have a finite operational life-span, *see* FEIS, Doc. No. 98, at 2-51, abandonment of the pipeline is inevitable, unavoidable and foreseeable. Thus abandonment is directly and inextricably connected construction and operation of the project. The impacts of abandonment are relevant to the agency’s consideration of the significance of the overall environmental impact of the project. Separation of this element of the project is unreasonable and contrary to NEPA. *See*, 40 C.F.R. §§ 1502.1, 1508.8(b); 1508.20.

2. The State Department fails to address Plaintiffs’ arguments concerning the Project’s purpose and need.

Although Defendants have discretion to define the purpose and need of the proposed action, Def. Opp. at 24, they do not have the discretion to rely on erroneous factual statements or to “define the project’s purpose in terms so unreasonably narrow as to make the FEIS a foreordained formality.” *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (quotations omitted).

Despite the fact that there is no evidence of increased demand for “unconventional” crude that would support Defendants’ rejection of the no-action alternative, Defendants continue to make the false assertion that the federal Energy Information Administration (“EIA”) expects U.S. demand for “unconventional” crude oil to increase from 1.5 million barrels per day to 4.3 million barrels per day by 2030. *See* Def. Opp. at 25 (citing FEIS, p. 1-4). Defendants fail to address the heart of Plaintiffs’ argument: that the EIA has made no such projection.

The EIA says that Canadian (and Mexican) *producers* expect to increase *production* of unconventional crude from 1.5 to 4.3 million barrels per day, not that U.S. demand for unconventional crude is expected to increase. Plaintiffs highlighted this error in their comments to the FEIS, Doc. No. 110, at 5-6, but the State Department continues to repeat the error.

Moreover, Plaintiffs are not “cherry-picking” data from the EIA to support their argument. *See* Def. Opp. at 25. Rather, they have supplied detailed analyses using the federal government’s own data to refute the assumption underlying the State Department’s rejection of the no-action alternative, which is that increased demand for Canadian crude necessitates construction of the Alberta Clipper pipeline. Pl. Comments on FEIS, Doc. No. 110, at 4-8. In comments that included supporting attachments from the EIA studies, Plaintiffs showed that the 2009 forecasts from EIA plainly project that, over the next two decades, (1) there will be *no increase* in U.S. demand for crude oil, (2) overall imports of crude to the U.S. will *decline sharply*, and (3) *imports from Canada also decline*. *Id.* at 4.

The fact that DOS continues to make the same basic error on a significant fact underlying the entire purpose and need for the Alberta Clipper pipeline shows not only the inadequacy of its analysis but also its failure to meaningfully review and respond to Plaintiffs’ comments. An EIS “must ... explain fully its course of inquiry, analysis and reasoning.” *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976). To “ensure[] the integrity of the process,” it must provide “reasoned analysis in response to conflicting data or opinions.” *Id.* at 1300. Agencies are required to respond to comments. 40 C.F.R. § 1503.4. Here, the State Department appears not to have even read Plaintiffs’ comments, let alone responded with a “reasoned analysis.”

Moreover, this is not a case where the data error or absence of data is “inconsequential.”

See Mid-States Coal. for Progress v. Surface Transp. Bd. (“Midstates”), 345 F.3d 520, 538 (8th Cir. 2003). The State Department’s error and its failure to identify *any* reliable source demonstrating a projected need for increased imports of crude from Canada are critical flaws. Arguably an agency would look differently upon a proposal for increased crude import infrastructure from Canada if it thought U.S. demand would require an additional 3 million barrels per day of Canadian crude than if it understood U.S. demand for Canadian crude to be declining. The State Department has not taken the “hard look” at this issue that NEPA requires.

C. Plaintiffs Are Likely to Prevail on Their Claims that the Corps and Forest Service Violated NEPA.

1. Plaintiffs have stated claims against the Corps and Forest Service.

Defendants incorrectly argue that Plaintiffs “failed to allege or argue any particular NEPA violations” by the Corps or Forest Service. Def. Opp. at 2, 9, 26-28. “Federal Rules of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)). Plaintiffs’ meet this standard. Plaintiffs alleged NEPA claims against both agencies. *See* Amend. Comp., ¶¶ 30, 43-44, 80-82, 90-96, 104-105. Both Plaintiffs’ Amended Complaint and their Motion for Preliminary Injunction: a) identified both the Corps’s and Forest Service’s actions; b) stated that both agencies were required to perform a NEPA analysis; and c) asserted that neither agency completed an independent EIS but instead relied on the State Department’s deficient FEIS. *See id.*; Pl. Mem. In Support of Motion for Preliminary Injunction (“Pl. Mem.”), Doc. No. 93, at 2. Plaintiffs’ opening brief established their likelihood of success on these deficiencies, Pl. Mem. at 6-16, and those arguments are discussed further herein. Accordingly, Plaintiffs requested an injunction against both the Corps,

and against the Forest Service. Pl. Mot. for PI, Doc. No. 91, at 2; Pl. Mot. to Amend Mot. for PI, Doc. No. 128, at 2.

2. Defendants Corps and Forest Service have independent obligations to comply with NEPA prior to issuing permits for both the Alberta Clipper and Southern Lights Diluent Pipelines.

Any “major federal action significantly affecting the environment” triggers NEPA. 42 U.S.C. 4332. Defendants Corps and Forest Service do not contest that the permits they have issued to Enbridge are major federal actions requiring compliance with NEPA. Nor is there any dispute that the Corps and Forest Service were “cooperating agencies” in development of the FEIS and relied on the State Department’s FEIS to fulfill their requirements under NEPA. *See* Corps ROD, Doc 15-1, at 30 (“The Corps prepared this ROD for the Project based on information presented in [the State Department] NEPA documents”); FS ROD, Doc. No.108, at 2 (Forest Service’s environmental analysis contained in Appendix U, Doc. No. 83-12, of the State Department’s FEIS).

“A cooperating agency may adopt the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.” 40 C.F.R. § 1506.3(c). However, the Corps and Forest Service may not “avoid[] the Act’s requirements by simply relying on another agency’s conclusions about a federal action’s impact on the environment.” *See North Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125, 1129-30 (4th Cir. 1992). *See also* CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,265 (1983) (“[T]he cooperating agency must independently review the EIS and determine that its own NEPA procedures have been satisfied.”); *National Audubon Soc. v. Butler*, 160 F. Supp.2d 1180, 1190 (W.D. Wash. 2001) (Fish and Wildlife Service violated NEPA by relying on Corps’ insufficient environmental

analysis). Accordingly, in a case like this in which an agency adopts a defective EIS, that agency must independently cure the defects prior to taking final action. *See, e.g., Ark. Wildlife Fed. v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1101 (8th Cir.2005) (final EA is deficient if it does not include a cumulative impact analysis or is not tiered⁶ to an EIS that contains such an analysis); *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (tiering does not release agency from obligation to comply with NEPA's EIS requirements).

Because the Corps and Forest Service were required to issue permits for both the Alberta Clipper and the Southern Lights Diluent pipelines they are required to prepare an EIS discussing fully the environmental impacts of both the Alberta Clipper and the Diluent pipelines. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. The Department of State admits that it declined to expand the scope of its EIS to include the diluent pipeline because, it says, "the Diluent Pipeline does not cross an international border and therefore did not require the issuance of a Presidential Permit by the State Department." Def. Opp., at 14. As a result, the Corps and the Forest Service issued permits for a pipeline for which there was no EIS, violating their NEPA obligations.

Plaintiffs made clear in repeated comments on the EIS that the Southern Lights Diluent Pipeline must be included, not just because it is a connected action, but because other federal agencies were permitting the proposed line:

Here, many of the cooperating agencies have jurisdiction over and an interest in the diluent and LSr pipelines in addition to the Alberta Clipper tar sands crude pipeline. Indeed, the Army Corps, for example, is considering Section 404 permits for Enbridge's work in wetlands on both the Alberta Clipper and the Southern Lights diluent pipelines. This DEIS must address both pipelines, not just because they are clearly connected actions, but because the environmental

⁶ Pursuant to the CEQ's regulations, "tiering" refers to "the coverage of general matters in broader environmental impact statements ... with subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28.

impacts of both lines must be evaluated based on the jurisdiction and permitting requirements of cooperating agencies.

January 30, 2009 Plaintiff's Comments on DEIS, attached hereto as Exh. 1, at 16-17. Because the State Department's FEIS did not review the diluent pipeline, the Corps and Forest Service could not rely on that FEIS to satisfy their NEPA obligations.

3. The environmental impacts of the Southern Lights Diluent Pipeline have not been disclosed or evaluated.

The State Department's FEIS and Appendices do not adequately evaluate the environmental impacts of the Southern Lights Diluent pipeline. Although the FEIS discusses some of the environmental impacts from *construction* of the Southern Lights diluent pipeline, to date no agency has gathered or analyzed information about the potential significant environmental effects, direct and indirect, of *operating* the 180,000 barrel-per-day diluent line.

There are numerous flaws in the FIES's handling of the Southern Lights diluent pipeline, but just two examples demonstrate that Plaintiffs will prevail on their claims against the Corps and Forest Service.

(a) The FEIS fails to identify the chemicals in "diluent" and contains no evaluation of the environmental consequences of diluent leaks and spills.

While NEPA may not prevent "unwise" agency actions, it clearly prohibits "uninformed" decisions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989).

Nevertheless, the Defendant agencies have completely failed to disclose or evaluate a major element of the project that has significant environmental consequences – they fail to identify and explain the chemicals contained in the "diluent" that will be pumped through the Southern Lights Pipeline. Instead, the FEIS defines diluent generically as "light hydrocarbons" and provides no assessment whatsoever of how operational leaks, spills and ruptures in the diluent pipeline will affect Minnesota's water-rich environment. The short section devoted to the environmental

consequences of leaks and spills is focused exclusively on crude oil. FEIS, Doc. No. 102, at 4-352 to 4-372.

This failure is important because, as explained in Plaintiffs' opening brief, diluent has different chemical and physical properties than heavy crude oil. Pl. Mem. at 15 n. 4; May Declaration, Doc. No. 104, ¶¶ 32 – 35. For example, it is more volatile and more highly flammable than crude oil. *Id.* Therefore the likelihood that it will leak is not the same, and when there are leaks and spills from the diluent pipeline, the diluent will behave differently in the environment and result in different impacts. *Id.*

Although the Forest Service Appendix purports to evaluate the Southern Lights diluent line as well as the Alberta Clipper, it, too, fails to identify what chemicals make up "diluent" or to evaluate any environmental impacts from leaks, spills, or ruptures in the diluent pipeline. *See* Doc. No. 83-12, at 3-2 to 3-8 (discussing ruptures solely in terms of crude oil). Plaintiffs have expressed particular concern about this deficit because the new diluent pipeline will connect to an existing line, buried in the 1950's, the integrity of which is not disclosed or evaluated anywhere in the FEIS.

Other commenters also pointed out this shortcoming of the FEIS. For example, the Wisconsin Department of Natural Resources wrote:

Another important issue not evaluated in the DEIS is that of potential spills of diluent. The DEIS deals with the potential for petroleum spills from the proposed Alberta Clipper pipeline, but not diluent spills from the proposed Southern Lights pipeline. It is unclear in the document as to what the properties of diluent are, and what its likely effects on the environment may be should a spill occur. We assume that, due to its lower viscosity, diluent would be much more mobile in the environment than is the petroleum. This deficit should be corrected.

FEIS, App. A, attached hereto as Exh. 2, at A-36.

The State Department ignored this deficit, stating flatly that the FEIS "does not address

operational aspects” of the diluent pipeline. *Id.* As a result, no federal agency has yet taken the “hard look” NEPA requires at these “operational aspects,” which would include the impacts on water quality, public health, wildlife and habitat from diluent leaks and spills.

This failure violates NEPA’s requirement that the agency include in its EIS a “full and fair discussion” of the significance of all “direct,” “indirect,” and “cumulative” effects of the action. *See* 40 C.F.R. §§ 1502.1, 1502.16(a)-(b), 1508.25(c); *see also*, *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 927 (D. Minn. 2005). In *Sierra Club Northstar Chapter v. Kimbell*, 2008 WL 4287424 (D. Minn. Sept. 15, 2008), Judge Montgomery found an FEIS inadequate because the Forest Service failed to disclose the potential impacts of a timber sale on water quality in the Boundary Waters, even though the area of the sale was not within the park. *Id.* at *5. This failure caused the FEIS to fall short of “fully fulfilling its purpose,” which is “to inform and assure the public that the environmental impacts of a proposed action have been fully considered.” *Id.*

The federal agencies’ lack of disclosure is even more egregious in the present case, as they have failed to tell the public what chemicals will be transported in the diluent pipeline, a pipeline that: crosses three principle aquifers providing drinking water to Minnesotans, FEIS at 4-28; comes within 200 feet of 27 domestic wells, *id.* at 4-29; crosses 177 surface waters, including 6 designated trout streams and multiple crossings of the Mississippi as well as Pike Bay on Cass Lake, *id.* at 4-35; and runs near residences, schools, highways and populated areas. *See, e.g.*, Aalgaard Dec., Doc. No. 119, ¶¶ 2, 8; Steva Dec., Doc. No. 120, ¶¶ 13-15. Defendants have further failed to disclose how these chemicals will react when they leak and spill, or what impacts they may have on water, wildlife, habitat, and human health. Defendants have clearly not taken the “hard look” required by NEPA, and the EIS fails to fully inform the public of all

the relevant environmental impacts.

(b) Contrary to the Eighth Circuit's holding in Mid-States, the FEIS fails to evaluate the indirect impacts from the diluent pipeline.

The FEIS contains no discussion of the indirect effects of delivering an additional 180,000 barrels of diluent per day to Canada, a project whose purpose is to facilitate increased exploitation of the tar resource and transportation of heavy tar sands crude. Again, even if DOS was somehow justified in failing to evaluate the diluent pipeline (which Plaintiffs contest), the Corps and Forest Service were not.

An EIS must evaluate all direct and reasonably foreseeable *indirect* environmental impacts resulting from a project. 40 CFR § 1508.8 (“Effects” include “indirect effects” which are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” such as “growth inducing effects.”); *see also Mid-States*, 345 F.3d at 549 (regulations leave “little doubt” that a “reasonably foreseeable” environmental effect must be evaluated).

An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Mid-States*, 345 F.3d at 549 (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)). Here, it is “reasonably foreseeable” that the delivery of 180,000 barrels of diluent per day will induce additional growth in tar sands mining and facilitate additional transport of heavy tar sands crude to refineries throughout the United States. Indeed, this is the purpose of the diluent pipeline project. *See* AEO Table 127, Doc. No. 109; FEIS App. U, Doc. No. 83-12, at 1-3. Increases in air pollution, and, in particular, increased GHG emissions, are an ineluctable result. Amend. Comp., ¶¶ 49-60. Yet the FEIS is completely silent on such effects because DOS elected not evaluate “operational” effects of the diluent pipeline.

In *Mid-States*, 345 F.3d 520, the Eighth Circuit addressed a similarly flawed EIS, faulting the Surface Transportation Board for failing to disclose and evaluate the reasonably foreseeable additional air pollution that would result as a consequence of upgrading a railroad to deliver additional coal to Midwest power plants. *Id.* at 548-50. The court noted that “it is reasonably foreseeable – indeed, it is almost certainly true – that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.” *Id.* at 549.⁷ Moreover, even if the *extent* of the long-term consequences was unknown, the court said, “when the *nature* of the effect is reasonably foreseeable..., we think that the agency may not simply ignore the effect.” *Id.* The same is true here. A new daily supply of 180,000 barrels of diluent is intended to, and certainly will, facilitate the increased extraction and export of heavy crude from the Canadian tar sands. Refining and burning that additional heavy crude will have adverse environmental effects. Pl. Mem. at 21-22. The Corps and Forest Service must disclose and evaluate these impacts before permitting the Southern Lights Diluent Pipeline.

In *Mid-States*, the Eighth Circuit also found it significant that the agency had earlier stated that it would consider the air impacts associated with increasing the availability and use of Powder River Basin coal, yet the EIS “failed to deliver on this promise.” 345 F.3d at 550. Similarly here, the State Department explicitly stated in its FONSI for the LSr pipeline that it would evaluate the environmental impacts from the Southern Lights diluent pipeline in its EIS,

⁷ Plaintiffs reassert the arguments fully set forth in their opening brief that the State Department’s FEIS does not meet the NEPA requirements established in *Mid-States*. Pl. Mem. at 11. The FEIS does not examine the full suite of foreseeable environmental effects from the Alberta Clipper project, such as the resulting increases in tar sands extraction operations, the use of the tar sands in the United States, and the effect of this on developing alternative energy sources. *See, e.g., FEIS* at 4-379 to 382, 388-390, 400-403. The FEIS fails to recognize or analyze the fact that increased access to tar sands oil will make it a more attractive option to future entrants into the utilities market when compared with other potential fuel sources, such as nuclear power, solar power, or natural gas, and affect the nation’s long-term demand for oil. *Mid-States* held that those factors must be considered. 345 F.3d at 549.

but failed to follow through. *See* Pl. Mem. at 4-5.

Defendants' reliance on *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), to dismiss the *Mid-States* holding is misplaced. *Public Citizen* dealt with a federal agency that had no authority to prevent or limit the action in question, and therefore no had obligation to study its environmental impacts. *See* 514 U.S. at 768 (agency not required to study emissions from cross-border operation of Mexican trucks where it had no authority to prevent such operation). In *Mid-States*, the Surface Transportation Board had authority to deny the project proponent's request for new and upgraded rail lines. Likewise, in this case Defendants have the ability and authority to prevent the construction and operation of the proposed pipelines. As a result, an EIS that describes in full the indirect impacts of the pipelines could and should influence Defendants' decision-making.

D. Plaintiffs are Likely to Prevail on their Claim that the Presidential Permit is Unconstitutional and *Ultra Vires*.

1. Defendants concede that they lack constitutional or statutory authority to regulate the Alberta Clipper Pipeline.

Plaintiffs assert that the Alberta Clipper Presidential Permit is unconstitutional because the State Department lacks constitutional authority to regulate the Alberta Clipper pipeline. Amend. Comp., at ¶¶ 6, 72-76 and Sixth Claim for Relief.

In response, the State Department admits that “*neither the President nor the State Department has claimed any authority to regulate pipelines of any kind.*” Def. Opp. at 10 (emphasis added).

That admission is fatal to Defendants' case because the Presidential Permit does regulate the Alberta Clipper pipeline. The permit regulates the construction, operation and maintenance of the entire 326.9 miles of the pipeline across three states. In Article 13 of the permit, the State

Department requires the permittee to take “all appropriate measures and mitigate adverse environmental impacts,” including those in Enbridge’s “Environmental Mitigation Plan (EMP) and other mitigation and control plans found in the Final Environmental Impact Statement (FEIS) dated June 5, 2009, and the Programmatic Agreement dated August 3, 2009, *both of which are appended to and made part of this permit.*” *Id.* at Art. 13 (emphasis added); *see also* FEIS, App. C. Those apply to the full length of the length of the pipeline, incorporating 14 different controls plans for North Dakota, Minnesota and Wisconsin.⁸ In addition, the Permit specifies that it applies to the “construction, operation, and maintenance of the ‘United States facilities,’” defined as “those parts of the facilities located in the United States.” Pres. Permit, Doc. No. 83-2 at 1. Hence this Permit regulates the entire pipeline within the United States, not

⁸ By incorporating the EMP, the permit applies to the full length of the pipeline and establishes the rights-of-way and extra workspaces, FEIS, App. C., at 4; regulates the use of hazardous materials and establishes a Spill Plan, *id.* at 15; specifies stream and river crossing methods, *id.* at 18-22; implements erosion control measures, *id.* at 22; and sets out procedures to minimize disturbance to wetlands, *id.* at 25-29. The Permit incorporates at least 14 “control plans,” which, *inter alia*, require Enbridge to: a) treat areas for weeds along the construction route in North Dakota and Minnesota, *id.*, App. H; b) evaluate avoidance alternatives and impact minimization options on construction in Wisconsin, *id.*, App. T (Pokegama-Carnegie Plans); c) avoid, mitigate or compensate for agricultural impacts in Minnesota (Agricultural Mitigation Plan, *id.* App. F); d) implement revegetation procedures in Minnesota and North Dakota, *id.*, App. K (Revegetation and Restoration Monitoring Plan); e) identify blasting procedures for the entire pipeline route, *id.*, App. L (Blasting Plan); and f) implement planning, prevention and control measures to minimize impacts resulting from fuel spills, *id.*, App. E (Spill Prevention, Containment, and Control Plan). *See also*, Drilling Mud Containment, Response, and Notification Plan, *id.*, App. G; Anthrax Mitigation Plan, *id.*, App. I; Petroleum-Containment Soil Management Plan, *id.*, App. J; Construction Environmental Control Plan, *id.*, App. M; Winter Construction Plan, *id.*, App. O; Migratory Bird Nest Avoidance and Monitoring Plan, *id.*, App. V. In addition, the Programmatic Agreement requires Enbridge to evaluate historic properties along the entire pipeline route. Programmatic Agreement, at 1. The FEIS also analyzes the environmental impacts of six alternatives for the Superior Terminal in Superior, Wisconsin. FEIS, App. S. In Chapter 5 of the FEIS, the State Department includes additional mitigation measures that are not included in the control plans, but are incorporated into the Permit. For example, Enbridge must relocate the creek heelsplitter mussels encountered in Swan River, Minnesota, prior to instream construction, FEIS at 5-7, and finalize plans to survey for migratory bird nests during nesting season. *Id.* at 5-6.

merely border facilities.

That the State Department's permitting decision regulates more than a border crossing is further evident from its NEPA analysis. The State Department claimed authority as the "lead federal agency" for the entire pipeline. *See* FEIS, at 1-1. As described in note 8 above, the State Department analyzed impacts of the entire project, including but not limited to route alternatives along the whole reach of the pipeline and the impacts of the Superior Wisconsin Terminal Expansion.

The State Department attempts to avoid the implications of this by claiming that it merely permitted "pipeline facilities at the international border" or "border crossings," Def. Opp. at 3, and that its authority for that comes from the President's foreign affairs and commander-in-chief powers. *Id.* at 10. That is incompatible with the actual permit, as established above. Regardless of whether the State Department has authority to permit a "border crossing," the State Department has not identified any authority for issuing a permit that regulates this entire interstate pipeline and related facilities. As a result, Plaintiffs are likely to succeed on this claim.

2. The State Department's action violates the Foreign Commerce Clause and was *ultra vires*.

As set forth in Plaintiffs' opening brief, oil pipelines are foreign commerce. *State v. Brown*, 850 F. Supp. 821, 827 (D. Alaska 1994). Congress has exclusive and plenary power over foreign commerce under the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. 1, 74 (1824); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974); *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006). Because there is no congressional delegation of that authority to the Executive Branch in this case, the State Department's regulation of the Alberta Clipper pipeline is unconstitutional. *See U.S. v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572, 582 (C.C.C.P.A. 1975);

Target Sportswear Inc. v. U.S., 875 F. Supp. 835, 838 n.2, 841 (Ct. Int'l Trade 1995).

Neither Defendants' nor Intervenor's opposition briefs mentions the Foreign Commerce Clause or any of this authority. This claim stands un rebutted and Plaintiffs have demonstrated a likelihood of success on this claim.

3. Congress has not approved tar sands pipelines.

Defendants claim Congress has "affirmed the President's authority" by enacting laws relating to "border crossings." Def. Opp. at 11. Actually, in the two statutes that Defendants cite, Congress *delegated* its power to the President – it did not "affirm" his power. *See* Submarine Cable Act of 1921, 47 U.S.C. § 35 ("The President may withhold or revoke such license."); International Bridge Act, 33 U.S.C. 535b ("The consent of Congress is hereby granted."). Defendants did not address the Natural Gas Pipeline Act, 15 U.S.C. § 717, in which Congress delegated its power to the Executive for international gas pipelines. As explained in Plaintiffs' opening brief, that limited delegation of authority demonstrates that Congress has retained its authority to regulate international oil pipelines.

Defendants further claim a "systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned," Def. Opp. at 12, but the facts are against them. The Alberta Clipper pipeline is only the second international tar sands crude pipeline for which a Presidential Permit has been issued. The first was the Keystone pipeline, which was issued in March of 2008. *NRDC v. U.S. Dept. of State*, 2009 WL 3153702, at *1. Congress's delegations of authority over border crossings to the President, such as the International Bridge Act, the Natural Gas Pipeline Act, and the telegraph cables in the Kellogg Act, 47 U.S.C. § 34, indicate Congress has *not* abdicated its power to regulate foreign commerce coming across the border.

The instant case is analogous to *Wilderness Soc. v. Morton*, 479 F.2d 842, 867 (D.C. Cir. 1973), which held that Congress did not acquiesce to the Secretary of the Interior's construction of oil pipelines on federal land because there was no indication the practice had been brought to the attention of congress or was such public knowledge that it was reasonable to assume that congressmen, as members of the general public, knew of the practice.

Similarly, there is no indication here that Congress was made aware of the executive issuing permits for tar sands crude oil pipelines. This is not a case where Congress has been completely silent on pipeline regulation. For instance, it has delegated the regulation of pipeline safety and rate-setting authority to the executive. *See* Pl. Mem. at 17-18. Even if Congress had been silent, that would not constitute ratification. *United States v. Chemical Foundation*, 5 F.2d 191 (3d Cir. 1925). Contrary to the State Department's arguments, an unconstitutional act does not become constitutional simply because it has been repeated over a long period of time.

4. The Telegraph Cable Articles and Attorney General Opinions are not binding or persuasive authority.

- a. *Defendants' antiquated authority pre-dates and is inconsistent with the Supreme Court's decision in Youngstown.*

Defendants resort to hyperbole, asserting that there is "over 100 years of precedent" for Presidential authority over any border crossings. Def. Opp. at 12. For that proposition, however, they cite only two articles from 1906 and 1942 that discuss the history of telegraph cables, and a handful of Attorney General opinions from the late 19th and early 20th century. *Id.* at 10-11.

Defendants' reliance on those sources is misplaced because they pre-date the limits on presidential power established by *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Jackson's concurrence in *Youngstown* strongly warned against the President's

foreign affairs power being exercised over internal affairs of the country. *Id.* at 642 (“no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country” through the use of his commander-in-chief powers). The instant case presents an analogous situation: under the color of its foreign affairs powers, the Executive branch is permitting a border crossing and 327 miles of internal pipeline across three states, and assuming the authority to prepare the EIS for the entire pipeline and related facilities, while simultaneously claiming that no judicial review of this action is possible because NEPA and the APA do not apply to the President.

Youngstown clearly recognized that the Constitution does not grant the President uncontrolled power. The mere fact that the President invoked his foreign affairs and commander-in-chief powers does not make the action constitutional or shield it from judicial review. In *Youngstown*, the Court held that the President’s powers must stem either from Article II, Section 1 of the Constitution or from Congress. The Court enjoined the action of the Secretary of Commerce because, like the instant case, there was no express constitutional language granting the President the power for his action, nor was there a statute expressly or impliedly authorizing it. 343 U.S. at 585–87. *See also, Independent Meat Packers Ass’n v. Butz*, 526 F2d 228 (8th Cir. 1975) (President may not act as lawmaker absent delegation of authority or mandate from Congress).⁹

⁹ In *Sisseton-Wahpeton* the Court relied on dicta from a pre-*Youngstown* case – *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936) – to justify applying the President’s inherent foreign affairs power. 2009 WL 3153655 at *7. However, that dicta was dismissed in *Youngstown* by Justice Jackson, who pointed out that *Curtiss-Wright* “involved not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an act of Congress.” 343 U.S. at 635-36, n.2. *Curtiss-Wright* merely held that the congressional delegation to the President was constitutional. *See* 299 U.S. at

(a) *The history of telegraph cables is equivocal or supports Congress's Exclusive Authority.*

The first cross-border telegraph cable was laid in 1867 pursuant to a *congressional* grant of authority. John Bassett Moore, *A Digest of International Law*, Vol. II, § 227, pp. 452, 453 (1906). In 1869, President Grant did not prevent the landing of an international cable, but he also presented the subject to Congress for action. A. Hackworth, *Digest of International Law*, Vol. IV, § 350, p. 250 (1942). President Cleveland stated in 1893 that in the absence of legislation, executive action allowing such a cable “would have no binding force.” Moore, *supra* at 460. In 1895, the State Department affirmed that in the absence of legislation “[t]he Department has, therefore, no power to act in the matter.” *Id.* at 461.

While dicta in *United States v. La Compagnie Francaise Des Cables Telegraphiques*, 77 F. 495, 496 (S.D.N.Y. 1896), suggests that the executive might allow an international cable in the absence of legislation, the court stated “it is certainly indisputable that congress has absolute authority over the subject.” After that, the State Department continued to assert that it lacked authority to approve cable permits. Moore, *supra*, at 452.

In 1898, the first of the Attorney General Opinions that Defendants rely on was issued. Contrary to the above history it opined that in the absence of legislation, the President could regulate telegraph cables, subject to subsequent Congressional action. *Id.* at 462–63. The later Attorney General Opinions Defendants cite repeat that opinion. However, the 1898 opinion is distinguishable from tar sands pipelines because it was based partly on the President’s authority as commander of the army and navy – the Attorney General reasoned that the cables were necessary for the President to communicate with his officers and diplomats. *Id.* at 462.

In *United States v. Western Union Telegraph Co.*, 272 F. 311, 317 (D.N.Y. 1921).

327-28.

the court found that the power of the President over such matters was “doubtful.” It ultimately held that Congress, in granting a federal franchise to Western Union, had intended to occupy the field and the President could not intervene to prevent the cables from landing.

Congress finally delegated its authority to the executive to issue or deny permits for the landing and operation of submarine cables on U.S. shores by passing the Kellogg Act in 1921. 47 U.S.C.A. §§ 34 *et seq.* As the above analysis shows, the history of telegraph cables does not establish Presidential authority to permit a tar sands pipeline under the “foreign affairs” power in the absence of congressional action.

5. In the absence of State Department authority, the Alberta Clipper Pipeline is still subject to federal regulation.

The State Department argues that if its permit is vacated then no permit would be required to cross the border. Def. Opp. at 12. However, this is a determination that only Congress can make. Moreover, the pipeline is subject to permitting by the Army Corps of Engineers, the Forest Service, the Environmental Protection Agency, the Department of Transportation, the Federal Energy Regulatory Commission, and the Pipeline and Hazardous Materials Safety Administration. *See Spiller v. Walker*, 2002 WL 1609722 (W.D. Tex. 2002), in which the court held federal defendants’ arguments that a pipeline to transport petroleum “to other states and perhaps Mexico” was a private action and no NEPA analysis was required was “not only arbitrary and capricious but ridiculous.” *Id.* at *2. The court consequently ordered “DOT and/or EPA” to prepare a NEPA analysis for the pipeline and enjoined the operator from placing petroleum products into the pipeline until the Court ordered otherwise. *Id.*

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

As set forth in Plaintiffs’ opening brief at pp. 20-22, Plaintiffs will suffer irreparable

harm in the absence of a preliminary injunction. According to Enbridge, construction has already begun. *See* Crawford Dec., Doc. No. 20, ¶¶ 9-10. This means this harm is underway – not merely possible or speculative – and an injunction is necessary to preserve the status quo and prevent further irreparable harm pending a decision on the merits.

Contrary to Defendants’ arguments that “the harms Plaintiffs have alleged are insufficient to establish irreparable harm,” Def. Opp. at 28-29, the FEIS demonstrates that the harm from the construction will be permanent, long-lasting, and irreparable. *See, e.g.*, FEIS at 4-46, 47 (“long term surface water quality degradation”); *id.* at 4-96 (“permanent modification of vegetation community” including upland and riparian forests); *id.* at 4-98 (“irreversible” destruction of prairie sod); *id.* at 4-6 (“direct mortality” of wildlife); *id.* at 4-120 (construction would “result in loss and alteration of about 6,402 acres, including more than 1,255 acres of upland forested habitat, 3,801 acres of developed, agricultural, and open habitats, and 1,346 acres of wetland habitats (including 765 acres of forested wetlands)”; *id.* at 4-124 (“loss of shrub and forest habitats would be long term, requiring from 5 to more than 50 years for [re]establishment”); *id.* at 4-246 to 47 (1,185.4 acres of forest in Minnesota would be impacted and “recovery could require decades” thus causing “a long term, localized impact to forested land.”).

Neither the Defendants nor Intervenor-Defendant address, much less rebut, this permanent and long-lasting harm. Nor do they address Plaintiffs’ Exhibit 14 (“FEIS Excerpts on Harms”), which enumerates the FEIS’s numerous and varied statements on the pipeline’s significant impacts. Doc. No. 113. Instead, they argue generally that most of these harms will be minimized or offset by mitigation or future actions. Def. Opp. at 29; Enbridge Opp. at 34-35. However, this argument based on the significance of the injury is no defense to whether the injury is *irreparable* – that is, whether there is any adequate remedy at law for the injury in

question. *See e.g., Northeastern Fla. Chapter v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (“An injury is ‘irreparable’ only if it cannot be undone through monetary remedies.”); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327-28 (N.D. Ga. 1996) (timber cutting in National Forest is irreparable).

Defendants argue that “the project would result in permanent (as opposed to temporary) loss of only 11.86 acres of wetland due to the construction of the Superior Terminal Pump States.... The remaining impacts to wetlands would be temporary.” Def. Opp. at 28-29. That is belied by the FEIS above, and the State Department’s own ROD, which concludes that more than 820 acres of wetlands will be “permanently maintained in a herbaceous state during operations.” Doc. No. 8-4 at 7.

In the Chippewa National Forest, there is no dispute that Defendants plan to “expand” the existing utility corridor. Def. Opp. at 28. In spite of this pending motion, Enbridge began clearing there on October 21, 2009. This involves cutting down trees, destroying wildlife habitat, and filling wetlands. *See* FEIS Appendix U at 3-34 to 40. The Norrgard and Davis declarations describe how this interferes with their use and enjoyment of the national forest. *See* Pl. Mem. at 21; Norrgard Dec., Doc. No. 116, ¶¶ 4-5, 7, 10-11; Davis Dec., Doc. No. 117, ¶ 10. Courts “have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws.” *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992), *aff’d sub nom. PAS v. Babbitt*, 998 F.2d 705 (9th Cir. 1993). Such an injunction is appropriate in this case.

In addition, the Aalgard declaration describes the impacts of the pipeline construction in her yard and her house, Doc. No. 119, ¶¶ 4, 7; the Steva declaration describes harm to her birdwatching activities and science class, Doc. No. 120, ¶¶ 4-11 and the Caron declaration

describes interference with his hunting, Doc. No. 121, ¶¶ 4-7. Plaintiffs also submitted declarations demonstrating how they will suffer harm due to refining of tar sands crude oil, *see, e.g.*, Davis Dec., Doc. No. 117, ¶ 7; Johnson Dec., Doc. No. 118, ¶¶ 6, 8. Defendants can not and did not rebut any of these assertions of harm.

Defendants also did not rebut Plaintiffs' expert declarations that describe the habitat destruction, air pollution, human health impacts, risks of spill and fires, transboundary and migratory wildlife resources and increased greenhouse gas emissions from construction and operation of the project. *See* May Dec., Doc No. 104; Fox Dec., Doc. No. 123. Defendants' only response is to object that these are not part of the Administrative Record, which is frivolous since declarations of harm for preliminary injunctions are well-recognized exceptions to the limitations on record review. *See, e.g. Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (recognizing need to allow extra-record evidence at the preliminary injunction stage); *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1259-1261 (10th Cir. 2003) (allowing evidence from expert witnesses on the issue of irreparable harm in a record review case).

Finally, contrary to Enbridge's claims that halting construction would present environmental damage, Enbridge Opp. at 36-37, the Court can tailor its injunction to allow construction to be stopped in a responsible manner, so as to leave a stable environment and preserve the status quo until a decision is reached on the merits.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR AN INJUNCTION

"An administrative agency's failure to comply with the law invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *City of S. Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1144 (C.D. Cal. 1999); *High Sierra Hikers Ass'n v. Blackwell*, 381 F.3d 886, 905 (9th Cir. 2004) (injunction granted pending agency's

compliance with NEPA). “Such compliance is especially appropriate in light of the strong public policy expressed in the nation’s environmental laws.” *Citizen’s Alert Regarding Environment v. Dep’t of Justice*, 1995 WL 748246, 11 (D.D.C. 1995).

Enbridge’s investments in the project cannot override this strong public policy, since it commenced construction with full knowledge of the pendency of this lawsuit and Plaintiffs’ request for an injunction. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (despite defendant’s assertion of significant financial penalties if the project was delayed, defendant held responsible for its own harm because it violated the law); *Sierra Club v. Martin*, 71 F. Supp. 2d at 1328 (balance favored plaintiffs because intervenors’ contract with Forest Service provided for suspension of project in the event of injunction).

NEPA requires that an adequate environmental analysis be performed *before* the agency action occurs and, until an agency issues the final Record of Decision “no action concerning the proposal shall be taken” that would have an adverse environmental impact or limit the choice of alternatives. 40 C.F.R. § 1506.1. Allowing the project to proceed in light of Plaintiffs’ claims concerning the adequacy of Defendants’ EIS would seriously undermine NEPA. Enjoining Defendants to comply with the statutory requirements, on the other hand, will uphold the objectives of NEPA and the APA. *Kettle Range Conservation Group v. Bureau of Land Management*, 150 F.3d 1083, 1087-88 (9th Cir. 1998) (in NEPA case, when project proceeds in the face of litigation, “judges must be particularly sensitive to the practical consequences of their initial action or inaction, not only because of the effect on the transactions involved, but because of the need to ensure that the court does not inadvertently lose its ability to enforce an important Congressional mandate”).

Therefore, this Court should grant Plaintiffs’ request for a preliminary injunction on the

construction and operation of the Alberta Clipper pipeline. Even if it did not enjoin the State Department's permit, the Court should enjoin any action pursuant to the Corps' § 404 permit and any actions in the Chippewa National Forest pursuant to the Forest Service's special use permit. No harm to these agencies is caused by compliance with NEPA.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, Plaintiffs request that the Court grant Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

Dated: October 26, 2009

/s/ Sarah H. Burt
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